FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Blue Star Helium Limited (No 4) [2021] FCA 1578

File number:	WAD 588 of 2017
Judgment of:	**BANKS-SMITH J**
Date of judgment:	16 December 2021
Catchwords:	**CORPORATIONS** - penalties and relief - where failure to comply with continuous disclosure obligations under s 674(2) of *Corporations Act 2001* (Cth) by listed public company - where director of company who was chair and chief executive officer contravened s 180 of the *Corporations Act* by failing to exercise care and diligence in causing or permitting the company to contravene s 674(2) - declarations of contraventions by company and by director - where Australian Securities and Investments Commission sought disqualification of director from managing companies - whether as a matter of statutory construction pecuniary penalties must be considered before disqualification - where appropriate that disqualification be considered first - whether contraventions serious - factors to be taken into consideration - application of totality principle - whether disqualification order justified - whether pecuniary penalty justified - director disqualified and pecuniary penalty imposed
Legislation:	*Corporations Act 2001* (Cth) ss 180, 206C, 674, 1317DA, 1317E, 1317EA, 1317F, 1317G, Parts 2D.6, 9.4B *Federal Court of Australia Act 1976* (Cth) s 21
Cases cited:	*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 *Australian Competition and Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483 *Australian Securities and Investments Commission v Beekink* [2007] FCAFC 7 *Australian Securities and Investments Commission v Big Star Energy Limited (No 3)* [2020] FCA 1442 *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292

Australian Securities and Investments Commission v Flugge (No 2) [2017] VSC 117

Australian Securities and Investments Commission v Forex Capital Trading Pty Limited, in the matter of Forex Capital Trading Pty Limited [2021] FCA 570

Australian Securities and Investments Commission v Healey (No 2) [2011] FCA 1003; (2011) 196 FCR 430

Australian Securities and Investments Commission v Helou (No 2) [2020] FCA 1650

Australian Securities and Investments Commission v Hochtief Aktiengesellschaft [2016] FCA 1489

Australian Securities and Investments Commission v Macdonald (No 12) [2009] NSWSC 714

Australian Securities and Investments Commission v Soust (No 2) [2010] FCA 388

Australian Securities and Investments Commission v Vocation Limited (in liq) (No 2) [2019] FCA 1783

Australian Securities and Investments Commission, in the matter of Padbury Mining Limited v Padbury Mining Limited [2016] FCA 990

Australian Securities and Investments Commission, in the matter of Sino Australia Oil and Gas Limited (in liq) v Sino Australia Oil and Gas Limited (in liq) [2016] FCA 1488

BMW Australia Ltd v Brewster [2019] HCA 45; (2019) 269 CLR 574

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482

Forster v Jododex Australia Pty Limited (1972) 127 CLR 421

Gillfillan v Australian Securities and Investments Commission [2012] NSWCA 370

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A [2020] FCAFC 121; (2020) 279 FCR 475

Morley v Australian Securities and Investments Commission (No 2) [2011] NSWCA 110

Pattinson v Australian Building and Construction Commissioner [2020] FCAFC 177; (2020) 282 FCR 580

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355

Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs [2013] NSWSC 106

Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129

	Rural Press Limited v Australian Competition and Consumer Commission [2003] HCA 75; (2003) 216 CLR 53 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR ¶41-076
Division:	General Division
Registry:	Western Australia
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	128
Date of hearing:	19 February 2021
Counsel for the Plaintiff:	Mr JA Halley SC with Mr M Sherman
Solicitor for the Plaintiff:	Australian Securities and Investments Commission
Counsel for the First Defendant:	The First Defendant did not appear
Counsel for the Second Defendant:	Mr SM Davies SC with Mr AJC Mossop
Solicitor for the Second Defendant:	DLA Piper Australia

ORDERS

WAD 588 of 2017

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**BLUE STAR HELIUM LIMITED (ACN 009 230 835)** First Defendant
	JAMES ANDREW CRUICKSHANK Second Defendant

ORDER MADE BY: **BANKS-SMITH J**

DATE OF ORDER: **16 DECEMBER 2021**

THE COURT DECLARES THAT:

1. Pursuant to s 1317E(1) of the *Corporations Act 2001* (Cth), the first defendant contravened s 674(2) of the *Corporations Act* during the period between 7 September 2015 and 15 September 2015 by failing to comply with Listing Rule 3.1 of the Australian Securities Exchange (**ASX**) Listing Rules by not notifying the ASX that Wade Energy Corporation (**Wade Energy**) was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the purchase and sale agreements (**PSAs**) for those assets.

2. Pursuant to s 1317E(1) of the *Corporations Act*, the first defendant contravened s 674(2) of the *Corporations Act* during the period between 7 September 2015 and 15 September 2015 by failing to comply with Listing Rule 3.1 of the ASX Listing Rules by not notifying the ASX of the cumulative information that:

   (a) Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs;

   (b) Antares Energy Ltd (now Blue Star Helium Limited) had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete under the PSAs; and

(c) Antares Energy Ltd (now Blue Star Helium Limited) had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase of the assets known as the Big Star Assets.

3. Pursuant to s 1317E(1) of the *Corporations Act*, the second defendant contravened s 180(1) of the *Corporations Act* in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether Antares Energy Ltd (now Blue Star Helium Limited) was required to disclose that Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs, and thereby caused or otherwise permitted Antares Energy Ltd (now Blue Star Helium Limited) to fail to disclose that information to the ASX in contravention of s 674(2) of the *Corporations Act*.

4. Pursuant to s 1317E(1) of the *Corporations Act*, the second defendant contravened s 180(1) of the *Corporations Act* in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether Antares Energy Ltd (now Blue Star Helium Limited) was required to disclose that:

(a) Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs;

(b) Antares Energy Ltd (now Blue Star Helium Limited) had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete under the PSAs; and

(c) Antares Energy Ltd (now Blue Star Helium Limited) had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase of the assets known as the Big Star Assets,

and thereby caused or otherwise permitted Antares Energy Ltd (now Blue Star Helium Limited) to fail to disclose that information to the ASX in contravention of s 674(2) of the *Corporations Act*.

THE COURT ORDERS THAT:

5. Pursuant to s 1317G of the *Corporations Act* the second defendant pay to the Commonwealth of Australia a pecuniary penalty in relation to the contraventions identified above at declarations 3 and 4 in the amount of $40,000.

6. Pursuant to s 206C of the *Corporations Act* the second defendant be disqualified from managing a corporation for a period of four years.

7. The second defendant pay 90% of the plaintiff's costs of the proceedings as taxed or agreed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BANKS-SMITH J:

Introduction

1 In *Australian Securities and Investments Commission v Big Star Energy Limited (No 3)* [2020] FCA 1442 I determined that certain contraventions of the *Corporations Act 2001* (Cth) relating to continuous disclosure obligations to the market had been made out. These reasons concern the appropriate relief that should follow from the liability findings.

2 I summarised the factual context in the introductory paragraphs of the liability judgment and for convenience repeat those paragraphs:

> [1] Over the course of a week in September 2015, the first defendant, a company listed on the Australian Stock Exchange (**ASX**) and then known as Antares Energy Limited (**Antares**), announced to the market that it had entered into two agreements to sell resources assets located in Texas, in the United States of America.
>
> [2] Trading in shares in Antares immediately following the announcements was elevated and the share price jumped, initially by some 250%.
>
> [3] The Australian Securities and Investment Commission (**ASIC**) alleges that Antares failed to disclose important information to the market at the time of the announcements in breach of its obligations of continuous disclosure. It alleges that Antares should have disclosed the name of the prospective purchaser. In the alternative, it alleges that Antares should have disclosed the following cumulative information:
>
> (a) the name of the prospective purchaser;
>
> (b) that Antares' Chairman and Chief Executive Officer, Mr James Cruickshank, had been told that the purchaser did not have financial approval in place for both relevant acquisitions; and
>
> (c) that Antares had not independently verified or otherwise determined the capacity of the purchaser to complete the acquisitions.
>
> [4] Some days after the initial announcements to the market about the sale agreements, trading in shares in Antares was halted at the request of Antares and ultimately suspended by the ASX.
>
> [5] ASIC has brought these proceedings seeking declarations and orders under the *Corporations Act 2001* (Cth) as to Antares' alleged breaches of its continuous disclosure obligations. ASIC also seeks relief against Mr Cruickshank on the basis that he was involved in the contraventions by Antares and breached his duties as a director of the company.

3 I will adopt the convention employed in the liability judgment of continuing to refer to the first defendant as Antares. Antares has gone through a number of subsequent name changes, relevantly to Big Star Energy Limited and more recently to Blue Star Helium Limited.

4 These reasons also assume familiarity with the reasons in the liability judgment (**reasons**).

5 I found at [455] of the reasons that Antares contravened s 674(2) of the *Corporations Act* during the period from 7 September 2015 to 15 September 2015 (**Relevant Period**) by failing to comply with Listing Rule 3.1 by not notifying the ASX that a company known as Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the Purchase and Sale Agreements for those assets (**PSAs**).

6 Further, I found at [456] that Antares contravened s 674(2) of the *Corporations Act* during the Relevant Period by failing to comply with Listing Rule 3.1 by not notifying the ASX of the following cumulative information:

(a) that Wade Energy was the purchaser under the PSAs;

(b) that Antares had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete under the PSAs; and

(c) that Antares had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase of the Big Star Assets.

7 I also found at [522]-[528] that Mr Cruickshank:

(a) contravened s 180(1) of the *Corporations Act* in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether Antares was required to disclose that Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs;

(b) contravened s 180(1) of the *Corporations Act* in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether Antares was required to disclose that:

(i) Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs;

(ii) Antares had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete under the PSAs; and

(iii) Antares had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase of the assets known as the Big Star Assets.

8 I will adopt the terms **Purchaser Identity Information** and **Cumulative Information** as defined in the reasons (at [245] and [248]) to describe respectively the information the subject of the first and second contraventions of each of s 674 and s 180.

9 ASIC seeks relief against both Antares and Mr Cruickshank. Antares entered a submitting appearance in these proceedings, other than as to costs, and took no part in the substantive hearing. ASIC seeks a declaration of contravention against Antares but did not seek the imposition of any pecuniary penalty at the time the proceedings were commenced, Antares then being in administration. ASIC maintains that position.

10 As to Mr Cruickshank, ASIC seeks declarations of contravention pursuant to s 1317E(1) of the *Corporations Act*; an order pursuant to s 206C of the *Corporations Act* that Mr Cruickshank be prohibited from managing a corporation for a period of six years; an order pursuant to s 1317G of the *Corporations Act* that he pay to the Commonwealth a pecuniary penalty in the amount of $50,000; and an order that he pay ASIC's costs of the proceedings.

11 Mr Cruickshank contends that only declaratory relief is appropriate and he makes no submissions as to costs. He asserts that no pecuniary penalty should be imposed as the contravention of s 180 'was not serious'. He contends there should be no period of disqualification.

The statutory context

12 The provisions incorporated below are as they were as at September 2015.

Declarations

13 Part 9.4B of the *Corporations Act* is headed 'Civil consequences of contravening civil penalty provisions'. Section 1317E provides for the circumstances where the Court must make a declaration of contravention. It relevantly provides:

1317E Declarations of contravention

(1) If a Court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention. The provisions specified in column 1 of the following table are ***civil penalty provisions***.

Civil penalty provisions		
Item	**Column 1** **provisions that are civil penalty provisions**	**Colum 2** **brief description of what the provisions are about**
1	subsections 180(1), 181(1) and (2), 182(1) and (2) and 183(1) and (2)	officers' duties
…		
14	subsections 674(2), 674(2A), 675(2) and 675(2A)	continuous disclosure
…		

Note 1: Once a declaration has been made ASIC can then seek a pecuniary penalty order (section 1317G) or (in the case of a corporation/scheme civil penalty provision) a disqualification order (section 206C).

Note 2: The descriptions of matters in column 2 are indicative only.

(2) A declaration of contravention must specify the following:

(a) the Court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention;

(e) if the contravention is of a corporation/scheme civil penalty provision - the corporation or registered scheme to which the conduct related.

Pecuniary penalties

14 Section 1317G provides for pecuniary penalties to be imposed, with the range of penalties varying depending upon, relevantly, whether the provision is a 'corporation/scheme civil penalty provision' or a 'financial services civil penalty provision'. By operation of definitions in s 1317DA, s 180 is a corporation/scheme civil penalty provision; s 674 is a financial services civil penalty provision.

15 Section 1317G relevantly provides:

> **1317G Pecuniary penalty orders**
>
> *Corporation/scheme civil penalty provisions*
>
> (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to $200,000 if:
>
> (a) a declaration of contravention by the person has been made under section 1317E; and
>
> (aa) the contravention is of a corporation/scheme civil penalty provision; and
>
> (b) the contravention:
>
> (i) materially prejudices the interests of the corporation or scheme, or its members; or
>
> (ii) materially prejudices the corporation's ability to pay its creditors; or
>
> (iii) is serious.
>
> *Financial services civil penalty provisions*
>
> (1A) A Court may order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum amount if:
>
> (a) a declaration of contravention by the person has been made under section 1317E; and
>
> (b) the contravention is of a financial services civil penalty provision not dealt with in subsections (1E) to (1G); and
>
> (c) the contravention:
>
> (i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or
>
> (ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or
>
> (iii) is serious.
>
> (1B) The relevant maximum amount is:
>
> (a) $200,000 for an individual; or
>
> (b) $1 million for a body corporate.
>
> …
>
> *Penalty a civil debt etc.*
>
> (2) The penalty is a civil debt payable to ASIC on the Commonwealth's behalf. ASIC or the Commonwealth may enforce the order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

Disqualification

16 Part 2D.6 of the *Corporations Act* is headed 'Disqualification from managing corporations'. Relevantly, s 206C provides as follows:

> **206C Court power of disqualification - contravention of civil penalty provision**
>
> (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
>
> (a) a declaration is made under:
>
> (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision; or
>
> (ii) section 386-1 (civil penalty provision) of the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 that the person has contravened a civil penalty provision (within the meaning of that Act); and
>
> (b) the Court is satisfied that the disqualification is justified.
>
> (2) In determining whether the disqualification is justified, the Court may have regard to:
>
> (a) the person's conduct in relation to the management, business or property of any corporation; and
>
> (b) any other matters that the Court considers appropriate.

17 There was no issue between the parties that the first step is for the Court to make appropriate declarations as to contraventions. However, the parties disagreed as to the order in which the Court should address the imposition of any pecuniary penalty or disqualification order, and it will be necessary to return to this. Before doing so, it is appropriate to record some of the key findings made in relation to Antares and Mr Cruickshank which are of particular relevance to penalties.

Findings relating to the contraventions

18 The following summary of relevant findings adopts in part the summary provided by ASIC in its written submissions, which I consider fairly records such findings. Although Mr Cruickshank made various submissions as to what can be made of such findings, he did not challenge ASIC's summary of the findings or 'seek to cavil in submissions on the acceptance by the Court of the opinion of ASIC's witness'. The reference to 'ASIC's witness' is to Mr Lee Bowers, the expert witness called by ASIC.

About Antares at the Relevant Period

19 Antares was an oil and gas exploration company, with shares listed on the ASX. Its principal assets at the relevant time were the oil, gas and other minerals contained in various contiguous properties in the Permian Basin of Texas known as Northern Star and Big Star (or the Northern Star Assets and Big Star Assets). At the time of the relevant contraventions, Antares was approaching a reset date for its convertible notes, which was pending in October 2015. Mr Bowers observed, among other matters that:

(a) prior to the opening of the market on 7 September 2015, shares in Antares had a last traded price of $0.09 per share;

(b) the Northern Star Assets and Big Star Assets appeared to be the only significant lease holdings of Antares and comprised its major physical assets;

(c) Antares had minimal revenue;

(d) Antares had no existing drilling commitments;

(e) Antares had estimated cash outflows of 'just A$1 m for the September 2015 quarter';

(f) other parties on nearby leases to those held by Antares had recently agreed to sizeable sale transactions;

(g) Antares' key financial assets were its cash balance ($7 million at 30 June 2015) and its holding of shares in Breitburn;

(h) Antares had $47.5 million of convertible notes on issue with a next reset date of 31 October 2015;

(i) Antares had a $200 million five year credit standby arrangement facility in place with Macquarie Bank Limited which was at that time undrawn, but it was not clear whether any conditions or lender approvals governed the potential drawdown of the facility;

(j) benchmark oil prices had declined in the preceding year; and

(k) over the course of the preceding year the Antares share price had declined over 80% to its closing price of $0.09 on 4 September 2015.

(reasons at [359])

Mr Cruickshank's role and responsibilities within Antares

20 Mr Cruickshank was a director of Antares at the relevant times. He was also the chairman and chief executive officer of the company. Mr Cruickshank was also president of Antares US, an indirect wholly owned subsidiary of Antares: reasons at [11], [13]-[14], [500].

21 In his roles, Mr Cruickshank was expected and assumed to have knowledge of the company's business and finances and some general knowledge of its shareholder base. He also had a number of formal qualifications including a commerce degree, graduate diploma in applied finance, a certificate relating to 'Advanced Investor Relations' and fellowship of the Australian Institute of Company Directors. Mr Cruickshank had over 20 years' commercial experience in commercial banking and equity markets: reasons at [500]-[501].

22 Based on the 2015 half yearly report, Mr Cruickshank can be taken to have known the significance of the completion of the PSAs to the ongoing financial position of the company and the material uncertainty as to the company's financial position that had been identified by Ernst & Young as auditors: reasons at [520].

Mr Cruickshank's involvement in the contraventions and knowledge

23 Mr Cruickshank was the central player in the events relating to the proceedings. He was the directing mind and will of Antares. There was no suggestion he delegated responsibility with respect to disclosure to the ASX to anyone else: reasons at [519].

24 Rather, Mr Cruickshank knew of, approved and authorised the release to the market of the two PSA Announcements: reasons at [209], [519]. Mr Cruickshank had knowledge of the PSA Clarification Announcement - he had knowledge of the draft version and the intention to release it: reasons at [217], [519]. The PSA Announcements and the PSA Clarification Announcement are defined in the reasons at [86] and [93] respectively.

25 It was Mr Smith's practice to seek instructions from Mr Cruickshank with respect to his dealings with the ASX, and there were a number of examples of Mr Cruickshank directing or instructing Mr Smith as to the content of announcements and of Mr Smith passing information from the ASX to Mr Cruickshank: reasons at [219]. The conduct which gave rise to the contraventions took place at the most senior levels of Antares' management: reasons at [303].

26 Mr Cruickshank was personally involved in the transactions and communications with Mr Hanson of Wade Energy on behalf of Antares: reasons at [303].

27 Mr Cruickshank had actual knowledge of the identity of the purchaser of the assets, being Wade Energy: reasons at [300].

28 Mr Cruickshank knew that Wade Energy had not yet received all financing approvals necessary to complete the purchase of the Big Star Assets: reasons at [301].

29 There is no evidence that Mr Cruickshank undertook investigations and completed enquiries about Wade Energy or Mr Hanson, nor that he exercised any due diligence: reasons at [294]-[296].

30 The ASX squarely raised the issue of due diligence with Mr Cruickshank: reasons at [270], [281]-[285].

31 Mr Cruickshank had knowledge of matters relating to the absence of independent verification or due diligence as to the financial capacity of the purchaser to complete: reasons at [303], [520].

32 Further, Mr Cruickshank knew of the continuous disclosure obligations under the Listing Rules and that any failure by Antares to comply with its continuous disclosure obligations could expose it to financial harm including by way of liability for a penalty: reasons at [521].

Failure by Mr Cruickshank to exercise reasonable care and diligence

33 Although after careful consideration I was not satisfied that ASIC had established a case of actual knowledge, as required for the purpose of s 674(2A) of the *Corporations Act*, I was satisfied that Mr Cruickshank's failure to exercise reasonable care and diligence caused or allowed Antares to contravene the continuous disclosure obligations, and that such failure constituted a contravention of s 180(1). In particular, I found at [522]-[527] that a person in Mr Cruickshank's position exercising reasonable care and diligence:

(a) would have considered the express terms of the PSAs, would have appreciated the absence of any express confidentially term and, if uncertain, would have sought legal advice as to whether and how Antares was bound by any such obligation but there was no suggestion advice was sought;

(b) would have reviewed Listing Rule 3.1A and Guidance Note 8 and appreciated that the position of the ASX was that a confidentiality agreement does not prevent an entity from complying with its obligations under the Listing Rules and that sufficient detail should be provided in any announcement to enable

investors to understand the ramifications of the information and to assess its impact on the price or value of shares;

(c) would not have come to the view that the information was exempt from disclosure based on alleged confidentiality;

(d) would have considered the impact of the PSA Announcements and the likely reactions of investors in context - they would have taken into account the significant quantum of the purchase price, the absence of any reference to conditions precedent and that the information bore all the hallmarks of a binding agreement;

(e) would have sought to assess the prospect of the sale of the assets completing, and that disclosure of the name of Wade Energy would have equipped them to research that entity and take into account any information (including a lack of available information) in making their assessment;

(f) would have appreciated that investors might be more cautious about the prospects of completion in a scenario where there was an absence of publicly available information about the purchaser;

(g) would have recognised that the Cumulative Information would have been likely to influence investors in deciding whether to hold or sell their shares or whether to acquire new shares;

(h) absent some other comfort, would have been concerned about the indication that finance was not in place for Big Star and would have carefully considered and understood that such information was material to the market;

(i) would have appreciated that an investor may be more nervous or cautious about the prospect of completion and, it follows, the receipt of the settlement proceeds, if they were provided with the Cumulative Information;

(j) would have appreciated that the Cumulative Information was of a nature that would or was likely to influence investors in deciding whether to acquire or dispose of shares; and

(k) would not have understood the responses and inquiries made by the ASX during the balance of the Relevant Period to have indicated that the disclosure by the PSA Clarification Announcement met the concerns as to disclosure about the identity of the purchaser or due diligence raised by the ASX.

Market movements

34 As to market movements before and after the announcements, I found that:

> ***Movement in share price***
>
> [140] Prior to the commencement of trading on Monday 7 September 2015 the market capitalisation of Antares was approximately $21.6 million. The closing share price for Antares on the previous trading day, Friday 4 September 2015, was $0.09.
>
> [141] The closing share price of Antares on 7 September 2015, being the day of the PSA Announcements, was $0.315.
>
> [142] The closing share price of Antares on 10 September 2015, being the day of the PSA Clarification Announcement, was $0.50.
>
> [143] It is clear that there was a significant increase in share price upon the release to the market of the First PSA Announcement and then again following the PSA Clarification Announcement.
>
> ***Volume***
>
> [144] In the week of 24 August 2015 to 28 August 2015 the total trading volume of Antares shares on the ASX was 513,127 with an average daily traded volume of 102,625.
>
> [145] In the week just prior to the First PSA Announcement, being 31 August 2015 to 4 September 2015, the total trading volume for the week was 302,900 with an average daily traded volume of 60,580.
>
> [146] On 7 September 2015 the day's trading volume was 15,654,227.
>
> [147] Accordingly it is also clear that there was a significant increase in trading volume following the PSA Announcements.

35 Certain other findings relevant to particular aspects of the penalties are included within the relevant sections below.

Declarations of contravention

36 As is apparent from its terms, s 1317E(1) is not discretionary in nature. If the Court is satisfied that a person has contravened a civil penalty provision, it must make a declaration of contravention. Section 180(1) and s 674(2) are civil penalty provisions for the purposes of s 1317E and have been at all relevant times, despite amendments to s 1317E.

37 The Court also possesses a general power to grant declaratory relief under s 21 of the *Federal Court of Australia Act 1976* (Cth). In circumstances where contraventions have been established and declarations would have utility, including by identifying contravening conduct and recording the Court's disapproval of that contravening conduct, the Court ought generally

to grant declaratory relief: *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437-438 (Gibbs J).

38 In framing declarations, attention must be given to the form of the declaration, so that it is at least informative as to the basis on which the Court declares that a contravention has occurred: *Australian Competition and Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 at [66] (Gordon J). However, a declaration of contravention need not recite in detail all of the factual matters and evidence upon which a finding of contravention is made: *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [90] (Gummow, Hayne and Heydon JJ).

39 In this case, I consider declarations to the following effect accurately reflect the reasons for judgment and sufficiently disclose the contraventions, and accordingly should be made under s 1317E of the *Corporations Act* (to be edited in the formal declarations and orders to incorporate definitions as appropriate):

(1) Antares contravened s 674(2) of the *Corporations Act* during the period between 7 September 2015 and 15 September 2015 by failing to comply with Listing Rule 3.1 of the ASX Listing Rules by not notifying the ASX that Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs for those assets.

(2) Antares contravened s 674(2) of the *Corporations Act* during the period between 7 September 2015 and 15 September 2015 by failing to comply with Listing Rule 3.1 of the ASX Listing Rules by not notifying the ASX of the cumulative information that:

  (a) Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs;

  (b) Antares had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete under the PSAs; and

  (c) Antares had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase of the assets known as the Big Star Assets.

(3) Mr Cruickshank contravened s 180(1) of the *Corporations Act* in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether Antares was required to disclose that

Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs, and thereby caused or otherwise permitted Antares to fail to disclose that information to the ASX in contravention of s 674(2) of the *Corporations Act*.

(4) Mr Cruickshank contravened s 180(1) of the *Corporations Act* in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether Antares was required to disclose that:

(a) Wade Energy was the purchaser of the assets known as the Northern Star Assets and Big Star Assets under the PSAs;

(b) Antares had not, prior to 15 September 2015, independently verified or otherwise determined the capacity of Wade Energy to complete under the PSAs; and

(c) Antares had been informed by Wade Energy that it had not yet received all funding approval necessary to complete the purchase of the assets known as the Big Star Assets,

and thereby caused or otherwise permitted Antares to fail to disclose that information to the ASX in contravention of s 674(2) of the *Corporations Act*.

40 Mr Cruickshank did not oppose the making of the declarations but it was submitted on his behalf that such declarations would 'mark' him and serve as a burden 'to be carried by him for the rest of his working life'.

Disqualification order before pecuniary penalty?

41 The authorities are replete with examples where once a declaration of contravention is made, the Court has turned to consider whether a disqualification order should be made before turning to the question of a pecuniary penalty.

42 In *Australian Securities and Investments Commission v Forex Capital Trading Pty Limited, in the matter of Forex Capital Trading Pty Limited* [2021] FCA 570, Middleton J, having made declarations as to contraventions, including as to contraventions of s 180 of the *Corporations Act*, said:

> [112] In respect of Mr Yoshai, I am required to consider the proposed disqualification order under s 206C of the CA before assessing the appropriateness of any pecuniary penalty. Of itself, a disqualification order will protect the public and further the objectives of personal and general

> deterrence: see *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [48]-[49] (McHugh J) citing *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 ('*ASIC v Adler*') at 97-99 (Santow J). In *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370; ACSR 460 at [330], Sackville AJA (Beazley and Barrett JJA agreeing) said 'a pecuniary penalty should be imposed on the appellants only if an order for disqualification is an inadequate or inappropriate remedy'.

43 This recent statement endorses and applies a long-standing practice whereby the question of disqualification is considered prior to a court turning to the question of a pecuniary penalty.

44 The extract from the Court of Appeal's reasons in *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370 referred to by Middleton J cites the Court of Appeal's decision in *Morley v Australian Securities and Investments Commission (No 2)* [2011] NSWCA 110, where the Court observed:

> [131] In *Rich v Australian Securities and Investments Commission* at [178] McHugh J said that it was 'expected that the courts would consider imposing a pecuniary penalty only if it considered that a civil penalty disqualification provided an inadequate or inappropriate remedy'. In our opinion, pecuniary penalties should be imposed in addition to the disqualification orders.

45 As it happens, the passage from *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129 referred to in *Morley v ASIC* appears not at [178] but at [45] in McHugh J's reasons. Relevantly, however, it includes a number of paragraphs apparently extracted from a 'Draft Legislation and Explanatory Paper (1992)' which accompanied the first draft of the Corporate Law Reform Bill 1992, one of those being para 178. According to McHugh J's reasons, the paragraph states in full:

> 178. It is expected that in settling an appropriate [civil penalty] order, the Court would first give consideration to whether it should impose a civil penalty disqualification. The issue should be whether the defendant's conduct, whilst not criminal in nature, was so reprehensible and had such serious consequences as to warrant an order prohibiting the person from managing a corporation. For example, if gross negligence by a director had led directly to massive losses for shareholders, the Court may consider that a director should be disqualified for a substantial period, even where there was no question of a dishonest intent. The emphasis should be on preventing a recurrence of the contravention by the defendant, and providing a deterrent to other persons involved in the management of corporations. It is expected that the Courts would consider imposing a pecuniary penalty only if it considered that a civil penalty disqualification provided an inadequate or inappropriate remedy.

46 Having regard to the provenance of the oft-cited reference to an expectation that the court will first consider a disqualification, it is appropriate to refer to the history of amendments to the corporations legislation in 1992 and 1999.

1992 legislation

47 The Corporate Law Reform Bill 1992 referred to by McHugh J in *Rich v ASIC* was the precursor to the 1992 amendments to the *Corporations Law* made by the *Corporate Law Reform Act 1992* (Cth). This Act inserted Part 9.4B, with its comprehensive treatment of civil penalty provisions. Section 1317EA was enacted at that time, and it provided:

> **1317EA Court may make civil penalty orders**
>
> (1) This section applies if the Court is satisfied that a person has contravened a civil penalty provision, whether or not the contravention also constitutes an offence because of section 1317FA.
>
> Note: Section 1317HF provides that a certificate by a court that the court has declared a person to have contravened a civil penalty provision is conclusive evidence of the contravention.
>
> (2) The Court is to declare that the person has, by a specified act or omission, contravened that provision in relation to a specified corporation, but need not so declare if such a declaration is already in force under Division 4.
>
> (3) The Court may also make against the person either or both of the following orders in relation to the contravention:
>
> (a) an order prohibiting the person, for such period as is specified in the order, from managing a corporation;
>
> (b) an order that the person pay to the Commonwealth a pecuniary penalty of an amount so specified that does not exceed $200,000.
>
> (4) The Court is not to make an order under paragraph (3)(a) if it is satisfied that, despite the contravention, the person is a fit and proper person to manage a corporation.
>
> (5) The Court is not to make an order under paragraph (3)(b) unless it is satisfied that the contravention is a serious one.
>
> (6) The Court is not to make an order under paragraph (3)(b) if it is satisfied that an Australian court has ordered the person to pay damages in the nature of punitive damages because of the act or omission constituting the contravention.
>
> …

1999 legislation

48 In 1999 Part 9.4B was repealed and in its place a new Part 9.4B was inserted by the *Corporate Law Economic Reform Program Act 1999* (Cth) (**CLERP Act**). As noted by McHugh J in

Rich v ASIC at [44], the new Part 9.4B was described in the explanatory memorandum to the *Corporate Law Economic Reform Program Bill 1999* as a 'rewrite without substantial change'.

49 Section 1317E was introduced in the following terms:

> **Declaration of contravention**
>
> (1) If a Court is satisfied that a person has contravened 1 of the following provisions, it must make a declaration of contravention:
>
> (a) subsections 180(1) and 181(1) and (2), 182(1) and (2), 183(1) and (2) (officers' duties)
>
> (b) subsection 209(2) (related parties rules)
>
> (c) subsections 254L(2), 256D(3), 259F(2) and 260D(2) (share capital transactions)
>
> (d) subsection 344(1) (requirements for financial reports)
>
> (e) subsection 588G(2) (insolvent trading)
>
> (f) subsection 601FC(1)
>
> (g) subsection 601FD(1)
>
> (h) subsection 601FE(1)
>
> (i) section 601FG
>
> (j) subsection 601JD(1).
>
> These provisions are the ***civil penalty provisions***.
>
> Note: Once a declaration has been made ASIC can then seek a pecuniary penalty order (section 1317G) or a disqualification order (section 206C).
>
> (2) A declaration of contravention must specify the following:
>
> (a) the Court that made the declaration
>
> (b) the civil penalty provision that was contravened
>
> (c) the person who contravened the provision
>
> (d) the conduct that constituted the contravention
>
> (e) the corporation or registered scheme to which the conduct related.

50 Section 1317F provided that a declaration of contravention is conclusive evidence of the matters referred to in s 1317E(2).

51 Section 1317G provided that:

> **Pecuniary penalty orders**
>
> (1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to $200,000 if:

(a) a declaration of contravention by the person has been made under section 1317E; and

(b) the contravention:

(i) materially prejudices the interests of the corporation or scheme, or its members; or

(ii) materially prejudices the corporation's ability to pay its creditors; or

(iii) is serious.

(2) The penalty is a civil debt payable to ASIC on the Commonwealth's behalf. ASIC or the Commonwealth may enforce the order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

52 Section 206C was also introduced by the CLERP Act, and provided:

Court power of disqualification - contravention of civil penalty provision

(1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:

(a) a declaration is made under section 1317E (civil penalty provision) that the person has contravened a civil penalty provision; and

(b) the Court is satisfied that the disqualification is justified.

Note: The civil penalty provisions are subsection 180(1) and (2), 181(1) and (2), 182(1) and (2), 183(1) and (2), 209(2), 254L(2), 256D(3), 259F(2), 260D(2) or 344(1) or section 588G.

(2) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate.

The position taken by courts since 1999

53 So it can be seen that prior to 1999, s 1317EA provided for either or both of a disqualification order or pecuniary penalty to be imposed upon the declaration of a contravention. After the 1999 amendments, the power to make a disqualification order, still expressly linked to a contravention of a civil penalty provision, was to be found in s 206C.

54 Since the 1999 amendments there have been inconsequential amendments to both s 1317E and s 206C.

55 It is also apparent that despite the changes in the legislation effected by the 1999 legislation, the courts have continued the practice of addressing a potential disqualification order before assessing the quantum of any pecuniary penalty, the practice endorsed by Middleton J in *ASIC v Forex Capital Trading.*

56 Other examples include *Australian Securities and Investments Commission v Macdonald (No 12)* [2009] NSWSC 714 at [263]-[265] (Gzell J); *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292 at [15] (Goldberg J); *Australian Securities and Investments Commission v Soust (No 2)* [2010] FCA 388 at [20] (Goldberg J); *Australian Securities and Investments Commission v Healey (No 2)* [2011] FCA 1003; (2011) 196 FCR 430 at [101] (Middleton J); *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* [2013] NSWSC 106 at [52] (Ward JA); and *Australian Securities and Investments Commission v Flugge (No 2)* [2017] VSC 117 at [109] (Robson J).

57 Each of these cases concerned the legislative regime in place after the movement of the provision empowering a court to make a disqualification order from s 1317EA to s 206C by the CLERP Act in 1999.

58 It is also to be observed that although McHugh J referred to the explanatory paper that related to the 1992 legislation, the Court in *Rich v ASIC* was concerned with the 1999 legislation. Even alive to this fact, the courts have proceeded to follow the practice of addressing disqualification prior to pecuniary penalty. For example, Ward JA in *Re Idyllic* specifically acknowledged that McHugh J's comments were made 'having referred to the explanatory paper accompanying the first draft of the Corporate Law Reform Bill 1992 in relation to the predecessors to ss 206C and s 206E' before her Honour proceeded to adopt the approach of first dealing with disqualification in her substantive analysis: at [52].

Mr Cruickshank's submission that the practice 'applies the incorrect order'

59 Senior counsel for Mr Cruickshank submitted that:

(a) there is no judicial authority for ASIC's suggested approach of dealing first with a declaration of contravention under s 1317E; second, with any disqualification order under s 206C; and third, with any pecuniary penalty under s 1317G;

(b) there is no support for such an approach in the words of the *Corporations Act*;

(c) the removal of the disqualification power from s 1317EA (and more generally from Part 9.4B), and the introduction of s 206C by the CLERP Act was a 'clear indicator that a disqualification application is to be dealt with separately and after the consequences that flow form Part 5.4B have been worked through';

(d) as a matter of 'method, logic and necessity' the court must work through the relief provided for by Part 9.4B before turning to s 206C;

(e) the question of whether a contravention is serious as referred to in s 1317G(1)(b) should be considered before addressing the question of disqualification;

(f) the structure of the *Corporations Act* does not support an assumption that ASIC's discretion to make an application to disqualify, or the Court's power to disqualify, were vested for the purpose of enabling the visitation on a person who contravenes a civil penalty provision of a different or additional consequence for that contravention in the form of a disqualification order; and

(g) if the legislature intended such a result, the power to make a disqualification order would be included in the part of the *Corporations Act* dealing with civil penalty provisions, and the power to make a disqualification order would not depend on the exercise of a discretion by ASIC to bring an application.

Preferred position is to follow the accepted practice

60 To address Mr Cruickshank's submissions it is necessary to apply recognised principles of statutory construction.

61 The High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (McHugh, Gummow, Kirby and Hayne JJ) said:

> [69] The primary object of statutory construction is to construe the relevant provisions so that it is consistent with the language and purpose of all the provisions of the statute.

62 And in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 (Hayne, Heydon, Crennan and Kiefel JJ) the High Court said:

> [47] This court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.
>
> (footnotes omitted)

63 More recently it has been emphasised that the starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst at the same time regard is to be had to its context and purpose: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at [14] (Kiefel CJ, Nettle and Gordon JJ), [35]-[39] (Gageler J); and *BMW Australia Ltd v Brewster* [2019] HCA 45; (2019) 269 CLR 574 at [48].

64 Applying these principles, there is nothing in the text of the *Corporations Act* that directs that the questions of disqualification and penalty must be addressed in any particular order.

65 It does not follow from the circumstance that the disqualification and penalty provisions are in different parts of the *Corporations Act* that they must be considered in any particular order. There must be regard to all provisions of the *Corporations Act*. Both provisions depend upon there being a declaration of contravention. The words '*if ... a declaration is made under ... section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision*' in s 206C(1)(a)(i), provide that the making of a declaration is a jurisdictional precondition to the making of a disqualification order under s 206C. Similarly, the words '*if ... a declaration of contravention of the civil penalty provision by the person has been made under section 1317E*' in s 1317G(1)(a), provide that the making of a declaration is a jurisdictional precondition to the making of a pecuniary penalty order under s 1317G(1).

66 Once a declaration is made, the fact that s 1317E and s 206C are in different parts of the *Corporations Act*, whilst s 1317E and s 1317G are in the same part of the *Corporations Act*, says nothing about the order in which the Court should consider the exercise of the two discretions.

67 Nor is there anything in the text, extrinsic materials or elsewhere that supports the contention that the relocation of the disqualification provision by the CLERP Act by the introduction of s 206C is a 'clear indicator' of any intention by the drafters of that legislation that s 206C was to be dealt with only after other relief under Part 9.4B was addressed. Rather, having regard to *Rich v ASIC*, such an outcome would be at odds with the legislative intent of the CLERP Act 'to rewrite without substantial change': see also (in a different context) the discussion as to lack of indicators of legislative change discussed in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* [2020] FCAFC 121; (2020) 279 FCR 475 at [142].

68 As to 'method, logic and necessity', nothing arises from the text that compels consideration of disqualification only after pecuniary penalty. Nothing in s 206C provides that the requirement that a contravention be 'serious', as referred to in s 1317G(1)(b), also pertains to s 206C. Section 206C may be considered absent any such finding under s 1317G(1)(b). Reference to that requirement does not assist Mr Cruikshank's argument as to an alleged 'correct' order.

69 Nor can the argument that s 206C visits an additional (unintended) consequence for a civil penalty contravention on a person be accepted. The text of s 206C directly links it to such contravention.

70 The fact that s 206C appears numerically earlier in the legislation does not assist. Regard must first be had to s 1317E and a declaration of a contravention before any disqualification order might be made. A reader is required to work both backwards and forwards in the statute to ascertain relevant provisions - a course not uncommon in the application of statute law. The placement in the *Corporations Act*, without more, does not assist in assessing or directing any particular order of consideration of s 206C and s 1317G, and says nothing about how the Court should reason in such circumstances.

71 ASIC submitted that:

> The novel submissions which have been made … seek to attribute a significance to the structure of Part 9.4B and Part 2D.6 which is both difficult to comprehend and would entail a significant departure from a multitude of prior authorities. It simply cannot be accepted … that the circumstance that s 206C appears in Part 2D.6 rather than Part 9.4B means that ASIC cannot seek a disqualification order as an 'additional consequence' to a civil penalty under s 1317G. As a result of the express reference to s 1317E in each of ss 206C and 1317G, where a declaration of contravention is made under s 1317E, the Court can make each or both types of order provided the other independent requirements of those two discrete provisions are satisfied.

72 ASIC also noted that such outcome is consistent with the observations of the High Court in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482:

> [24] In essence, civil penalty provisions are included as part of a statutory regime involving a specialist industry or activity regulator or a department or Minister of State of the Commonwealth ('the regulator') with the statutory function of securing compliance with provisions of the regime that have the statutory purpose of protecting or advancing particular aspects of the public interest. Typically, the legislation provides for a range of enforcement mechanisms, including injunctions, compensation orders, disqualification orders and civil penalties, with or, as in the BCII Act, without criminal offences. That necessitates the regulator choosing the enforcement mechanism or mechanisms which the regulator considers to be most conducive to securing

> compliance with the regulatory regime. In turn, that requires the regulator to balance the competing considerations of compensation, prevention and deterrence. And, finally, it requires the regulator, having made those choices, to pursue the chosen option or options as a civil litigant in civil proceedings.

73 I accept ASIC's submission in this regard. As a matter of statutory construction it is open to ASIC to seek a declaration, and then both or either of (relevantly) a disqualification order and a pecuniary penalty. In this case, it seeks both.

74 Nor do I accept Mr Cruickshank's submission that the 'correct' manner in which the Court is to address such orders requires consideration of a pecuniary penalty prior to any disqualification order. Such an outcome would be in contrast to some 18 years of authorities that support a different approach, including numerous first instance decisions of this Court, at least one first instance decision of the Victorian Supreme Court, and first instance and appellate level decisions of the New South Wales Supreme Court and Court of Appeal. Whilst I acknowledge the absence of a statutory term that *requires* that the prospect of a disqualification order must be considered prior to consideration of a pecuniary penalty, absent good reason I would not depart from the established practice. Mr Cruickshank has not persuaded me that there is any such good reason.

Disqualification order

75 In order to make a disqualification order a court must be satisfied that first, an order for disqualification should be made against the contravenor; and second, that the period of disqualification is justified: *Gillfillan v ASIC* at [193]. The nature of the contravention and the seriousness of the contravention are important issues, both as to whether a disqualification order should be made and its duration: *Rich v ASIC* at [47].

76 I respectfully adopt the analysis and summary of the principles undertaken by Middleton J in *ASIC v Healey (No 2)* (a summary that was also adopted by Nicholas J in *Australian Securities and Investments Commission v Vocation Limited (in liq) (No 2)* [2019] FCA 1783 at [42]):

> [104] Although there has been a considerable number of cases which have set out the principles, propositions and circumstances which should be taken into account in determining whether, and for what period, an order should be made disqualifying a person from managing a corporation, in *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [48] McHugh J stated that Santow J's judgment in *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 was the leading authority on the reasons for a court exercising its power under s 206C or s 206E of the Act. It has been referred to and followed in most cases dealing with the subject.

[105] The propositions expounded by Santow J in *ASIC v Adler* must, however, be considered in the light of the decision of the High Court in *Rich v ASIC*. Justice Santow's propositions, which followed from his analysis of the cases up to that time, were as follows:

> [56] The cases on disqualification gave orders ranging from life disqualification to 3 years. The propositions that may be derived from these cases include:
>
> (i) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards;
>
> (ii) The banning order is designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office;
>
> (iii) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors;
>
> (iv) The banning order is protective against present and future misuse of the corporate structure;
>
> (v) The order has a motive of personal deterrence, though it is not punitive;
>
> (vi) The objects of general deterrence are also sought to be achieved;
>
> (vii) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company;
>
> (viii) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty;
>
> (ix) In assessing an appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public;
>
> (x) It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct;
>
> (xi) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming;
>
> (xii) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 have been influential. It was held that in making such an order it is necessary to assess:

- character of the offenders;
- nature of the breaches;
- structure of the companies and the nature of their business;
- interests of shareholders, creditors and employees;
- risks to others from the continuation of offenders as company directors;
- honesty and competence of offenders;
- hardship to offenders and their personal and commercial interests; and
- offenders' appreciation that future breaches could result in future proceedings;

(xiii) Factors which lead to the imposition of the longest periods of disqualification (that is disqualifications of 25 years or more) were:

- large financial losses;
- high propensity that defendants may engage in similar activities or conduct;
- activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy;
- lack of contrition or remorse;
- disregard for law and compliance with corporate regulations;
- dishonesty and intent to defraud;
- previous convictions and contraventions for similar activities;

(xiv) In cases in which the period of disqualification ranged from 7-12 years, the factors evident and which lead to the conclusion that these cases were serious though not 'worst cases', included:

- serious incompetence and irresponsibility;
- substantial loss;
- defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense, but with lesser degrees of dishonesty;
- continued, knowing and wilful contraventions of the law and disregard for legal obligations;
- lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform;

…

(xv) The factors leading to the shortest disqualifications, that is disqualifications for up to 3 years were:

- although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated;
- the defendants had no immediate or discernible future intention to hold a position as manager of a company;
- in *Donovan's* case, the respondent had expressed remorse and contrition, acted on advice of professionals and had not contested the proceedings.

[Citations omitted]

[106] In *Elliott v Australian Securities and Investments Commission* (2004) 10 VR 369 the Victorian Court of Appeal likened many of the items in Santow J's list to sentencing principles, observing that matters going to aggravation and mitigation need to be considered and accorded proper weight, but above all else, protection of the public and deterrence, specific and general, must also be given appropriate consideration.

[107] In *Rich v ASIC* at [52] McHugh J said that both Santow J's list and the comments of the Victorian Court of Appeal indicated that factors taken into account in the criminal jurisdiction - retribution, deterrence, reformation, contrition and protection of the public - were also central to determining whether a disqualification order should be made and, if so, the appropriate period of disqualification.

[108] As to the nature and seriousness of the contraventions, McHugh J gave examples, by reference to the decided cases, of the kinds of contraventions which have been held to justify the making of disqualification orders:

[47] Many and varied are the contraventions of the Corporations Act that give rise to applications for the disqualification of a person from managing corporations. Those contraventions are the grounds for the exercise of the court's discretion to order disqualification. The nature and seriousness of the contraventions are important matters to which the courts have regard when determining whether to order disqualification. Contraventions under the Corporations Act and its predecessor legislation that have been found to enliven the court's discretion include breaches of directorial duties of honesty, good faith and due care and diligence, making improper use of the position of director to gain an advantage for that person or for others to the detriment of the company, making inappropriate use of company funds, engaging in misleading and deceptive conduct, permitting corporations to trade while insolvent, operating unregistered schemes unlawfully or carrying on a business such as a securities business or an investment advice business without a licence and failing to comply with administration obligations. In substance, the nature of these contraventions is little different from those which attract the sanctions of the criminal law.

[citations omitted.]

77 I also acknowledge the well-recognised qualification, referred to by the Full Court in *Australian Securities and Investments Commission v Beekink* [2007] FCAFC 7 at [112], that the factors referred to by Santow J in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483 are merely guidelines and that each case must turn upon its own considerations.

78 There is no doubt that general deterrence is a factor to be taken into account: *ASIC v Healey (No 2)* at [112]; *ASIC v Beekink* at [83]. I also take into account the Full Court's observation in *ASIC v Beekink* that:

> [92] We reject the submission … that deterrence is of less importance in cases of neglect or carelessness as in cases of misfeasance. That submission is contrary to the remarks of Cooper J in *Donovan* at 608. His Honour considered that general deterrence was applicable to those who might be minded to adopt a passive role.

79 I have also taken into account generally the totality principle, having regard to the fact that I have found there were two contraventions of s 180 by Mr Cruickshank (although somewhat overlapping in terms of the factual matrix): *ASIC v Adler* at [128]-[134].

80 In the present case the matters of particular importance to which I have had regard when considering whether a disqualification order should be made in respect of Mr Cruickshank are the nature and seriousness of the contraventions established against him, the need to protect the public from further contraventions and the need for general and specific deterrence. It is not a case where mitigating circumstances feature in any meaningful way, for reasons I will discuss further below.

81 In *Australian Securities and Investments Commission v Helou (No 2)* [2020] FCA 1650, Beach J observed at [149] that '[t]he objectives sought to be served by the continuous disclosure regime relate to the efficiency and reliability of the capital markets and the accountability of participants in those markets' and, as a result, '[c]ontraventions of the continuous disclosure regime are serious'. The seriousness of such contraventions is readily understandable when regard is had to the statutory purpose of the continuous disclosure regime. I noted the statutory purpose in the reasons as follows:

> [50] The main statutory purpose of the continuous disclosure regime is to achieve a well-informed market, leading to greater investor confidence. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information.

82 Contraventions that involve a breach of continuous disclosure obligations are, by their very nature, serious contraventions: *ASIC v Helou (No 2)* at [149]. ASIC submits that Mr Cruickshank's departure from the degree of care and diligence that a reasonable person in his position would have exercised was significant in this case, and that the contraventions are objectively serious.

83 In my view, the contravention of s 180(1) by Mr Cruikshank was serious, and not trivial or minor. I have set out at [33] above the shortcomings in Mr Cruikshank's conduct as a director. There is no suggestion that Mr Cruickshank would have faced any particular difficulty in avoiding those shortcomings.

84 Mr Cruickshank did not delegate responsibility with respect to continuous disclosure but was involved in drafting the PSA announcements and signed them himself.

85 I also consider that Mr Cruickshank's conduct was not inadvertent. He was an active participant in the events during the Relevant Period and was on notice that the ASX had squarely raised the issue of due diligence and the issue of disclosure of the Purchaser Identity Information. I rejected Mr Cruickshank's contention at trial that there was uncertainty on the part of the ASX as to whether the disclosure of the name of the purchaser was required: reasons at [222]-[226].

86 As noted at [31] above, there was no question that at the Relevant Period Mr Cruickshank had actual knowledge of the identity of the purchaser of the assets; knew that Wade Energy had not yet received all financing approvals necessary to complete the purchase of the Big Star Assets; and had knowledge of matters relating to the absence of independent verification and due diligence as to the financial capacity of the purchaser to complete. He knew that Antares had continuous disclosure obligations. I rejected the contention that there was an obligation or requirement on the part of Antares under the PSAs to maintain any confidentiality as to the identity of Wade Energy: reasons at [320].

87 These matters are all relevant to the question of the seriousness of the contravention. Taken as a whole, and taking into account the findings set out above at [33], the shortcomings in Mr Cruickshank's consideration of whether Antares was required to disclose the Purchaser Identity Information and the Cumulative Information were extensive. I accept ASIC's submission that they were serious. To my mind Mr Cruickshank's breaches involved a failure during the Relevant Period to properly listen, acknowledge or turn his mind to matters

including: the matters being raised by the ASX; the scope of Antares' disclosure obligations and whether there was any enforceable confidentiality undertaking; the materiality of the information known by Mr Cruickshank that was not disclosed to investors, being the Purchaser Identity Information and the Cumulative Information; and the potential for this information to affect an investor's perception of risk. I also consider the apparent failure to obtain or consider independent legal advice as to disclosure obligations in the circumstances to be significant: reasons at [508]. Mr Cruickshank submitted that some degree of secrecy as to the identity of the purchaser was justified in order to enhance the prospect of the PSAs 'getting over the line', such a result being 'in the best interests of Antares'. However, no obligation of confidentiality to Wade Energy was established and, in any event, Mr Cruickshank remained obliged during the Relevant Period to have proper regard to the company's disclosure obligations, a course that would have been undertaken by a person in his position exercising reasonable care and diligence.

88 The consequences (actual or potential) of the contraventions were significant. I accepted Mr Bowers' evidence that knowledge of the identity of the purchaser would have been likely to influence relevant investors in deciding whether to acquire or dispose of Antares shares during the Relevant Period. I also accepted his evidence that, consistent with the approach he had applied with respect to knowledge of the identity of the purchaser, knowledge as to the absence of due diligence or independent verification would have been likely to influence investors in deciding whether to acquire or dispose of Antares shares during the Relevant Period. The Purchaser Identity Information and the Cumulative Information was information that a reasonable person would have expected to have a material effect on the price or value of Antares securities. It was material in that it would have been likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of Antares shares during the Relevant Period. Separately, I note that the share price volatility upon release of the relevant announcements (see reasons at [140]-[147]) reflects the potential for such matters to impact upon the market.

89 Many investors depended on due compliance by Mr Cruickshank with his duties, as the person holding office as a director, chairman and chief executive officer of Antares.

90 I have had particular regard to four submissions made on Mr Cruickshank's behalf.

91 First, it was contended that a breach of s 180 was at the lower end of any spectrum of contraventions under s 1317E. There is no sound reason to proceed on this basis. It can be

accepted that a range of matters might fall to be considered under s 1317E. It can also be accepted that a range of duties might be breached by a director in contravention of s 180. The purpose of considering the relevant facts is to assess carefully the seriousness of the particular conduct and contravention. Even in the context of a director's duty to consider the obligations of continuous disclosure, no two cases will necessarily be directly comparable. Each company will differ; companies may have a different shareholder base; the type of information to be disclosed may differ; and the extent of any failure to disclose may differ. The court is not required to ascertain where a contravention sits in some highly calibrated hierarchy of contraventions, but rather to look carefully at the facts and come to an instinctive view as to the seriousness of the contravention. In many instances it will be neither difficult nor contentious to assess whether a breach can be described generally as minor or extremely serious or somewhere in between. There may be little value in attempting to refine such descriptions further. In the case of the continuous disclosure obligations, the content of the duty is informed in part by the purpose of the continuous disclosure regime and the impact that a breach may have on the market, as discussed above (and see Davies J in *Australian Securities and Investments Commission, in the matter of Sino Australia Oil and Gas Limited (in liq) v Sino Australia Oil and Gas Limited (in liq)* [2016] FCA 1488 at [7]). Therefore, it is not surprising that the courts have generally considered contraventions of the regime, which in turn have involved breaches of s 180, to be serious. This case is no exception, having regard to the nature of the information that was not disclosed to the market and the fact that the assets the subject of the PSAs were Antares' principal assets. The contraventions could not properly or fairly be described as trivial or minor. I consider them to be serious.

92 Second, it was submitted that it was not possible for the Court to assess the extent to which Mr Cruickshank had departed from the appropriate standards of care of a reasonable director without expert evidence as to such standard of care. I rejected a similar submission when considering liability. I observed in the reasons:

> [518] Mr Cruickshank contends that ASIC could not succeed in this part of its claim because expert evidence is required as to the standard of care of a reasonable director. That submission does not reflect the authorities. There are examples where expert evidence has been relied upon to assist a court in determining the standards to be applied to a director: see, for example *Australian Securities and Investments Commission v Vines* [2005] NSWSC 738, where the Court drew upon evidence of an experienced chief financial officer; and *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229, where the Court drew upon evidence of experienced company directors as to the roles of a managing director and a finance director of a publicly listed company. However, that there are examples where expert evidence has been relied upon

> does not direct that such evidence must always be obtained and there are instances where it has not been obtained and a breach has been established (*ASIC v Vocation* being an example).

93 The statutory continuous disclosure obligations, the Listing Rules and the Guidance Notes all provide clear guidance as to the standards required of a director of an ASX listed company. I have assessed Mr Cruickshank's conduct not in a commercial vacuum, but having regard to those statutory and regulatory guidelines, having regard to the communications between Antares and the ASX and having regard to the nature of the steps that I consider a reasonable director would have undertaken in order to properly consider Antares' disclosure obligations. Those steps are neither surprising nor complex, but involve objectively obvious steps, such as (for example) considering whether there were binding confidentiality undertakings in place and assessing the potential for a prospective purchaser to complete a transaction, and legal advice that might be sought about such matters. I did not consider it necessary to have the assistance of expert evidence in the circumstances of this case in order to assess whether Mr Cruickshank had breached the standards of care required of him, having regard to the identified transactions involved and the status of Antares as an ASX listed company.

94 Third, it was submitted that in assessing the seriousness of the contravention I must take into account an alleged inconsistency in a finding that Mr Cruickshank's conduct was not inadvertent (or however similarly described) with the finding that, because ASIC had not established that Mr Cruickshank intentionally participated in the contravention with actual knowledge of the essential elements constituting the contravention, ASIC had not established that Mr Cruickshank was knowingly concerned in Antares' contravention for the purpose of s 674(2A) of the *Corporations Act*: reasons at [487], [489]-[504].

95 I do not accept that submission. It is by no means unorthodox for a s 674(2A) claim to fail although a breach of s 180, relating to the same underlying non-disclosure, is established. *ASIC v Vocation (No 2)* is an example of such a case. The objective elements of a s 180 breach may be satisfied by knowledge and conduct that falls short of establishing the particular nuanced actual knowledge required in order to establish liability under s 674(2A). As the reasons disclose, I was satisfied that Mr Cruickshank had certain knowledge. I was satisfied he knew that certain matters had been raised by the ASX. I was also satisfied that he was personally responsible for certain tasks, such as signing off on the PSA Announcements. Relevantly, I also set out in some detail the matters that I considered a person in Mr Cruickshank's position, exercising reasonable care and diligence, ought to have done or

understood. These matters inform the nature of the contravention. It was not necessary that ASIC establish that Mr Cruickshank had the detailed and analytical knowledge reflected in Mr Bowers' expert report about investor behaviour and materiality of information in order for liability under s 180 to be established, and to the extent Mr Cruickshank suggested otherwise, I do not accept the submission. As the reasons disclose (at [520]-[528]), I was satisfied that a person in Mr Cruickshank's position exercising reasonable care and diligence would have recognised the significance of the Purchaser Identity Information and the Cumulative Information and the influence it may have on an investor's decision-making processes, and would have recognised that Antares' failure to comply with its continuous disclosure obligations could expose it to financial harm.

96 Fourth, counsel for Mr Cruickshank submitted that the only circumstance which may be considered in imposing a disqualification order is the protection of the public. That submission is contrary to the authorities, and I refer to the principles at [76]-[78] above. Whilst ASIC accepts, and the authorities establish, that protection of the public is the primary purpose of s 206C, it is long established that other matters may be considered, whilst also acknowledging that the sanctions are not being imposed in a criminal sentencing context.

97 Turning next to matters that might be relevant to the question of mitigation, I note that Mr Cruickshank did not evince any evidence with respect to penalty. There was no evidence as to the effect any disqualification may have on him now or in the future or on his ability to meet any pecuniary penalty. There was no expression of remorse or recognition of his conduct falling short of the standards required of him. Having regard to the written submissions, Mr Cruickshank continues to rely on his dealings with the ASX in an attempt to reduce his culpability for the contravention of s 180, rather than recognising that those communications should have been given due weight by him when ascertaining and seeking to comply with the relevant duties that fell upon him as the chairman and chief executive officer of Antares. Based on the evidence of the various communications, Mr Cruickshank appears to have minimised the legitimate concerns that the ASX raised, rather than according them proper regard. There is insufficient evidence of mitigating circumstances.

98 As noted, the potential financial effect on Mr Cruickshank of a disqualification order is unknown. ASIC pointed out in its submissions that the Antares Annual Report for 2015 discloses that in the year to 31 December 2014 (the last period in which such reporting occurred prior to the appointment of external administrators), Mr Cruickshank derived salary and fees

of $775,053, non-monetary benefits of $31,174, 'other' remuneration of $178,463 and long service leave entitlements of $42,598 for a total remuneration of $1,027,288.106. It was noted that Mr Cruickshank's salary was paid in US dollars (totalling US$698,775 for the salary component), and that an average exchange rate of .9016 had been applied. Based on that information, it is fair to say that Mr Cruickshank was well remunerated at the relevant time. However, that says nothing about Mr Cruickshank's current employment, income or financial position.

99 As to other authorities that might provide some comparison of disqualification periods, I acknowledge that reference to such authorities does not provide a tariff. I also acknowledge that the propositions advanced by Santow J in *ASIC v Alder* are merely guidelines. But there remains value in considering other examples of disqualification periods so as to tend towards comity and consistency in the determination of penalties.

100 ASIC referred to four authorities which concerned breach of obligations as to continuous disclosure: *Australian Securities and Investments Commission, in the matter of Padbury Mining Limited v Padbury Mining Limited* [2016] FCA 990; *ASIC v Vocation (No 2)*; *ASIC v Sino*; and *ASIC v Helou (No 2)*.

101 ASIC's submissions on these cases were detailed. I consider that two provide some assistance, being *ASIC v Padbury* and *ASIC v Vocation (No 2)*. The facts in *ASIC v Sino* and *ASIC v Helou (No 2)* are such that they do not greatly assist in the present matter.

102 In *ASIC v Padbury* the critical issue was the failure to disclose information in an ASX announcement. Padbury announced that it had successfully secured funding of a $6 billion facility for the development and construction of the Oakajee deep-water port and associated railway network. The announcement did not disclose the contractual pre-conditions upon which the provision of the funding depended or the identity of the party that incurred the funding obligation. The directors took the step of seeking legal advice the evening before the announcement as to, in particular, whether it was necessary to identify the investor. The funding did not eventuate.

103 Padbury admitted that the representation as to funding made in the announcement was misleading or deceptive or likely to mislead or deceive, and that it had contravened s 1041H of the *Corporations Act*. The relevant directors accepted that they had permitted or caused Padbury to engage in that conduct. Padbury also admitted that it had contravened s 674(2) of

the *Corporations Act* in two respects (failure to disclose the conditions precedent and failure to disclose the identity of the investor). The directors admitted they were involved in the two contraventions within the meaning of s 674(2A). Each of the directors also agreed that they contravened s 180 in that they failed to discharge their duties to Padbury with due care and diligence, and that the contraventions of s 674(2A) and s 180 were serious.

104 ASIC and the directors had also consented to proposed orders as to penalty, which were then considered by Siopis J in accordance with the principles discussed in *Commonwealth v Director, Fair Work Building Industry Inspectorate* at [46]-[64].

105 His Honour referred to Sackville AJA's assessment of the contraventions in *Gillfillan v ASIC*. Sackville AJA assessed them as 'sufficiently serious to justify a five year disqualification before having regard to personal mitigating circumstances'. In particular, Siopis J noted that the directors were not found to have been dishonest in *Gillfillan v ASIC*, but it was said that their conduct represented a departure from the standards to be expected of the officers of a public company, and that the conduct led to the creation of a false market in which shares were traded at inflated prices: *ASIC v Padbury* at [84].

106 In *Gillfillan v ASIC* the five year period referred to by Sackville AJA was reduced to three years, allowing for mitigating circumstances. Similarly, in *ASIC v Padbury* Siopis J considered that, having regard to *Gillfillan v ASIC* and the matters raised by Sackville AJA, the contraventions by the Padbury directors justified a five year disqualification, but significant weight was placed on early cooperation and contrition. His Honour considered the three year period proposed by the parties was therefore appropriate, and made orders accordingly. Each director was also ordered to pay a pecuniary penalty of $25,000, and they were ordered to pay ASIC's costs.

107 In *ASIC v Vocation (No 2),* Mr Hutchinson, who occupied the position of CEO and managing director, was disqualified for six years. Whilst penalties were also imposed on other directors, it is the position of Mr Hutchinson that provides the most assistance for the present case. As in this case, both liability and penalty involved contested hearings. Mr Hutchinson was found liable for three contraventions of s 180: by failing to discharge his duties with reasonable diligence and care in permitting Vocation to contravene s 1041H by making misleading deceptive representations in both an ASX announcement and in information provided to an underwriter; and in permitting Vocation to contravene s 674(2) by failing to disclose the existence of certain information (the 'Withholding and Suspension Information') to the ASX.

As explained by Nicholas J, the Department of Education Early Childhood Development (**DEECD**) had effectively put a hold on funding for Vocation, and there was dispute with the DEECD.

108 In contrast to the position in *ASIC v Padbury* but similarly to the present case, there was no finding of actual knowledge on the part of Mr Hutchinson for the purpose of the application of s 674(2A). However, Nicholas J said the following:

> [51] Nevertheless, there are aspects of Mr Hutchinson's conduct that reflect a glaring failure on his part to discharge his duties and responsibilities as Vocation's CEO and managing director. In my opinion, Mr Hutchinson's breaches of duty involved a persistent and continuing failure to properly turn his mind to the task of understanding the nature and scope of Vocation's dispute with DEECD, the effect of relevant correspondence, the effect of relevant contractual provisions, and the reliability of his management team's assessment of the extent of the potential financial impact of the Withholding and Suspension Information on Vocation.
>
> [52] I have previously found that Mr Hutchinson had no reasonable basis to believe, at the time he approved the 25 August Announcement, that the amount of funds withheld by DEECD would be permanently lost was unlikely to exceed $2.0 million. A person in Mr Hutchinson's position exercising reasonable care and diligence would have understood that the outcome of the review was too uncertain to enable any such conclusion to be drawn with any reasonable level of confidence. Mr Hutchinson's belief was not based on any proper analysis of the scope of Vocation's dispute with DEECD, the parties' contractual rights and obligations under the Funding Contracts, or the correspondence exchanged between the parties up to 25 August 2014.

109 Nicholas J proceeded to identify some particular issues arising from Mr Hutchinson's conduct, including a failure to pass on legal advice in a timely manner, before concluding that each of the three contraventions of s 180, although not shown to have been engaged in dishonestly or for an improper nature or personal gain, must be regarded as extremely serious.

110 His Honour then addressed mitigating factors, noting that Mr Hutchinson was a relatively young and inexperienced CEO and managing director, the fact that he had shown some remorse and contrition, and the fact that there was some positive character evidence and evidence of Mr Hutchinson's contribution to the protection of the environment.

111 His Honour considered each of the three contraventions warranted a disqualification for a period of five years for a total disqualification period of 15 years, but reduced by 30% on account of mitigating factors and a further 40% applying the totality principle, resulting in a total disqualification period of six years. Similarly, Nicholas J considered pecuniary penalties

of $50,000 for each contravention were appropriate, being a total of $150,000, but reduced by the same approximate percentages resulting in a total pecuniary penalty of $70,000.

112 As *ASIC v Vocation (No 2)* reveals, contraventions of s 180 may still be considered serious even where liability under s 674(2A) is not established, and may justify both a period of disqualification and a pecuniary penalty.

113 Having regard in an overarching way to the categories collected by Santow J, it cannot be said that Mr Cruickshank's conduct is at the lower end of the spectrum for contraventions of s 180. In my view the six year disqualification period sought by ASIC in this case is too severe, but a period of some years is still appropriate.

114 I take into account that Mr Cruickshank's conduct was not deliberately wrongful or dishonest. I acknowledge that no finding of actual knowledge was made for the purpose of s 674(2A). I acknowledge that there is no disclosed history of other contraventions by Mr Cruickshank and that the number of contraventions on his part was fewer than in other cases. I take into account that there was some overlap in the circumstances of the two contraventions. No finding has been made of improper personal gain. However, for the reasons I have given above, the conduct in question was not inadvertent and involved a degree of deliberate decision-making on Mr Cruickshank's part. The contravention must be taken seriously, given Mr Cruickshank's position within Antares, the degree of departure from the requisite standards of care and diligence required, and the consequences (actual or potential) of the contraventions. I take into account that a disqualification order will therefore serve the purpose of protection of the public whilst also acting as specific deterrence to Mr Cruickshank. A disqualification order will also serve the function of general deterrence, communicating the need to uphold proper standards of corporate behaviour, and reflecting the significance of the purpose of continuous disclosure obligations to the market generally. Those standards are apparent from sources including the Listing Rules and it is expected that directors be familiar with how and why they operate.

115 In all of the circumstances, I consider a disqualification order is justified. I consider the appropriate period of disqualification for each of the two contraventions is three years, but having regard to principles of totality I would discount the cumulative period and order that the total effective disqualification period is four years.

116 For completeness, I note that Mr Cruickshank submitted that because ASIC sought 'only' a six year period of disqualification, if it failed to satisfy the Court that a six year period is

appropriate, there should be no period of disqualification. I do not accept that submission. The period of disqualification is a matter for the Court to determine as it considers appropriate, having some regard to ASIC's submissions as a regulator, but in accordance with the principles already discussed, including those addressed in *Commonwealth v Director, Fair Work Building Industry Inspectorate* at [60]-[61].

Pecuniary penalty

117 The next question is whether the Court should order pursuant to s 1317G of the *Corporations Act* that Mr Cruickshank pay to the Commonwealth a pecuniary penalty and, if so, in what amount.

118 At the time of the contraventions, s 1317G of the *Corporations Act* relevantly provided that a court could order a person to pay the Commonwealth a pecuniary penalty up to the relevant maximum amount ($200,000, in the case of a contravention of s 180) if a declaration of contravention by the person was made under s 1317E, the contravention was of a 'corporation/scheme civil penalty provision' and the contravention was 'serious'.

119 At all relevant times, s 180(1) has been a 'corporation/scheme civil penalty provision'. As to whether a contravention is 'serious', Wigney J said the following in *Australian Securities and Investments Commission v Hochtief Aktiengesellschaft* [2016] FCA 1489, a case that involved an admitted insider trading contravention:

> [97] Unusually (particularly for relatively modern Commonwealth legislation like the Corporations Act), there is no definition of 'serious' in the Corporations Act. The ordinary meaning of 'serious' in this context would include 'grave', 'not trifling', 'weighty' or 'important'. In *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs* (2013) 93 ACSR 421; [2013] NSWSC 106 at [109], Ward JA said that a contravention would be 'serious' for the purposes of s 1317G(1)(b) of the *Corporations Act* (which is the corresponding pecuniary penalty provision for corporation/scheme civil penalty provisions) if the relevant default or neglect was 'grave or significant', including by reference to the potential or actual consequences of the contravention.
>
> [98] The question whether a contravention meets the description 'serious' is ultimately a question of fact. There are a number of features of Hochtief AG's contravening conduct which support the conclusion that the contravention was grave and significant, and therefore serious for the purposes of s 1317G(1A). Those features are considered in detail later in these reasons in the context of fixing the appropriate pecuniary penalty. Hochtief AG's contravention could not in any sense be considered to be trivial, minor or inconsequential.

120 As already discussed, it is not the case that every contravention of s 180 will be serious. I have addressed above matters that are relevant to assessing whether the contravention was serious for the purpose of determining whether disqualification is justified. Those matters are also relevant in determining whether the contravention is serious for the purpose of granting relief under s 1317G. Such approach accords with that of Ward JA in *Re Idyllic* at [109]. I am satisfied that the objective features of the contraventions are serious for the purpose of s 1317G(1)(b).

121 As to the other principles relating to pecuniary penalties, they are well-known and summarised elsewhere, and it is not necessary to set them out again: but see Middleton J's summary in *ASIC v Healey (No 2)* at [119]-[123]. Considerations of both personal and general deterrence arise, and the principle of totality again applies.

122 The appropriate quantum is a question of discretion that depends upon the circumstances of the case. The non-exhaustive list of relevant factors from the judgment of French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR ¶41-076 is well recognised: see *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; (2020) 282 FCR 580 at [99]-[100]. In this case, absent information from Mr Cruickshank as to his personal financial or employment position, and absent any evidence of a disposition to cooperate with ASIC, the factors of particular relevance are the nature and extent of the contravening conduct, the fact that Mr Cruickshank was in a senior decision-making role and the circumstances in which the contravening conduct took place.

123 It was submitted for Mr Cruickshank that relevant matters included the fact that opinion evidence was needed and obtained by ASIC 'with the luxury of time'; that Mr Cruickshank had 'openly' communicated with the ASX during the relevant period; that there is no way of evaluating whether the breaches were serious when compared with other breaches and that the conduct all took place 'over 7 or 8 days'. These and the other matters raised by Mr Cruickshank have been considered and have already been addressed: see in particular [20]-[33] and [81]-[95] above. I would add that the 'open' communications did not include disclosing to the ASX the identity of the purchaser or other information as to due diligence requested by it during the Relevant Period. I do not consider the duration of the period of the contraventions to be of any particular importance in this case: there was no evidence that Mr Cruickshank could not have sought any advice or information that he considered appropriate during the Relevant Period.

124 I have taken Mr Cruickshank's submissions into account. However, in my view, given the seriousness of the contraventions, I consider it appropriate that there be a pecuniary penalty imposed in addition to the disqualification period. I have had regard to that period in assessing the level of pecuniary penalty.

125 ASIC submitted that a total pecuniary penalty of $50,000 is appropriate in the present circumstances, being a penalty of $30,000 in respect of the first contravention and a penalty of $50,000 in respect of the second resulting in a total of $80,000, reduced by $30,000 to reflect the overlap between those on totality and course of conduct grounds. I consider it somewhat artificial to consider the contravention relating to the Purchaser Identity Information alone to be less serious than the contravention relating to the Cumulative Information, even allowing for the degree of overlap. Both contraventions are serious. To my mind the level of overlap between the two contraventions and the manner in which the three integers of the Cumulative Information considered together led to the second contravention is best addressed in the context of relief by application of the totality principle.

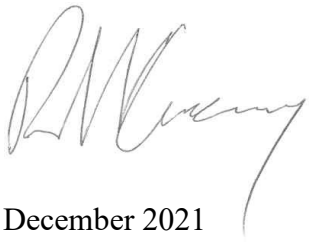
126 I consider that $50,000 is excessive in all of the circumstances, although not greatly excessive. I consider a penalty of $30,000 per contravention is appropriate having regard to all of the circumstances, so that the starting point is $60,000, but discounting that figure by application of the totality principle, I consider the appropriate total pecuniary penalty is $40,000. Absent evidence as to any mitigating factors, I do not consider it appropriate to apply any further discount.

Costs

127 ASIC sought its costs, and submitted that although it did not succeed in making out its case pursuant to s 674(2A), the issue of Mr Cruickshank's involvement in the contravention for the purpose of s 674(2A) was a legal point that did not take up a great deal of time. The submission understates its relevance to the proceeding. Reliance on s 674(2A) gave rise to an important legal argument, and it was necessary to analyse and consider this part of the claim carefully against a backdrop of competing authorities: reasons at [457]-[504]. Having considered the competing factors relevant to the exercise of the court's discretion as to costs, I consider there should be a discount in Mr Cruickshank's favour to reflect that this aspect of ASIC's claim was unsuccessful. Accordingly, Mr Cruickshank should pay 90% of ASIC's costs of the proceedings as taxed or agreed.

128 There will be declarations and orders accordingly.

I certify that the preceding one hundred and twenty-eight (128) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Banks-Smith.

Associate: 

Dated: 16 December 2021