

NOTICE OF FILING

Details of Filing

Document Lodged:	Concise Statement
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	13/08/2024 4:45:00 PM AEST
Date Accepted for Filing:	13/08/2024 5:10:56 PM AEST
File Number:	NSD1108/2024
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v ASX LIMITED (ACN 008 624 691)
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



Form NCF1

Concise Statement

No. of 20

Federal Court of Australia

District Registry: New South Wales

Division: General

Australian Securities and Investments Commission

Plaintiff

ASX Limited ACN 008 624 691

Defendant

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

Introduction

1. At all relevant times, the Defendant (**ASX**) operated, and continues to operate, market infrastructure that is critical to the Australian economy. ASX was, and continues to be, the licensed operator of Australia's primary cash equities market. In this role, ASX is responsible for promoting fair, orderly and transparent markets.
2. At all relevant times, ASX, by its subsidiaries, was also responsible for maintaining the clearing and settlement services system known as the Clearing House Electronic Subregister System (**CHESS**). CHESS was, and is, the predominant clearing and settlement services system in Australia. CHESS, and any replacement of it, represented critical financial infrastructure for which there was, and continues to be, a very low or zero tolerance for system failure. Such a system was, and is, required to have a high degree of security and operational reliability and should also have adequate performance and scalable capacity.
3. The Plaintiff (**ASIC**) alleges that on 10 February 2022, ASX contravened sections 12DA(1) and 12DB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) by making false or misleading representations to the public about the progress of the replacement of CHESS and by otherwise engaging in conduct that was misleading or deceptive. In doing so, ASX risked damaging confidence in the Australian financial system and market participants, other market operators, and service providers incurred, or were exposed to the risk that they would incur, sunk costs associated with the replacement of CHESS.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission		
Prepared by (name of person/lawyer)	Jack Pembroke-Birss		
Law firm (if applicable)	Norton Rose Fulbright Australia		
Tel	+61 2 9330 8160	Fax	+61 2 9330 8111
Email	jack.pembroke-birss@nortonrosefulbright.com		
Address for service	Level 5, 60 Martin Place		
(include state and postcode)	Sydney NSW 2000		

Background

4. By January 2016, ASX determined that it would replace CHESS.
5. By December 2017, and after engaging in a ‘proof of concept’, ASX determined that it would use Distributed Ledger Technology (**DLT**) in the system which replaced CHESS. ASX engaged Digital Asset (**DA**) to build the ledger (**Ledger**) and application (**Application**) for that purpose. In August 2019, VMware replaced DA in the development of the Ledger.
6. At all relevant times from December 2017, DA was tasked with developing the Application. The Application was intended to facilitate different business processes and requirements on the Ledger, including message-based interaction using the global standard ISO20022 messaging format, called **ISO messages**.
7. From April 2019 to November 2022 when the programme was paused, ASX, DA and, from August 2019, VMware, developed, tested and deployed to software developers and vendors (for their testing), various iterations of the Ledger and Application. In this Concise Statement, the system being developed to replace CHESS, as it existed from time to time and including the various environments and iterations of the system provided to market participants, is called the **CHESS Replacement System**. The programme for the development of the CHESS Replacement System, as it existed from time to time, is called the **CHESS Replacement Project**.
8. At all relevant times, ASX had determined that the CHESS Replacement System would “Go-Live” by way of a “cut over” from CHESS. ASX had determined that any such “cut over” would need to be undertaken over the course of a long weekend in the month of April (in the relevant year) given ASX’s inability to run both CHESS and the CHESS Replacement System simultaneously and given limited openings in the financial year calendar, other than April, for conducting such a significant “cut over”.
9. In circumstances where there was to be a “cut over” process for switching from CHESS to the CHESS Replacement System, the Application and Ledger had to be functional, stable and performant to a high degree and with low errors or defects so that the system could satisfy the very low or zero tolerance for failure. Any plan to “Go-Live” was required to be low risk, alternatively low to medium risk, for this reason.

Published Plan

10. In the period April 2019 to about November 2021, ASX established, and made available, a customer development environment (**CDE**) to enable software developers and vendors to interact with and test parts of the Application.
11. During the period to October 2020, ASX published plans to the market and regulatory agencies to assist the market to be ready for the implementation of the CHESS Replacement System. At all times until November 2022, market participants and software developers and vendors were requested to undertake CHESS Replacement System “readiness” activities based on these plans, including developing and implementing systems, interfaces and applications which the market participants and software vendors did at significant expense and effort.

12. By March 2020, ASX announced that it would be replanning the CHESSE Replacement Project and that the then ‘go-live’ date of April 2021 would be delayed.
13. In the period from March 2020 to October 2020, the ASX engaged in a replan of the CHESSE Replacement Project. A key driver for the replan was achieving greater throughput capacity, or performance, after extreme trading volumes on the ASX platform in March 2020, with the replan requiring 50% throughput capacity increases from 463 to 690 transactions per second (**TPS**). Further, ASX had identified difficulties with the functionality and performance, including scalability, of a business process called the Net Broker Obligation (**NBO**). In this Concise Statement, the term ‘business process’ or ‘business capability’ is used to describe a process required to enable the CHESSE Replacement System to deliver, at least, the same or equivalent functionality of CHESSE.
14. On 28 October 2020, the ASX announced a new plan which involved an increase to the functional scope, throughput capacity, scalability and testing of the CHESSE Replacement System, a new “Go-Live” date of April 2023, revised milestones to that “Go-Live” date, and that there would be a consultation with respect to the features of the NBO from January 2021. With respect to the new plan, the ASX stated that the “[Industry Test Environment 1 (**ITE1**)] will open with code complete and with production-level performance.” The new plan (**Published Plan**) contained the following milestones to “Go-Live”:
 - a. full functional code, to enable software developers to complete their development, being delivered within CDE at the end of September 2021 (via CDE11);
 - b. the CDE, for software development, remaining open until about December 2021;
 - c. an ITE1, for software providers, opening at the end of November 2021;
 - d. ITE1 system testing (including functional testing using migrated data and performance testing) occurring from the end of November 2021 to the end of April 2022;
 - e. ITE1 Accreditation activities (**ITE1 Accreditation**) occurring from the end of April - July 2022;
 - f. an Industry Test Environment 2 (**ITE2**), for CHESSE users, opening in April 2022;
 - g. ITE2 user testing (including functional testing using migrated data and performance testing) occurring from April – November 2022;
 - h. ITE2 operational readiness activities occurring from the end of August - November 2022;
 - i. two ITE2 industry-wide, end-to-end, testing events occurring by the end of December 2022 and February 2023 respectively;
 - j. a cutover and transition production environment (**Production Environment**) opening by the end of August 2022;
 - k. at least three “migration dress rehearsals” taking place in the Production Environment in about October 2022, December 2022 (as a contingency), by the end of January 2023 and in March 2023 respectively; and
 - l. “Go-Live” in April 2023.
15. Software developers and vendors required fully functional code, in a stable and performant version of the Application and Ledger to be made available in ITE1 to test their specific applications for the purposes of accrediting those applications for use by brokers, banks and other end users of the CHESSE

Replacement System. Market participants required fully functional code, in a stable and performant version of the Application and Ledger to be made available in ITE2 to undertake user testing and operational readiness activities. In this respect, whether the CHES Replacement System's non-functional requirements (as to scalability and performance) for business processes were met needed to be established through appropriate testing. Further, ISO messages had to be optimised through testing, including on a Ledger, to ensure that they were ready to be deployed, with production level performance, in any production-like testing environment implemented in the period to "Go-Live".

16. On 30 June 2021, ASX completed its consultation with respect to the features of the NBO and published an updated implementation timetable. The dates and milestones in the Published Plan for ITE1 opening, ITE2 opening, ITE1 Accreditation opening and Go-Live, were not changed. By the updated implementation timetable, the ASX stated that CDE10 (not CDE11) would deliver "the full functional payload for Day 1 go-live, allowing software providers to complete their development". Then, on 30 July 2021, ASX released an "Industry Test Strategy" paper "to inform software providers and CHES users on the approach to the different industry test stages and the associated test environments (ITEs), and to provide guidance on the requirements for the successful go-live of the CHES replacement solution." In that paper, ASX stated that "ITE1 will open with all functional and non-functional components of the CHES replacement system" and "ITE1 and ITE2 share the same characteristics and will be provided on production grade infrastructure."
17. In the period from 30 June 2021 to 28 March 2022, the ASX did not publish any revisions to the Published Plan to the market. In June, August, September and November 2021, ASX made statements to the market to the effect that it was in the process of releasing the functionally complete code to the CDE prior to opening ITE1 in November 2021 in accordance with the Published Plan. In August, September and November 2021, the ASX also made statements to the effect that the CHES Replacement Project was 'on track' for 'go-live' in April 2023.
18. In the period to November 2021, DA developed and delivered code to the ASX, including with respect to the new NBO business process. After a period of testing the delivered code, ASX delivered iterative drops of the code into the CDE. By, and from, about mid 2021, DA's delivery was subject to delays and the final drop of code into the CDE, being CDE10, was late. Contrary to the Published Plan, the full functional code was not published to the CDE.
19. In the period from July 2021 to November 2021, DA indicated to the ASX that there was a risk of continued delays to the delivery of code (including functional code) beyond ITE1 open (at the end of November 2021) and that this would put additional pressure on future milestones including ITE1 Accreditation and ITE2 opening. In the period to November 2021 and thereafter, DA indicated to the ASX that its delivery status was "red", meaning that there were material risks to its delivery in the time frames required and mitigants/resolutions were not in place to address that risk.

Descoped Opening of ITE1

20. On 30 November 2021, ASX opened ITE1 without full functionality or production level performance in that certain 'Business Capabilities' were missing, a business process called Corporate Actions was not

activated, there were delivery gaps in ‘Enabler Capabilities’ including with regard to security, testing and performance (including that a number of business processes and ISO messages were not delivered to the non-functional requirements) and approximately 100 defects in the Application were not addressed. ASX determined that ITE1 would not be a “pre-production environment”.

21. In the circumstances described in the above paragraph, ASX opened ITE1 with a materially reduced scope and performance and therefore otherwise than in accordance with the Published Plan.

DA Delayed Delivery

22. In early December 2021, DA proposed a draft delivery plan to ASX which indicated a delay of up to November 2022 for DA to provide a fully functional and optimised Application with all ISO messages optimised and production-level performance of the Application on the Ledger (**DA Draft Delivery Plan**). ASX rejected the DA Draft Delivery Plan because it did not allow ASX to open ITE2 and ITE1 Accreditation with a fully functional, performant and stable Application in April 2022 and in accordance with the Published Plan.

23. At all relevant times from 21 December 2021, ASX recorded a red “RAG” overall status for the CHESS Replacement Project and for the Application because the DA Draft Delivery Plan did not align with the Published Plan (including interim milestones and the Go-Live date of April 2023) and DA had not provided a further delivery plan which aligned with the Published Plan. At all times, the red “RAG” status meant that there was a material risk to the project proceeding to the Published Plan and that mitigants/resolutions were not in place to address that risk. The ASX Audit and Risk Committee was informed of the project’s red “RAG” status for the purposes of its meeting on 3 February 2022. The project’s red “RAG” status was not disclosed to the market at any time on or prior to 10 February 2022 or indeed any relevant time thereafter.

24. Between December 2021 and early February 2022, representatives of DA and ASX met multiple times to try to bring DA’s delivery dates forward.

25. In the period up to 10 February 2022, DA did not bring its delivery dates forward to align with the Published Plan and had indicated:

- a. a red “RAG” status for its delivery in respect of the Application because “the time to achieve 100% code completion” did not fit the “ASX roadmap” including “interim milestones” and “Go-Live”;
- b. that there remained outstanding dependencies on ASX for the delivery of datasets to DA by which DA could test the functionality and performance of the code it was delivering; and
- c. that there was ongoing work related to the scalability and performance of certain business requirements.

Descoped opening of ITE2

26. In the period up to 10 February 2022, ASX planned that it would open ITE2 in April 2022 without full functionality or production level performance, in that ASX planned to use the same code base as was, then, available in ITE1 (v1.2), without various downstream systems known as CMS, DCS, nCORE and

RMS, without Corporate Actions, without functionality called ‘Operating Hours (part 2)’, and without meeting the non-functional requirements of all business processes.

27. In the circumstances described immediately above, by 10 February 2022, ASX planned to open ITE2 with a materially reduced scope and performance and therefore otherwise than in accordance with the Published Plan.

Descoped ITE1 Accreditation Release Candidate

28. On 8 February 2022, being two days prior to ASX’s announcement of its half year results to the market, two meetings took place between ASX and DA representatives. The first meeting took place between, at least, ASX’s CEO and DA’s CEO. The second meeting took place between members of ASX’s and DA’s respective project management teams (including the Executive Sponsor for the CHES Replacement Project at ASX). At one or both of those meetings, representatives of DA and ASX discussed DA delivering to ASX a release candidate for a descoped ITE1 Accreditation (**Descoped ITE1 Accreditation Release Candidate**). Insofar as statements of intent were made by DA on 8 February 2022, they were conveyed orally and were not, or alternatively were not clearly, documented. Further, any such statements by DA were not documented by way of a delivery plan to ASX prior to 10 February 2022 or at all.

29. In the period to 10 February 2022, ASX planned to open ITE1 Accreditation without full functionality or production level performance, in that the ASX planned to use the Descoped ITE1 Accreditation Release Candidate which did not address or include: all functionality, all existing change requests, various downstream systems known as CMS, DCS, nCORE and RMS, the optimisation of ISO messages performance, or meet the non-functional requirements across all business processes.

30. In the circumstances described in paragraphs 28 to 29 above, as at 10 February 2022, the ASX planned to open ITE1 Accreditation with a materially reduced scope and performance and therefore otherwise than in accordance with the Published Plan.

Further milestones and Go-Live at April 2023

31. The Descoped ITE1 Accreditation Release Candidate did not address all of the remaining functionality or performance issues, including with respect to a number of outstanding ISO messages and business processes. Those issues were required to be addressed for ASX to provide a stable, functional and performant Application, with sufficient industry and performance testing, for “Go-Live” in April 2023.

32. Despite the descoping discussed above, the functionality and performance requirements which had been descoped from the ITE1, ITE2 and ITE1 Accreditation milestones were, nevertheless, still required for the purposes of the CHES Replacement Project overall. Also, as a result of the descoping of ITE1, ITE2 and ITE1 Accreditation (set out above), work on the CHES Replacement Project had “shifted right”, meaning that all the remaining coding, optimisation, testing, hardening and other work for the project needed to be completed later, and in less time, than had originally been allocated in the Published Plan, assuming that the “Go Live” date remained at April 2023. Further, as at about mid-January 2022, the throughput performance target for a single business process called trade registrations, of 690 TPS,

had not been met in ASX testing, also, testing for the “batch settlement” and “end-of-day” business processes had encountered latency defects, and the testing of other business scenarios were either “blocked” or had not met production levels.

33. As at 10 February 2022, DA had not provided to ASX a commitment as to whether (or when) the remaining code and other work, beyond that required by the Descoped ITE1 Accreditation Release Candidate, would be delivered, tested and optimised in sufficient time to enable the CHESSE Replacement System to ‘Go-Live’ by April 2023 in accordance with the Published Plan. To the contrary, DA had alerted ASX to its concerns that the ASX may not meet its post ITE2 milestones including “Go-Live”. Further, ASX had not validated (through testing) the attainment of 690 TPS with accounts and holdings “loaded” (and not just trade registrations) and ASX considered that 690 TPS for trade registrations (only) was not an appropriate proxy for the performance of other business processes of the CHESSE Replacement System.
34. As at 10 February 2022, ASX had not assessed and reasonably determined whether the work which had “shifted right” and the likely delayed delivery and optimisation of code from DA after ITE1 Accreditation, could be accommodated within the CHESSE Replacement Project’s existing Published Plan to ‘Go-Live’ by April 2023. Further, at no time prior to 10 February 2022 (or at all) did ASX produce a low, or low to medium, risk plan to address those issues. To the contrary, on about 31 January 2022, the ASX project team produced a “Plan-on-a-Page” which showed that, based on certain assumptions, the “Go-Live” date would be delayed to September 2023 assuming code complete (including a final code drop and all ISO messages optimised) occurred in October 2022. At all relevant times, the “RAG” status for both the overall CHESSE Replacement Project, and the project schedule, remained classified ‘red’.
35. In the circumstances described in paragraphs 31 to 34, as at 10 February 2022, the ASX did not have a low risk, alternatively a low to medium risk, plan which accommodated: (i) the work which had “shifted right” as a result of the descoped ITE1, ITE2 and ITE1 Accreditation environments, and (ii) the anticipated delayed delivery (after ITE1 Accreditation), testing and optimisation of code, so as to enable the further milestones of “operational readiness”, the “Production Environment”, “migration dress rehearsals” and “Go-Live” at the times and in the manner stated in the Published Plan. than in accordance with the Published Plan.

10 February 2022 announcements

36. On 10 February 2022 in the period 9.19AM – 9.21AM, the ASX made the following announcements to the market (**together, the 10 February releases**):
 - a. ASX Limited Half-Year Results to 31 December 2021 (1H22), which referenced accompanying speaking notes and presentation slides (**1H22 Market Release**);
 - b. 2022 Half-Year Results Presentation and Speaking Notes (**1H22 Presentation**);
 - c. 2022 Half-Year Financial Results presentation slides, which included a Strategic Update from the CEO (**1H22 Presentation Slides**); and
 - d. ASX CEO announces plan to retire (**Resignation Release**).
37. The 10 February releases were considered and approved by the ASX Board on 9 February 2022.

38. The 10 February releases stated, *inter alia*:
- a. “CHESS replacement remains on track for Go-Live April 2023. [The] new system’s ITE is open to software vendors ahead of bringing in customers. [The] new system uses Digital Asset’s Daml smart contract development capability, VMware’s DLT (blockchain) platform and other ASX infrastructure that underpins the new CHESS replacement system. [The] new technology is meeting its availability and stability targets for the test environment” (1H22 Presentation);
 - b. “CHESS replacement remains on track for go-live and the industry test environment is open to software vendors, with customers joining in the coming months. The system uses Daml smart contracts, VMware’s DLT platform and connects to other ASX infrastructure that underpins the new system. It is meeting its availability and stability targets. The team has plenty of work ahead, as we now transition to the industry stage” (1H22 Presentation);
 - c. “Our new CHESS system will be at the leading edge globally, with a DLT system capable of managing a multitrillion dollar ecosystem with millions of trades and billions of value turning over every day. It also means ASX’s clearing and settlement systems are fully contemporary, using global standard ISO20022 messaging, and operating on modern hardware across multiple data centres with improved security” (1H22 Presentation);
 - d. the CHESS Replacement Project “remains on track for Go-Live April 2023” (1H22 Presentation Slides);
 - e. “New technology is meeting its availability and stability targets for the test environment” (1H22 Presentation Slides);
 - f. the CHESS Replacement Project was “progressing well, with the fully integrated industry test environment open and operating successfully” (Resignation Release); and
 - g. ASX’s “focus on technology” had expanded, “including developing a world-leading position on the distributed ledger technology with the CHESS replacement project” (Resignation Release).
39. In the circumstances, on 10 February 2022, ASX made a representation of present fact to the effect that the CHESS Replacement Project, alternatively the CHESS Replacement System, was presently tracking to the Published Plan (**Tracking to Plan Representation**).
40. Further, on 10 February 2022, ASX made a representation of its present opinion reasonably held, to the effect that the CHESS Replacement Project, alternatively the CHESS Replacement System, was on track to meet (i) the future project milestones in accordance with the Published Plan including Go-Live in April 2023, or, alternatively, (ii) Go-Live in April 2023 (**Tracking to Go-Live Representation**). Further, or alternatively, the Tracking to Go-Live Representation was a representation “with respect to a future matter” within the meaning of s 12BB of the ASIC Act.
41. Further, on 10 February 2022, ASX made a representation of present fact, alternatively a representation of its present opinion reasonably held, to the effect that the CHESS Replacement Project was progressing well (**Progressing Well Representation**).

Post 10 February 2022

42. Within about 7 days of the 10 February releases, following consideration by ASX and further information from DA, ASX no longer planned to open ITE1 Accreditation using the Descoped ITE1 Accreditation Release Candidate. Then, on 28 March 2022, ASX announced that there was a strong likelihood of delay to the Go-Live date of April 2023.
43. In the period September to November 2022, Accenture reviewed the use of the Ledger and Application and produced a report in which they, with the assistance of DA and ASX, identified significant challenges with the solution design and its ability to meet ASX's requirements.
44. On 17 November 2022, ASX announced a pause to the CHESSE Replacement Project, that it would reassess all aspects of the CHESSE Replacement Project and that it had derecognised approximately \$245-255 million (pre-tax) in capitalised costs in circumstances where the continued use of the Ledger and Application was in doubt.

B. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

45. At all relevant times, CHESSE was a clearing and settlement facility within the meaning of s 12BAB(17) of the ASIC Act and so was a "financial service" within the meaning of s 12BAB(1) of the ASIC Act. At all relevant times, the CHESSE Replacement System was a facility or benefit which was provided in trade and commerce and therefore a "service" within the meaning of s 12BA(1) of the ASIC Act. Further, the CHESSE Replacement System would be, upon "Go-Live", a clearing and settlement facility within the meaning of s 12BAB(17) of the ASIC Act and so would be a "financial service" within the meaning of s 12BAB(1) of the ASIC Act. Further, at all relevant times, the CHESSE Replacement Project was a facility or benefit which was provided in trade and commerce and therefore a "service" within the meaning of s 12BA(1) of the ASIC Act. Further, at all relevant times, securities in ASX were a "financial service" within the meaning of ss 12BAB(1AA) and 12BAA(7) of the ASIC Act.

False or misleading representations and misleading or deceptive conduct

46. In the circumstances set out in paragraphs 14 to 35 above, the Tracking to Plan Representation was misleading or deceptive. In particular:
 - a. the CHESSE Replacement Project, alternatively the CHESSE Replacement System, had not met the Published Plan in that ASX had opened a materially descoped ITE1 in November 2021, and ITE1 remained materially descoped as at 10 February 2022, in the circumstances stated at paragraphs 20 to 21 above;
 - b. the overall RAG status of the CHESSE Replacement Project was 'red' as stated at paragraph 23 above;
 - c. the RAG status of DA's delivery was 'red' as stated at paragraph 25.b. above;
 - d. the DA Draft Delivery Plan was not in accordance with the Published Plan and DA had not provided a further delivery plan to ASX in the circumstances stated at paragraphs 22 to 25 and 28;

- e. ASX planned to deliver a materially descoped ITE2 which was not in accordance with the Published Plan in the circumstances stated at paragraphs 26 and 27 above;
 - f. ASX planned to deliver a materially descoped ITE1 Accreditation which was not in accordance with the Published Plan in the circumstances stated at paragraphs 28 to 30 above.
47. In the circumstances set out in paragraphs 14 to 35 above, the Tracking to Go-Live Representation was misleading or deceptive because ASX did not have a reasonable basis for that opinion. In particular:
- a. the CHES Replacement Project, alternatively the CHES Replacement System, was not presently tracking to the Published Plan in the circumstances stated at paragraph 46.a. - d. above;
 - b. the ASX planned to deliver a materially descoped ITE2 which was not in accordance with the Published Plan in the circumstances stated at paragraphs 26 and 27 above;
 - c. the ASX planned to deliver a materially descoped ITE1 Accreditation which was not in accordance with the Published Plan in the circumstances stated at paragraph 28 to 30 above;
 - d. the matters in paragraphs 25 and 31 to 35 above indicated that the CHES Replacement Project was not tracking to Go-Live in accordance with the Published Plan.
48. Alternatively, insofar as the Tracking to Go-Live Representation is with respect to a future matter, the representation was misleading where ASX did not have reasonable grounds for making the representation, in respect of which ASIC relies upon s 12BB(2) of the ASIC Act.
49. The Progressing Well Representation was misleading and deceptive because:
- a. the CHES Replacement Project was not progressing well as at 10 February 2022 in light of the matters stated in paragraphs 14 to 35 above;
 - b. insofar as it was an expression of opinion reasonably held, ASX did not have a reasonable basis for that opinion in light of the matters stated in paragraphs 14 to 35 above.
50. In the circumstances, making each of the Tracking to Plan Representation, the Tracking to Go-Live Representation, and the Progressing Well Representation, constituted misleading or deceptive conduct, in trade or commerce, in relation to CHES, alternatively securities in ASX, being a financial service, and so ASX contravened s 12DA of the ASIC Act.
51. In the circumstances, each of the Tracking to Plan Representation, the Tracking to Go-Live Representation, and the Progressing Well Representation, was a false or misleading representation made in trade or commerce and in connection with the supply of CHES or the possible supply of the CHES Replacement System, or alternatively the supply or possible supply or promotion of securities in ASX, to the effect that the services, being the CHES Replacement Project or the CHES Replacement System or both:
- a. were of a particular standard, quality, value or grade and so ASX contravened s 12DB(1)(a) of the ASIC Act; and
 - b. had performance characteristics, uses or benefits and so ASX contravened s 12DB(1)(e) of the ASIC Act.

C. HARM SUFFERED

52. By the misleading conduct, ASX risked damaging perceptions of the integrity of the Australian financial markets and the confidence of investors and other market participants in the Australian financial system. ASX is the entity responsible for developing and issuing its Listing Rules and for ensuring Australia's primary cash equities market, a piece of significant national infrastructure, operates fairly and transparently.
53. The ASX Corporate Governance Council develops and issues the Corporate Governance Principles and Recommendations to be adopted by ASX listed entities. The principles instil a culture of acting lawfully, ethically and responsibly and highlight the importance of market announcements being accurate. By reason of the misleading conduct referred to above, ASX undermined the principles it promotes for itself and other listed entities.
54. Further, by the misleading conduct, ASX, as a listed entity itself, risked causing harm to its shareholders and potential shareholders.
55. In addition, market participants, other market operators, and service providers incurred, or were exposed to the risk that they would incur, sunk costs in preparation for a "go-live" of the CHESSE Replacement Project or the CHESSE Replacement System in April 2023.
56. By the time the ASX announced (in March 2022) the strong likelihood of delay to the Go-Live date of April 2023, and by the time the CHESSE Replacement Project was paused in November 2022, the sunk costs that had been incurred by market participants, other market operators, and service providers were significant.

D. RELIEF SOUGHT FROM THE COURT

57. ASIC seeks the declarations, pecuniary penalty orders, and other relief set out in the Originating Process.

This Concise Statement has been prepared by Joanne Shepard and Denes Blazer of counsel and Norton Rose Fulbright, and settled by David Thomas SC.

Certificate of lawyer

I, Jack Pembroke-Birss, certify to the Court that, in relation to the Concise Statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.

Date: 13 August 2024



Signed by Jack Pembroke-Birss

Lawyer for the Plaintiff