

FEDERAL COURT OF AUSTRALIA

Mineralogy Pty Ltd v Australian Securities and Investments Commission

[2021] FCA 996

File number: NSD 269 of 2021

Judgment of: **WIGNEY J**

Date of judgment: 24 August 2021

Catchwords: **PRACTICE AND PROCEDURE** – interlocutory process by defendant, Australian Securities and Investments Commission (ASIC), to set aside or summarily dismiss the plaintiff’s claim pursuant to rr 13.01 or 26.01 of the *Federal Court Rules 2011* (Cth) – where principal relief sought by plaintiff was a declaration that its financial statements lodged with ASIC contained a true and fair view of its financial position – where plaintiff lodged its financial statements with ASIC for registration, but claimed that ASIC had formed, or was required to form, an opinion that the financial statements contained false or misleading information and that ASIC was therefore required by s 1274(8) or (11) of the *Corporations Act 2001* (Cth) to refuse to receive or register the financial statements – where the plaintiff’s claim to that effect was based on the fact that the financial statements contained a note which referred to advice received by the plaintiff which was inconsistent with proceedings which had been commenced against a director of the plaintiff – proper construction of s 1274 of the *Corporations Act 2001* (Cth) – where plaintiff claimed that the alleged inconsistency between the note in its financial statements and the criminal proceedings meant that “users” could not rely in its financial statements – where plaintiff contended that ASIC had infringed its right, as a user of its financial statements, to rely on s 1305 of the *Corporations Act 2001* (Cth) – where ASIC contended that the Court did not have jurisdiction to entertain the claim as there was no justiciable controversy between it and the plaintiff – where ASIC claimed that the plaintiff’s claim had no reasonable prospect of success – plaintiff’s originating process set aside

Legislation: *Australian Securities and Investments Commission Act 2001* (Cth), ss 1(2), 12A(2)
Corporations Act 2001 (Cth), ss 9, 45A(3), 184(2)(a), 292-299, 301, 319, 1274(1), 1274(2), 1274(2)(a), 1274(8), 1274(11), 1305, 1317B

Director of Public Prosecutions Act 1983 (Cth), ss 6(1)(b), 6(1)(c), 6(1)(e)
Director of Public Prosecutions Regulations 2019 (Cth), rr 6(1)(a)(i), 6(1)(a)(iv),
Federal Court of Australia Act 1976 (Cth), s 19(1)
Judiciary Act 1903 (Cth), ss 39B(1A), 39B(1A)(c)
Federal Court Rules 2011 (Cth), rr 13.01, 13.01(1)(a), 26.01, 26.01(1)(a)-(d)
Criminal Code Act 1899 (Qld), s 408C(1)(d)
Human Rights Act 2019 (Qld)

Cases cited:

Agar v Hyde (2000) 201 CLR 552; [2000] HCA 41
Australian Securities and Investments v Edensor Nominees Pty Ltd (2001) 204 CLR 559; [2001] HCA 1
Batistatos v Roads and Traffic Authority (NSW) (2006) 226 CLR 256; [2006] HCA 27
CGU Insurance Limited v Blakely (2016) 259 CLR 339; [2016] HCA 2
Clarence City Council v Commonwealth (2020) 280 FCR 265; [2020] FCAFC 134
Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51
Fencott v Muller (1983) 152 CLR 570
Minister for Immigration and Multicultural and Indigenous Affairs v B (2004) 219 CLR 365; [2004] HCA 20
Mutual Home Loans Fund of Australia (Qld) Ltd v Commissioner for Corporate Affairs [1978] Qd R 487
Palmer v Ayers (2017) 259 CLR 478; [2017] HCA 5
Polar Aviation Pty Ltd v Civil Aviation Safety Authority (2012) 203 FCR 325; [2012] FCAFC 97
R v Carroll (2002) 213 CLR 635; [2002] HCA 55
Re Judiciary and Navigation Acts (1921) 29 CLR 257
Re McBain; Ex parte Australian Catholic Bishops Conference (2002) 209 CLR 372; [2002] HCA 16
Re North Queensland Auto Spares Co Pty Limited [1984] 2 Qd R 241
Rogers v The Queen (1994) 181 CLR 251
Sino Iron Pty Ltd v Palmer (No 3) (2015) 2 Qd R 574; [2015] QSC 94
Spencer v Commonwealth (2010) 241 CLR 118; [2010] HCA 28
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28
Ward v Williams (1955) 92 CLR 496

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Corporations and Corporate Insolvency

Number of paragraphs: 139

Date of hearing: 22 June 2021

Counsel for the Plaintiff: Mr P Dunning QC with Mr L Sheptooha

Solicitor for the Plaintiff: Mr Jonathan Shaw

Counsel for the Defendant: Mr J Giles SC with Ms A Reid and Ms C Nguyen

Solicitor for the Defendant: MinterEllison

ORDERS

NSD 269 of 2021

BETWEEN: **MINERALOGY PTY LTD ACN 010582 680**
Plaintiff

AND: **AUSTRALIAN SECURITIES AND INVESTMENTS**
COMMISSION
Defendant

ORDER MADE BY: **WIGNEY J**

DATE OF ORDER: **24 AUGUST 2021**

THE COURT ORDERS THAT:

1. The plaintiff have leave to amend its originating process and concise statement.
2. The plaintiff's amended originating process dated 22 June 2021 and amended concise statement dated 10 May 2021, in the form in which those documents were provided to the Court, be taken to have been filed in accordance with the *Federal Court Rules 2011* (Cth) (**Rules**).
3. The plaintiff's originating process, as amended, be set aside pursuant to r 13.01 of the Rules.
4. The plaintiff pay the defendant's costs of the proceeding and the interlocutory process filed by the defendant on 30 April 2021.

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

REASONS FOR JUDGMENT

WIGNEY J:

1 **Mineralogy** Pty Ltd has commenced a proceeding in this Court against the Australian Securities and Investments Commission (**ASIC**). The primary relief sought by Mineralogy is declaratory relief, including a declaration that its audited accounts for the year ended 30 June 2014 provide a true and fair view of its financial position for that financial year and a declaration that it complied with its obligation under Ch 2M of the *Corporations Act 2001* (Cth) in respect of the preparation and lodgement of its accounts for the year ended 30 June 2014. ASIC's response to the commencement of the proceeding was to file an interlocutory process seeking an order that Mineralogy's originating process be set aside, or summarily dismissed, on the basis that there is no justiciable controversy between Mineralogy and ASIC in relation to the subject matter of the declaratory relief and therefore the Court has no jurisdiction to entertain the proceeding.

2 For the reasons that follow, the Court does not have jurisdiction to entertain the claim or grant the relief sought by Mineralogy and its originating process, as amended, must be set aside. Even if the Court had jurisdiction to entertain the claim, it would in any event have been appropriate to enter judgment against Mineralogy on the basis that it has no reasonable prospect of successfully prosecuting the proceeding.

BACKGROUND FACTS

3 The relevant background facts were not in dispute, at least for the purpose of determining ASIC's application to set aside or dismiss Mineralogy's claim.

4 Mineralogy is a company incorporated under the Corporations Act. Its directors include Mr Clive **Palmer**.

5 Mineralogy is a 'large proprietary company' as defined in ss 9 and 45A(3) of the Corporations Act and as such is required to comply with certain financial reporting and audit obligations in the Corporations Act. In particular, it is required to: prepare annual financial reports and a director's report; ensure that the financial reports comply with the relevant accounting standards and give a true and fair view of the financial position and performance of the company; and have its financial statements audited in accordance with Div 1 of Pt 2M.3 of the Corporations Act: see ss 292-299 and 301 of the Corporations Act. It is also required to lodge

with ASIC the financial reports prepared in accordance with the requirements of the Corporations Act: s 319 of the Corporations Act.

Criminal charges against Mr Palmer

6 On 6 February 2020, an employee of ASIC signed a complaint which was filed in the Magistrates Court in Brisbane. The complaint alleged that Mr Palmer had committed two offences against s 408C(1)(d) of the *Criminal Code Act 1899* (Qld) and two offences against s 184(2)(a) of the Corporations Act. The charges against Mr Palmer were pleaded as follows:

1. Between the fifth day of August 2013 and the fifth day of September 2013 at Brisbane and elsewhere in the State of Queensland, CLIVE FREDERICK PALMER, contrary to section 408C(1)(d) of the *Criminal Code Act 1899* (Queensland), dishonestly gained a benefit or advantage, pecuniary or otherwise, namely a chose in action, for any person, namely Cosmo Developments Pty Ltd and/or the Palmer United Party and others.

And the property is of a value of at least \$30,000 namely \$10,000,000.

2. Between the fifth day of August 2013 and the fifth day of September 2013 at Brisbane and elsewhere in the State of Queensland, CLIVE FREDERICK PALMER, contrary to section 184(2)(a) of the *Corporations Act 2001* (Commonwealth), dishonestly used his position as a director of a corporation, namely Mineralogy Pty Ltd, with the intention of directly or indirectly gaining an advantage for someone else, namely Cosmo Developments Pty Ltd and/or the Palmer United Party and others.

3. Between the thirty-first day of August 2013 and the third day of September 2013 at Brisbane and elsewhere in the State of Queensland, CLIVE FREDERICK PALMER, contrary to section 408C(1)(d) of the *Criminal Code Act 1899* (Queensland), dishonestly gained an advantage, pecuniary or otherwise, namely a chose in action, for any other person, namely Media Circus Network Pty Ltd and/or the Palmer United Party.

And the property is of a value of at least \$30,000 namely \$2,167,065.60.

4. Between the thirty-first day of August 2013 and the third day of September 2013 at Brisbane and elsewhere in the State of Queensland, CLIVE FREDERICK PALMER, contrary to section 184(2)(a) of the *Corporations Act 2001* (Commonwealth), dishonestly used his position as a director of a corporation, namely Mineralogy Pty Ltd, with the intention of directly or indirectly gaining an advantage for someone else namely Media Circus Network Pty Ltd and/or the Palmer United Party.

7 The prosecutor's case against Mr Palmer was further particularised in a document entitled "Summary of Facts", though the document was said to be a draft and to be "subject to review" by "[t]he Commonwealth". The summary of facts stated that the two charges under s 408C(1)(d) of the Code (charges 1 and 3) related to the transfer by Mr Palmer of a total of \$12,167,065.60 from a particular bank account held by Mineralogy to bank accounts held by two companies, **Media Circus** Network Pty Ltd and **Cosmo** Developments Pty Ltd. The first

payment was made by cheque signed by Mr Palmer on 6 August 2013 for \$10 million and made payable to Cosmo. The second payment was made by cheque signed by Mr Palmer on 1 September 2013 for \$2,167,065.60 and made payable to Media Circus.

8 A key element of the prosecutor’s case, as articulated in the summary of facts, is that the Mineralogy bank account from which the funds were paid held funds “pursuant to existing agreements with other companies” and that the transfers of the funds from the account were “not in accordance with those agreements”. In short summary, the bank account was said to have been opened pursuant to agreements between Mineralogy and **Sino Iron Pty Ltd** and **Korean Steel Pty Ltd**. Those agreements provided, in effect, that the funds deposited into the account were only to be used to pay, or reimburse others who had paid, costs and expenses associated with the establishment, maintenance, operation and repair of certain “Authorised Facilities”. The “Authorised Facilities” were, in summary, certain “port-related facilities” at the Port of Cape Preston.

9 The central allegation against Mr Palmer, as enunciated in the summary of facts, is that the funds that he caused to be paid to Media Circus and Cosmo out of the relevant Mineralogy bank account were ultimately used for the benefit of the Palmer United Party (**PUP**) to fund its 2013 federal election campaign. PUP was a political party associated with Mr Palmer. Media Circus was a company which had been engaged by PUP to run its marketing and advertising campaign for the election. It is alleged that, of the \$12,167,000 transferred to Media Circus and Cosmo, a total of \$10,214,673.07 was transferred to bank accounts held by PUP and Media Circus for the benefit of PUP’s 2013 election campaign and other funds were transferred to bank accounts controlled by other companies associated with Mr Palmer.

10 The two charges under s 184(2)(a) of the Corporations Act (charges 2 and 4) also relate to the payments of \$10 million and \$2,167,065.60. The prosecutor alleges that, in causing Mineralogy to make the \$10 million payment, Mr Palmer dishonestly used his position as a director of Mineralogy to gain an advantage for Cosmo, PUP and others and that, in causing Mineralogy to make the \$2,167,065.60 payment, Mr Palmer dishonestly used his position as a director of Mineralogy to gain an advantage for Media Circus and PUP.

11 The prosecutor’s summary of facts also states that on 9 May 2014, after a dispute had arisen between Mineralogy and Sino and Korean Steel concerning the use of funds in the relevant Mineralogy bank account, the sum of \$12,700,000 was deposited into the account by “Old Nickel”, another company with which Mr Palmer was associated.

12 The offences with which Mr Palmer has been charged are indictable offences. Despite having been laid in the Queensland Magistrates Court in February 2020, the criminal proceeding have not yet proceeded to a committal hearing. It was essentially common ground that the delay in having the criminal proceeding heard was at least in part a result of a proceeding that Mr Palmer had commenced in the Supreme Court of Queensland in which Mr Palmer alleged that the commencement of the criminal proceeding was unlawful because it somehow breached the *Human Rights Act 2019* (Qld). That proceeding was ultimately not pursued.

Preparation and lodgement of Mineralogy’s financial report for the year ended 30 June 2014

13 In late 2020, a special purpose **financial report** was prepared by Mineralogy for the year ended 30 June 2014. The financial report included a director’s report signed by Mineralogy’s chairman, Mr Domenic **Martino** on 3 December 2020. The director’s report noted, amongst other things, that “significant events occurring after [the] balance date are set out in Note 17 to the Group’s financial statements”.

14 The financial report also contained **financial statements** of the “consolidated entity”, which was Mineralogy and the entities it controlled. Note 4(c) to the financial statement stated that “[p]ort management services fee totalling \$12,000,000 were paid to Queensland Nickel Pty Ltd via their agent Cosmo Developments Pty Ltd in August 2013” and that “[a]s these services were not provided, the fees were refunded in May 2014”.

15 It would seem that this note was referable to the payments of \$10 million and \$2,167,065.60 which are the subject of the charges against Mr Palmer.

16 Note 17(b) to the financial statements included the following:

On 23 July 2014, Sino Iron Pty Ltd and Korean Steel Pty Ltd (together plaintiffs) commenced proceedings in the Queensland Supreme Court (6791 of 2014) against a director of the Company, Mr Clive Palmer (Palmer), and a wholly owned subsidiary of the Company, Cosmo Developments Pty Ltd (Cosmo) in respect of payments that the company had made under a contract. Sino Iron and Korean Steel sought, inter alia, declarations that Cosmo was liable to account to Sino Iron and Korean Steel, that Cosmo had received funds from the company in breach of trust and that Palmer procured or assisted Cosmo in breach of trust regarding two payments from the company’s account.

Those two payments were:

1. \$10,000,000.00 on 8 August 2013 to Cosmo;
2. \$2,167,065.50 on 1 September 2013 to Media Circus Pty Ltd

(the Two Payments).

17 The note went on to refer to the judgment of Jackson J in the Supreme Court of Queensland in the proceeding referred to in the note, as well as to the unsuccessful appeal from that judgment by Sino and Korean Steel. More will be said about the judgment of Jackson J later in these reasons. It suffices at this point to note that Jackson J held that the funds held in the bank account from which the two payments were made were not held in trust by Mineralogy.

18 The note also contained the following statements concerning the two payments:

The company has obtained a[n] independent business report and further legal advice which has confirmed the two payments occurred when the company had a right of set off against Sino Iron and Korean Steel of HK\$1,524,000,000 exceeding the two payments by hundreds of millions of dollars. The advice also determined that the two payments were honestly made by the director in the best interest of the company.

The director has no case to answer and has acted honestly at all times. The beneficiaries of the two payments were Queensland Resources Pty Ltd and Queensland Metals Pty Ltd (QN Companies). The audited accounts of the QN Companies for the year ended 30 June 2014 (audited accounts) covered the period of the two payments. The audited accounts were not qualified by the auditor Ernst and Young and signed as giving a true and fair view. No matters of concern were raised by Ernst and Young in respect of the two payments in audited accounts. Section 1305 of the Corporations Act in effect provides that the audited accounts are evidence in any proceeding, and is prime facie [sic] evidence of any matter stated or recorded in books of the company.

19 The financial report also included a director's declaration signed by Mr Martino on 3 December 2020. That declaration included a statement that "in the opinion of the director" the "financial statements and notes of the Company are in accordance with the Corporations Act 2001", including "giving a true and fair view of the Company's and the consolidated entity's financial positions as at 30 June 2014 and of its performance for the year ended on that date" and "complying with Australian Accounting Standards ...".

20 Finally, the financial report relevantly included a report of an auditor which included an opinion by the auditor that the financial report of Mineralogy was in accordance with the Corporations Act, including giving a "true and fair view of the company's financial position as at 30 June 2014" and "complying with Australian Accounting Standards".

21 Mineralogy's financial report was lodged with ASIC. It is common ground that it was subsequently entered on a register maintained by ASIC pursuant to s 1274(1) of the Corporations Act. As such, it is available for inspection for a fee by members of the public.

22 It should perhaps be emphasised at this point that Mineralogy’s financial report was prepared and lodged with ASIC in December 2020, some considerable time after the criminal proceeding was commenced against Mr Palmer in February 2020.

Ability of “users” to rely on Mineralogy’s financial report

23 The evidence adduced by Mineralogy indicates that its board of directors has been considering listing Mineralogy’s shares on an international stock exchange and Mineralogy has engaged in discussions with brokers, potential investors, lawyers and accountants concerning the execution of an initial public offering (**IPO**). The evidence suggests, in that context, that some of Mineralogy’s advisers have expressed concerns about what is perceived by them to be a conflict between the criminal charges against Mr Palmer and what was said in the financial report that Mineralogy had lodged with ASIC about the payments that form the basis of those charges. The evidence indicated, for example, that Mineralogy’s “corporate adviser”, Indian Ocean Management Group Pty Ltd (**IOMG**) had written to Mineralogy’s directors on 24 March 2021 and relevantly advised as follows:

- Mineralogy should not proceed with the Mineralogy IPO as long as there is a conflict between the Charge and the Audited Accounts; [sic]
- Even though the auditor has given an unqualified opinion on the Audited Accounts, and even though section 1305 of the Corporations Act deems them to be admissible in court as prima facie evidence of any matter stated or recorded, Mineralogy should resolve the conflict in respect of the Audited Accounts and the Charge by obtaining a court declaration that the Audited Accounts are true and fair.
- To enable Mineralogy to achieve the Mineralogy IPO, Mineralogy must, due to the contradiction of the Audited Accounts and the Charge, legally establish the reliability of its own Audited Accounts.
- The contradiction between Mineralogy’s 2014 Audited Accounts and the ASIC charge sheet prevents Mineralogy from proceeding with the Mineralogy IPO on the New York Stock Exchange.

24 Similarly, in his affidavit evidence, the managing director of IOMG expressed the view that as a “user” of Mineralogy’s audited accounts, IOMG “must be able to rely on them in recommending financial strategies for the Mineralogy IPO” and that it is important that the accounts can also be relied on by “stakeholders”.

Correspondence concerning Mineralogy’s financial statements

25 On 1 March 2021, Mr Martino, on behalf of Mineralogy, wrote to ASIC concerning Mineralogy’s financial report. That letter referred, by way of background, to the criminal

proceeding against Mr Palmer. It noted, correctly, that Mineralogy had not been charged with any offence. The letter asserted that the alleged dishonest payments that are the subject of the criminal proceeding were made “within the period of the 2014 audited accounts” of Mineralogy which had been “published” by ASIC and which could therefore be “accessed by the public by search”. The letter then stated as follows:

Notwithstanding the matters set out above, I note that ASIC has not sought to take any issue in respect of our company’s 2014 audited accounts. Nor has ASIC taken issue with the 2014 audited accounts of the party that was the payee of the Alleged Payments.

26 It should perhaps be noted at this point that, as will become apparent, ASIC accepts that it has not taken issue with Mineralogy’s financial report for the year ended 30 June 2014. Indeed, that is one of the points upon which ASIC relies in asserting that there is no justiciable dispute between it and Mineralogy.

27 In any event, the letter continued as follows:

The effect of section 1305 of the Corporations Act is that our company and the Court have the entitlement to rely upon our audited accounts as being prima facie evidence of matters stated or recorded in those Accounts. Both the opinion statements of directors and the auditors record that the 2014 accounts are true and correct. The independent auditors, Ernst & Young (EY) of the beneficial payees and the independent auditors of Mineralogy, Hall Chadwick, make no mention of any matters capable of supporting the allegations regarding dishonest payments.

28 The letter concluded with what was in effect a threat of legal proceedings:

Our company, the Court and users must be able to rely on our audited Accounts. Accordingly, I request that you confirm to me within 7 days that ASIC is satisfied that Mineralogy’s 2014 audited Accounts are complete and accurate. If ASIC fails to respond to this letter not only will the writer regard it as a breach of ASIC’s responsibility as regulator and to act reasonably but confirmation by ASIC of a contradiction of our company’s 2014 accounts.

29 The letter reserved Mineralogy’s rights to “commence proceedings seeking appropriate relief inter alia as foreshadowed in this letter”, though the letter in fact did not indicate the nature of the cause of action which would be the subject of the proceeding or the relief Mineralogy would seek if it commenced proceedings.

30 ASIC did not respond to Mineralogy’s letter within seven days, or indeed before this proceeding was commenced. That would appear to be because, for one reason or another, the letter did not come to the attention of the specific ASIC officer to whom the letter was addressed until late March 2021. In any event, ASIC’s lawyers eventually responded to

Mineralogy's letter, albeit after the commencement of the proceeding, by letter dated 29 April 2021 addressed to Mineralogy's lawyer. That letter asserted as follows:

In relation to the matters raised in the Proceeding, we are instructed to inform your client that, at the present time, ASIC has not opened an investigation in relation to whether the Special Purpose Financial Report (DVM-03) (**Report**) lodged by your client on 1 December 2020 and amended on 4 December 2020 complies with the obligations under Part 2M of the *Corporations Act 2001* (Cth) (**Act**), nor has ASIC commenced any administrative process or legal process with respect to whether the Report complies with the obligations under Part 2M of the Act. Presently, ASIC makes no allegation against Mineralogy with respect to the Report.

31 The letter then foreshadowed that ASIC would apply to the Court to set aside Mineralogy's originating process on the basis that the proceeding did not raise any "matter" for the purposes of s 39B(1A) of the *Judiciary Act 1903* (Cth) and so was not within the Court's jurisdiction.

MINERALOGY'S CLAIM AND THE RELIEF SOUGHT

32 The principal relief sought by Mineralogy in its originating process as filed is as follows:

1. A declaration that Mineralogy's Audited Accounts for the year ended 30 June 2014 provide a true and fair view of its financial position for the year ended 30 June 2014.
2. A declaration that Mineralogy has complied with its obligations under Part 2M of the Corporations Act in respect of the preparation and lodgement of Mineralogy's Audited Accounts for the year ended 30 June 2014.

33 The reference to Pt 2M of the Corporations Act may be taken to be a reference to Ch 2M of the Corporations Act and in particular Pt 2M.3, which contains the provisions relevant to financial reporting.

34 During the course of, and as a result of, oral argument during the hearing of ASIC's application to set aside or summarily dismiss the originating process, Mineralogy sought leave to amend its originating process to include the following additional relief:

- 2A. Order that a writ of mandamus issue to the Defendant directing it to form an opinion under s.1274(8) of the Corporations Act 2001 (Cth) about whether Mineralogy's Audited Accounts for the year ended 30 June 2014 contain a matter identified in any [one] or more of s.1274(8)(b), (d) or (e) of the Corporations Act 2001 (Cth).
- 2B. Having regard to that opinion, an order that a writ of mandamus issue to the Defendant directing it to take any action, as necessary, under s.1278(8)(f)-(h) or alternatively, s.1274(11)(b) of the Corporations Act 2001 (Cth).

35 ASIC took the reasonable position that its interlocutory application should be approached on the basis of the amended originating process. It accordingly did not oppose leave being granted to Mineralogy to file the amended originating process, though it submitted that the amendment

was futile because the additional relief was liable to be set aside or dismissed on the same basis as the principal relief sought by Mineralogy.

36 Mineralogy's originating process was supported by a concise statement. At the hearing of ASIC's application, Mineralogy sought to rely on an amended concise statement. ASIC again took the approach that its application should be considered on the basis of the amended concise statement. The amended concise statement identifies and explains the basis upon which Mineralogy claims that it is entitled to the relief sought by it.

37 Mineralogy's claims essentially hinge on certain rights that it contends that it has by virtue of s 1274(1), (2), (8) and (11) and s 1305 of the Corporations Act.

38 Subsections 1274(1), (2), (8) and (11) of the Corporations Act provide as follows:

1274 Registers

- (1) ASIC must, subject to this Act, keep such registers as it considers necessary in such form as it thinks fit.
- (2) A person may:
 - (a) inspect any document lodged with ASIC, not being:
 - (iaa) a notice lodged under subsection 205D(3); or
 - (iab) information of the kind specified under subsection 1212(4) or 1213(4) (information included in, or accompanying, applications in relation to passport funds); or
 - (i) an application under section 1279 (application for registration as an auditor), or section 20-5 of Schedule 2 (application for registration as a liquidator); or
 - (ia) a document lodged under a provision of Chapter 7 (other than subsection 792C(1), section 1015B or section 1015D); or
 - (ii) a document lodged under section 1287 (notification of matters by registered auditors), 1287A (annual statements by registered auditors), 30-1 of Schedule 2 (annual liquidator returns) or 35-1 of Schedule 2 (notice of significant events); or
 - (iii) a document lodged under paragraph 1296(2)(b); or
 - (iv) a report made or lodged under section 422, 438D or 533; or
 - (iva) a disclosure document lodged under section 718, or a supplementary or replacement document lodged under section 719, in relation to an offer of an ESS interest, in a company (within the meaning of the Income Tax Assessment Act 1997), if the conditions set out in subsection (2AA) are satisfied; or

- (ivb) an industry notice lodged under subsection 40-100(1) of Schedule 2; or
 - (v) a document that has been destroyed or otherwise disposed of; or
 - (b) require a certificate of the registration of a company or any other certificate authorised by this Act to be given by ASIC; or
 - (c) require a copy of or extract from any document that the person is entitled to inspect pursuant to paragraph (a) or any certificate referred to in paragraph (b) to be given, or given and certified, by ASIC.
- ...
- (8) If ASIC is of opinion that a document submitted for lodgment:
- (a) contains matter contrary to law; or
 - (b) contains matter that, in a material particular, is false or misleading in the form or context in which it is included; or
 - (c) because of an omission or misdescription has not been duly completed; or
 - (d) contravenes this Act; or
 - (e) contains an error, alteration or erasure;
- ASIC may refuse to register or receive the document and may request:
- (f) that the document be appropriately amended or completed and resubmitted; or
 - (g) that a fresh document be submitted in its place; or
 - (h) where the document has not been duly completed, that a supplementary document in the prescribed form be lodged.
- ...
- (11) If a body corporate or other person, having made default in complying with:
- (a) any provision of this Act or of any other law that requires the lodging in any manner of any return, account or other document or the giving of notice to ASIC of any matter; or
 - (b) any request of ASIC to amend or complete and resubmit any document or to submit a fresh document;
- fails to make good the default within 14 days after the service on the body or person of a notice requiring it to be done, a court may, on an application by any member or creditor of the body or by ASIC, make an order directing the body or any officer of the body or the person to make good the default within such time as is specified in the order.

39 Section 1305 of the Corporations Act provides as follows:

1305 Admissibility of books in evidence

- (1) A book kept by a body corporate under a requirement of this Act is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book.
- (2) A document purporting to be a book kept by a body corporate is, unless the contrary is proved, taken to be a book kept as mentioned in subsection (1).

40 In its amended concise statement (at [17]), Mineralogy contends that rights which it claims are created or conferred on it by ss 1274 and 1305 of the Corporations Act will be infringed by ASIC in the following circumstances:

- c. ASIC will infringe Mineralogy's rights where through its conduct:
 - i. it expressly or impliedly asserts that the Audited Accounts are not in compliance with the CA, (including in particular where it expressly or impliedly asserts that the Audited Accounts do not provide a true and fair view of the financial position and performance of the company as required under s 297 CA); and/or
 - ii. the Audited Accounts cannot be relied upon by Users for the purpose of making economic decisions; and/or
 - iii. it expressly or impliedly asserts that the Audited Accounts are not prima facie evidence of any matter stated or recorded in the Audited Accounts; and/or
 - iv. Users are unable to rely on the benefit of the statutory presumption in s1305 CA.

41 It may be noted that this paragraph of the amended concise statement does not expressly claim that ASIC has infringed Mineralogy's rights derived from ss 1305 and 1274 of the Corporations Act. Mineralogy's allegation that ASIC has breached those rights would appear to hinge on the allegation that there is a conflict between Mineralogy's financial report which has been lodged with and registered by ASIC and the criminal charges that have been laid against Mr Palmer. The key allegation would appear to be that, by causing the criminal charges to be laid against Mr Palmer, or by pursuing those charges, ASIC has formed the opinion that Mineralogy's audited accounts contain false or misleading "matter". The amended concise statement articulates Mineralogy's claim concerning ASIC's infringement of its rights in the following terms (at [24A]-[24C]):

- 24A. By reason of causing the Complaint to be made as pleaded in paragraph 18 above and in the premises of paragraphs 19 and 21 to 24:
 - a. ASIC is of the opinion that the Audited Accounts:
 - i. contain a matter that, in a material particular, is false or misleading in the form or context in which it is included within the meaning of s1274(8)(b) CA;

Particulars

Such matter is that pleaded in paragraph 23 above.

- ii. contravene the CA within the meaning of s1274(8)(d) CA:

Particulars

Such contraventions are those pleaded in paragraphs 24(b) above.

- iii. contains an error within the meaning of s1274(8)(h) CA; and

Particulars

Such error is the matter pleaded in paragraph 23 above.

- b. ASIC thereby has a duty to refuse to register or receive the document and request that:
 - i. the Audited Accounts be appropriately amended or completed and resubmitted in accordance with s1274(8)(f) CA; or
 - ii. a fresh document be submitted in place of the Audited Accounts in accordance with s1274(8)(g) CA.

Particulars

Such duty arises under s1274(8) CA.

- 24B. ASIC has not complied with the duty pleaded in paragraph 24A(b) by taking the action pleaded therein.
- 24C. In the premises of paragraphs 24A and 24B, Mineralogy has a right:
 - a. to challenge the opinion pleaded in paragraph 24A(a) by way of legal proceedings; and
 - b. further or alternatively, and to the extent necessary to so challenge ASIC's opinion, to require ASIC to comply with its duty and take the action pleaded in subparagraphs 24A(b)(i) or (ii).

42 Mineralogy claims that a dispute exists between ASIC and Mineralogy, that dispute being “in respect of the allegations by ASIC of non-compliance by Mineralogy with the [Corporations Act]”, or “in respect of the express or implied allegations by ASIC of non-compliance by the directors of Mineralogy and the Auditors with the [Corporations Act]”: amended concise statement at [26], [47] and [48].

ASIC'S APPLICATION

43 ASIC's interlocutory process filed on 30 April 2021 seeks an order pursuant to r 13.01 of the *Federal Court Rules 2011* (Cth) that Mineralogy's originating process be set aside, or further or in the alternative, an order pursuant to r 26.01(1)(a), (b), (c) or (d) of the Rules that the originating process be dismissed.

44 ASIC's case that the originating process be set aside or dismissed largely hinges on the proposition that there is no present dispute between it and Mineralogy in relation to the subject matter of the declarations and that there is, accordingly, no justiciable controversy which constitutes a "matter" in respect of which the Court has jurisdiction pursuant to s 19(1) of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) read with s 39B of the Judiciary Act. ASIC advanced the following arguments in support of that proposition.

45 First, there is no dispute or controversy between ASIC and Mineralogy concerning Mineralogy's financial report for the financial year ended 30 June 2014. Mineralogy's reliance on the criminal proceeding as demonstrating that there is such a dispute was said to be misplaced because Mineralogy is not a party to the criminal proceeding and no allegation is made against it. ASIC has also advised Mineralogy that it has not commenced any investigation or administrative or legal process in respect of Mineralogy's financial report.

46 Second, the fact that ASIC maintains a register pursuant to s 1274(1) of the Corporations Act and that Mineralogy's financial report has been recorded on that register does not give rise to any immediate right of Mineralogy, or duty or liability of ASIC, in relation to the financial report. While ASIC had a power under s 1274(8) to refuse to register or receive a document submitted for lodgement, that power is discretionary and has not been exercised by ASIC in respect of Mineralogy's financial report.

47 Third, the alleged rights identified by Mineralogy in the amended concise statement are artificial and hypothetical and in effect require or request the Court to give a purely advisory opinion. The artificiality of Mineralogy's case is, it was submitted, demonstrated by the fact that Mineralogy contended, in effect, that it is entitled to have its financial report recorded on ASIC's register, and that ASIC has no basis to refuse to register it, in circumstances where ASIC has not refused to register the financial report and it had accordingly been registered. In those circumstances, ASIC submitted that the financial report could be relied on by so-called "users" whether or not the Court makes any of the declarations sought by Mineralogy. The hypothetical nature of Mineralogy's case was also said to be demonstrated by the fact that no declaration made by the Court could affect or displace the operation of s 1305 of the Corporations Act in any proceeding, including the criminal proceeding.

DOES THE COURT HAVE JURISDICTION?

48 It was common ground that the question whether the Court has jurisdiction to determine Mineralogy's claims in the originating process depends on whether the claims constitute or give rise to a "matter" for the purposes of s 39B(1A) of the Judiciary Act.

Relevant statutory provisions and principles

49 Subsection 19(1) of the Federal Court Act provides that the Court has "such original jurisdiction as is vested in it by laws made by the Parliament".

50 Subsection 39B(1A) of the Judiciary Act provides as follows:

39B Original jurisdiction of Federal Court of Australia

Scope of original jurisdiction

...

- (1A) The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
- (a) in which the Commonwealth is seeking an injunction or a declaration; or
 - (b) arising under the Constitution, or involving its interpretation; or
 - (c) arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

51 It is apparent that Mineralogy's case is that the Court has jurisdiction pursuant to s 39B(1A)(c) because its claims arise under the Corporations Act. That, however, depends on whether its claims can be characterised or found to constitute a "matter" for the purposes of s 39B(1A) of the Judiciary Act. The word "matter" for the purposes of s 39B of the Judiciary Act is to be given the same meaning and is to be construed consistently with the word "matter" as used in Ch III of the *Constitution: Australian Securities and Investments v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [2001] HCA 1 at [50]-[51] and [54] (Gleeson CJ, Gaudron and Gummow JJ).

52 The word "matter" in this context does not mean "legal proceeding between parties or a bare description of some subject matter that falls within a head of federal legislative power": *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365; [2004] HCA 20 at [7] (Gleeson CJ and McHugh J) (*Minister for Immigration v B*). The identification of some subject matter which falls within a head of federal legislative power is necessary, but not sufficient, to enliven the judicial power or authority to adjudicate: *CGU*

Insurance Limited v Blakely (2016) 259 CLR 339; [2016] HCA 2 at [24]-[25] (French CJ, Kiefel, Bell and Keane JJ). Thus, it is necessary, but not sufficient, for Mineralogy to identify some subject matter in the proceeding which, relevantly, arises under the Corporations Act and therefore falls within s 39B(1A)(c) of the Judiciary Act.

53 The other element that is required to enliven the Court’s power to adjudicate is that the matter is “justiciable” or gives rise to a “justiciable controversy”: *CGU Insurance* at [26]-[27] and [29]. There can, however, be no “matter” within the meaning of s 39(1A) of the Judiciary Act “unless there is some immediate right, duty or liability to be established by the determination of the Court”: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); in other words, “unless the relevant legislation identifies – expressly or inferentially – some right that may be determined or privilege that may be granted by a court, or some duty or liability that is enforceable against a person by another person”: *Minister for Immigration v B* at [8].

54 The requirement that there be a justiciable controversy “reinforces that the controversy that the court is being asked to determine is genuine, and not an advisory opinion divorced from a controversy”: *Palmer v Ayers* (2017) 259 CLR 478; [2017] HCA 5 at [27] (Kiefel, Keane, Nettle and Gordon JJ). The justiciable controversy must be “identifiable independently of the proceedings which are brought for its determination”: *Fencott v Muller* (1983) 152 CLR 570 at 603 (Mason, Murphy, Brennan and Deane JJ). It must also be “real and immediate” and not involve mere “[h]ypothetical questions”: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [2002] HCA 16 at [242] (Hayne J); *Clarence City Council v Commonwealth* (2020) 280 FCR 265; [2020] FCAFC 134 at [54].

The subject matter for determination

55 It may be accepted that the proceeding commenced by Mineralogy satisfies the “subject matter” element. That is because the subject matter of Mineralogy’s claims and the relief it seeks are identified in the originating process and amended concise statement as arising under ss 1274 and 1305 of the Corporations Act. It follows that the subject matter of Mineralogy’s claims falls within a relevant head of federal legislative power, namely s 39B(1A)(c) of the Judiciary Act.

56 The critical question is whether the claims constitute a “matter” for the purposes of s 39B(1A)(c) of the Judiciary Act. That question hinges on whether there is a justiciable controversy between Mineralogy and ASIC in respect of the identified subject matter.

Is there a justiciable controversy between Mineralogy and ASIC?

57 The starting point in determining whether there is a justiciable controversy is to identify the right or rights created or derived from the Corporations Act that Mineralogy claims may properly be determined by the Court, or the duty or duties that it contends can be enforced by it against ASIC. Consideration may then be given to whether there is any genuine, as opposed to artificial or hypothetical, controversy in respect of that right or duty.

A right based on s 1274 of the Corporations Act

58 The first right identified by Mineralogy as being the source or basis of its claims is the right to have its financial report for the year ended 30 June 2014 “made available to Users and be able to be relied upon by Users for the purpose of making economic decisions regarding Mineralogy”: amended concise statement at [17(a)]. “Users” in that context, is defined as meaning present and prospective creditors of Mineralogy; present and prospective members of Mineralogy; Mineralogy’s corporate adviser IOMG; advisers, consultants and other professionals who will be involved in the Mineralogy IPO; other persons who will be involved in, or have an interest in, the proposed Mineralogy IPO; and Mineralogy itself: amended concise statement at [16].

59 The source of this alleged right is said by Mineralogy to be s 1274(1) and (2) of the Corporations Act, coupled with a duty said to be imposed on ASIC by s 1274(8) and (11) of the Corporations Act.

60 As has been seen, s 1274(1) of the Corporations Act requires ASIC to “keep such registers as it considers necessary in such form as it sees fit” and s 1274(2)(a) provides that a person may “inspect any document lodged with ASIC”, other than certain specified types of documents, none of which are relevant to this proceeding. Subsection 1274(8) provides, insofar as it is potentially relevant, that “if ASIC is of [the] opinion that a document submitted for lodgement ... (b) contains matter that, in a material particular, is false or misleading ... ASIC may refuse to register or receive the document and may request: (f) that the document be appropriately amended or completed and resubmitted; or (g) that a fresh document be submitted in its place”. Subsection 1274(11) provides that a member or creditor of a body corporate, or ASIC, may apply to a court to make an order directing the body corporate or an officer of that body corporate to “make good” a default in complying with any provision of the Corporations Act that, relevantly, requires the lodging of a return or account, or any request made by ASIC to amend or resubmit any document.

61 It is common ground that: ASIC keeps a register as required by s 1274(1); Mineralogy lodged its financial report for the year ended 30 June 2014 with ASIC; that report is recorded on ASIC's register and is able to be inspected by any person; and ASIC has not taken any action pursuant to s 1274(8) or (11) of the Corporations Act.

62 The controversy which Mineralogy contends can be quelled by the Court is that ASIC will or has infringed its right under s 1274(1) and (2) of the Corporations Act because "the Audited Accounts cannot be relied upon by Users for the purpose of making economic decisions": amended concise statement at [17(c)(ii)]. It would appear to be on that basis that Mineralogy contends that it is entitled to both a declaration that its audited accounts for the year ended 30 June 2014 provide a true and fair view of its financial position for the year ended 30 June 2014 and a declaration that it has complied with its obligations under Ch 2M of the Corporations Act in respect of the preparation and lodgement of its audited accounts for the year ended 30 June 2014.

63 Mineralogy's argument that ASIC has somehow infringed its right, based on s 1274(1), (2) and possibly (8) and (11) of the Corporations Act, to have its financial report made available to and relied on by users, is, at best, opaque or elusive. It appears to be based on the proposition that, while its financial report has in fact been placed on ASIC's register and is able to be inspected by anyone, those so-called "users" of the report cannot rely on the report, either because note 17(b) to the report is said to be inconsistent with the allegations made in the criminal proceeding against Mr Palmer, or because those allegations somehow suggest or show that ASIC asserts or is of the opinion that note 17(b) to the report is false or misleading.

64 Mineralogy's contention that there is some justiciable controversy concerning a right it has by reason of s 1274 of the Corporations Act is entirely unmeritorious. There is no such right for determination at the suit of Mineralogy and no such justiciable controversy. That is so for a number of reasons.

65 First, it may be accepted that s 1274(1) of the Corporations Act creates a duty on the part of ASIC to keep a register or registers, or at least such register or registers "as it considers necessary". There is, however, no dispute that ASIC has complied with that duty and established a register.

66 Second, it may perhaps also be accepted that, by virtue of s 1274(2) of the Corporations Act, a person has a right to inspect any document that has been lodged with ASIC, other than those

listed in s 1274(2)(a). It may be that, if ASIC refused to allow a person to inspect a particular document which had been lodged with ASIC that did not fall within s 1274(2)(a), that person could approach the Court to have its right to inspect the document determined. In the present case, however, there is no dispute that Mineralogy has lodged its financial report for the year ended 30 June 2014 with ASIC, ASIC has placed that report on its register, and any person is able to inspect that document. There is no suggestion that any person has been denied the right to inspect it.

67 Third, the fact that s 1274(2) of the Corporations Act may confer a right on persons generally to inspect documents which have been lodged with ASIC does not create any right on any person to rely on any particular document on the register, or its contents, as being true and correct, or as not containing any false or misleading information. The mere fact that a document has been lodged with ASIC and placed on its register does not somehow mean that ASIC has given the contents of the documents its imprimatur, or has somehow represented, expressly or impliedly, that the contents of the document are true and correct.

68 Mineralogy appeared to contend to the contrary. While it conceded that s 1274 of the Corporations Act did not require ASIC to check the contents of every document lodged with it, it nevertheless submitted that “users” had a right to treat any document that had been lodged with ASIC, and which ASIC had put on its register, as being a document the contents of which ASIC “does not take issue with”. That would appear to be tantamount to contending that, by registering a document which has been lodged with it, ASIC effectively represents to anyone who may inspect the document that, so far as ASIC is concerned, the document does not contain any false or misleading information.

69 Mineralogy relied, in support of that contention, on s 1(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), which relevantly provides that “[i]n performing its functions and exercising its powers, ASIC must strive to ... (e) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and ... (g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it”.

70 The list of aspirations or objectives in s 1(2) of the ASIC Act, including paragraph (e), does not assist Mineralogy’s argument concerning the existence of some right that people have to rely on the contents of documents lodged with ASIC as being true and correct. The fact that

ASIC must “strive” to “receive, process and store, efficiently and quickly, the information given to” it by a company or person does not mean that ASIC must check and verify the contents of every document lodged with it and form an opinion as to whether it does or does not contain any false or misleading information. It follows that this provision provides no support for the proposition that, when ASIC registers a document lodged with it, ASIC somehow guarantees or warrants that the information in the document is not inaccurate in any respect.

71 The same can be said in relation to Mineralogy’s apparent reliance on s 12A(2) of the ASIC Act, which provides that “ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system”. The fact that ASIC has that function does not mean that ASIC checks and verifies the contents of every document lodged with it, or warrants that the contents of every document that it places on its register is true and correct, or does not contain any false or misleading information.

72 Finally, Mineralogy relied on an introductory passage in one of ASIC’s regulatory guides, which indicates that the purpose of requiring companies to prepare and lodge financial reports with ASIC is to “make information available that is useful to a wide range of users, to help them make economic decisions”: ASIC Regulatory Guide 43 at [43.2]. It is difficult to see how this general passage of a regulatory guide could inform the proper construction of s 1274(1) and (2) of the Corporations Act. In any event, it indicates no more than that the purpose of ASIC’s register is to enable “users” to inspect, amongst other things, the financial statements of companies that are required by the Corporations Act to lodge their financial statements with ASIC. That is not to say that users have a right to treat the document as a document the contents of which ASIC has checked and does not take issue with.

73 There is, in short, no basis for Mineralogy’s contention that s 1274(1) and (2) of the Corporations Act somehow give users of a document registered by ASIC, or persons who may choose to inspect the document, any sort of enforceable right to treat or rely on the document as a document the contents of which ASIC has considered and does not take issue with or dispute.

74 Fourth, Mineralogy’s reliance on s 1274(8) of the Corporations Act is also misplaced. Subsection 1274(8) gives ASIC the discretionary power to “refuse to register or receive” a document which is “submitted for lodgement”, and to request that the document be “appropriately amended ... and resubmitted”, or that a “fresh document be submitted in its

place”, if ASIC is of the opinion that the document, relevantly, “contains a matter that, in a material particular, is false or misleading”. Mineralogy disavowed any suggestion that s 1278(8) created any right in Mineralogy. Rather, it contended that it gave rise to a duty on the part of ASIC. Indeed, it went so far as to contend that ASIC had a duty in the circumstances of its case to refuse to register or receive its financial report for the year ended 30 June 2014, and perhaps a duty to request that the financial report be appropriately amended and resubmitted, or that a fresh document be submitted in its place.

75 It is perhaps unnecessary to finally determine whether, as a matter of statutory construction, s 1274(8) creates a duty on the part of ASIC. That is because, for the reasons that follow, there could be no suggestion that s 1274(8) could apply in the circumstances of this case in any event. That said, the better view would appear to be that s 1274(8) does not impose a duty on ASIC to either form an opinion about the contents of every document lodged with it, or to take any action concerning the receipt or registration of a document if it forms any adverse opinion about its contents. Rather, as has already been indicated, it confers a discretionary power on ASIC to take certain action if it forms the requisite opinion. The discretionary nature of the power is clear from the multiple use of the permissive or facultative word “may”, as opposed to the mandatory word “must”.

76 It may be accepted that, at least in some cases or circumstances, a statutory provision can create or give rise to a duty even when it uses a permissive word such as “may”, as opposed to a mandatory word such as “must”. That is often the case particularly where, as here, the enlivenment of the power is conditioned upon the formation of a particular opinion: *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 84-85 (Brennan J, Toohey and McHugh JJ concurring). This, however, is not such a case. There is nothing in the text or statutory context to displace the prima facie “presumption that permissive or facultative expressions operate according to their ordinary natural meaning”: *Ward v Williams* (1955) 92 CLR 496 at 505, referred to in *Royal Insurance* at 54.

77 It may also be accepted that, if ASIC positively formed an opinion of the sort specified in one or more of paragraphs (a) to (e) of s 1274(8) and exercised its discretion to refuse to register or receive a document, or its discretion to take one or more of the actions specified in paragraphs (f) to (h) of s 1274(8), the person or corporation who lodged the document with ASIC could seek a review of that decision in the Administrative Appeals Tribunal pursuant to s 1317B of the Corporations Act. Authorities in respect of cognate provisions in earlier versions of

companies legislation also tend to indicate that a regulator’s decision to refuse to register a document lodged for registration may be amenable to judicial review for jurisdictional error: *Mutual Home Loans Fund of Australia (Qld) Ltd v Commissioner for Corporate Affairs* [1978] Qd R 487 at 504-505; *Re North Queensland Auto Spares Co Pty Limited* [1984] 2 Qd R 241 at 262. The fact that a decision by ASIC under s 1274(8) not to receive or register a document is amenable to review does not, however, necessarily mean that ASIC has a duty to form an opinion, one way or another, of the sort referred to in s 1274(8)(a) to (e) in respect of every document lodged with it. Nor does it follow that ASIC has a duty, as opposed to a discretion, to refuse to register or receive a document, or to take one of the steps under s 1274(8)(f) to (h), if it does form such an opinion. It is, moreover, difficult to conceive a case where a failure by ASIC to form an opinion under s 1274(8)(a) to (e), or a failure by ASIC to refuse to receive a document lodged with it, would be reviewable.

78 In any event, there is no basis for contending that any such duty under s 1274(8) of the Corporations Act could arise in the circumstances of this case. Any duty that may arise under s 1274(8) arises when a document is “submitted for lodgement” and before ASIC has registered the document. Subsection 1274(8) does not, in terms, give ASIC the power to remove a document that has already been received and placed on the register. The power or duty also only arises where ASIC “is of the opinion”, relevantly, that the document that has been submitted contains false or misleading information. As discussed in more detail later, there is no evidence that ASIC has formed that opinion in respect of Mineralogy’s financial report for the year ended 30 June 2014. Indeed, the evidence is to the contrary. ASIC has advised Mineralogy’s lawyer, in effect, that it has not formed any such opinion. For the reasons given later, Mineralogy’s reliance on the criminal proceeding against Mr Palmer as somehow demonstrating that ASIC has formed an opinion for the purposes of s 1274(8) is misconceived and contrived.

79 Fifth, even if s 1274(8) of the Corporations Act could be construed as giving rise to a duty on ASIC, and even if there was evidence or a basis for finding that ASIC had formed an opinion of the sort referred to in s 1274(8)(a) to (e) about Mineralogy’s financial report, and the duty to take some action of the sort referred to in s 1274(8)(f) to (h) was therefore enlivened, it does not follow that s 1274(8) could be said to be the source of a right of any “user” to rely on the report. So much so appeared to be conceded by Mineralogy. It follows that there could be no basis for any contention that, by failing to take action in respect of Mineralogy’s financial report as supposedly required by s 1274(8), ASIC has somehow infringed the rights of “users”

of the report. The most that could be said is that action may be able to be taken to enforce ASIC's duty under s 1274(8), though it is unclear exactly who would have standing to enforce the duty. The apparent suggestion that Mineralogy, having lodged the financial report for registration by ASIC, could seek to compel ASIC to perform its duty under s 1274(8) to refuse to receive or register the report is fanciful.

80 Sixth, and as just adverted to, Mineralogy's attempt to conjure up a justiciable controversy based on s 1274(8) and (11) of the Corporations Act is entirely contrived and artificial.

81 To briefly recapitulate, the relevant sequence of events is as follows.

82 On 6 February 2020, a criminal complaint was filed against Mr Palmer which alleged, in summary, that in causing Mineralogy to make two payments in August 2013, Mr Palmer dishonestly gained an advantage for his associates and dishonestly used his position as a director. Almost 10 months later, Mineralogy prepared, and its chairman signed, a special purpose financial report for the year ended 30 June 2014. It is unclear why Mineralogy prepared that report over six years after the end of the relevant financial year. In any event, note 17(b) in the report recorded that Mineralogy had obtained an "independent business report" and "further legal advice" to the effect that the two relevant payments, being the payments the subject of the criminal proceeding against Mr Palmer, "were honestly made by [Mr Palmer] in the best interest of the company". It also asserted, presumably on the basis of that advice, that Mr Palmer "has no case to answer and has acted honestly at all times".

83 Mineralogy lodged the financial report with ASIC for recording on the register, no doubt on the basis that it, or its directors, believed that the contents of the report, including the relevant note, were true and correct. The report was duly recorded on the register. It is open for inspection by so-called "users". Needless to say, when it lodged the financial report, Mineralogy did not suggest that ASIC should refuse to receive or register the report pursuant to s 1274(8) of the Corporations Act because it contained false or misleading statements. Mineralogy now appears to contend that ASIC should be compelled to form an opinion under s 1274(8) that the financial report contains false or misleading statements – even though ASIC maintains that it has formed no such opinion – so that Mineralogy can then seek to prove that the opinion in that regard is wrong. It also appears to contend that ASIC should be compelled to refuse to receive or register the report pursuant to s 1274(8) of the Corporations Act – even though the report has already been received and registered – so it can seek to prove that ASIC

is not in fact entitled to take that action. The circularity and artificiality of those claims is manifest. They are colourable.

84 Mineralogy also apparently contends that “users” of the report cannot rely on it because ASIC has not refused to receive or register it, or has not taken any action under s 1274(8)(f)-(h) in respect of the report, even though it apparently also claims, or wants to claim, that ASIC has no right or basis to take any such action. Again, the circularity and artificiality of this claim is demonstrable. The reality, of course, is that “users” are perfectly entitled to rely on the financial report as they see fit. If there is any reluctance on the part of “users” to rely on anything in the financial report, that reluctance is plainly a result of the existence of the criminal proceeding against Mr Palmer, not a result of anything that ASIC supposedly should do pursuant to s 1274(8) of the Corporations Act. There is an obvious inconsistency between the allegations made in the criminal proceeding against Mr Palmer and the advice referred to in note 17 to the financial statements contained in the financial report. So-called “users” of the financial report are, however, entirely free to rely on the advice received by Mineralogy in preference to the allegations made in the criminal proceeding. It is fanciful to suggest otherwise.

85 Indeed, the artificiality, if not absurdity, of Mineralogy’s claim and alleged controversy is highlighted by the fact that some of the “users” who it is said cannot, or will not, rely on the financial report are the very advisers whose advice is referred to in note 17. Similarly, Mineralogy itself is said to be a “user” of the financial report who is apparently unable to rely on it. The suggestion appears to be that it cannot rely on the legal and other advice that it sought and received and chose to include in a note to its financial statements. Even putting that absurdity to one side, Mineralogy does not in any event have a right, in a juridical sense, to have “users” rely on the contents of a document that they have lodged with ASIC.

86 Seventh, and related to the previous point, the principal relief that Mineralogy seeks, in order to supposedly quell the controversy it has contrived by including note 17 in its financial report, is clearly hypothetical and advisory in nature. The basis upon which the declaratory relief is supposedly sought by Mineralogy is that “users”, in particular those associated with its proposed IPO, are said for some reason to be unable to rely on the financial report. What Mineralogy in effect seeks is an advisory opinion of the Court concerning the financial report which will somehow give “users” some comfort in relying on the accounts for the purposes of the IPO. Yet even that relief, if granted, would be somewhat pointless. Let it be assumed that

the Court made the declaration and the IPO goes ahead. If persons who acquired shares in Mineralogy in reliance on the financial report subsequently sued Mineralogy, or its advisers, on the basis that the financial report contained false or misleading statements, those persons would not be bound by any declaration that the Court made in this proceeding. Neither Mineralogy, nor its advisers, could rely on the declaration, or the Court's judgment, to defeat such a claim.

87 Eighth, s 1274(11) of the Corporations Act also does not assist Mineralogy in any respect. There is currently no allegation that Mineralogy is in default of any provision of the Corporations Act which requires it to lodge any return or account or other document. Nor has ASIC made any request to amend or resubmit any document, or to submit a fresh document. Even if there was any such allegation, s 1274(11) provides only that a member or creditor of the relevant company, or ASIC, may apply to a court for an order directing the remedying of the default. No such application has been made in this Court and Mineralogy has no right to make any such application.

Enforcement of an alleged duty under s 1274 of the Corporations Act

88 As has already been noted, at the hearing of ASIC's application, and largely as a result of the argument that ensued at the hearing, Mineralogy sought to amend its originating process to seek prerogative relief which effectively compelled ASIC to do two things. The first thing is to form an opinion under s 1274(8) of the Corporations Act about whether Mineralogy's financial report for the year ended 30 June 2014 contains "a matter identified in any [one] or more of s.1274(8)(b), (d) or (e) of the Corporations Act"; that is, relevantly, whether the report contains a matter which is false or misleading in a material respect, or contravened the Corporations Act, or contained an error. The second thing is, having regard to that opinion, to "take any action, as necessary, under s.1278(8)(f)-(h) or alternatively, s.1274(11)(b) of the Corporations Act"; that is, relevantly, to request that the report be appropriately amended and resubmitted, or that a fresh document be submitted in its place, or to apply to the Court for an order that Mineralogy make good a default in complying with its obligation to lodge its financial statements.

89 The availability of this alternative relief may be dealt with shortly.

90 For the reasons effectively already given, there is no basis for the apparent contention that ASIC has a duty to form an opinion under s 1274(8)(b), (d) or (e) of the Corporations Act in relation to Mineralogy's financial report for the year ended 30 June 2014, or a duty to take any

action under s 1274(8)(f), (g) or (h) or (11)(b) in relation to that financial report, or that Mineralogy has any right to enforce any such duty. Nor is there any basis for contending that ASIC has formed an opinion under s 1274(8)(b), (d) or (e) in relation to the financial report which requires it to take any action under s 1274(8)(f), (g) or (h) or (11)(b). To the extent that there is any controversy concerning ASIC's duty to form an opinion or take any action under s 1274 in respect of Mineralogy's financial report, that controversy is entirely contrived and artificial.

91 As already discussed, the better view is that s 1274(8) of the Corporations Act, properly construed, does not impose a duty on ASIC to form an opinion as to whether any document which is lodged with it for registration is a document of the sort referred to in s 1274(8)(a) to (e). Nor does it impose a duty on ASIC to take any action of the sort referred to in paragraph (f), (g) or (h) even if it has formed an opinion that a document submitted for lodgement satisfies any of the descriptions in (a) to (e). It follows that Mineralogy's claim that ASIC can be compelled to form an opinion in relation to its financial report for the year ended 30 June 2014 for the purposes of s 1274(8) is misconceived. That is all the more so given that the report has already been received and registered, so it would not in any event be open to ASIC to take any of the steps referred to in paragraph (f), (g) or (h).

92 There is also no basis for Mineralogy's contention that ASIC has already formed an opinion of the sort referred to in s 1274(8)(a) to (e) in respect of Mineralogy's financial report. Mineralogy's case in that regard is based entirely on the supposed inconsistency or conflict between the existence of the criminal proceeding against Mr Palmer and note 17(b) in Mineralogy's financial statements for the year ended 30 June 2014. As discussed in more detail later, Mineralogy's reliance on the criminal proceeding against Mr Palmer as somehow demonstrating that ASIC has formed an opinion for the purposes of s 1274(8) is misconceived and contrived.

93 Even putting the proper construction of s 1274 of the Corporations Act to one side, the artificiality and circulatory of Mineralogy's claim to be entitled to seek prerogative relief based on s 1274(8) or (11) of the Corporations Act is demonstrable. Mineralogy in effect seeks to compel ASIC to form an opinion concerning its financial report which it contends that ASIC should not form because it is wrong. In effect, it seeks to compel ASIC to form an opinion that the financial report contains false and misleading statements so it can seek to prove that it does

not. Equally, it effectively seeks to compel ASIC to take action under s 1274(8) or (11) so that it can seek to prove that ASIC has no right or basis to take that action.

94 The artificiality of Mineralogy’s case in this respect demonstrates that there is no justiciable controversy between ASIC and Mineralogy concerning any duty that ASIC may have to take any action under s 1274(8) of the Corporations Act in respect of Mineralogy’s financial report.

A right based on s 1305 of the Corporations Act

95 Mineralogy’s claims based on a right allegedly derived from s 1305 of the Corporations Act are even less meritorious.

96 The alleged right said to be derived from s 1305 of the Corporations Act is the right of “users” to “rely on the Audited Accounts as being admissible in evidence in any proceeding and as being prima facie evidence of any matter stated or recorded in the Audited Accounts”: amended concise statement at [16A]. Mineralogy contends that ASIC will infringe that right if, through its conduct, it “expressly or impliedly asserts that the Audited Accounts are not prima facie evidence of any matter stated or recorded in the Audited Accounts”, or “Users are unable to rely on the benefit of the statutory presumption in s 1305” of the Corporations Act: amended concise statement at [17(c)(iii) and (iv)].

97 Indeed, Mineralogy goes so far as to allege that ASIC has infringed this alleged right because, supposedly by reason of the inconsistency between the criminal proceeding and the statements in note 17(b) to the financial statements in the financial report, “ASIC is taken to have challenged the statutory presumption under s 1305” and “Users are unable to rely on the benefit of the statutory presumption”: amended concise statement at [44A].

98 Mineralogy’s contentions concerning this alleged right may be dealt with shortly. Mineralogy has no immediate right deriving from s 1305 of the Corporations Act that is able to be determined by the Court and there is no justiciable controversy concerning any such right.

99 First, it is inapt to refer to s 1305 of the Corporations Act as a “statutory presumption” or as giving rise to a justiciable right. It is, rather, simply an evidentiary provision or aid to proof. As noted earlier, s 1305 of the Corporations Act provides that a “book kept by a body corporate under a requirement of [the Corporations Act] is admissible in evidence in any proceeding and is prima facie evidence of any matter stated or recorded in the book”. The word ‘books’ is broadly defined in s 9 of the Corporations Act as including, relevantly, “(c) financial reports”.

100 Second, there is no question that Mineralogy, or any so-called “user”, could tender a copy of Mineralogy’s financial report for the year ended 30 June 2014 in any proceeding that they happen to be a party to. There is equally no doubt that, subject of course to relevance, the financial report would be admissible and prima facie evidence of any matter stated or recorded in the book. No express or implied assertion by ASIC concerning Mineralogy’s financial report could prevent or impede a party from tendering the financial report pursuant to s 1305 of the Corporations Act in any proceeding, or from relying on the fact that the report is prima facie evidence of any matter stated or recorded in the report. The opposing party could, of course, object to the tender on the grounds of relevance, or seek to disprove any relevant fact stated in the report. That is so irrespective of any express or implied assertion that ASIC may have made about the report.

101 It follows that even if it were somehow apt to refer to a person’s ability to rely on s 1305 of the Corporations Act as a right, there is no merit in, or basis for, Mineralogy’s contention that ASIC might or has somehow infringed that right. That is all the more so given that the basis upon which it is contended that ASIC will or has infringed that right is that there is an inconsistency between the allegation in the criminal proceeding against Mr Palmer and the subsequent statement in note 17 in the financial report. It is fanciful to suggest that the existence of that alleged inconsistency could somehow prevent or impede anyone from tendering Mineralogy’s financial report in any proceeding and relying on it as prima facie evidence of any matter stated in it.

102 Third, there is no immediate controversy concerning anyone’s ability or right to tender and rely on Mineralogy’s financial report pursuant to s 1305 of the Corporations Act. A controversy may perhaps arise in the future should someone tender the financial report in a proceeding. The controversy, however, is likely to revolve around relevance or whether the prima facie effect of tendering the report has been displaced or rebutted by other evidence tendered in the proceeding. Any such controversy will almost certainly have nothing whatsoever to do with any express or implied assertion that ASIC may be found to have made about the financial report. Perhaps more significantly, no declaration or order made in this proceeding could be relied on by a party in another proceeding in which the controversy may arise.

103 Fourth, the previous point highlights the hypothetical or advisory nature of the relief sought by Mineralogy in this proceeding, supposedly based on the right derived from s 1305 of the Corporations Act. The suggestion appears to be, in effect, that the Court should give an

advisory opinion concerning whether note 17 to the financial statements in the financial report is, or is not, false or misleading so that Mineralogy, or some other “user” of the financial report, can seek to rely on the financial report in some future proceeding. The hypothetical and artificial nature of the relief sought is again manifest. In any event, neither Mineralogy, nor any other “user”, could rely on any declaration made by the Court in this proceeding in any other proceeding, or at least in any proceeding not involving ASIC, to somehow bolster the evidentiary effect of the tender of Mineralogy’s financial report.

A right or controversy based on the criminal proceeding against Mr Palmer

104 The central allegation or contention that forms the basis of Mineralogy’s claim to be entitled to the relief it seeks is that ASIC has expressly or impliedly asserted that Mineralogy’s financial report for the year ended 30 June 2014 is not in compliance with the Corporations Act, or has expressly or impliedly challenged the “statutory presumption” under s 1305 in relation to the contents of that report: amended concise statement at [17(b) and (c)]. The only basis for that allegation or contention is that there is a conflict or contradiction between Mineralogy’s financial report and the criminal complaint against Mr Palmer: see amended concise statement at [18]-[24].

105 There is, however, no such conflict or contradiction and no basis for Mineralogy’s contention that there is a controversy between it and ASIC arising from any such conflict. That is so for a number of reasons.

106 First, the criminal complaint against Mr Palmer was lodged in February 2020, well before Mineralogy completed and lodged its financial report for the year ended 30 June 2014 in December 2020.

107 Second, while the proceeding may have been instituted by an officer of ASIC signing a complaint, it does not follow that ASIC is necessarily a party to, or is itself carrying on, the criminal proceeding. Rather, because the alleged offences are indictable offences, the criminal proceeding is likely being carried on by the Commonwealth **Director** of Public Prosecutions pursuant to s 6(1)(b), (c) or (e) of the *Director of Public Prosecutions Act 1983* (Cth) and s 6(1)(a)(i) and (iv) of the *Director of Public Prosecutions Regulations 2019* (Cth). If Mr Palmer is committed for trial in respect of some or all of the offences, the indictment will undoubtedly be presented by the Director.

108 Second, and more significantly, Mineralogy is not a party to the criminal proceeding. The proceeding is against Mr Palmer personally, though the allegations relate to his conduct as a director of Mineralogy.

109 Third, the allegations against Mr Palmer have nothing to do with Mineralogy's financial statements or financial report for the year ended 30 June 2014. Nor do the alleged offences involve any conduct on the part of Mineralogy. The allegations are that, in causing payments to be made from a bank account held by Mineralogy, Mr Palmer dishonestly gained a benefit or advantage for someone else, and dishonestly used his position as a director of Mineralogy with the intention of gaining an advantage for someone else.

110 Fourth, it is true that note 17 to the financial statements included in Mineralogy's financial report for the year ended 30 June 2014 refers to a "business report" and legal advice received by Mineralogy to the effect that the two payments which are the subject of the criminal charges against Mr Palmer were "honestly made by the director in the best interest of the company" and that the "director has no case to answer and has acted honestly at all times". There is no reason to doubt that Mineralogy received that report and advice. There is no evidence to suggest that ASIC contends otherwise. The correctness of that advice is another matter.

111 It is of course perfectly open to Mineralogy to maintain, on the basis of advice or otherwise, that Mr Palmer acted honestly and lawfully when he caused Mineralogy to make the two payments in August 2013. It is equally open to Mineralogy to include a reference to the advice it has received in that regard in a note to its financial statements. The fact that the advice that Mineralogy has received concerning the actions of Mr Palmer conflicts in certain respects with the allegations in the criminal case against Mr Palmer that is being carried on by the Director does not mean that there is a justiciable controversy between ASIC and Mineralogy that can be properly determined in this Court. The alleged controversy between Mineralogy and ASIC supposedly created by the inclusion of a note concerning that advice in Mineralogy's financial statements is not a genuine controversy, but is a mere contrivance. The relevant controversy is the controversy between the Director and Mr Palmer concerning the two payments. That controversy is properly determined in the criminal proceeding, not in this Court under the contrivance of a controversy about whether the financial statements give a true and fair view of the financial position of Mineralogy.

112 It should finally be added in this context that the relief sought by Mineralogy would appear to be directed at obtaining the Court's imprimatur or approval in respect of the advice it has

received concerning the propriety of the payments that Mr Palmer caused it to make in August 2013. The primary relief sought by Mineralogy is a declaration that Mineralogy's financial statements for the year ended 30 June 2014, as included in the financial report lodged with ASIC, "provide a true and fair view of its financial position for the year ended 30 June 2014". It is, however, tolerably clear that there is no genuine issue about whether Mineralogy's financial statements provide a true and fair view of its financial position for the relevant financial year. That is because it is common ground that the two impugned payments were effectively reversed or repaid by a payment that Mineralogy received from another company associated with Mr Palmer. It is, in those circumstances, unlikely that the impugned payments had any material effect on the balance sheet or profit and loss statement of Mineralogy for the relevant financial year. The only issue concerning Mineralogy's financial statements would appear to be the merits of the advice referred to in note 17 to the effect that Mr Palmer did not act dishonestly in causing the payments to be made. No other issue has been identified.

113 The fact that the declaratory relief sought by Mineralogy in the proceeding is simply directed at seeking the Court's effective imprimatur or approval of the advice Mineralogy has received about the impugned payments is another reason for concluding that the alleged controversy is not genuine, but is hypothetical or advisory in nature.

Conclusion concerning the existence of a justiciable controversy

114 Mineralogy's case as articulated in the amended concise statement discloses no justiciable controversy between Mineralogy and ASIC. There is no genuine right, duty or liability which can properly be established in the proceeding. There is no relevant right or duty under either s 1274 or s 1305 of the Corporations Act which arises as a result of Mineralogy including note 17 in its financial statements in the financial report that it lodged with ASIC. Nor is there any genuine controversy between Mineralogy and ASIC concerning the financial report which Mineralogy has lodged with ASIC. The supposed controversy concerning note 17 to Mineralogy's financial statements is contrived and artificial and the relief sought by Mineralogy is effectively hypothetical and advisory.

Conclusion in relation to jurisdiction

115 It follows that the Court has no jurisdiction in this matter. Mineralogy's originating process must accordingly be set aside pursuant to r 13.01(a) of the Rules.

SHOULD THE ORIGINATING PROCESS BE SUMMARILY DISMISSED?

116 It is strictly unnecessary to consider whether Mineralogy’s originating process should be summarily dismissed pursuant to r 26.01 of the Rules given the conclusion that has been reached concerning the absence of jurisdiction and the finding that has been made that the originating process should be set aside pursuant to r 13.01(1)(a) of the Rules. It is, however, prudent to give some consideration to this issue given the possibility that Mineralogy may appeal the finding that the Court has no jurisdiction to entertain its claim.

117 ASIC’s submissions did not separately deal with summary dismissal under r 26.01 of the Rules. It simply submitted that Mineralogy’s originating process was liable to be summarily dismissed for the same reason it was liable to be set aside. That is, because it does not raise any “matter” for the purposes of s 39B(1A) of the Judiciary Act. There are nevertheless some issues that should be separately addressed in the context of r 26.01 of the Rules.

Relevant principles

118 It is unnecessary to refer to the relevant principles concerning summary dismissal at length, particularly given the absence of any detailed submissions in relation to this aspect of ASIC’s application.

119 Summary judgment may be given against an applicant pursuant to r 26.01 of the Rules if, amongst other things, the applicant has “no reasonable prospect of successfully prosecuting the proceeding”, or “no reasonable cause of action is disclosed”, or the “proceeding is an abuse of the process of the Court”. It suffices to make the following short points concerning these grounds for summary dismissal.

120 First, an applicant may have no reasonable prospect of successfully prosecuting the proceeding even if it cannot be concluded that the proceeding is hopeless or bound to fail: *Spencer v Commonwealth* (2010) 241 CLR 118; [2010] HCA 28 at [17] (French CJ and Gummow J). Although the Court in *Spencer* was considering the principles applicable in the context of s 31A of the Federal Court Act, rather than r 26.01 of the Rules, those “provisions contain identical tests”: *Zippo Manufacturing Co v Jaxlawn Pty Ltd* [2011] FCA 1125 at [20] (Gordon J). The relevant inquiry is “not an enquiry directed to whether a certain and concluded determination could be made that the proceeding would necessarily fail”: *Spencer* at [52] (Hayne, Crennan, Kiefel and Bell JJ).

121 Second, a “reasonable cause of action”, for the purposes r 16.21 of the Rules, is a cause of action that has some chance of success having regard to the allegations pleaded: *Polar Aviation Pty Ltd v Civil Aviation Safety Authority* (2012) 203 FCR 325; [2012] FCAFC 97 at [42]-[43]; *Chandrasekaran v Commonwealth (No 3)* [2020] FCA 1629 at [102], [108]-[111]. It is difficult to see why a “reasonable cause of action” for the purposes of r 26.01(1)(c) of the Rules would have any different meaning.

122 Third, the concept of abuse of process is flexible and “insusceptible of a formulation which comprises closed categories”: *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 at [25]. It applies in any circumstances in which the Court’s processes are used for an illegitimate purpose, or are used in a way which would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute: *Rogers v The Queen* (1994) 181 CLR 251 at 255-256, 286.

123 Fourth, the “exercise of powers to summarily terminate proceedings must always be attended with caution”, whatever may be the basis upon which that disposition is sought: *Spencer* at [24] (French CJ and Gummow J). It is not a power to be exercised lightly: *Spencer* at [60] (Hayne, Crennan, Kiefel and Bell JJ). There must be a “high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way”: *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256; [2006] HCA 27 at [46], citing *Agar v Hyde* (2000) 201 CLR 552; [2000] HCA 41 at [57], referred to in *Spencer* at [24] (French CJ and Gummow J).

Reasonable prospect of successfully prosecuting the proceeding

124 Even if, contrary to the conclusion reached earlier, the Court has jurisdiction to entertain Mineralogy’s claims based on s 1274 and s 1305 of the Corporations Act, those claims have no reasonable prospect of success.

125 For the reasons given earlier in the context of the question whether there is a justiciable controversy, Mineralogy’s claim that ASIC has somehow infringed Mineralogy’s right to have its financial statements made available to users has no reasonable prospect of success. That is essentially because the claim is based on a strained and erroneous construction of s 1274 of the Corporations Act and a manifestly unmeritorious contention that ASIC has somehow asserted that Mineralogy’s financial statements do not comply with the Corporations Act or do not provide a true and fair view of Mineralogy’s financial position.

126 In summary, and at risk of repetition, it is common ground that Mineralogy’s financial report for the year ended 30 June 2014 has been lodged with ASIC and placed on ASIC’s register. It follows that it can be inspected by anyone pursuant to s 1274(1) of the Corporations Act. Those who choose to inspect the document can rely on it as they see fit.

127 The fact that Mineralogy chose to insert a note to its financial statements which refers to advice received by it which is inconsistent with the allegations made in the existing criminal proceeding against Mr Palmer does not mean that “users” cannot “use” or rely on the financial report. So-called “users” can choose to accept or reject that advice as they see fit. Nor does the inclusion of the note somehow mean that ASIC has formed the opinion that the financial report contains false or misleading “matter” for the purposes of s 1274 of the Corporations Act, let alone that the financial statements in the report do not provide a true and fair view of Mineralogy’s financial position. Mineralogy’s claims to the contrary are unmeritorious and have no reasonable prospect of success.

128 Mineralogy’s claim that it can somehow compel ASIC to form an opinion for the purposes of s 1274(8)(b), (d) or (e), or take any of the action in s 1274(8)(f) to (h) or s 1274(11)(b) of the Corporations Act is similarly misconceived, based on a strained and erroneous interpretation of those provisions and has no reasonable prospect of success. It is highly artificial and contrived for Mineralogy to lodge a document with ASIC, no doubt on the basis that it does not contain any false or misleading information, and then seek to compel ASIC to form a contrary opinion so that Mineralogy can then seek to prove that that opinion is wrong. It is equally artificial and contrived for Mineralogy to lodge a document with ASIC for registration and then seek to require ASIC to refuse to receive or register the document.

129 The proper construction of s 1274(8) is that it gives ASIC a discretionary power to take certain steps if it forms an opinion that a document submitted for lodgement relevantly contains “matter” that is contrary to law, or is false or misleading in a material respect, or that the document contravenes the Corporations Act. ASIC has no duty to form such an opinion which is enforceable at the suit of the party who has lodged the document. Nor is there any, or any reasonable, basis for asserting that the party who lodged the document can compel ASIC to take any of the action in s 1274(8)(f) to (h), all the more so when the document has already been received and registered by ASIC. Subsection 1274(11) is also inapposite as it only gives a member or creditor of a body corporate, or ASIC, the right to apply to a court for an order compelling a body corporate to make good a default.

130 Finally, Mineralogy’s claims based on s 1305 of the Corporations Act are also misconceived and have no reasonable prospect of success. Nothing that ASIC has done, or could do, could deprive Mineralogy, or anyone else, from tendering Mineralogy’s financial report in any future proceeding and relying on the report as being prima facie evidence of any matter stated or recorded in it. Mineralogy’s contention to the contrary is without merit.

131 While it is accepted that the Court should exercise its power to give summary judgment under r 26.01 of the Rules with considerable caution, and that the power should not be exercised lightly, Mineralogy’s claims are based on such a highly strained construction of provisions of the Corporations Act and are so colourable and devoid of merit as to warrant the exercise of the power in all the circumstances of this case.

Abuse of process

132 ASIC did not expressly contend that this proceeding was an abuse of process. Mineralogy also maintained, both in its evidence and submissions, that this proceeding had nothing to do with the criminal proceeding against Mr Palmer. There are, however, at least some grounds for suspecting that the proceeding amounts to little more than an ill-disguised collateral attack on the criminal proceeding against Mr Palmer.

133 Mineralogy claims that the proceeding is all about ensuring that “users” of its financial report can rely on the financial statements in the report for the purposes of considering Mineralogy’s proposed IPO. The only potential issue with the financial statements which has been identified by Mineralogy, however, is the inclusion of note 17 and a reference in that note to advice that Mineralogy has received which appears to conflict with the allegations in the criminal proceeding against Mr Palmer. It is unclear why Mineralogy could not simply provide “users” with a copy of the advice it has received in that regard. Putting that peculiarity to one side, the purpose of this proceeding would appear to be to somehow obtain the Court’s imprimatur or approval of the advice that Mineralogy has apparently received. It may perhaps be inferred that the reason Mineralogy has effectively sought the Court’s imprimatur in that regard is to somehow undermine the criminal proceeding against Mr Palmer.

134 The availability of that inference is perhaps fortified by Mineralogy’s heavy reliance in its submissions on the decision of Jackson J in *Sino Iron Pty Ltd v Palmer (No 3)* (2015) 2 Qd R 574; [2015] QSC 94 (*Sino v Palmer*). In that proceeding, Sino and Korean Steel sued Mr Palmer, alleging that the payments of \$10 million and \$2,167,165.60 made by Mineralogy in August and September 2013 were made in breach of trust and that Mr Palmer “dishonestly

procured or was involved in or assisted Mineralogy's breaches of trust or knowingly assisted Mineralogy in its dishonest and fraudulent breaches of trust": *Sino v Palmer* at [5]. That action failed, essentially because Jackson J held that the funds held in the bank account from which the funds were drawn were not held on trust by Mineralogy: *Sino v Palmer* at [109]. It should perhaps be noted, however, that Jackson J went on to hold that, had the funds been held on trust, Mr Palmer's "knowledge was sufficient to make him liable for knowingly procuring or inducing the alleged breach of trust by Mineralogy": *Sino v Palmer* at [141].

135 Mineralogy submitted that the findings by Jackson J in *Sino v Palmer* are inconsistent with the allegations made in the criminal proceeding against Mr Palmer. Mineralogy relied, in that regard, on the fact that the prosecutor's summary of facts (at [1]) in the criminal proceeding allege that "the funds held in the Mineralogy account were behind [sic] held on account of other entities for a specific purpose". Mineralogy went so far as to submit that the criminal proceeding against Mr Palmer seeks to "controvert that which the law says must be treated as incontrovertible" and was a "frontal attack on what is now incontrovertible in respect of Jackson J's decision". Mineralogy relied, in support of that submission, on the decision of the High Court in *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55, a case concerning double jeopardy and abuse of process in criminal proceedings.

136 It is unnecessary to consider the merits of that submission. That is because, on just about any view, it has no bearing on the issues supposedly raised for determination in this proceeding. The question whether the criminal proceeding against Mr Palmer is an abuse of process given the findings made in *Sino v Palmer* may need to be considered by the court which ultimately hears the criminal proceeding, assuming that the submission made in this proceeding is replicated in the criminal proceeding. What the submission does tend to indicate, however, is that, despite Mineralogy's protestations to the contrary, the underlying purpose of this proceeding seems to have more to do with casting doubt on the criminal proceeding against Mr Palmer than ensuring that "users" can rely on Mineralogy's financial report.

137 It is unnecessary and undesirable in the circumstances to make any definite finding concerning whether this proceeding is an abuse of process on the basis that it amounts to a collateral attack on the criminal proceeding against Mr Palmer, particularly as ASIC did not really press or pursue any such contention. As has already been made clear, Mineralogy maintained that this proceeding had nothing to do with the criminal proceeding and ASIC's application hinged primarily on the proposition that the Court lacked jurisdiction because there was no justiciable

controversy. It perhaps suffices to say that the question mark that hangs over the purpose of this proceeding fortifies the conclusion that there is no genuine controversy between Mineralogy and ASIC in this proceeding. The real controversy is in the criminal proceeding against Mr Palmer.

CONCLUSION AND DISPOSITION

138 The Court does not have jurisdiction to entertain this claim. There is no justiciable controversy between Mineralogy and ASIC because there is no immediate right, duty or liability arising under the Corporations Act to be established by the determination of the Court. The controversy asserted by Mineralogy is contrived and artificial and the relief sought is, in effect, at best hypothetical and advisory in nature. Even if the Court had jurisdiction to entertain the claim, it would in any event have been appropriate to enter judgment against Mineralogy on the basis that it has no reasonable prospect of successfully prosecuting the proceeding.

139 It follows that Mineralogy's originating process as amended must be set aside pursuant to r 13.01 of the Rules. Mineralogy should pay ASIC's costs of the proceeding and the interlocutory process.

I certify that the preceding one hundred and thirty-nine (139) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney.

Associate:



Dated: 24 August 2021