

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 10/06/2021 8:23:53 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Concise Statement  
File Number: VID307/2021  
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v  
AUSTAL LIMITED & ANOR  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 10/06/2021 8:38:55 AM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

## Concise Statement

Federal Court of Australia  
District Registry: Melbourne  
Commercial and Corporations NPA

No. VID



of 2021

**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**  
Plaintiff

**AUSTAL LIMITED (ACN 009 250 266)**  
First defendant

**DAVID SINGLETON**  
Second defendant

### A. SUMMARY

1. The Australian Securities and Investments Commission (**ASIC**) brings this proceeding against Austal Ltd (**Austal**) and David Singleton (**Singleton**), its Chief Executive Officer (**CEO**) at the time of the alleged contraventions. This case involves an alleged failure by Austal to immediately disclose to the market a material change in its prior earnings guidance. Austal had represented that it expected its US shipbuilding business would be profitable in FY2016, but subsequently became aware that it would likely generate a significant loss.
2. ASIC alleges that Austal contravened ss 674(2) and 1041H of the *Corporations Act 2001* (Cth) (**Act**) and s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). ASIC also alleges that, by reason of his involvement in Austal's contraventions of the Act, Singleton contravened ss 180(1) and 674(2A) of the Act.

### B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

3. Austal is a public company whose shares are quoted on the Australian Securities Exchange (**ASX**). It designs and builds defence and commercial ships for governments, navies and ferry operators worldwide. Austal is the ultimate holding company of Austal USA LLC (**AUSA**). In FY2015-FY2016, AUSA's operations accounted for approximately 80-85% of Austal's annual revenue. The majority of AUSA's revenue was derived from the LCS (Littoral Combat Ship) program which comprised a contract with the US Navy for the delivery of 11 ships (even numbered vessels between LCS 6-26).
4. Singleton was a director of Austal from December 2011. From January 2016, he was the CEO-designate of Austal. From 4 April 2016, he was CEO, a member (with the Company Secretary) of Austal's continuous disclosure committee and a board member of AUSA. At all

---

Filed on behalf of (name & role of party) Australian Securities and Investments Commission, plaintiff

Prepared by (name of person/lawyer) Catherine Macrae

Law firm (if applicable) MinterEllison

Tel (03) 8608 2061

Fax \_\_\_\_\_

Email catherine.macrae@minterellison.com

**Address for service**

(include state and postcode) Collins Arch, 447 Collins St, Melbourne Vic 3000

material times, Greg Jason (**Jason**) was the Chief Financial Officer. Both were officers of Austal within the meaning of s 9 of the Act at all material times.

5. Austal used an estimate at completion (**EAC**) approach to forecasting the total vessel construction costs of the LCS program. Austal recognised revenue and profits earned to date on a vessel in the same proportion as costs incurred to date relative to EACs. A significant increase in EACs would mean that Austal had over-recognised profit to date (by having previously underestimated the EACs), and reported profit would have to be reduced (written back) accordingly. Relevant accounting standards required EAC increases to be recognised in the current reporting period.
6. On 26 August 2015, Austal represented to the market for its securities that it expected to see incremental margin improvement as it applied lessons learnt from LCS 6 (the first of the LCS class) to the remaining LCS vessels (that is, from LCS 8 onwards).
7. On 10 December 2015, Austal gave earnings guidance by representing to the market for its securities that its US shipbuilding business would be profitable in FY2016 in that it expected:
  - 7.1. its US shipbuilding EBIT margin to be in the range of 4.5% to 6.5% for FY2016 (**EBIT Margin Guidance**); and
  - 7.2. to see incremental margin improvement after delivery of LCS 10 (**Margin Growth Representation**).
8. The US shipbuilding EBIT margin is a measure of operating profit as a percentage of revenue from Austal's US shipbuilding business.
9. From at least 22 February 2016, Austal was aware of doubts about the accuracy of AUSA's financial forecasts in relation to the EACs for the LCS program. Jason proposed a plan to analyse and quantify the error band around the AUSA forecasts, which was further developed for a board meeting on 28 April 2016 (**LCS EAC Review**).
10. On 23 February 2016, Austal released its FY2016 H1 results and repeated the EBIT Margin Guidance.
11. The LCS EAC Review was substantially undertaken during May and June 2016.
12. On 6 May 2016, Austal released an investor presentation to the ASX, which stated that "*LCS first of class issues continuing with margin under review*".
13. By 11 May 2016, Singleton and Jason were aware that the committed costs of constructing LCS 6-16 had already exceeded the expected lifetime costs of construction, as forecasted in the current EACs.
14. By 4 June 2016 (a Saturday), Singleton and Jason were aware that, based on the LCS EAC Review analysis undertaken to date:
  - 14.1. profit recognised to date exceeded the lifetime profitability of the LCS program;

- 14.2. three LCS EAC scenarios (Bull (most favourable), Bear (least favourable) and Base (intermediate)) had been modelled, each of which involved a significant increase in EACs;
- 14.3. it was likely that a significant increase in LCS EACs (a **reset**) and a profit writeback of at least US\$90m was required in FY2016; and
- 14.4. the reset and profit writeback would generate a loss of at least US\$40m FY2016 for AUSA.
15. The matters in paragraph 14 meant that the EACs had been underestimated and profits overrecognised for the LCS program and that it was likely that the EBIT Margin Guidance and the Margin Growth Representation would not be met in FY2016.
16. Further, by 4 June 2016, Singleton and Jason were aware that the reset and profit writeback would generate a significant loss in FY2016 for Austal.
17. By 11 June 2016 (a Saturday), based on the LCS EAC Review analysis undertaken to date:
  - 17.1. Singleton and Jason were aware of the matters in paragraphs 14 to 16; and
  - 17.2. Jason had informed JP Morgan (on 8 June 2016) that a “[m]aterial downgrade to FY16 outlook versus current broker consensus, together with substantial write-back in prior period booked profit [was] now expected.”
18. By 16 June 2016, based on the LCS EAC Review analysis undertaken to date:
  - 18.1. Singleton and Jason were aware of the matters in paragraphs 14 to 17; and
  - 18.2. Jason commenced to inform Austal’s bankers of the results of the LCS EAC Review.
19. The results of the LCS EAC Review were presented to the AUSA board on 22 June 2016 and to the Austal board on 28 June 2016.
20. Austal’s securities were placed in a trading halt on 30 June 2016. On 1 July 2016, matters related to the LCS EAC Review were discussed at a further meeting of the Austal board.
21. On 4 July 2016, Austal notified the ASX, by an announcement entitled ‘LCS Program and Earnings Update’, that, inter alia, it had undertaken a comprehensive review of the LCS contract; “[a] US\$115 million (A\$156 million) one off write back of work in progress (WIP) is required to recognise an increase in the cost of construction (unaudited)”; and “[s]tatutory Group EBIT [for FY2016] is expected to be in the range \$(116) - (121) million”.

### **C. RELIEF SOUGHT**

22. Declarations pursuant to s 1317E of the Act and/or s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA**) that, on or from 6 June 2016, alternatively 13 June 2016, alternatively 16 June 2016, and before 4 July 2016:
  - 22.1. Austal contravened s 674(2) of the Act by failing to notify the ASX of the Writeback

Information (as defined below) and/or the Group EBIT Information (as defined below).

22.2. further or alternatively, Austal contravened s 1041H(1) of the Act and/or s 12DA of the ASIC Act by failing to correct or withdraw the EBIT Margin Guidance and/or the Margin Growth Representation.

23. A declaration pursuant to s 1317E of the Act and/or s 21 of the FCA that Singleton contravened ss 674(2A) and/or 180(1) of the Act.

24. Pecuniary penalties for each contravention of a civil penalty provision, and costs.

#### **D. PRIMARY LEGAL GROUNDS**

##### **D.1 Austal**

25. At all material times, Austal was bound by the ASX Listing Rules (LR) and s 674 of the Act.

26. By reason of the matters summarised in Pt B, above, by 4 June 2016, alternatively by 11 June 2016, alternatively by 16 June 2016, Austal was aware, within the meaning of LR 3.1 and 19.2 and s 674(2)(b) of the Act, that:

26.1. it was likely that a one-off writeback of work in progress of at least US\$90 million (A\$122 million) was required in FY2016 to recognise an increase in the cost of construction of the LCS vessels; and

26.2. the writeback would generate a loss of at least US\$40 million in FY2016 for AUSA; (together, the **Writeback Information**); and

26.3. the writeback would generate a significant loss in FY2016 for Austal (the **Group EBIT Information**).

27. The Writeback Information and the Group EBIT Information:

27.1. was not generally available for the purposes of s 674(2)(c)(i) and LR 3.1A.1; and

27.2. was information that a reasonable person would have expected to have had a material effect on the price or value of the entity's shares, if it had been generally available, for the purposes of s 674(2)(c)(ii) and LR 3.1.

28. Austal was therefore obliged by s 674(2) and LR 3.1 to notify the ASX of the Writeback Information and/or the Group EBIT Information on and from 6 June 2016, alternatively 13 June 2016, alternatively 16 June 2016, and contravened s 674(2) of the Act by failing to do so until 4 July 2016. The contraventions were serious within the meaning of s 1317G(1)(c)(iii).

29. Further or alternatively, the EBIT Margin Guidance and the Margin Growth Representations were made in trade or commerce, in relation to a financial product or a financial service, and were continuing representations that were neither withdrawn nor qualified before 4 July 2016.

30. On and from 6 June 2016, alternatively 13 June 2016, alternatively 16 June 2016, as a result of the matters alleged in paragraph 26, Austal:

- 30.1. no longer expected to meet the EBIT Margin Guidance or the Margin Growth Representation in FY2016; and/or
- 30.2. no longer had reasonable grounds for the EBIT Margin Guidance and/or the Margin Growth Representation and contravened s 1041H(1) of the Act and/or s 12DA of the ASIC Act by failing to correct or withdraw those representations before 4 July 2016.

## **D.2 Singleton**

31. As at 4 June 2016, alternatively 11 June 2016, alternatively 16 June 2016, Singleton: knew the Writeback Information and the Group EBIT Information; knew it was not generally available; and knew that it was material in the sense that a reasonable person would have expected, if it were generally available, to have had a material effect on Austal's share price. Accordingly, Singleton was a person involved in Austal's contravention of s 674(2) for the purposes of s 674(2A).
32. Further or alternatively, on and from the dates alleged, Singleton failed to exercise the degree of care and diligence that a reasonable person would have exercised if they were the CEO of a corporation in Austal's circumstances and thereby contravened s 180(1) of the Act because:
  - 32.1. he knew the matters in the preceding paragraph; failed to cause the Writeback Information and/or the Group EBIT Information to be immediately disclosed to the ASX on the dates alleged in paragraph 28; failed to cause the EBIT Margin Guidance and/or Margin Growth Representations to be corrected or withdrawn; and/or failed to cause the Writeback Information and the Group EBIT Information to be promptly brought before the Austal board;
  - 32.2. he therefore caused or permitted Austal to contravene s 674(2) and/or s 1041H of the Act and/or s 12DA of the ASIC Act; and
  - 32.3. it was reasonably foreseeable that the contravention(s) might harm Austal's interests by exposing it to pecuniary penalties or other liability.
33. The contraventions referred to in paragraphs 31 and 32 were serious within the meaning of s 1317G(1)(c)(iii) and (b)(iii), respectively.

## **E. ALLEGED HARM**

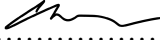
34. Harm was suffered by investors who invested in Austal's shares at a time when the market was not fully apprised of information materially relevant to Austal's financial position. In the period from 6 June 2016 to the imposition of the trading halt on 30 June 2016, 26,003,676 Austal shares with a total value of \$31,967,036.44 were traded.

This Concise Statement was prepared by A Pound SC and V Bell of counsel and settled by M Borsky QC.

**Certificate of lawyer**

I, Catherine Macrae, certify to the Court that the factual and legal material available to me at present provides a proper basis for each allegation in this Concise Statement.

10 June 2021

  
.....

Signed by Catherine Macrae

Lawyer for the Plaintiff

---

Filed on behalf of (name & role of party) Australian Securities and Investments Commission, plaintiff  
Prepared by (name of person/lawyer) Catherine Macrae  
Law firm (if applicable) **MinterEllison**  
Tel (03) 8608 2061 Fax \_\_\_\_\_  
Email catherine.macrae@minterellison.com

**Address for service**  
(include state and postcode) Collins Arch, 447 Collins St, Melbourne Vic 3000