SQUIRE PATTON BOGGS

Continuous Disclosure Breaches Attract a AU$450,000 Penalty for Mining and Exploration Company

APAC – 13 February 2023

On 13 January 2023, the Federal Court of Australia handed down a AU$450,000 fine to Australian Mines Limited (AML) for breaching its continuous disclosure obligations on three occasions. Federal Court justice, Craig Colvin, noted that AML had breached disclosure laws on matters of considerable significance to its affairs and on matters that were of major importance for its shareholders. This comes as a timely reminder, to companies and managing directors alike, of the importance of complying with continuous disclosure obligations.

Background

AML is a listed mining and exploration company that is principally based in Western Australia. As a listed company, it has continuous disclosure obligations to immediately inform the Australian Securities Exchange (ASX) as soon as it becomes aware of any information concerning the company that a reasonable person would expect to have a material effect on the price or value of its securities.

The continuous disclosure breaches mentioned related to a cobalt, nickel, and scandium resource in North Queensland, known as the "Sconi Project" (Project), which was acquired by AML in December 2017. In February 2018, a buyer entered into an agreement with a subsidiary of AML to purchase cobalt offtake from the Project (Offtake Agreement).

On 10 May 2022, ASIC commenced proceedings against AML and its managing director, Benjamin Bell, for allegedly breaching its continuous disclosure obligations and his directors' duties, respectively.

The First Contravention

On 19 February 2018, AML failed to disclose in its Offtake Agreement that the purchase of the expected cobalt and nickel from AML's Project included a 15% discount to the buyer upon acquiring shares in AML at a fixed price. Ultimately, AML failed to notify ASX of the 15% discount in circumstances where that information was material and not generally available.

The Second Contravention

On 23 April 2018, at a conference held in Hong Kong, Mr Bell announced that AML had secured finance for the Project and noted that the value to AML of the Offtake Agreement was AU$5 billion. However, this representation was false as AML had not secured finance for the construction of the Project, nor had the buyer committed to the funding of it. Furthermore, the value of the Offtake Agreement was materially misleading as AML had not factored in a buyer's discount of 15%. AML subsequently failed to take the appropriate steps in a timely matter to correct these misleading and false representations to the market.

The Third Contravention

On 17 May 2018, Mr Bell made the same representations at the Hong Kong conference as well as the conference held in London. Further to false and misleading representations of the financing and value, Mr Bell asserted during the conference that it was a condition of the Offtake Agreement that the buyer commit to the funding construction of the Project. This further assertion was false as there was no such obligation. The presentation made in London was posted to YouTube on 15 June 2018, where it remained publicly available for approximately one month (and a further link to the YouTube video was posted on the Australian stock market online chat forum, HotCopper). Once again, AML failed to take the appropriate steps in a timely matter to disclose to the market the errors in the representations.

Subsequent Conduct

On 27 June 2018, AML retracted its previous representation that the Offtake Agreement was valued at AU$5 billion. At that time, AML also responded to an ASX query in which it disclosed the true position as to funding for the Project, resulting in the reinstatement of AML's securities to official quotation on 28 June 2018. During its period of suspension between 19 June 2018 and 28 June 2018, AML's share price suffered a 10% fall (from 10 cents to 9 cents) and its market capitalisation fell by approximately AU$32.14 million.

Outcome

On 13 January 2023, the Federal Court handed down the AU$450,000 penalty to AML. The penalty came after AML sought early resolution of ASIC's proceedings and admitted that it had failed in its continuous disclosure obligations on three occasions.

The Federal Court found that AML had contravened section 674(2) of the Corporations Act 2001 (Cth) (Corporations Act) on the three instances previously mentioned. Section 674 of the Corporations Act applies to "listed disclosing entities" and provides continuous disclosure requirements – specifically, that the company must notify the market operator (ASX) of information about specified events or matters as they arise, for the purpose of making that information available to participants of the market.

In arriving at the penalty amount, Justice Colvin accounted for AML's admission that it contravened the law by failing to notify information to the ASX, and its efforts to rectify its conduct. Justice Colvin noted that the penalty should act as a specific and general deterrent, "recognising the significance of remediating conduct of that kind encourages self-disclosure and supports a general culture of compliance." At the relevant time, the maximum amount for a pecuniary penalty for each contravention by a body corporate was AU$1 million. A pecuniary penalty may be imposed if a declaration of contravention has been made and the contravention is a specified kind of financial services provision that is serious, or materially prejudices the interests of acquirers, disposers or issuers of the relevant financial products.

In AML's case, the contraventions were deemed to be "serious" on the basis that the failure to conform to the disclosure requirements concerned matters of significance to the affairs of AML and evident importance for shareholders. A penalty was then agreed. Any agreed penalties must be appropriate and not exceed what is reasonably necessary to achieve general and specific deterrence. It was submitted that a pecuniary penalty should have been imposed on the basis that the contraventions materially prejudiced the interests of acquirers or disposers of shares in AML; however, this submission was rejected on the basis that there was no evidence to support any finding that the decline in AML's share price was attributable to the contravening failures (that is, there was no basis for establishing a causative link).

ASIC's proceedings against Mr Bell are ongoing and are listed for a final hearing on 17 February 2023.

Key Takeaways

In the event that listed companies do find themselves at the hands of a continuous disclosure breach, the steps taken by the company in making corrective disclosure, revising its disclosure policy, admitting the conduct, and, in the event of disclosure obligation breaches of a director, terminating employment, are all elements that support future compliance. Therefore, listed companies and their subsequent managing directors should take this as a reminder of the importance of both remediating conduct of this kind and of self-disclosure – all of which support a culture of general compliance.

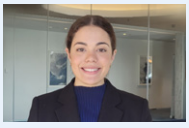
ASIC commissioner, Sean Hughes, noted that "today's outcome reinforces how fundamental the continuous disclosure regime is in ensuring that Australia's financial markets are well-informed and fair. The outcome is a timely reminder for ASX listed companies attending overseas conferences that compliance with the law is expected and enforceable".

ASIC has stated that it will, in light of these findings, "continue to take enforcement action to ensure that Australia's markets operate fairly and are transparent". This outcome highlights the need for managing directors and companies to be aware of their continuous disclosure obligations and relevant compliance, as a contravention of this kind has the potential to undermine investor confidence and the integrity of the market, and attract substantial penalty amounts.

Authors

Ashley Rose
Partner, Corporate
T +61 2 8248 7879
E ashley.rose@squirepb.com

Sarah Roper
Associate, Corporate
T +61 2 8248 7831
E sarah.roper@squirepb.com



Georgia Mateer
Paralegal, Corporate
T +61 2 8248 7893
E georgia.mateer@squirepb.com