No. VID624 of 2025

Federal Court of Australia

District Registry: Victoria

Division: Commercial and Corporations Division

IN THE MATTER OF SUNSTONE METALS LTD ACN 123 184 412

SUNSTONE METALS LTD ACN 123 184 412 Applicant

OUTLINE OF SUBMISSIONS of the APPLICANT

1. By originating process filed Monday, 19 May 2025, following a request for an urgent listing for hearing filed Friday 16 May 2025, the applicant Sunstone Metals Ltd (**Sunstone** or **Company**) seeks relief under s 1322(4) of the *Corporations Act 2001* (Cth) (**Act**) relating to failures to lodge compliant "cleansing notices" in respect of 18 allocations of shares by the Company.
2. The Company relies upon –
    1) an affidavit of Lucas Welsh, CFO and Company Secretary for the Company, of 18 May 2025 (**Welsh Affidavit**),
    2) an affidavit of Gavin Leicht, former Company Secretary of the Company, of 19 May 2025 (**Leicht Affidavit**),
    3) an affidavit of Malcolm Norris, Director and former Managing Director and CEO of the Company, of 18 May 2025 (**Norris Affidavit**),
    4) an affidavit of Emma Claire Cook, partner of Thomson Geer, Lawyers, of 18 May 2025 (**Cook Affidavit**), and
    5) two further updating affidavits to come from Mr Welsh and from Ms Beattie of Thomson Geer Lawyers, to update the Court as to: notification of the hearing date to shareholders, ASIC and the ASX, and any communications received in response as to the positions of any party.

BACKGROUND

3. The Company is an Australian owned mineral exploration company with two gold and copper assets in Ecuador: being the Bramaderos Gold-Copper Project and the El Palmar Copper Gold Project. It employs 5 people in Australia.[1]
4. The Company was incorporated on 20 December 2006 and is an ASX-listed public company, with 5,982,775,046 shares on issue with a paid-up capital of $148,561,924.52. It undertook

[1] Welsh Affidavit at [3]-[4].

its initial public offering (**IPO**) in February-March 2007 and following its success, was admitted to the Official List of the ASX on 22 March 2007. At that time, Sunstone traded under the name Avalon Minerals Limited. A review of Sunstone's lodgements with the ASX over the 7 years since 1 July 2018 by the current Company Secretary Mr Welsh has confirmed that since that time, the Company has remained listed on the ASX and has not been subject to suspension, other than the current voluntary suspension in place from 15 May 2025 (following a 2 day voluntary trading halt) for reasons the subject of this application.[2]

Share Issues

5. Since the IPO, the Company has issued securities on a total of 34 further occasions, which fall within 10 share issue types.[3]

6. Of these, as discussed below, the Company has recently discovered that 18 share issues over the past 7 years were affected by compliance failures, by way of a disclosure requirement which could be met by the issue of a cleansing notice within a requisite time frame, which did not occur. This has ramifications for shareholders who have since sold or have since bought the relevant shares, both as to title and as to exposure to civil liability for on-sales (see below). There is evidence that there has been trading (on-selling) of shares from the affected share issues.[4] Hence this application is urgently brought, seeking curative orders to remedy the position for shareholders.

7. The affected share issues fall within these 4 types –

    1) **SPP Issues**[5]

    On one occasion – 13 May 2022 – the Company issued 36,417,976 shares pursuant to terms of a Share Issue Plan (**SPP**) (Issue 11), where shares were issued to existing shareholders of the Company pursuant to *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547* and ASIC Regulatory Guide 125,[6]

    2) **Placement Issues**[7]

    On three occasions – 22 April 2022 (295,507,463 shares issued) (Issue 9), 29 April 2022 (3,000,000) (Issue 10) and on 2 April 2025 (800,000,000 shares issued) (Issue 22) – the Company issued shares by way of a placement issue to sophisticated and professional investors pursuant to sections 708(8) and (11) of the Corporations Act.[8]

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[2] Welsh Affidavit at [4]-[6].
[3] Welsh Affidavit at [9(a)-(c)] and [9(j)] as to the relevant share issue types, and [15] as to a table of the 34 issues of securities (listed as 24 share issues, the 24th comprising 11 instalments).
[4] Welsh Affidavit at [52].
[5] Welsh Affidavit at [9(a)] as to this type of share issue by the Company.
[6] See below at [29]-[31] as to relevant compliance requirements, and Welsh affidavit at [15] (table) and [19]-[21] as to the failures identified and their circumstances.
[7] Welsh Affidavit at [9(c)] as to this type of share issue by the Company.
[8] See below at [32]-[34] as to relevant compliance requirements, and Welsh affidavit at [15] (table) and [17]-[18] and [43]-[46] as to the failures identified.

3) **Placement Issues – Director Allocations**[9]

On three occasions – 13 February 2024 (12,916,667 shares issued) (Issue 14), 9 July 2024 (13,636,364 shares issued) (Issue 18) and 31 October 2024 (26,000,000 shares issued) (Issue 21) – the Company issued shares to directors as a result of their participation in a recent Placement Issue, following the approval by shareholders of such allocations to directors at an Extraordinary General Meeting and the subject of an ASX announcement,[10]

4) **Issues upon Employees' Exercise of Performance Rights**[11]

On eleven occasions (Issue 24) – 28 September 2018 (5,244,072 shares issued), (8 April 2019 (6,000,000 shares issued), 18 July 2019 (3,688,874 shares issued), 10 September 2019 (504,496 shares issued), 1 November 2021 (3,466,667 shares issued), again on 1 November 2021 (20,000,000 shares issued), 10 November 2021 (3,466,666 shares issued), 1 December 2021 (2,600,000 shares issued), 13 July 2022 (22,000,001 shares issued), 4 November 2022 (20,000,000 shares issued) and 18 November 2022 (3,999,999 shares issued) – the Company issued shares to employees following their exercise of performance rights pursuant to the Company's employee incentive plan.[12]

Actions taken by the Company to identify, address and rectify failures

8. The curative orders are sought in circumstances where, upon discovering the first omission – on 8 May 2024 - the Company immediately sought legal advice as to the effect of the omission and of Sunstone's associated legal and regulatory obligations. Upon receipt of legal advice on these matters on 12 May 2025, the Company moved swiftly to prepare a trading request halt, notify the ASX and instigate a voluntary trading halt (2 days) on 13 May 2025 and inform the market as to the reason and commence an investigate review and survey of records.[13]

9. The Company then moved on 14 May 2025 to prepare and lodge a request to have trading in its shares placed in a voluntary suspension on 15 May 2025, with the market informed as to why.[14] As advised to the market in the suspension request published with the ASX announcement, the Company was preparing to bring an application to Court.[15] It has since continued to work with its lawyers to complete its investigative reviews as summarised in Mr Welsh's affidavit, complete gathering evidence and prepare this application to Court, inform

[9] Welsh Affidavit at [9(b)] as to this type of share issue by the Company.
[10] See below at [32]-[34] as to relevant compliance requirements, and Welsh affidavit at [15] (table) and [22]-[26] and [33]-[42] and as to the failures identified.
[11] Welsh Affidavit at [9(j)] as to this type of share issue by the Company.
[12] See below at [35]-[36] as to relevant compliance requirements, and Welsh affidavit at [15] (table) and [47]-[49] as to the failures identified and their circumstances.
[13] Welsh Affidavit at [10]-[12] and [14].
[14] Welsh Affidavit at [13].
[15] Welsh Affidavit – exhibit LW-5.

shareholders as to which share issues are affected and of the intended Court hearing, inform and communicate with the ASX and with ASIC, working to rectify the incidents that had occurred.[16]

Evidence as to circumstances of cleansing notice failures

10. In summary, the evidence shows that –

1) as a mineral exploration company with gold and copper assets in Ecuador, and like many resource companies listed on the ASX, the capital expenditure required to investigate and develop the potential of interests in mining and other tenements is significant. Sunstone has raised capital on many occasions via multiple different methods;[17]
2) on multiple occasions, both under the previous Company Secretary Mr Leicht, and under the current Company Secretary Mr Welsh, the Company did duly lodge requisite cleansing notices within the required timeframe, in compliance with its disclosure obligations;[18]
3) under Mr Leicht –
    a) on one occasion, the cleansing notice required was indeed prepared and lodged for the placement (Issue 9). However, it had one technical defect by omitting a statement that the Company had complied with section 674A of the Corporations Act, a requirement that had recently been introduced by an amendment to the Corporations Act, which was inadvertently missed by Mr Leicht;[19]
    b) on one occasion, because one shareholder was several days late in depositing funds to participate in a placement, the issue of shares to that shareholder happened several days after the main placement issue (Issue 10). This meant that the cleansing notice issued for the placement ended up being issued just <u>before</u>, rather than <u>after</u>, the issue of shares to the late shareholder, and a fresh one needed to be issued. Mr Leicht overlooked this;[20]
    c) on one occasion, an issue of shares to existing shareholders under a SPP, there had been a recent placement of shares for which a cleansing notice was issued, leading to a misapprehension by Mr Leicht that a fresh cleansing notice was not required for the SPP issue (Issue 11). However, because of the timing of the SPP

[16] Welsh Affidavit at [50]-[58]; Cook Affidavit at [5]-[16]; Updating Beattie and Welsh Affidavits yet to come.
[17] Welsh Affidavit at [3] and [8].
[18] WelshAffidavit at [15] (table).
[19] Welsh Affidavit at [17]; Leicht Affidavit at [11]-[12].
[20] Welsh Affidavit at [18]; Leicht Affidavit at [11]-[12]. Note this is the cleansing notice that also had the technical defect described immediately above.

offer, preceding the issue, it was; [21]

d) on eleven occasions in the relevant period, employees exercised performance rights under the Company's employee incentive scheme, and the Company issued shares accordingly, but without a fresh cleansing notice each time. The scheme had been established before Mr Leicht commenced with Sunstone in April 2015. Whether or not a form CF08 was lodged by his predecessor, he believed erroneously that a cleansing notice was not required in any event as the shares were issued for nil consideration such that their issue was exempt from disclosure under s 708(15) of the Corporations Act, and as they were restricted in trading the shares by the terms of Sunstone's policy;[22]

e) for one director allocation of shares as part of a placement, delayed by and following approval by shareholders of the allocation to directors, a cleansing notice had been issued for the principal placement (Issue 14). However, by Mr Leicht's misunderstanding of the requirements, a fresh cleansing notice was not then also issued for the later allocation of shares to directors pursuant to the placement; [23]

4) under Mr Welsh, appointed CFO and Company Secretary on 1 July 2024,[24] and with Mr Leicht's assistance for the first month[25] -

a) on two further director allocations of shares as part of a placement – the first on Mr Welsh's 7th day on the job - the same error was made, on the misapprehension by Mr Welsh that: a second cleansing notice was not also required, the issue had shareholder approval, the directors were subject to trading restrictions under Sunstone's policy, and a "senior manager" exemption was available under s 708(12) – (Issues 18 and 21);[26] and

b) on one recent occasion, Mr Welsh inadvertently overlooked the need to lodge a cleansing notice for a placement (Issue 22). While he was generally aware of the requirement for a share issue of this nature, he was labouring under an extraordinarily heavy workload through a hectic period for the Company, in which circumstances the inadvertent error was made.[27]

[21] Welsh Affidavit at [19]-[21]; Leicht Affidavit at [13]-[15].
[22] Welsh Affidavit at [47]-[49]; Leicht Affidavit at [19]-[22].
[23] Welsh Affidavit at [22]-[26]; Leicht Affidavit at [16]-[18].
[24] Welsh Affidavit at [27]-[32] as to Mr Welsh's appointment and recent experience, including his recently completed Company Secretariat and Company Directors courses.
[25] Leicht Affidavit at [1].
[26] Welsh Affidavit at [33]-[42].
[27] Welsh Affidavit at [43]-[46].

Communications with ASIC and the ASX

11. As noted above, upon receiving legal advice as to what ought be done following the first discovery of non-lodgement of a cleansing notice, Sunstone instructed its lawyers to proceed to prepare a trading halt request letter to inform the ASX (and shareholders, upon its publication). Within a day Sunstone had sent the request to the ASX and had its shares placed in a voluntary trading halt.[28] It also moved promptly and prior to the end of the trading halt, to inform ASX of its intention to make this application to the Federal Court, and request to have its shares placed in voluntary suspension.[29]
12. At the same time, Sunstone has been working to investigate, identify, and rectify the failures that have occurred,[30] and its lawyers have been in further communication with the ASX and ASIC, informing them as to what has occurred and the nature of the proposed application, and asking them for their preference as to the provision of Court documents prior to the hearing.[31]
13. On Friday 16 May 2025, upon receiving confirmation of the upcoming hearing on Tuesday, 20 May 2025, the ASX informed Sunstone's lawyers that the ASX did not require either the unsealed or sealed copies of the Originating Application and affidavit materials. The ASX would only require a copy of the final sealed Orders, which would need to be announced to the ASX.[32]
14. Also on Friday 16 May 2025, given the tight timeframes, ASIC requested and were provided with an advance summary of the missed cleansing notices and the reasons for them being missed.[33] ASIC requested that unsealed copies of the Originating Application and affidavit materials be provided to ASIC as soon as possible, noting the indication that this would likely be the afternoon of Sunday 18 May 2025, and stated that ASIC understood the need to move quickly and would try its best to review the documents quickly and revert prior to the date of the intended hearing on 20 May 2025.[34]
15. On Sunday 18 May 2025 at 8.31pm Sunstone's lawyers provided ASIC with the following unsealed Court documents: the signed Originating Process, the Welsh Affidavit, the Cook Affidavit, and the Norris Affidavit.[35] The Leicht Affidavit was provided after it was made, on Monday, 19 May 2025 at 8.56am.[36] These submissions are also to be provided to ASIC as soon as practicable on Monday, 19 May 2025.

[28] Welsh Affidavit at [10]-[12].
[29] Welsh Affidavit at [13].
[30] Welsh Affidavit at [7] and [14].
[31] Cook Affidavit at [5]-[16]; Updating Beattie Affidavit to come.
[32] Cook Affidavit at [7]-[8].
[33] Cook Affidavit at [14(a)] and [15].
[34] Cook Affidavit at [14].
[35] Updating Beattie Affidavit to come.
[36] Updating Beattie Affidavit to come.

16. Any response from ASIC as to its position on the application will be addressed in the Updating Beattie Affidavit to be filed prior the hearing on 20 May 2025.

Measures now in place

17. In light of these matters, Sunstone has taken steps to put in place various measures and safeguards to ensure robust compliance practices in the future.[37]
18. Sunstone's Company Secretary, Mr Welsh, has commenced work on developing and documenting standard operating procedures / checklists in relation to all types of share issues used by Sunstone, incorporating relevant updates to the Corporations Act and from the regulators, to ensure Sunstone's disclosure obligations are properly complied with and technically correct for share issues in the future.
19. In addition, Sunstone will retain Thomson Geer Lawyers for the next 12 months to oversee compliance matters with respect to any proposed issue of shares, as an extra layer of oversight, so that Sunstone can ensure its staff's understanding and processes have been properly corrected, and that their updated compliance procedures/checklists are working effectively.
20. Lastly, the regular compliance report issued to the Board as part of their Board papers will be expanded to include reference to specific compliance with all laws and regulations for share issues including as to cleansing notices / disclosure requirements.
21. With these measures and safeguards in place, Sunstone seeks diligently to ensure that it will properly lodge cleansing notices moving foward.

Notice to shareholders and announcements to the market

22. As noted above, notice of failure to issue cleansing notices and of the hearing of this Court application were given to all shareholders of the Company and to the market by way of public ASX announcements.[38]
23. Notice of the hearing of this application was also given to as many shareholders/former shareholders as possible in the time available by direct correspondence.[39]
24. Two further affidavits will be filed shortly before the hearing to update the Court on these matters, including as to ASIC's response as to is position on the application once received, and as to whether any other interested party has indicated it will seek to be heard.

[37] Welsh Affidavit at [65]-[66].
[38] Welsh Affidavit at [12], [13] and [55]-[56] – exhibits LW-4, LW-5 and LW-17 as to ASX announcements on 13, 15 and 16 May 2025 respectively; See Updating Affidavits yet to come as to ASX Announcement with further hearing and Federal Court information on 19 May 2025.
[39] Welsh Affidavit at [54]; Updating Welsh Affidavit yet to come.

STATUTORY FRAMEWORK – DISCLOSURE REGIME

Part 6D.2 of the Act

25. Broadly, part 6D.2 of the Act requires the provision of information to investors about securities when an offer to issue or sell them is made.

26. As was explained in *Re Austpac Resources NL* [2023] FCA 108; (2023) 16 ACSR 1 (***Austpac Resources***) by Goodman J[40], for present purpose and ignoring inapplicable exceptions, the following parts of Part 6D.2 are salient –

> *First,* as a general proposition:
>
> (1) an offer of securities for issue needs disclosure unless ss 708 or 708AA provide otherwise: s 706; and
> (2) a person must not make an offer of securities that needs disclosure under Part 6D.2 unless a disclosure document for the offer has been lodged with the Australian Securities and Investments Commission (**ASIC**): s 727.
>
> *Secondly*, the offers of securities [for sale] that require disclosure under Part 6D.2 are only those for which disclosure is required by s 707(2), (3) or (5): s 707(1).
>
> *Thirdly,* s 707(3) provides –
>
> (3) an offer of a body's securities for sale within 12 months after their issue needs disclosure to investors under this Part if:
> (a) the body issued the securities without disclosure to investors under this Part; and
> (b) either:
> (i) the body issued the securities with the purpose of the person to whom they were issued selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; or
> (ii) the person to whom the securities were issued acquired them with the purpose of selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them;
>
> and section 708 or 708A does not say otherwise.
>
> *Fourthly,* s 708A provides some exceptions to the requirement of disclosure prescribed by s 707(3). In so far as is presently relevant, s 708A provides:
>
> **708A Sale offers that do not need disclosure**
>
> *Sale offers to which this section applies*
> (1) This section applies to an offer (the ***sale offer***) of a body's securities (the ***relevant securities***) for sale by a person if:
> (a) but for subsection (5), (11) or (12), disclosure to investors under this Part would be required by subsection 707(3) for the sale offer; and
> (b) the securities were not issued by the body with the purpose referred to in subparagraph 707(3)(b)(i); and
> (c) a determination under subsection (2) was not in force in relation to the body at the time when the relevant securities were issued.
> …

[40] At [4]-[10].

Sale offers of quoted securities – case 1

(5) The sale offer does not need disclosure to investors under this Part if:

(a) the relevant securities are in a class of securities that were quoted securities at all times in the 3 months before the day on which the relevant securities were issued; and

(b) trading in that class of securities on a prescribed financial market on which they were quoted was not suspended for more than a total of 5 days during the shorter of the period during which the class of securities were quoted, and the period of 12 months before the day on which the relevant securities were issued; and

(c) no exemption under section 111AS or 111AT covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (b); and

(d) no order under section 340 or 341 covered the body or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (b); and

(e) either:

(i) if this section applies because of subsection (1) – the body gives the relevant market operator for the body a notice that complies with subsection (6) before the sale offer is made; or

(ii) if this section applies because of subsection (1A) – both the body and the controller give the relevant market operator for the body a notice that complies with subsection (6) before the sale offers I made.

(6) A notice complies with this subsection if the notice:

(a) is given within 5 business days after the day on which the relevant securities were issued by the body; and

(b) states that the body issued the relevant securities without disclosure to invsetors under this Part; and

(c) states that the notice is being given under paragraph (5)(e); and

(d) states that, as at the date of the notice, the body has complied with:

(i) the provisions of Chapter 2M as they apply to the body; and

(ii) sections 674 and 674A; and

(e) sets out any information that is excluded information as at the date of the notice (see subsections (7) and (8)).

(7) For the purposes of subsection (6), excluded information is information:

(a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and

(b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:

(i) the assets and liabilities, financial position and performance, profits and loss and prospects of the body; or

(ii) the rights and liabilities attaching to the relevant securities.

(8) The notice given under subsection (5) must contain any excluded information only to the extent to which it is reasonable for investors and their professional advisors to expect to find the information in a disclosure document.

…

[*Sale offer of quoted securities – case 2*

(11) The sale offer does not need disclosure to investors under this Part if:

(a) the relevant securities are in a class of securities that are quoted securities of the body; and

(b) either:

(i) a prospectus is lodged with ASIC on or after the day on which the relevant securities were issued but before the day on which the sale offer is made; or

(ii) a prospectus is lodged with ASIC before the day on which the relevant securities are issued and offers of securities that have been made under the prospectus are still open for acceptance on the day on which the relevant securities were issued; and

(c) the prospectus is for an offer of securities issued by the body that are in the same class of securities as the relevant securities.

…]

Fifthly, the making of an offer of shares that needs disclosure under Part 6D.2 absent the lodging of a disclosure document with ASIC is a contravention of s 727 of the Act: s 727(1) and (6) (subject to the operation of s 727(5)).

Finally, a person who contravenes s 727 is exposed to proceedings for relief under s 1325 of the Act: s 1325 (and in particular s 1325(1), (5) and (7)(d)).

27. As to the documents commonly referred to as "cleansing notices" and "cleansing prospectuses", these were further explained in *Re Structural Monitoring Systems PLC* [2022] FCA 473 (***Structural Monitoring***) by Anastassiou J[41] –

(a) **Cleansing notice exception - s 708A(5)** – the seller does not need to comply with the disclosure requirements of Part 6D.2 if the issuer provided a cleansing notice in relation to the securities. The cleansing notice must have been given by the issuer to the ASX within 5 days of the issue of the securities, and before the sale offer was made. Sub-section 705A(6) sets out the maters which must be included in the cleansing notice, the most important of which are that the company must state that, as at the date of the notice, it has complied with its financial reporting obligations in Chapter 2M of the Act and its continuous disclosure obligations in s 674 of the Act, and the notice must include any 'excluded information', defined as information that has been excluded from a continuous disclosure notice in accordance with the exceptions in the ASX Listing Rules. In addition, to fall within the cleansing notice exception, s 708A(5) sets out a number of other requirements, including that the company's securities have not been suspended from trading for more than 5 days in the 12 months prior to the issue of securities that were on-sold;

(b) **Cleansing prospectus exception – s 708A(11)** – the seller does not need to comply with the disclosure requirements of Part 6D.2 if the issuer lodged a cleansing prospectus in relation to the securities with ASIC. The cleansing prospectus must be lodged on or after the day on which the relevant securities were issued, but before the day on which the sale offer is made. The cleansing prospectus must be an offer for securities issued by the entity that are in the same class of securities as the relevant securities that have been issued and are to be on-sold. Unlike the cleansing notice exception, suspension from trading does not prevent reliance upon the cleansing prospectus exception.

[41] At [11], adopting this summary drawn from the Plaintiff's submissions.

28. As to the question of the liability of on-sellers where there has been a failure of disclosure by a company upon issue of relevant shares, s 707(3) is set out above. Section 727 relevantly provides as follows –

> (1) A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6.2D unless a disclosure document for the offer has been lodged with ASIC.
> …
>
> (6) A person contravenes this subsection if the person contravenes subsection (1), (2), (3) or (4).
>
> Note: This subsection is a civil penalty provision (see section 1317E).

When a Disclosure Document (eg a Cleansing Notice) is Required for Particular Types of Share Issues

(1) SPP Issues – Offers for issue and offers for sale

29. For a Share Purchase Plan (**SPP**) Issue of shares, whereby shares are offered to existing shareholders, *ASIC Corporations (Share and Interest Purchase Plans) Instrument 2019/547* **(SPP ASIC Instrument)** and ASIC Regulatory Guide 125 apply. Under the SPP ASIC Instrument, ASIC provides relief from the disclosure requirement in s 706 of the Act. Under the SPP ASIC Instrument, ASX listed companies can make an offer of shares to existing holders under a share purchase plan without a prospectus, so long as the offer complies with the provisions of the SPP ASIC Instrument.
30. Under the SPP ASIC Instrument, an issuer need not issue a further Cleansing Notice for an SPP offer when it follows a placement, and the issuer has lodged a compliant Cleansing Notice under s 708A(6) or s 1012DA(6) not more than 30 days before the SPP offer is made per condition (f)(i) of the SPP Instrument, RG 125.42, ASIC Regulatory Guide 125.
31. Where an offer to issue securities under an SPP is made as a stand-alone offer (i.e. it is not offered in conjunction with a placement), a Cleansing Notice must be lodged with ASX within a 24-hour period before the SPP offer is made per condition (f)(i) of the SPP Instrument, RG 125.37, ASIC Regulatory Guide 125.

(2) Placements to sophisticated investors or professional investors, and to senior managers (including directors) pursuant to ss 708(8), (11) and (12) – Offers for issue and offers for sale

32. For a Placement Issue, so long as the issue is made under:
    1) sections 708(8) (Sophisticated Investors);
    2) sections 708(11) (Professional Investors), or
    3) section 708(12) (people associated with the Company) as amended by *ASIC Corporations (Disclosure Relief—Offers to Associates) Instrument 2017/737*,

    such an issue does not require disclosure under section 706 of the Act.

33. For the onsale of shares from a Placement Issue (i.e. to sophisticated investors, professional investors or senior managers including directors), listed companies are required to issue compliant Cleansing Notices in accordance with section 708A (5)(e) and (6) of the Act. A Cleansing Notice is required to be given within 5 business days after the day that any shares under a placement are issued by the company, and must set out other relevant information as mandated by those provisions.

34. A Cleansing Notice is not however required where shares under a Placement Issue are not being on-sold for a period of 12 months following their issue and this is documented by way of some form of escrow agreement. This is because s 707(3) will not be considered to apply to the Placement Issue, because for a 12 month period post issue they were not able to be on-sold, therefore within that period:

    1) the body could not be considered to have issued the securities with the purpose of the person to whom they were issued selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them; and
    2) the person to whom the securities were issued could not be considered to have acquired them with the purpose of selling or transferring the securities, or granting, issuing or transferring interests in, or options over, them.

(3) Employee Incentive Plan Issues – Offers for issue and offers for sale

35. For an Employee Incentive Plan Issue, so long as the issue is made under section 708(12) (people *associated* with the Company) as amended by *ASIC Corporations (Disclosure Relief—Offers to Associates) Instrument 2017/737*, such an issue does not require disclosure under section 706 of the Act.

36. For the onsale of such shares from an Employee Incentive Plan, issued in the relevant period (prior to 1 March 2023), ASIC *Class Order [CO 14/1000] Employee incentive schemes: Listed bodies* provided relief from the on-sale provisions of the Act in certain circumstances for incentive plan issues of shares to employees. It provided that a listed body that made an offer under an employee incentive scheme did not have to comply with Part 6D.2, 6D.3 or Part 7.9 of the Act in relation to the offer (clause 5), so long as it met the requirements of the Class Order. If compliance with the Class Order was not achieved, a Cleansing Notice was required. See further ASIC Regulatory Guide 49.

RELIEF UNDER SECTION 1322(4) – PROVISIONS AND PRINCIPLES

37. It has been said of relief sought under ss 1322(4) to validate, relieve from liability or otherwise to cure the effects of failures to issue cleansing notices that[42] –

> All of the above relief is within the scope of s 1322. The importance of this section should not be

[42] *Re Lake Resources NL* [2022] FCA 197 (***Lake Resources***) at [29] per Derrington J.

> underestimated. It contemplates that errors may occur in relation to complying with the intricacies of the *Corporations Act*. It is obviously remedial in nature and should be afforded a liberal operation: *Re Wave Capital Ltd* [2009] FCA 969 at [27] [French J]. Nevertheless, the relatively untrammelled scope of s 1322(4) is circumscribed by the need to satisfy the requirements of s 1322(6).

38. Section 1322 is commonly utilised in cases of cleansing notice failures to validate non-disclosure by shareholders who on-sell shares, and to relieve shareholders for liability: see cases collected in *Re iCandy Interactive Limited* [2018] FCA 533; (2018) 125 ACSR 369 (***iCandy Interactive***) at [43] per Banks-Smith J.[43] See also the cases summarised in the Schedule attached, and the book of authorities to be filed.

Key Provisions

39. Relevantly section 1322(4) provides as follows -

> Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following others, either unconditionally or subject to such conditions as the Court imposes:
>
> (a) An order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;
> (b) …
> (c) An order reliving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);
> (d) …
>
> and may make such consequential or ancillary orders as the Court thinks fit.

40. Section 1322(6) provides as follows –

> The Court must not make an order under this section unless it is satisfied:
> (a) In the case of an order referred to in paragraph 4(a):
> i. That the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;
> ii. That the person or persons concerned in or party to the contravention or failure acted honestly; or
> iii. That it is just and equitable that the order be made; and
> (b) in the case of an order referred to in paragraph 4(c) – that the person subject to the civil liability concerned acted honestly; and
> (c) in every case – that no substantial injustice has been or is likely to be caused to any person.

Principles

41. In order to satisfy the requirements of s 1322(4)(a), the Company must demonstrate that[44] –

> 1) It is an interested person within the meaning of s 1322(4),

[43] *Re Caeneus Minerals Ltd* [2018] FCA 560 (***Caeneus Minerals***) at [33] per Banks-Smith J.
[44] *Re Golden Gate Petroleum Ltd* [2010] FCA 40; 77 ACSR 17 (***Golden Gate***) at [37] per McKerracher J.

2) There was an act, matter or thing purporting to have been done under the Act or in relation to a corporation that may be invalid by reason of a contravention of a provision of the Act: s 1322(4)(a),
3) Either -
    a) The act, matter or thing was essentially of a procedural nature, or
    b) The person or persons concerned in or party to the contravention or failure acted honestly, or
    c) It is just and equitable that the order be made: s 1322(6)(a), and
4) No substantial injustice has been or is likely to be caused to any person: s 1322(6)(c).

42. In order to satisfy the requirements of s 1322(4)(c), the Company must demonstrate similar – though not the same - matters as for s 1322(4)(a) -
    1) It is an interested person within the meaning of s 1322(4),
    2) There was a contravention or failure of a kind referred to in s 1322(4)(a) that may give rise to the civil liability of a person: s 1322(4)(c),
    3) The person subject to the civil liability concerned acted honestly: s 1322(6)(b), and
    4) No substantial injustice has been or is likely to be caused to any person: s 1322(6)(c).

Standing - Interested person

43. It is well-established that the company whose shares were on-sold in breach of the Act is an interested party with standing to bring the application.[45]
44. The term is not defined in the Act, but as noted in *Austpac Resources* in 2023 at [92], it has been interpreted broadly. In circumstances where the company seeks relief concerning trading in its shares including the integrity of such trading, and the relief is sought in aid of a foreshadowed application for removal of a suspension of trading in its shares, the Courts are commonly satisfied that the company concerned is an interested person in such an application.[46]

Relief under s 1322(4)(a) – the Validity Declaration

45. The validity declaration sought is, in summary, that any offer for sale, or sale, of any of the relevant shares occurring in the period after their issue is not invalid by reason of any failure of a notice under s 708A(5)(e) or prospectus under s 708A(11) to exempt the sellers from the obligation of disclosure, and any consequent contravention by selling shareholders of s 707(3) or s 727(1) of the Act.
46. There must first be an act, matter or thing purporting to have been done under the Act or in

[45] *iCandy Interactive* at [46].
[46] See also *Golden Gate* at [44] and *Re Sprint Energy Limited* [2012] FCA 1354 (***Sprint Energy***) at [38]-[40], both per McKerracher J, and *Lake Resources* at [23] per Derrington J.

relation to a corporation that may be invalid, for s 1322(4)(a) to be engaged. It is for this reason – that on-sales of a company's shares may be invalid - that orders are commonly made validating on-sales of shares which had been issued without a requisite cleansing notice.[47]

47. Section 1322(4)(a) then confers upon the Court a discretion to make a validity declaration, such a discretion being enlivened upon the satisfaction of the pre-conditions set out in ss 1322(6)(a) and (c).

Satisfaction of one of the 3 alternative limbs of s 1322(6)(a)

48. Subsection 1322(6)(a) sets out 3 alternative limbs. Only one of those limbs need be satisfied in order to meet the requirements of this sub-section.[48]
49. In this application, the Company relies on the second and third of these – the honest failure limb, and the just and equitable limb.

(i) – ***Essentially of a procedural nature***

50. The Company does not rely upon this limb. We make brief submissions as to the principles that emerge from the authorities, as these explain why.
51. It has been said that "the issuing of a cleansing notice has regularly been held as being essentially of a procedural nature", and the Court has thereby been satisfied as to this limb.[49]
52. However, divergent views have been expressed as to this limb, some preferring the view that a contravention of s 707(3) in the nature of on-selling shares without disclosure where there had been no cleansing notice issued is not a procedural irregularity.[50]
53. It is respectfully submitted that the difference appears to be whether, in evaluating whether something is essentially procedural, one is focussed upon the non-issuing of a cleansing notice by the company, or the on-selling of shares without disclosure by the shareholders. It is submitted that it is the latter – the act, matter or thing which is sought to be declared valid - to which attention is directed by the wording of s 1322(6)(a)(i).
54. This may be why, as our research has suggested, in numerous cleansing notice cases this procedural limb is not relied upon by applicants, who more commonly rely upon the just and

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[47] See *Sprint Energy* at [41]; *Golden Gate* at [45]. See further submissions below at [89].
[48] *Golden Gate* at [39], and the authorities there cited; *Nenna v Australian Securities and Investment Commission* [2011] FCA 1193; (2011) 198 FCR 32 (***Nenna v ASIC***) at [47] per Middleton J; *Austpac Resources* at [98], where Goodman J observed that being satisfied that it was just and equitable to make the validity declaration, this was sufficient to satisfy the pre-condition of s 1322(6)(a), such that it was unnecessary to consider the alternative limb there relied upon of the honesty of those concerned in the contraventions.
[49] It can be seen that this has particularly been the case in decisions of the West Australian Supreme Court. See *Re Nanoveu Ltd* [2024] WASC 329 (***Nanoveu***) at [70] per Strk J, citing as examples: *Re Sprintex Ltd* [2022] WASC 188 at [28]; *Re Yandal Resources Ltd* [2022] WASC 338 at [82]; *Re Memphasys Limited* [2022] WASC 269 at [56]; *Re Cyprium Metals Ltd* [2022] WASC 241 at [54]. See also *Re Power Minerals Ltd* [2024] WASC 121 (***Power Minerals***) at [33] per Hill J.
[50] See *iCandy* Interactive at [49] per Banks-Smith J and the authorities there cited in *obiter* (the applicant did not rely on the procedural limb in that case); *Golden Gate* at [46] and *Sprint Energy* at [42], both per McKerracher J.

equitable and the honesty limbs. Hence this issue is often not addressed by the Courts in the cleansing notice cases.

55. In any event, the Court need not determine this issue, as this limb is not relied upon.

56. Moreover, it is clear that the application of s 1322(4)(a) has not been confined to procedural or quasi procedural cases. "It may be used to cure substantive as well as procedural contraventions of the Act."[51] It is submitted that this is because the limb in s 1322(6)(a)(i) is not an essential pre-condition, but one of three alternatives, hence clearly non-procedural irregularities may be cured through the gateway of one of the other two alternative limbs.

(ii) – ***That the person or persons concerned in or party to the contravention or failure acted honestly***

57. The principles as to this limb may be distilled as follows –

1) when determining whether someone has acted honestly for the purposes of s 1322 of the Act, the Courts look to an absence of evidence of dishonesty;[52]
2) the Courts also take into account whether the applicant company has taken prompt action to remedy the error;[53]
3) the concept of honesty can embrace the following –
    a) inadvertence or a failure to turn their mind to the relevant issue,
    b) an active, but incorrect, consideration of a legal issue as well as failure to consider the issue at all,
    c) failure to understand or appreciate the significance of non-compliance;[54]
4) any concerns about the honesty of those involved in the contraventions may not be a sufficient reason to refuse to make the validity declaration in circumstances where, relevantly, there is no reason to believe that shareholders who received or purchased the affected shares have acted otherwise than honestly. There may be no reason why doubts as to the integrity of the transactions by which the affected shares have been transferred should not be removed;[55]
5) "[Section] 1322(6)(a) envisages that the court can make an order under s 1322 even where the court is not satisfied that the person concerned in the contravention acted honestly. So even where a person acts dishonestly, which would normally involve an element of deliberate behaviour, the legislation will permit the court to make an order under s 1322(4)(a). For instance, if the court is justified that it is just and equitable that the order sought be made (see s 1322(6)(a)(iii)), then an order under s 1322(4)(a) can

[51] *Golden Gate* at [40]-[41].
[52] *iCandy Interactive* at [54]; *Austpac Resources* at [115].
[53] *iCandy Interactive* at [54]; *Austpac Resources* at [115].
[54] *iCandy Interactive* at [55]; *Austpac Resources* at [115].
[55] *Austpac Resources* at [110].

be made, even though an element of dishonesty is involved. The court, of course, may not make the order sought, but s 1322(6) does not prevent the court from doing so in the appropriate circumstance."[56]

6) "[A]n order can be made under s 1322(4)(a) even if that provision is concerned with "irregularities" and the order is to declare a deliberate irregularity valid."[57]

(iii) - ***Just and Equitable***

58. The expression "just and equitable" are words of significant width and provide the Court with a broad discretion.[58]

59. It has been observed that[59] –

> The words "just and equitable" are words of the widest significance and do not limit the jurisdiction of the court to any case. It is a question of fact, and each case must depend on its own circumstances. The words give the court a wide discretion. There is no necessary limit on their generality, and they are to be applied in their ordinary meaning as calling for the exercise of judgment in the conventional way.

60. The Courts have generally focused on the interests and conduct of the shareholders in assessing whether it is just and equitable to make orders validating the on-sales in these cases.[60]

61. The grounds on which the Courts have held that it is just and equitable to make the validity declaration in these cleansing notice cases include –

1) that if relief is not granted, the title of any persons who had acquired (or any who in the future might acquire) the affected shares, may be impugned;[61]

   or

   that it would be just and equitable to grant relief to the extent necessary to reasonably protect the interests of current shareholders and for the integrity of future trading in the company's shares;[62]

2) that it is in the interests of the company's shareholders for the contraventions to be cured, so as to allow trading in the shares to resume;[63]

3) that it is to be inferred that the on-sellers of the affected shares are likely to have

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[56] *Nenna v ASIC* at [80] per Middleton J. The authority of his Honour's *dicta* at [80]-[82] has been widely accepted as well established, including in the cleansing notice case of *iCandy Interactive* at [44] and, for example, in *Re Investa Listed Funds Management Limited as responsible entity for the Armstrong Jones Office Fund and the Prime Credit Property Trust* [2018] NSWSC 1432 at [21] per Black J, and *De Kun Holding (Aust) Pty Ltd v Yuan* [2017] NSWSC 106 at [19] per Pembroke J.
[57] *Nenna v ASIC* at [82] per Middleton J.
[58] *Austpac Resources* at [96].
[59] *Re Superior Resources Ltd* [2020] FCA 635; (2020) 144 ACSR 677 per Jackson J at 681 [18], and the authorities there cited; quoted with approval in *Austpac Resources* at [96].
[60] *iCandy Interactive* at [110] per Banks-Smith J; *Austpac Resources* at [90(h)]; *Nanoveu* at [74] per Strk J.
[61] *Nanoveu* at [75(a)].
[62] *Power Minerals* at [36] per Hill J.
[63] *Nanoveu* at [75(b)].

acquired their shares on the basis that they were not required to provide disclosure,[64] and that they have made offers or on-sold them in good faith on the assumption that no disclosure was required by them;[65]

or

that those shareholders were entitled to assume that the company had done what was necessary to comply with Part 6D.2;[66]

4) that the effect of the failure of the company to lodge effective cleansing notices or to otherwise comply with Part 6D.2 has been to expose the on-sellers to claims for relief under s 1325 of the Act; [67]
5) that there is no evidence of knowledge or deliberate nondisclosure on the part of the shareholders.[68]

No substantial injustice - s 1322(6)(c)

62. Subsection 1322(6)(c) requires – both for s 1322(4)(a) and s 1322(4)(c) orders – that the Court must be satisfied that no substantial injustice has been or is likely to be caused to any person.
63. In this regard, the applicable principles may be distilled as follows –
    1) "There are two aspects to this requirement: (a) the expression "has been" invites an inquiry as to the effect of the irregularity sought to be cured; and (b) the expression "likely to be" draws attention to the effect of the proposed order";[69]
    2) The reference to "substantial injustice" in s 1322(6)(c) is to a real and not insubstantial or theoretical prejudice. Whether there is real injustice requires a weighing of any prejudice if the order is made, against the prejudice which would be suffered by those affected if an order is not made;[70]
    3) "A degree of prejudice to a person or persons may be outweighed if the overwhelming weight of justice is in favour of making the order"; [71]

    or

    "[A]ny prejudice which may have existed may be powerfully outweighed by the benefit

[64] *Austpac Resources* at [97].
[65] *iCandy Interactive* at [111].
[66] *Austpac Resources* at [97]; see also *iCandy Interactive* at [112]; citing *Sprint Energy* at [48].
[67] *iCandy Interactive* at [110(3)], quoted with approval in *Austpac Resources* at [97], citing the matter of exposure to such liability as also relevant as to whether it was just and equitable to validate on-sales under s 1322(4)(a).
[68] *iCandy Interactive* at [113].
[69] *Austpac Resources* at [99] per Goodman J, quoting with approval from *Re Murray River Organics Ltd* [2019] FCA 931; (2019) 138 ACSR 365 (***Murray River Organics***) at [35] per Anderson J.
[70] *Austpac Resources* at [99], quoting with approval from *Murray River Organics* at [37]. The reference there was in fact to "the corporation and its directors and officers" rather than "those affected". However *Murray River Organics* was not a cleansing notice case, where curative orders are properly sought under s 1322(4) for the protection of affected shareholders and not the company or its directors and officers. See also *iCandy Interactive* at [117]; *Re QBiotics Limited* [2016] FCA 873 at [46] per Gleeson J.
[71] *Austpac Resources* at [99], quoting with approval from *Murray River Organics* at [36].

to shareholders of being able to resume trading in its shares";[72]

4) "Such an order is clearly in the interests of shareholders who have made offers or on-sold their shares, as they risk exposure to claims against them absent validation";[73]

5) "One mechanism by which the court may ensure that an order under s 1322(4) does not cause substantial injustice is to make an ancillary order permitting any interested person who may suffer substantial injustice to apply within a set period of time to vary or dissolve the s 1322(4) order".[74]

64. Factors to which the Courts have had regard in considering whether any substantial injustice has been or is likely to be caused to any person in these cleansing notice cases include –

1) whether there is evidence of substantial injustice caused by the contravention/s,[75] or where there is any basis to infer that substantial injustice has been or is likely to be caused to any person by the making of the orders sought;[76]

2) that if the orders were not made, there may be a substantial injustice to the company as the offers or sale of shares may be void or voidable which could give rise to commercial uncertainty and expense;[77]

3) that there may be substantial injustice to other ordinary shareholders of the company if the orders are not made, as they may be unable to trade their shares on an open market if the ASX were not to lift the suspension;[78]

4) that an opportunity is to be afforded in the orders for shareholders or other parties who can demonstrate a sufficient interest to raise a complaint about the proposed orders within 28 days from the date of the orders or their publication.[79]

Exercise of the discretion

65. Once the Court is satisfied as to the jurisdictional matters identified in s 1322(6), the discretion in s 1322(4)(a) is enlivened, and the Courts then consider whether to exercise the discretion to make the order sought.[80]

66. The factors to which the Courts have had regard in considering whether to proceed to exercise their discretion to make the validity declaration in these cleansing notice cases include –

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[72] *Nanoveu* at [82], per Strk J accepting the submission that this factor supported the grant of relief.
[73] *iCandy Interactive* at [117].
[74] *Austpac Resources* at [99], quoting with approval from *Murray River Organics* at [38]; see also *iCandy Interactive* at [117].
[75] See *Lake Resources* at [39]-[40], where the Court found the evidence showed that any information which would have been in the cleansing notices would have been somewhat minimal, or disclosed to the market, of minimal relevance, making it unlikely any person had acted in reliance on its absence. See also *Austpac Resources* at [100], where the Court noted that the company had provided regular updates to the ASX, and the retrospective review of one of the officers did not reveal any further information requiring disclosure.
[76] *Nanoveu* at [83].
[77] *Nanoveu* at [84].
[78] *Nanoveu* at [84].
[79] *Nanoveu* at [85]; *Austpac Resources* at [115]; *Golden Gate* at [55].
[80] See for example *Lake Resources* at [43] *et seq*.

1) **that the orders would be just and equitable & no substantial injustice** - the conclusions that it would be just and equitable to make the validity declaration, and that no substantial injustice has been or is likely to be caused to any person, not only enliven the discretion but also weigh in favour of the making of the validity declaration;[81]
2) **that the orders would restore integrity in share dealings -** the making of the declaration will serve to remove doubts as to the integrity of dealings in the affected shares caused by the contraventions;[82]
3) **the regulators' position -** the position of the ASX and ASIC on the application, and whether they have any concerns about the making of the validity declaration.[83]
4) **notice to shareholders -** whether the company's shareholders have been on notice of application and have sought to be heard in opposition or support of the application;[84]
5) **public policy -** whether public policy would be undermined by the making of the orders;[85]

   or

   whether there is evidence of substantial misconduct, serious wrongdoing or flagrant disregard of the corporate law or the company's constitution so as to warrant refusal of the relief sought;[86]
6) **that public policy is not undermined by protecting shareholders only -** notably, in *iCandy Interactive*, the Court accepted ASIC's submission that:[87]

   > [I]nsofar as the s 1322(6)(a) preconditions are met and as no relief is sought for the benefit of directors, officers or the company itself, then there is no suggestion that the public policy of the remedial provision is undermined by the making of the orders.

7) **prompt action to remedy -** the promptness with which the applicant company has acted to remedy the irregularity once it had been identified;[88]
8) **any other reason / whether company has taken steps to address causes of failures -** whether there is any other matter which might inform the exercise of the discretion and which provides a reason not to make the declaration sought. For example, whether the company has not taken steps to address the causes of its previous failures to meet

[81] *Austpac Resources* at [106].
[82] *Austpac Resources* at [107].
[83] *Austpac Resources* at [108].
[84] *Austpac Resources NL* at [109].
[85] *Caeneus Minerals* at [58] per Banks-Smith J.
[86] *Nanoveu* at [88].
[87] *iCandy Interactive* at [122]-[123]. In that case, the Court found that while the conduct of directors was open to criticism, their conduct did not involve blatant disregard of the provisions of the Act: [120]. See Schedule (summaries of cases of note) for findings as to the relevant conduct in that case, including ignoring legal advice.
[88] *Nanoveu* at [91]; *iCandy Interactive* at [54].

its obligations;[89]

9) **frank and detailed account –** whether the company applicant has provided a frank and detailed account as to the circumstances surrounding each of the share issues.[90]

67. It is notable from our research that –

1) invariably in the cleaning notice s 1322 cases we have reviewed, where it is determined that it is **just and equitable** to make the s 1322(4)(a) order for the protection of affected shareholders, and for both s 1322(4)(a) and (c) orders the Court is satisfied that **no substantial injustice** has been or is likely to be caused to any person - the orders have been made;

2) indeed our research of over 60 cleansing notice cases has found no cleansing notice s 1322 case where the s 1322(4)(a) and (c) orders protective of shareholders have been refused once the preconditions are satisfied. This has been so even in cases where there have been concerns as to the conduct of the officer responsible for the contraventions.[91]

Relief under s 1322(4)(c) – the Relief from Liability order

68. The relieving order sought is that any person who has on-sold the affected shares is relieved from any civil liability arising out of any failure of a notice under s 708A(5)(e) or prospectus under s 708A(11) to exempt the sellers from the obligation of disclosure, and any consequent contravention by selling shareholders of s 707(3) or s 727(1) of the Act.

69. Section 1322(4)(c) confers upon the Court a discretion to make such an order, the discretion being enlivened upon the satisfaction of the pre-conditions set out in ss 1322(6)(b) and (c).

Honesty of the affected shareholders - s 1322(6)(b)

70. Subsection 1322(6)(b) requires that the person the subject of the civil liability concerned acted honestly. This makes it necessary to identify the civil liability and the persons the subject of such liability, to consider if they acted honestly. The relevant liability is a liability under ss 707(3) or 727(1) of the Act. The persons the subject of such liability and for whom relief here is sought are shareholders - the persons who on-sold affected shares.[92]

71. There is a body of authority that supports the view that it is open to the Court to readily infer

[89] *Austpac Resources* at [112].
[90] *Power Minerals* at [3], where this counted against the number of failures (61); *Caeneus Minerals* at [4], where this counted against the number of failures (31); *Re Clancy Exploration Limited* [2018] FCA 569 at [3]; *Lake Resources* at [32]; *Re Astral Resources NL* [2024] WASC 251 at [3]; *Re Haranga Resources Ltd* [2024] WASC 105 at [2].
[91] For example in *Austpac Resources,* there was evidence of self-dealing by the responsible officer. The former company secretary (who did not give evidence) had apparently made a clandestine placement of shares to his own service company, which cast doubt on his integrity. See further the summary in the Schedule. The orders sought were made, with a carve out from relief from liability for the former officer and his service company.
[92] *Austpac Resources* at [114].

that those shareholders have acted honestly in on-selling the shares.[93]

No substantial injustice - s 1322(6)(c)

72. Subsection 1322(6)(c) requires – both for s 13224(a) and s 1322(4)(c) orders – that the Court must be satisfied that no substantial injustice has been or is likely to be caused to any person.

73. See above. The principles and factors cited above apply here also, but as to orders relieving of liability.

Exercise of the discretion

74. Key principles to be distilled from the authorities as to the exercise of the discretion as to whether to make an order sought under s 1322(4)(c) include -

    1) satisfaction of the pre-conditions not only enlivens the discretion under s 1322(4)(c) but also weighs in favour of making the relief order;[94]
    2) "Relief of this kind is not required in order to ensure the ongoing integrity of the market. However it may be justified to provide an assurance to innocent parties, particularly where their contravention arises from a failure to disclose consequent upon the issuing company creating the impression that the shares were freely tradable at any time";[95]
    3) "[A]n order under s 1322(6)(c) operates only for the benefit of the party concerned and will not require a consideration of wider public interest issues of a kind that may support the making of an order under s 1322(6)(a) on the basis that it is just and equitable";[96]
    4) whether there is any reason, including delay, not to exercise the discretion so as to make the relief from liability order.[97]

75. Relief from liability is sought for the protection of shareholders in these cleansing notice s 1322 cases. It is not customary to seek such relief to explicitly extend to the company or its officers.[98]

76. The factors to which the Courts have had regard in considering whether to proceed to exercise their discretion to make the order to relieve shareholders from liability under s 1322(4)(c) in these cleansing notice cases have included –

    1) that the order would relieve anyone who purchased the shares and on-sold them from potential liability or the concern of potential liability in circumstances where that

[93] *iCandy Interactive* at [58].
[94] *Austpac Resources* at [124].
[95] *Austpac Resources* at [126].
[96] *Austpac Resources* at [126].
[97] *Austpac Resources* at [124].
[98] In *Golden Gate*, relief was initially sought to afford protection from liability arising from the share issue contraventions also for the issuing company, its company secretary and its consultant. After concerns were raised by ASIC, the application was amended to remove them from the protections by the orders sought.

potential has arisen through no fault on their part;[99]

2) the position of the ASX and ASIC on the application, and whether they have any concerns about the making of the order relieving shareholders from liability; [100]
3) whether the company's shareholders have been on notice of application and have sought to be heard in opposition or support of the application; [101]
4) whether there appears to be any reason such as delay not to exercise the discretion so as to make the relief from liability order.[102]

CONTENTIONS

Standing - Interested person

77. It is submitted that having regard to the principles at [43]-[44] above, the Court can be comfortably satisfied that the Company is an interested person with standing to bring the present application.

The Validity Declaration – s 1322(4)(a)

Act, matter or thing that may be invalid by reason of contravention

78. Again, it is submitted that the Court can be comfortably satisfied that on-sales of the Company's affected share are an act, matter or thing that may be invalid as a result of the Company's failure to issue the requisite cleansing notices, pursuant to s 1325(5)(a) of the Act.[103] This is because –

1) The offers for sale and ultimate sale and transfer of the affected shares satisfy and fall within the description of any act purporting to have been done in relation to a corporation,
2) The offers for sale and sales contravened s 707(3) of the Act as the Company did not comply with the requirements:
    a) to lodge a compliant cleansing notice within the time requirements for the purposes of s 708A(5)(e)(i) of the Act; or
    b) to lodge a compliant cleansing prospectus for the purposes of s 708A(11) of the Act; or
    c) for SPP share issues - to lodge a compliant cleansing notice for the purposes of the SPP ASIC Instrument; or
    d) to lodge a compliant cleansing notice for on sale relief under *ASIC Class Order*

[99] *Lake Resources* at [45(b)].
[100] *Austpac Resources* at [124].
[101] *Austpac Resources* at [124].
[102] *Austpac Resources* at [124].
[103] See principles above at [56], and *Sprint Energy* at [41].

[CO 14/1000] Employee Incentivee Schemes; Listed bodies.

3) Accordingly disclosure, though required, was not given as to the offers for sale or sale of the affected shares by shareholders, and
4) the transactions resulting from the offers may be void or voidable: s 1325(5)(a) and 7(d) of the Act.

79. Further, the Court can be comfortably satisfied that the issue of shares under the SPP in April 2022 was an act, matter or thing that may be invalid as a result of the SPP Issue being made without:
    1) compliance with condition 7(f) of the SPP ASIC Instrument; or
    2) disclosure as required by section 706 of the Act (e.g. a prospectus);

    Accordingly disclosure, though required, was not given for the offer of shares for issue, and the SPP Issue itself may be void or voidable: s 1325(5)(a) and 7(d) of the Act.

Satisfaction of s 1322(6)(a)

80. As discussed above, under s 1322(6), the Court need only be satisfied of one of the three alternative limbs in s 1322(6)(a). The Company relies on the second and third of these – the honest failure limb, and the just and equitable limb.

Honest Failure

81. For this limb, it is the conduct of the person involved in or party to the contraventions which is considered, and whether they acted honestly. Here, this means Mr Leicht, then Mr Welsh.
82. As noted above at [57(3)], the concept of honesty can embrace any of: inadvertence or a failure to turn their mind to the relevant issue; an active, but incorrect, consideration of a legal issue as well as failure to consider the issue at all; failure to understand or appreciate the significance of non-compliance
83. It is submitted that on the evidence, and having regard to the principles distilled at [57] above, the Court ought be satisfied that each of Mr Leicht and Mr Welsh acted honestly with regards to the contraventions and how they came about, for these reasons -
    1) the evidence shows that the errors have arisen by variously inadvertent oversight in some cases and a misapprehension of what was required by the legislative provisions and ASIC instruments as to compliance obligations in others;
    2) the majority of the errors identified over the 7 years examined occurred during Mr Leicht's time as Company Secretary. Mr Welsh has examined the Company's books and records and found no evidence of deliberate failure; rather, the evidence indicates inadvertent oversight or a misapprehension of the legal and technical requirements. Mr Leicht has confirmed how the errors occurred based on his recollection;

3) the last 3 failures occurred over the 10 months Mr Welsh has been CFO and Company Secretary. The first two were cases of a misapprehension of the requirement for a fresh cleansing notice for one particular type of share issue. The last, on the evidence, was a case of a particularly excessive workload and inadvertent oversight of the requirement to issue a cleansing notice for this particular share issue, though it was done for others;
4) there is an absence of evidence of dishonesty;
5) Sunstone has taken prompt action to remedy the error.

Just and Equitable

84. As noted above at [60], it is the interests and conduct of the shareholders who are the focus of the Courts in assessing whether it is just and equitable that orders be made validating the on-sales of shares in these cleansing notice cases.

85. Here, it is submitted that it is just and equitable that the declaration sought be made validating the on-sales of affected shares since their issue, to reasonably protect the interests of current shareholders and for the integrity of future trading in the Company's shares. This is so for the following reasons –

1) if this relief is not granted, the title of any person who has acquired the affected shares (or might acquire them in the future) may be impugned;
2) it is to be inferred that shareholders on-selling the affected shares likely acquired their shares on the basis that they were not required to provide disclosure in on-selling them;
3) that is, it is to be inferred that they on-sold them in good faith on the assumption that the Company had properly complied with its obligations, and that no further disclosure was required of them;
4) they were entitled to so assume;
5) there is a body of authority supporting that it is open to the Court to readily infer that those shareholders have acted honestly in on-selling the shares;
6) there is no evidence of knowledge or deliberate non-disclosure on the part of the shareholders;
7) it is in the interests of all of the Company's shareholders for the contraventions to be cured, so as to allow trading in the shares to resume.

Satisfaction of s 1322(6)(c) – substantial injustice

86. As noted above at [62], s 1322(6)(c) requires – both for s 1322(4)(a) and s 1322(4)(c) – that the Court must be satisfied that no substantial injustice has been or is likely to be caused to any person.

87. This requirement involves examining the effect of the irregularity sought to be cured, and the effect of the orders sought to be made. It is submitted that this is, thus, an enquiry that looks

both backward and forward. The Courts have recognised that any prejudice which may have existed as a result of the failures to lodge effective cleansing notices may be "powerfully outweighed by the benefit to shareholders of being able to resume trading in its shares".[104]

88. Regarding the forward-looking enquiry, whether there is real injustice requires a weighing of any prejudice if the order is made, against the prejudice which would be suffered if it is not.

89. Here, it is submitted that the Court ought be satisfied that no substantial injustice has been or is likely to be caused to any person, for these reasons –

1) the retrospective review undertaken and deposed to by Mr Welsh reveals that in the case of all of the relevant Share Issues there was no 'excluded information' that would have been included if a cleansing notice had been issued. In other words, there was nothing that would have been disclosed had a cleansing notice been issued. In addition, announcements made subsequent to share issues had been foreshadowed in earlier announcements to the market in any event. Further, Sunstone was otherwise complying with its continuous disclosure obligations when each potentially problematic share issue occurred.[105]
2) the authorities are clear that "substantial injustice" in this sense means real and not insubstantial or theoretical prejudice.[106] On the evidence, it is demonstrably unlikely that any of the failures to lodge cleansing notices caused prejudice to any party. Even if they did, it could only have been marginal, and is far outweighed by the substantial injustice that will be caused to a range of parties if the orders are not made (see below);
3) in contrast – if the orders are not made, there may be a substantial injustice caused to a range of parties –
    a) **to people and entities who have bought and sold affected shares since their issue** – if the validity declaration is not made, these shareholders may be prejudiced given the potential uncertainty as to title – whether on-sale transactions may be void or voidable, and whether the current holders of the relevant shares can properly now sell their shares;
    b) **to other ordinary shareholders of the Company** – the Company, properly, entered quickly into a voluntary halt on 13 May and a voluntary suspension on 15 May 2025, and trading in its shares has remained suspended. If the orders are not made such that the ASX might then lift the suspension, the Company's ordinary shareholders will be unable to trade their shares on an open market;
    c) **to the Company and its stakeholders** - if the orders are not made, there may be substantial prejudice to the Company and its stakeholders on several fronts. The potential uncertainty as to title given on-sales of affected shares may be void or

[104] See above at [63(3)].
[105] Welsh Affidavit at [59]-[61].
[106] See above at [63(2)].

voidable, will give rise to commercial uncertainty for the Company. Moreover, the Company is hamstrung in its ability to raise capital from the market until this matter is resolved and the voluntary suspension lifted, which has the obvious further potential to cause commercial uncertainty and harm, to the detriment of the Company, its employees and its shareholders. It is also noted that if the orders are not made as sought on 20 May 2025 and the Company is suspended for more than 5 days, it will be unable to issue any Cleansing Notices at all for the following 12 months period;

4) the Company and its lawyers have been properly in communication with the regulators since early on.[107] As noted above, the ASX declined copies of the Court documents ahead of the hearing, and raised no concerns, wanting only to be provided copies of the orders once made. ASIC requested and were provided with a summary of the share issues affected and the reasons for the failures on 15 May 2025, and unsealed copies of the Court documents as soon as they were ready on Sunday 18 May 2025 and one of the affidavits first thing on Monday 19 May 2025. The Court will be informed of ASIC's response in an updating affidavit to be filed shortly before the hearing;

5) the usual safeguard is proposed here - an opportunity afforded in the orders proposed for shareholders or other persons who claim a substantial injustice to raise a complaint about the proposed orders within 28 days from the date of publication of the orders.

90. It is submitted that the Court ought be satisfied here that there has been no substantial injustice caused, or likely to be caused to any person if the orders are made.

Exercise of the discretion to make the order under s 1322(4)(a)

91. The Courts regularly conclude that where it is just and equitable to make the validity declaration, and where no substantial injustice has been or is likely to be caused to any person, the orders ought be made.

92. Even if the Court has concerns about the circumstances of the 18 failures to lodge cleansing notices, it does not follow that the curative orders sought for the protection of shareholders – who had no part in the Company's failures – ought be denied. It is established that s 1322(6)(a) permits the Court to make an order under s 1322(4)(a) even if it cannot be satisfied as to the honesty of the person concerned in the contravention.[108] The public policy of the remedial provision is not undermined by the making of s 1322(4) orders where the preconditions are met and no relief is sought for the benefit of directors, officers or the company.[109] Further, and as noted above, our research has not found any case in over 60 cleansing notice s 1322

[107] Welsh Affidavit; Cook Affidavit; Updating Beattie Affidavit.
[108] See above at [57(5)-(6)] and the authority of *Nenna v ASIC*.
[109] See [76(6)] and fn116 above.

cases where relief has been refused. Here the number of failures is significantly less than what it has been in some cases (31 failures in *Caeneus Minerals*, 61 failures in *Power Minerals*), and there is no evidence of self-dealing in issuing the shares by the officer responsible for the compliance failures (as there was in *Austpac Resources*). Yet even in such cases the orders have been made.

93. In this case, the evidence shows these failures to have been a case of variously inadvertent oversight and a misapprehension of the legal and regulatory requirements and when they applied. There is no evidence of dishonesty.

94. Respectfully it is submitted that, in all the circumstances, the Court ought exercise its discretion under s 1322(4)(a) and make the validity declaration sought here, for the following reasons -

1) satisfaction of the preconditions not only enlivens the discretion but also weighs in favour of the making of the order;
2) it is just and equitable, and protective of the interests of affected shareholders and indeed of all other shareholders, that the on-sales be declared valid, for the reasons discussed above;
3) there is no substantial justice to any person by the failures that have occurred, nor would there be if the order is made. In contrast, if the order is not made, there will be significant and substantial prejudice of a serious nature to a range of parties, as discussed above;
4) the making of the declaration will remove doubts as to the integrity of dealings in the affected shares caused by the contraventions;
5) the ASX has raised no concern about the application, and expressed no intention to appear at the hearing. ASIC has been provided with unsealed copies of the originating process, and all 4 supporting affidavits to be filed together with the originating process. They will also be provided with these written submissions as soon as they are completed. ASIC's response and position on this application will be addressed in an updating affidavit to be filed shortly before the hearing;
6) the Company's shareholders have been given notice of the application and of the hearing details. The updating affidavits will update the Court as to whether any have sought to be heard in opposition or support of the application;
7) notably, the Company moved swiftly upon first discovery of an omission seeking advice, and once it was received taking immediate action to seek to rectify the matter – see the summary at [8]-[9] above and the evidence there cited;
8) the Company has given a frank and detailed account of what has happened since the discovery of the first omission, and what its investigations have found. As Goodman J observed in *Lake Resources NL,* it is submitted that the Company's transparency and

willingness to rectify the problem is both commendable and (were there to have been any) negates any suggestion of a lack of honesty on the Company's part;[110]

9) the errors identified were a result of variously inadvertent oversight and misapprehension of the legal and regulatory requirements. Multiple other share issues were made properly and in compliance with the Company's disclosure obligations; and

10) the Company has commenced diligence in putting in place measures and safeguards to ensure that moving forward the legal and regulatory requirements are properly met. This includes the development of protocols/checklists to ensure procedures are followed to ensure compliance, the oversight of their external lawyers for the next 12 months to ensure the new systems are working properly and effectively, and expanded compliance reports to the board.

The relief from liability order – s 1322(4)(c)

Satisfaction of s 1322(6)(b)

95. As discussed above, this provision requires that the person the subject of the civil liability to be waived acted honestly. Here the relevant persons are shareholders who on-sold or might on-sell affected shares. The relevant liability arises under ss 707(3) or 727(1) of the Act.

96. The authorities are clear that it is open to the Court to readily infer that such shareholders have acted honestly in on-selling the shares.[111] As noted above, the Courts have found that the shareholders were entitled to expect that the Company had done what was necessary to comply with Part 6D.2, and it is to be inferred that they have made offers or on-sold the share in good faith on the assumption that no disclosure was required by them.[112]

Satisfaction of s 1322(6)(c)

97. As discussed above, "substantial injustice" in s 1322(6)(c) requires consideration of whether there has been substantial injustice by the failures to lodge cleansing notices in the requisite period, and the weighing of any prejudice if the order is made against the prejudice which would be suffered by those affected if the orders are not made. For the reasons discussed at [86]-[90] above, the Court ought be satisfied that no substantial injustice has been or is likely to be caused to any person.

Exercise of the discretion

98. The Courts regularly conclude that where the preconditions are satisfied, they both enliven

[110] *Lake Resources* at [32].
[111] See above at [71].
[112] See above at [61(3)].

the discretion to make a s 1322(4)(c) order reliving shareholders of any liability, and weigh in favour of its exercise. In short, the shareholders were entitled to expect the Company had complied with Chapter 6.2D and whether it did or did not require a cleansing notice for a particular share issue, and it is to be inferred that they traded in the shares they acquired in good faith on that assumption.[113] No material prejudice is likely to have been caused thereby to any person. Even if there were, under the proposed orders, the orders will be published and any such person will then have a reasonable opportunity to make any complaint.

99. In this case, in all the circumstances, the discretion in s 1322(4)(c) ought be exercised and the relieving order ought be made, for the following reasons –

1) as with s 1322(4)(a), the Courts' satisfaction of the preconditions not only enlivens the discretion in s 1322(4)(c) but also weighs in favour of the making of the order;
2) the order would relieve anyone who purchased the shares and on-sold them from potential liability or the concern of potential liability in circumstances where that potential has arisen through none of their doing;
3) the shareholders sought to be relieved of liability ought not remain exposed, regardless of what the Company Secretaries have done or failed to do. Upon discovering them Sunstone has worked hard to rectify them, to consult with the regulators, and ensure that measures and safeguards are in place to ensure they can't happen again. The shareholders had no part in what occurred at Sunstone in the past, and ought be protected from the liability to which they have been exposed;
4) as to the balance of the reasons why the order relieving shareholders of liability ought be made, the Company refers to and repeats its submissions at [94] above.

Conclusion

100. It is submitted that the Company has acted promptly and diligently in this matter, which speaks to its intention to comply with the regulatory requirements. It has made early and appropriate announcements to the market and voluntarily moved to halt and then suspend trading in its shares. Its transparency and willingness to rectify the problems demonstrate the Company's honesty and intention to properly comply. This case is not about absolution for the Company and what has occurred. The Company seeks these curative orders directed to the reasonable protection of affected shareholders and former shareholders, and in the interests of all its stakeholders. The relief sought is within the scope of s 1322, which provision is remedial in nature and should be afforded a liberal interpretation. In all the circumstances, it is submitted that the orders sought under s 1322(4) ought be made.

Lonsdale Chambers
19 May 2025

C G ROME-SIEVERS
Counsel for the Applicant

[113] See above at [61(3)].

NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
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