FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Noumi Limited (No 4)

[2024] FCA 1192

File number:	NSD 163 of 2023
Judgment of:	**JACKMAN J**
Date of judgment:	17 October 2024
Catchwords:	**CORPORATIONS** – continuous disclosure regime for entities listed on the Australian Stock Exchange – civil penalty – where first defendant in business of manufacturing and selling food products – where valueless inventory not written off – where revenue included invoices for unfulfilled purchase orders liable to cancellation – where declarations and pecuniary penalty made against the first defendant – where third defendant was the chief financial officer of the first defendant – where third defendant admits alleged contraventions
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) s 12GBA *Corporations Act 2001* (Cth) ss 79, 180, 206C, 206E, 674, 676, 677, 1309, 1317E, 1317G, *Federal Court Act 1976* (Cth) s 21
Cases cited:	*ASIC v Blue Star Helium Limited (No 4)* [2021] FCA 1578; (2021) 158 ACSR 196 *ASIC v GetSwift Limited* [2021] FCA 1384 *ASIC v Healey (No 2)* [2011] FCA 1003 *ASIC v Healey (No 2)* [2011] FCA 1003; (2011) 196 FCR 430 *ASIC v Healey* [2011] FCA 717; (2011) 196 FCR 291 *ASIC v Helou (No 2)* [2020] FCA 1650 *ASIC v Holista Colltech Ltd* [2024] FCA 244 *ASIC v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373 *ASIC v Mercer Superannuation (Australia) Limited* [2024] FCA 850 *ASIC v Rich* [2004] NSWSC 836; (2004) 50 ACSR 500 *ASIC v Vines* [2005] NSWSC 738; (2005) 55 ACSR 617 *ASIC v Vocation Ltd (in liquidation)* [2019] FCA 807; (2019) 136 ACSR 339

Australian Building and Construction Commission v Pattinson [2002] HCA 13; (2022) 274 CLR 450

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3; (2018) 262 CLR 157

Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2) (1999) 95 FCR 302

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; (2013) 250 CLR 640

Australian Securities & Investments Commission v Cash King Pty Ltd [2005] FCA 1429

Australian Securities and Investments Commission v Macquarie Bank Ltd [2024] FCA 416

Australian Securities and Investments Commission v Noumi [2024] FCA 862

Brand v Digi-Tech (Aust) Ltd [2002] NSWSC 416

Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52; (2020) 275 FCR 533

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482

Crowley v Worley Ltd [2022] FCAFC 33; (2022) 293 FCR 438

Cruickshank v Australian Securities and Investments Commission [2022] FCAFC 128; (2022) 292 FCR 627

Dean-Willcocks Pty Ltd v Commissioner of Taxation (No 2) [2004] NSWSC 286; (2004) 49 ACSR 325

Gill v Chief Executive Officer of Customs (2001) 166 FLR 125

Grant-Taylor v Babcock & Brown Ltd (in liq) [2016] FCAFC 60; (2016) 245 FCR 402

Kaur v Minister for Immigration and Border Protection [2014] FCA 281

Khan v Minister for Immigration and Citizenship [2011] FCA 75

Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission [2022] FCAFC 170

Medical Benefits Fund of Australia Ltd v Cassidy [2003] FCAFC 289; (2003) 135 FCR 1

Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz (1992) 34 FCR 348

Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd [2004] FCAFC 72; (2004) ATPR 41-993

Morley v ASIC [2010] NSWCA 331; (2010) 81 ACSR 285

NW Frozen Foods Pty Ltd v ACCC (1996) 71 FCR 285

Productivity Partners Pty Ltd v ACCC [2024] HCA 27; (2024) 98 ALJR 1021

Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); ASIC v Adler [2002] NSWSC 483; (2002) 42 ACSR 80

Shafron v Australian Securities and Investments Commission [2012] HCA 18; (2012) 247 CLR 465

Singh v Minister for Immigration and Border Protection [2019] FCAFC 22

Singtel Optus Pty Ltd v Australian Competition and Consumer Commission [2012] FCAFC 20; (2012) 287 ALR 249

Trade Practices Commission v CSR Ltd [1991] ATPR 41-076

Vines v ASIC [2007] NSWCA 75; (2007) 73 NSWLR 451

Yorke v Lucas (1985) 158 CLR 661

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	138
Date of hearing:	8 October 2024
Counsel for the Plaintiff:	Mr J Arnott SC and Ms N Moncrief
Solicitor for the Plaintiff:	MinterEllison
Counsel for the Third Defendant:	The Third Defendant did not appear

ORDERS

NSD 163 of 2023

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**NOUMI LIMITED ACN 002 814 235** First Defendant
	RORY MACLEOD Second Defendant
	CAMPBELL NICHOLAS Third Defendant

ORDER MADE BY: **JACKMAN J**

DATE OF ORDER: **17 OCTOBER 2024**

THE COURT DECLARES THAT:

Contraventions of s 674(2A) of the Corporations Act 2001 (Cth)

1. Pursuant to s 1317E(1) of the *Corporations Act 2001* (Cth) (**Act**), in the period between 29 August 2019 and 25 May 2020, the Third Defendant contravened s 674(2A) of the Act by being knowingly concerned in FFG's contravention of s 674(2) of the Act in FFG failing to notify the ASX of the FY19 Information (**FY19 Information**), namely that:

   (a) the FY19 Disclosed Inventories were $120.2 million which included Not Saleable Inventory which was recorded in the FY19 Financial Report at a value of at least $20 million;

   (b) FFG had not made sufficient or adequate provisions and had failed to write down the value of the FY19 Disclosed Inventories to account for the Not Saleable Inventory;

   (c) the FY19 Disclosed Inventories were overstated by at least $20 million as a result of the inclusion of the Not Saleable Inventory;

(d) by reason of one or more of the matters referred to in subparagraphs (a)–(c) above, the FY19 Disclosed Inventories were not recorded in the FY19 Financial Report in accordance with FFG's Inventory Accounting Policy; and

(e) by reason of one or more of the matters referred to in subparagraphs (a)–(d) above, the financial statements and notes in the FY19 Financial Report did not give a true or fair view of the financial position and performance of FFG.

2. Pursuant to s 1317E(1) of the Act, in the period between 27 February 2020 and 25 May 2020, the Third Defendant contravened s 674(2A) of the Act by being knowingly concerned in FFG's contravention of s 674(2) of the Act in FFG failing to notify the ASX of each of the HY20 Inventory Information and the HY20 Revenue Information, namely that:

(a) the HY20 Disclosed Inventories were $122.3 million which included Not Saleable Inventory which was recorded in the HY20 Financial Report at a value of at least $20 million;

(b) FFG had not made sufficient or adequate provisions and/or had failed to write-down the value of the HY20 Disclosed Inventories to account for the Not Saleable Inventory;

(c) the HY20 Disclosed Inventories were overstated by at least $20 million as a result of the inclusion of the Not Saleable Inventory;

(d) by reason of one or more of the matters referred to in subparagraphs (a)–(c) above, the HY20 Disclosed Inventories were not recorded in the HY20 Financial Report in accordance with the Inventory Accounting Policy; and

(e) the HY20 Disclosed Revenue (being the revenue from sale of goods disclosed in the HY20 Financial Report) included the Lactoferrin Invoice Amounts despite the existence of the Non-Revenue Information (being that in the period from 1 July 2019 until 31 December 2019, no lactoferrin the subject of the Lactoferrin Invoices was delivered to Interfood, Interfood had the right to cancel the order because CNCA and sample approval had not been obtained by June 2019 and no payment was made by Interfood to FFG in respect of the Lactoferrin Invoices);

(f) FFG failed to reduce the value of the HY20 Disclosed Revenue to account for the Non-Revenue Information;

(g) the HY20 Disclosed Revenue was overstated by at least $9.8 million as a result of the Non-Revenue Information;

(h) the HY20 Disclosed Profit included the Lactoferrin Invoice Amounts despite the existence of the Non-Revenue Information and the Lactoferrin Profit Information (being that the Lactoferrin Invoice Amounts contributed at least $8.5 million towards FFG's gross profit recorded in the HY20 Financial Report);

(i) the HY20 Disclosed Profit was overstated by at least $8.5 million as a result of the Non-Revenue Information and the Lactoferrin Profit Information;

(j) by reason of one or more of the matters referred to in subparagraphs (e) to (i) above, the HY20 Disclosed Revenue and the HY20 Disclosed Profit were not recorded in the HY20 Financial Report in accordance with the Revenue Accounting Policy; and

(k) by reason of one or more of the matters referred to in subparagraphs (a)–(j) above, the financial statements and notes in the HY20 Financial Report did not give a true or fair view of the financial position and performance of FFG.

Contraventions of s 180(1) of the Act

3. Pursuant to s 1317E(1) of the Act, in the period between 29 August 2019 and 25 May 2020, the Third Defendant contravened s 180(1) of the Act by failing to exercise the degree of care and diligence that a reasonable person acting as Chief Financial Officer and Company Secretary of a company in FFG's circumstances would have exercised in:

(a) causing or permitting FFG to disclose the FY19 Financial Report;

(b) failing to ensure that FFG had devised and implemented adequate policies and procedures for the write down of Not Saleable Inventory;

(c) failing to ensure that FFG had devised and implemented adequate policies and procedures for the preparation of financial statements in accordance with the Act and Australian Accounting Standards;

(d) failing to take reasonable steps to qualify, withdraw or correct the FY19 Financial Report to mitigate the risk that FFG's financial statements were inaccurate or misleading;

(e) failing to take all reasonable steps to disclose the FY19 Information to the Board of Directors and to the ASX or to mitigate the risk of such non- disclosure;

(f) failing to take all reasonable steps to ensure that he had sufficient knowledge of FFG's inventories including the value of Not Saleable Inventory; and

(g) failing to take reasonable steps to ensure that the FY19 Financial Report gave a true and fair view of FFG's financial position and performance of FFG.

4. Pursuant to s 1317E(1) of the Act, in the period between 29 August 2019 and 25 May 2020, the Third Defendant contravened s 180(1) of the Act by failing to exercise the degree of care and diligence that a reasonable person acting as Chief Financial Officer and Company Secretary of a company in FFG's circumstances would have exercised in causing or permitting (or failing to prevent) FFG to contravene s 674(2) of the Act, in circumstances where it was reasonably foreseeable that such conduct might harm the interests of the company and exposing it to the risk of legal proceedings for contraventions of the Act, legal costs and penalties.

5. Pursuant to s 1317E(1) of the Act, in the period between 27 February 2020 and 30 April 2020, the Third Defendant contravened s 180(1) of the Act by failing to exercise the degree of care and diligence that a reasonable person acting as Chief Financial Officer and Company Secretary of a company in FFG's circumstances would have exercised in:

(a) causing or permitting FFG to disclose the HY20 Financial Report;

(b) failing to ensure FFG had devised and implemented adequate policies and procedures for the write down of Not Saleable Inventory,

(c) failing to ensure FFG had devised and implemented adequate policies and procedures for the recognition of revenue;

(d) failing to ensure FFG had devised and implemented adequate policies and procedures for the preparation of financial statements in accordance with the Act and Australian Accounting standards;

(e) failing to take reasonable steps to qualify, withdraw or correct the HY20 Financial Report to mitigate the risk that FFG's financial statements were inaccurate or misleading;

(f) failing to take all reasonable steps to disclose the HY20 Inventory Information, the HY20 Revenue Information and/or the HY20 Combined Information to the Board and to the ASX, or alternatively, mitigate the risk of such non- disclosure;

(g) failing to take all reasonable steps to ensure that he had sufficient knowledge of FFG's inventories including the value of the Not Saleable Inventory; and

(h) failure to take all reasonable steps to ensure that the HY20 Financial Report gave a true and fair view of the financial position and performance of FFG.

6. Pursuant to s 1317E(1) of the Act, in the period between 27 February 2020 and 30 April 2020, the Third Defendant contravened s 180(1) of the Act by failing to exercise the degree of care and diligence that a reasonable person acting as Chief Financial Officer and Company Secretary of a company in FFG's circumstances would have exercised in causing or permitting (or failing to prevent) FFG to contravene s 674(2) of the Act, in circumstances where it was reasonably foreseeable that such conduct might harm the interests of the company and expose it to the risk of legal proceedings for contraventions of the Act, legal costs and penalties.

Contraventions of s 1309(2) and s 1309(12) of the Act

7. Pursuant to s 1317E(1) of the Act, the Third Defendant contravened s 1309(2) and s 1309(12) of the Act by giving to the directors of FFG, and its auditors, the information comprising the FY19 Financial Report Representations, being that:

(a) the FY19 Financial Report was prepared and presented in accordance with the Act;

(b) the FY19 Financial Report gave a true and fair view of FFG's financial position as at 30 June 2019 and of its performance for the financial year ended on that date;

(c) the FY19 Financial Report complied with Australian Accounting Standards; and

(d) no inventory was stated in the financial statements for the FY19 Financial Report at an amount in excess of net realisable value,

being information that was false or misleading in a material particular, and omitted the FY19 Information which rendered the FY19 Financial Report Representations misleading in a material respect, without having taken reasonable steps to ensure that

the FY19 Financial Report Representations were not false or misleading in a material particular and did not have omitted from them the FY19 Information.

8. Pursuant to s 1317E(1) of the Act, the Third Defendant contravened s 1309(2) and s 1309(12) of the Act by giving to the directors of FFG, and its auditors, the information comprising the HY20 Financial Report Representations, being that:

   (a) the HY20 Financial Report was prepared and presented in accordance with the Act;

   (b) the HY20 Financial Report gave a true and fair view of FFG's financial position as at 31 December 2019 and of its performance for the financial half-year ended on that date;

   (c) the HY20 Financial Report complied with Accounting Standards; and

   (d) no inventory was stated in the financial statements for the HY20 Financial Report at an amount in excess of net realisable value,

   being information that was false or misleading in a material particular, and omitted the HY20 Inventory Information and the HY20 Revenue Information which rendered the HY20 Financial Report Representations misleading in a material respect, without having taken reasonable steps to ensure that the HY20 Financial Report Representations were not false or misleading in a material particular and did not have omitted from them the HY20 Inventory Information and the HY20 Revenue Information.

THE COURT ORDERS THAT:

9. Pursuant to s 1317G(1) of the Act, the Third Defendant pay to the Commonwealth of Australia a pecuniary penalty in the amount of $100,000 in respect of the contraventions of s 674(2A), s 180(1) and s 1309(12) of the Act referred to in paragraphs 1 to 8 above.

10. Pursuant to s 206C of the Act, the Third Defendant be disqualified from managing corporations for a period of 4 years.

11. The Third Defendant pay the Plaintiff's costs of the proceedings solely against the Third Defendant as agreed or taxed.

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

REASONS FOR JUDGMENT

JACKMAN J:

Introduction

1 In *Australian Securities and Investments Commission v Noumi* [2024] FCA 862, I made declarations and pecuniary penalty orders against the first defendant, formerly known as Freedom Foods Group Ltd (**FFG**) in relation to contraventions of s 674(2) of the Corporations Act 2001 (Cth) (the **Act**).

2 These reasons address the orders that the Plaintiff (**ASIC**) seeks against the third defendant, Mr Campbell Nicholas (**Mr Nicholas**), following the admissions made by Mr Nicholas in his emails and letter sent to the Court and ASIC dated 26 January 2024, 22 July 2024 and 27 August 2024 (**Admissions**). Mr Nicholas did not appear at the hearing, and on ASIC's application under r 30.21(1)(b)(i) of the *Federal Court Rules* 2011 (Cth), I ordered that the hearing proceed generally.

3 In this proceeding, ASIC alleges that Mr Nicholas contravened s 674(2A), s 180, s 1309(2) and s 1309(12) of the Act. By his Admissions, Mr Nicholas admits all of the contraventions alleged by ASIC in its amended statement of claim dated 26 January 2024 (**ASOC**).

The statutory framework and continuous disclosure regime

4 The continuous disclosure regime is set out in Chapter 6CA of the Act. At the time of the contraventions, s 674(2) of the Act provided:

> If:
>
> (a) this subsection applies to a listed disclosing entity;
> (b) the entity has information that those provisions require the entity to notify to the market operator; and
> (c) that information:
> (i) is not generally available; and
> (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;
>
> the entity must notify the market operator of that information in accordance with those provisions.

5 FFG is a "listed disclosing entity" to which s 674(2) applies. The relevant rules are the Listing Rules of the Australian Securities Exchange.

6 In order for there to be a contravention of s 674(2), three criteria must be satisfied:

(a) the Listing Rules must require notification of the information to the ASX;

(b) the information must not be "generally available"; and

(c) the information must be price-sensitive (ie it must be information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity).

7 The determination of whether or not information is generally available is governed by s 676, which provides that:

> (2) Information is generally available if:
>
> (a) it consists of readily observable matter; or
>
> (b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:
>
> (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and
>
> (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.
>
> (3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
>
> (a) information referred to in paragraph (2)(a);
>
> (b) information made known as mentioned in subparagraph (2)(b)(i).

8 Section 677 provides that:

> For the purposes of sections 674 and 675, a reasonable person would be taken to expect that information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

9 A contravention of s 674(2) occurs where the Listing Rules require disclosure of the information. Listing Rule 3.1 provides that:

> Once an entity becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.

10 The term "aware" is defined in Listing Rule 19.12 as follows:

> an entity becomes aware of information if, and as soon as an officer of the entity ... has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

11 The continuous disclosure obligation in Listing Rule 3.1 is subject to certain exceptions set out in Listing Rule 3.1A. It is an admitted fact that Listing Rule 3.1 required immediate disclosure of the FY19 Information, the HY20 Inventory Information and the HY20 Revenue Information, and that therefore none of the exceptions applied to it.

12 The statutory purpose of the continuous disclosure regime has been considered by the Full Court in *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; (2016) 245 FCR 402 (***Grant-Taylor***) (Allsop CJ, Gilmour and Beach JJ); and *Crowley v Worley Ltd* [2022] FCAFC 33; (2022) 293 FCR 438 (***Crowley***) (Perram, Jagot and Murphy JJ). In *Grant-Taylor*, the Full Court said at [92]-[93]:

> 92 The statutory purposes for the continuous disclosure regime were foreshadowed in the 1991 Australian Companies and Securities Advisory Committee Report and in a Second Reading Speech to the *Corporate Law Reform Bill 1992* (Cth) (although the 1992 Bill was superseded by the 1993 Bill). The main purpose is to achieve a well-informed market leading to greater investor confidence. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information (see *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 at [353]-[355]; *Re Chemeq Ltd* (2006) 234 ALR 511 at [42]-[46] per French J (as he then was)) ...
>
> 93 It is also to be noted that ss 674 to 677 are remedial or protective legislation. They should be construed beneficially to the investing public and in a manner which gives the "fullest relief" which the fair meaning of their language allows (*James Hardie v ASIC* at [356]).

13 Similarly, in *Crowley*, Jagot and Murphy JJ stated at [157]-[159]:

> 157 The purpose of s 674 and the continuous disclosure regime is clear. In Treasury Paper, *CLERP Paper No 9, Proposals for Reform – Corporate Disclosure* (Part 8 at 8.4) it was described in the following terms:
>
> > The primary rationale for continuous disclosure is to enhance confident and informed participation by investors in secondary securities markets ...
> > Continuous disclosure of materially price sensitive information should ensure that the price of securities reflects their underlying economic value. It should also reduce the volatility of securities prices, since investors will have access to more information about a disclosing entity's performance and prospects and this information can be more rapidly factored into the price of the entity's securities.
>
> 158 In *Grant-Taylor FFC* at [92] the Full Court said, and we agree, that the main purpose of the regime is:
>
> > ... to achieve a well-informed market leading to greater investor confidence. The object is to enhance the integrity and efficiency of capital markets by requiring timely disclosure of price or market sensitive information.
>
> 159 It is necessary to keep in mind that s 674 of the *Corporations Act* is a remedial

> or protective provision which should be construed beneficially to the investing public and in a manner which gives the fullest relief which the fair meaning of the language allows: *Grant-Taylor FFC* at [93]; *James Hardie Industries NV v Australian Securities and Investments Commission* (2010) 274 ALR 85 at [356].

14 Section 674A(2A) provides that:

> A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.

15 Relevantly, s 79 of the Act provides:

> A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.

16 In order for a person to be knowingly concerned in a contravention, that person must have been an intentional participant, with actual knowledge of the essential elements constituting the contravention: *Yorke v Lucas* (1985) 158 CLR 661 at 670 (***Yorke***); *Productivity Partners Pty Ltd v ACCC* [2024] HCA 27; (2024) 98 ALJR 1021 (***Productivity Partners***) at [12] and [82] per Gageler CJ and Jagot J; Gordon J at [154] (Steward J agreeing at [308]); Edelman J at [263]; Beech-Jones J at [339], [351]–[352], [364]–[365] (Gleeson J agreeing at [211]). However, it is not necessary to prove that the accessory knew that the company was in breach of its continuous disclosure obligation: *Productivity Partners* at [83] per Gageler CJ and Jagot J.

17 A person is "concerned in" the contravention if there is a practical connection between that person's act or omission and the contravention. It is not, however, necessary to establish that a person with knowledge of the essential elements making up the contravention also knows that those elements do amount to a contravention: *Yorke* at 667; *Australian Competition and Consumer Commission v Giraffe World Australia Pty Ltd (No 2)* (1999) 95 FCR 302 (***Giraffe World***) [185]–[186] (Lindgren J); *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 at [7]–[13] (Moore J), [74]–[75] (Stone J with whom Mansfield J agreed). An accessory does not have to have appreciated that the conduct was unlawful: *Giraffe World* at [186] (Lindgren J).

Directors' and officers' duties and applicable legal principles: s 180 of the Act

18 Section 180(1) of the Act provides:

> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
>
> Note: This subsection is a civil penalty provision (see section 1317E).

19 Section 180 applies to Mr Nicholas, because as Chief Financial Officer he was an officer within the meaning of s 9 of the Act: see also *ASIC v Vines* [2005] NSWSC 738; (2005) 55 ACSR 617 at [1052], [1055] (Austin J); *Vines v ASIC* [2007] NSWCA 75; (2007) 73 NSWLR 451 at [601] (Santow JA); *Morley v ASIC* [2010] NSWCA 331; (2010) 81 ACSR 285 at [1079]–[1086] (Spigelman CJ, Beazley and Giles JJA).

20 There are two elements as to the content of the duty of reasonable care and diligence under s 180(1) of Act, namely: (a) the circumstances of the company; and (b) the position and responsibilities of the officer: *ASIC v GetSwift Limited* [2021] FCA 1384 (***GetSwift***) at [2530] (Lee J).

21 As to the circumstances of the company, this includes: the type of company; the provisions of its constitution; the size and nature of the company's business; the composition of the board; the officer's position and responsibilities within the company; the particular function the director is performing; the experience or skills of the particular officer; the terms on which he or she has undertaken to act as an officer; the manner in which responsibility for the business of the company is distributed between its directors, officers and its employees; and the circumstances of the specific case: *ASIC v Maxwell* [2006] NSWSC 1052; (2006) 59 ACSR 373 (***Maxwell***) at [100] (Brereton J); *GetSwift* at [2531] (Lee J).

22 The "responsibilities" referred to by s 180(1) do not just refer to statutory responsibilities that the Act imposes upon the officer, but include whatever responsibilities the officer has within the corporation, regardless of how or why those responsibilities came to be imposed on that officer: *Shafron v Australian Securities and Investments Commission* [2012] HCA 18; (2012) 247 CLR 465 at [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52; (2020) 275 FCR 533 (***Cassimatis***) at [27] (Greenwood J) and [457] (Thawley J). The standard imposed by s 180

requires consideration of all of the circumstances of an officer's role including what others within the corporation expected the officer to do and including any special responsibilities that the officer had: *ASIC v Vines* at [1057]–[1069] (Austin J); *Cassimatis* at [27] (Greenwood J) and [455]–[457] (Thawley J). In Mr Nicholas's case, he was not only Chief Financial Officer and Company Secretary, but also held the following responsibilities as a Disclosure Officer under the FFG's Continuous Disclosure Policy:

(a) to make disclosures to the ASX;

(b) in discussion with Mr Macleod (as CEO) and Mr Gunner (as Chairman), to decide what information must be disclosed to the ASX;

(c) to conduct all disclosure discussions with FFG's management.

23 The test under s 180(1) is an objective one and is measured by what an ordinary person, with the knowledge and experience of the relevant director, would have done: *GetSwift* at [2527] (Lee J).

24 Directors and officers are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company: *ASIC v Healey* [2011] FCA 717; (2011) 196 FCR 291 (***Healey***) at [16]–[17] (Middleton J); *GetSwift* at [2535] (Lee J). A director or officer should become familiar with the fundamentals of the business in which the corporation is engaged; he or she is under a continuing obligation to keep informed about the activities of the corporation: *Healey* at [16]–[17] (Middleton J).

25 The conduct of a director contributing to a company's breach of the Act which exposes the company to prejudice (including any actual or potential exposure to civil penalties or other liability under the Act) may give rise to breaches of s 180(1), but such liability does not automatically follow from the fact that the company contravened a provision of the Act at the time the defendant was a director: *ASIC v Vocation Ltd (in liquidation)* [2019] FCA 807; (2019) 136 ACSR 339 (***Vocation***) at [730] (Nicholas J).

26 Section 180(1) does not impose an obligation on directors to conduct the affairs of the company in accordance with the law generally or the Act specifically: *Cassimatis* at [460] (Thawley J); *GetSwift* at [2538] (Lee J). However, liability under s 180(1) may be triggered where a director's failure to exercise reasonable care and diligence has caused or allowed the company to contravene the Act, at least where it was reasonably foreseeable that such contravention

might harm the company's interests: *Vocation* at [730]; *Maxwell* at [104] (Brereton J); *GetSwift* at [2538] (Lee J).

27 Relevant jeopardy to the interests of the company may be found in the actual or potential exposure of the company to civil penalties or other liability under the Act, and it may no doubt be a breach of a relevant duty for a director to embark on or authorise a course which attracts the risk of that exposure, at least if the risk is clear and the countervailing potential benefits insignificant: *Maxwell* at [104] (Brereton J); *Cassimatis* at [180] (Greenwood J) and [427] (Thawley J). It is the failure to guard against the foreseeable harm flowing from the company's contraventions that leads to the conclusion that the directors or officers did not discharge the degree of care and diligence required of them by s 180(1) of the Act: *Cassimatis* at [78] (Greenwood J) and [464]–[465] (Thawley J).

28 The duties of a chief financial officer extend to ensuring accuracy of financial statements. In *Healey*, Middleton J observed at [188(a)] that directors were required by s 180 to be diligent and careful in their consideration of the resolution to approve the accounts and reports. In *ASIC v Healey (No 2)* [2011] FCA 1003, Middleton J made a declaration against Mr Nenna reflecting his Honour's findings in respect of the chief financial officer that he had contravened s 180 of the Act by recommending to the directors a resolution to approve the annual financial report and annual directors' report in circumstances where:

(a) the chief financial officer knew information as to the company's liabilities such that he ought to have known that the annual financial report and directors' report did not comply with the Act and the Accounting Standards and did not give a true and fair view of the financial position of the company; and

(b) the chief financial officer did not take reasonable steps to rectify that non- compliance.

Giving misleading information to the Board and auditors: s 1309(2) of the Act

29 Section 1309(2) of the Act provides that:

> (2) An officer or employee of a corporation who makes available or gives information, or authorises or permits the making available or giving of information, to:
>
> (a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation; or
>
> (b) if the corporation is taken for the purposes of Chapter 2M to be controlled by another corporation - an auditor of the other corporation; or
>
> (c) an operator of a financial market (whether the market is operated in Australia or elsewhere) or an officer of such a

market;

being information, whether in documentary or any other form, relating to the affairs of the corporation that:

(d) is false or misleading in a material particular; or

(e) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;

without having taken reasonable steps to ensure that the information:

(f) was not false or misleading in a material particular; and

(g) did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect;

contravenes this subsection.

30 Section 1309(12) of the Act provides that:

> (12) A person contravenes this subsection if the person contravenes subsection (2).
> Note: This subsection is a civil penalty provision (see section 1317E).

31 There is a long line of authority that has considered the meaning of the term "false in a misleading particular" in different statutory contexts. It has been held that a statement or information will be false in a misleading particular where it is of some significance and is not inconsequential and that the matter that is said to make the statement or information misleading must be relevant to the purpose for which it was supplied: *Minister for Immigration, Local Government and Ethnic Affairs v Dela Cruz* (1992) 34 FCR 348 (***Dela Cruz***) at 352.

32 In *Dela Cruz* at 352, Black CJ, Davies and Neaves JJ explained:

> The expression "false in a material particular" appears in many statutes, both in this country and overseas. It has been discussed in *R v Lord Kylsant* [1932] 1 KB 442; *Murphy v Griffiths* [1967] 1 WLR 333; *R v Mallett* [1978] 1 WLR 820; *R v M* [1980] 2 NSWLR 195; *R v Brott* [1988] VR 1. In the last mentioned case, Brooking J pointed out that the concept is well understood. As his Honour said (at 11): "an assertion that a document is false is to be taken as an assertion that it is false in a material particular." The term "material" requires no more and no less than that the false particular must be of moment or of significance, not merely trivial or inconsequential.
>
> Section 20(1) does not apply to statements that are merely false or misleading; there is the added requirement that the statement must be false or misleading in a material particular. In the context of s 20(1), a statement will be false or misleading in a material particular if it is relevant to the purpose for which it is made: see *Jovcevski v Minister for Immigration, Local Government and Ethnic Affairs* (Federal Court, Lockhart J, 12 October 1989, unreported). A statement will be relevant to that purpose if it may — not only if it must or if it will — be taken into account in making a decision under the Act as to the grant of the visa or entry permit in respect of which the statement is made.

33 This statement has been applied subsequently on numerous occasions: *Singh v Minister for Immigration and Border Protection* [2019] FCAFC 22 at [3] (Reeves J, with whom Jagot and Derrington JJ agreed); *Khan v Minister for Immigration and Citizenship* [2011] FCA 75 at [23] (Moore J); *Brand v Digi-Tech (Aust) Ltd* [2002] NSWSC 416 at [1192] (Einstein J); *Gill v*

Chief Executive Officer of Customs (2001) 166 FLR 125 at [74] (Giles JA), with whom Howie J and Carruthers AJ agreed). This reasoning has also been used in the context of the statutory phrase "false in a material respect": *Kaur v Minister for Immigration and Border Protection* [2014] FCA 281 at [27], [43]–[44] (Wigney J).

Admitted facts and elements of the contraventions

34 As a listed entity, FFG was required each half and full financial year to prepare and provide to the ASX financial reports including financial statements which complied with Australian accounting standards. These financial statements were required to give a true and fair view of the financial position and performance of FFG and its subsidiaries which formed its consolidated group, including its inventories, revenue and profit.

35 At all material times, FFG had in place an accounting policy that was consistent with Australian accounting standards and required that its inventory be valued at the lower of cost and net realisable value (the **Inventory Accounting Policy**).

36 A consequence of the Inventory Accounting Policy was that the value of any inventory for which no sale price or other monetary benefit was likely to be received had to be written down and recorded as an expense in the period that the write-down or loss occurred (a **"write-off"**).

37 Additionally, at all material times, FFG had in place a revenue accounting policy that was consistent with Australian accounting standards and required that:

(a) revenue was measured at the fair value of the consideration received or receivable; and

(b) revenue from the sale of goods was recognised when all the following conditions were satisfied: (1) identification of contract, (2) identification of the performance obligations in the contract, (3) determination of the transaction price, (4) allocation of the transaction price to the performance obligations in the contract, and (5) recognition of revenue when performance obligations are satisfied (the **Revenue Accounting Policy**).

38 The relevant information withheld from the market in this proceeding concerns inventory and revenue, both of which the company had been monitoring during the relevant period.

39 FFG used an inventory management software (known as QAD) to manage and monitor its inventory. QAD contained a record of FFG's inventory levels (by number of items and inventory values in dollars).

40 Within QAD, inventory was recorded in terms of whether it was available for sale (where coded as "nettable" and "available") or not ("non-nettable"). Within the non-nettable category, inventory was given more specific status codes, including as to stock that was unable to be found (WWHOLD) or missing (MISS-NNN), was unsaleable for quality reasons (REJECT), or had expired or was subject to minimum life on receipt requirements (MLOR). Some of the inventory recorded in QAD did not exist. This was referred to by some FFG employees as "virtual stock" or "phantom stock".

41 The inventory recorded in QAD that was assigned a non-nettable status code included some stock that never existed (the "virtual stock"), had been rejected for quality reasons, had expired or was subject to MLOR requirements, or was otherwise stock for which no sale price or other monetary benefit was likely to be received (**Not Saleable Inventory**).

42 At all relevant times, FFG's chief financial officer was Mr Nicholas and its chief executive officer was Mr Rory Macleod (**Mr Macleod**). From around June 2018, Mr Macleod (with the knowledge of Mr Nicholas) put in place a standing policy that stock was not to be disposed of or written off unless Mr Macleod gave authority or permission to do so (the **No Write Off Policy**). During the period of contravention, Mr Macleod did not authorise any significant disposal or write-down of inventory of FFG and no such disposal or write-down occurred.

43 FFG produced, from time to time, inventory reports exported or extracted from QAD. Inventory reports were, from time to time, circulated to management including to Mr Macleod and Mr Nicholas. Sales revenue was monitored through regular "accounts receivable reports" circulated to management including Mr Macleod and Mr Nicholas.

44 The inventory reports and their contents were also available through a business intelligence software program and application called Power BI.

45 From around 26 July 2019, each of Mr Macleod and Mr Nicholas:

(a) received access to the Power BI application on their desktop computers and mobile phones which, displayed, amongst other data, FFG's inventory levels and value, the balance of non-nettable inventory (as those balances changed from time to time) and the value of FFG's inventory for each status code; and

(b) accessed (and used) the Power BI application and were able to see the value of non-nettable inventory and the value of FFG's inventory for each status code.

46 In early October 2019, Ms Stephanie Graham, FFG's former group financial controller and then General Manager of Commercial Strategy, attended two warehouses leased by FFG near the Shepparton Site, photographed the stock she observed in the warehouses and showed the photos to Mr Macleod and Mr Nicholas shortly after she saw it. She also told Mr Macleod and Mr Nicholas that there was an "enormous" amount of Not Saleable Inventory stored at the Mooroopna warehouse. On 6 November 2019, Mr Nicholas sent Ms Graham a text message in which he said: "I have just walked through all the hidden factories at Shepparton - holy holy crap!" and Ms Graham responded "yep, photos don't do it justice".

47 As a result of the No Write Off Policy and the practices that developed because of it, before May 2020, FFG failed to apply the Inventory Accounting Policy and accumulated material amounts of Not Saleable Inventory which it did not write-off.

48 By 29 August 2019, Mr Nicholas had received inventory reports and had accessed the Power BI app, which showed that FFG had non-nettable stock in excess of $28 million.

49 On 29 August 2019, FFG provided the FY19 Financial Report to the ASX which stated that:

(a) as at 30 June 2019, FFG had current assets consisting of inventories valued at $120.2 million (**FY19 Disclosed Inventories**);

(b) FFG had prepared the FY19 Financial Report in accordance with the accounting policies disclosed in that report;

(c) FFG had valued its inventories in accordance with its Inventory Accounting Policy;

(d) FFG had measured its revenue in accordance with its Revenue Accounting Policy;

(e) the financial statements and notes in the FY19 Financial Report gave a true and fair view of FFG's financial position as at 30 June 2019 and of its performance for the financial year ended on that date.

50 On and from 29 August 2019 until 25 May 2020:

(a) the FY19 Disclosed Inventories were $120.2 million which included Not Saleable Inventory of at least $20 million;

(b) FFG had not made sufficient or adequate provisions and had failed to write down the value of the FY19 Disclosed Inventories to account for the Not Saleable Inventory;

(c) the FY19 Disclosed Inventories were overstated by at least $20 million as a result of the inclusion of the Not Saleable Inventory;

(d) by reason of one or more of the matters referred to in subparagraphs (a)-(c) above, the FY19 Disclosed Inventories were not recorded in the FY19 Financial Report in accordance with FFG's Inventory Accounting Policy; and

(e) by reason of one or more of the matters referred to in subparagraphs (a)-(d) above, the financial statements and notes in the FY19 Financial Report did not give a true or fair view of the financial position and performance of FFG,

(together, the **FY19 Information**).

51 Between September 2019 and March 2020, Mr Nicholas had received inventory reports and had accessed the Power BI app, which showed that FFG had non-nettable stock in excess of $29 million.

52 On 27 February 2020, FFG released its HY20 Financial Report in which FFG stated that:

(a) as at 31 December 2019, FFG had current assets which included inventories valued at $122.3 million (**HY20 Disclosed Inventories**);

(b) for the half year ending 31 December 2019, FFG received revenue from sale of goods of $299.7 million **(HY20 Disclosed Revenue**);

(c) for the half year ending 31 December 2019, FFG achieved gross profit of $81.2 million and profit before tax of $6.9 million (HY20 Disclosed Profit);

(d) the HY20 Financial Report did not include all the notes of the type normally included in annual financial statements and that the financial statements were to be read in conjunction with the FY19 Financial Report;

(e) the principal accounting policies adopted were consistent with those of the previous financial year; and

(f) the financial statements and notes in the HY20 Financial Report gave a true and fair view of FFG's financial position as at 31 December 2019 and of its performance for the financial half-year ended on that date.

53 On and from 27 February 2020 until 25 May 2020:

(a) the HY20 Disclosed Inventories were $122.3 million of which Not Saleable Inventory was at least $20 million;

(b) FFG had not made sufficient or adequate provisions and had failed to write down the value of the HY20 Disclosed Inventories to account for the Not Saleable Inventory;

(c) the HY20 Disclosed Inventories were overstated by at least $20 million as a result of the inclusion of the Unsaleable Inventory;

(d) by reason of one or more of the matters referred to in subparagraphs (a)-(c) above, the HY20 Disclosed Inventories were not recorded in the HY20 Financial Report in accordance with the Inventory Accounting Policy; and

(e) by reason of one or more of the matters referred to in subparagraphs (a)-(d) above, the financial statements and notes in the HY20 Financial Report did not give a true or fair view of the financial position and performance of FFG,

(together, the **HY20 Inventory Information**).

54 In the second half of FY19, FFG produced and sold a product named lactoferrin, which was a high margin or high profit product, being a by-product extracted from milk. The cost of goods allocated to the sale of lactoferrin once payment was received was between 5-8% of the sale price, resulting in a margin of at least 92%.

55 In April 2019, FFG received a lucrative purchase order from a Singaporean company, Interfood Pte Ltd (**Interfood**), for 4000kg of lactoferrin at a price of USD$1,950 per kg, representing a total price of USD7.8 million. However, the purchase order was subject to customer sample approval, Certification and Accreditation Administration of China (**CNCA**) approval and an export licence to China by June 2019, failing which the customer had a right to cancel the order.

56 Between 1 July 2019 and 31 December 2019, FFG raised 16 invoices in respect of lactoferrin to Interfood (**Lactoferrin Invoices**), amounting to a total price of USD$6.84 million, being at least AUD$9.8 million (**Lactoferrin Invoice Amounts**).

57 FFG recognised and recorded in its accounts the Lactoferrin Invoice Amounts as soon the Lactoferrin Invoices were raised, and did not record any cost of goods sold.

58 However, in the period from 1 July 2019 to 31 December 2019, no lactoferrin the subject of the Lactoferrin Invoices was delivered to Interfood, Interfood had the right to cancel the order because CNCA and sample approval had not been obtained by June 2019 and no payment was made by Interfood to FFG in respect of the Lactoferrin Invoices (the **Non-Revenue Information**).

59 Mr Nicholas received regular accounts receivable reports, and knew that, as at 7 February 2020, no payment had been received by FFG from Interfood in respect of the Lactoferrin Invoices.

On or about 26 March 2020, Ms Shepherd also informed Mr Nicholas that lactoferrin sales to Interfood with a P&L impact of -$9,309,375 had not been shipped.

60 The Lactoferrin Invoice Amounts contributed at least $8.5 million towards FFG's gross profit recorded in the HY20 Financial Report (**Lactoferrin Profit Information**).

61 From 27 February 2020 until 25 May 2020:

(a) the HY20 Disclosed Revenue included the Lactoferrin Invoice Amounts despite the existence of the Non-Revenue Information;

(b) FFG had failed to reduce the value of the HY20 Disclosed Revenue to account for the Non-Revenue Information;

(c) the HY20 Disclosed Revenue was overstated by at least $9.8 million as a result of the Non-Revenue Information;

(d) the HY20 Disclosed Profit included the Lactoferrin Invoice Amounts despite the existence of the Non-Revenue Information and the Lactoferrin Profit Information;

(e) the HY20 Disclosed Profit was overstated by at least $8.5 million as a result of the Non-Revenue Information and the Lactoferrin Profit Information;

(f) the HY20 Disclosed Revenue and the HY20 Disclosed Profit were not recorded in the HY20 Financial Report in accordance with the Revenue Accounting Policy; and

(g) by reason of one or more of the matters referred to in subparagraphs (a)-(f) above, the financial statements and notes in the HY20 Financial Report did not give a true or fair view of the financial position and performance of FFG,

(together, **HY20 Revenue Information**).

62 The FY19 Information and the HY20 Combined Information (comprising the HY20 Inventory Information and the HY20 Revenue Information) was information that was required to be notified to the ASX by FFG under ASX Listing Rule 3.1 and s 674(2)(b) of the Act.

63 Mr Nicholas received inventory reports and had access to the Power BI application which showed him the level and value of non-nettable inventory. FFG was therefore aware of the FY19 Information from August 2019 until 25 May 2020, because, relevantly, Mr Nicholas knew the FY19 Information during that period, as an officer of FFG. FFG was also aware of the HY20 Combined Information from 27 February 2020 and before 25 May 2020, because it was information that Mr Nicholas knew.

64 The FY19 Information, the HY20 Inventory Information and the HY20 Revenue Information was not generally available. The FY19 Information and the HY20 Inventory Information arose from inventory reports which were confidential and had not been disclosed. The HY20 Revenue Information arose from internal information as to the details of the purchase order, the cost of goods of lactoferrin and accounts receivable reports, which were confidential and had not been disclosed.

65 The FY19 Information (alone) and the HY20 Inventory Information and the HY20 Revenue (in combination) (**HY20 Combined Information**) were information which a reasonable person would have expected, if it had been generally available, to have had a material effect on the price of the FFG's shares within the meaning of s 674(2) of the Act.

66 In considering whether the relevant information was material, I also take into account the fall in the price of FFG's shares immediately following the corrective disclosure on 22 March 2021, namely a fall of 82.39% from the day of the trading halt, to confirm the correctness of the conclusion as to materiality. A similar approach was taken to the question of materiality in *Grant-Taylor v Babcock & Brown Limited (in liq)* [2015] FCA 149; (2015) 322 ALR 723 at [64] (Perram J), cited in *GetSwift* at [1094] (Lee J); and *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332; (2010) 274 ALR 85 at [534]–[535] (Spigelman J, Beazley JA and Giles JA), cited in *GetSwift* at [1103] (Lee J).

67 As is apparent from the facts referred to above, including his role as CFO and Disclosure Officer, from 29 August 2019 until 25 May 2020, Mr Nicholas knew each of the following matters:

(a) FFG had released the FY19 Financial Report to the ASX on 29 August 2019;

(b) the FY19 Information;

(c) FFG was aware (because Mr Nicholas was aware) of the FY19 Information;

(d) the FY19 Information was not generally available;

(e) the FY19 Information was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of FFG's shares;

(f) the FY19 Information required immediate disclosure pursuant to ASX Listing Rule 3.1; and

(g) FFG had not notified the ASX of the FY19 Information.

68 Mr Nicholas failed to cause FFG to take any steps to notify the ASX of the FY19 Information from 29 August 2019 until 25 May 2020.

69 FFG therefore contravened s 674(2) of the Act from 29 August 2019 until 25 May 2020 by failing to notify the ASX of the FY19 Information. Mr Nicholas participated in FFG's contravention of s 674(2) of the Act by:

(a) authorising the release of the FY19 Financial Report;

(b) providing the signed August 2019 Representation Letter to the Board and Deloitte; and

(c) failing to cause FFG to take any steps to notify the ASX of the FY19 Information from 29 August 2019 until 25 May 2020.

70 Mr Nicholas admits, and I find, that from 29 August 2019 until 25 May 2020, he was:

(a) directly or indirectly knowingly concerned within the meaning of s 79 of the Act in the contraventions by FFG of s 674(2) and thereby was involved in those contraventions; and

(b) thereby contravened s 674(2A) of the Act on each day that FFG contravened s 674(2) of the Act.

71 Mr Nicholas's contraventions of s 674(2A):

(a) materially prejudiced the interests of acquirers or disposers of FFG's shares within the meaning of s 1317G(1)(c)(i) of the Act; and

(b) were "serious" within the meaning of s 1317G(1)(c)(iii) of the Act.

72 As is apparent from the facts referred to above, including his role as CFO and Disclosure Officer, from 27 February 2020 until 25 May 2020, Mr Nicholas knew each of the following matters:

(a) FFG released the HY20 Financial Report to the ASX on 27 February 2020;

(b) the HY20 Combined Information (being the combination of the HY20 Inventory Information and the HY20 Revenue Information);

(c) FFG was aware (because Mr Nicholas was aware) of the HY20 Combined Information;

(d) the HY20 Combined Information was not generally available;

(e) the HY20 Combined Information was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of FFG's shares;

(f) the HY20 Combined Information required immediate disclosure pursuant to ASX Listing Rule 3.1; and

(g) FFG had not notified the ASX of the HY20 Combined Information.

73 Mr Nicholas failed to cause FFG to take any steps to notify the ASX of the HY20 Combined Information from 27 February 2020 until 25 May 2020.

74 FFG therefore contravened s 674(2) of the Act from 27 February 2020 until 25 May 2020 by failing to notify the ASX of the HY20 Combined Information. Mr Nicholas participated in FFG's contravention of s 674(2) of the Act by:

(a) authorising the release of the HY20 Financial Report;

(b) providing the signed February 2020 Representation Letter to the Board and Deloitte; and

(c) failing to cause FFG to take any steps to notify the ASX of the HY20 Combined Information from 27 February 2020 until 25 May 2020.

75 Mr Nicholas admits, and I find, that from 27 February 2020 until 25 May 2020, he:

(a) was directly or indirectly knowingly concerned within the meaning of s 79 of the Act in the contraventions by FFG of s 674(2) and thereby involved in those contraventions; and

(b) thereby contravened s 674(2A) of the Act on each day that FFG contravened s 674(2) of the Act.

76 Mr Nicholas's contraventions of s 674(2A):

(a) materially prejudiced the interests of acquirers or disposers of FFG's shares within the meaning of s 1317G(1)(c)(i) of the Act; and

(b) were "serious" within the meaning of s 1317G(1)(c)(iii) of the Act.

77 Mr Nicholas admits that he engaged in two contraventions of s 180(1) in respect of each financial reporting period.

78 In respect of FY19, Mr Nicholas admits, and I find, that he contravened s 180(1) from 29 August 2019 until 30 April 2020, by failing to exercise the degree of care and diligence that a reasonable person acting as Chief Financial Officer and Company Secretary of a company in FFG's circumstances would have exercised in:

(a) causing or permitting FFG to disclose the FY19 Financial Report;

(b) failing to ensure that FFG had devised and implemented adequate policies and procedures for the write down of Not Saleable Inventory;

(c) failing to ensure that FFG had devised and implemented adequate policies and procedures for the preparation of financial statements in accordance with the Act and Australian Accounting Standards;

(d) failing to take reasonable steps to qualify, withdraw or correct the FY19 Financial Report to mitigate the risk that FFG's financial statements were inaccurate or misleading;

(e) failing to take all reasonable steps to disclose the FY19 Information to the Board of Directors and to the ASX or to mitigate the risk of such non-disclosure;

(f) failing to take all reasonable steps to ensure that he had sufficient knowledge of FFG's inventories including the value of Not Saleable Inventory; and

(g) failing to take reasonable steps to ensure that the FY19 Financial Report gave a true and fair view of FFG's financial position and performance of FFG.

79 Mr Nicholas also admits, and I find, that he contravened s 180 of the Act from 29 August 2019 until 30 April 2020 by failing to exercise the degree of care and diligence that a reasonable person acting as Chief Financial Officer and Company Secretary of a company in FFG's circumstances would have exercised in causing or permitting (or failing to prevent) FFG to contravene s 674(2) of the Act, in circumstances where it was reasonably foreseeable that such conduct might harm the interests of the company and exposing it to the risk of legal proceedings for contraventions of the Act, legal costs and penalties.

80 In respect of HY20, Mr Nicholas admits, and I find, that he contravened s 180(1) from 27 February 2020 until 30 April 2020 by failing to exercise the degree of care and diligence that a reasonable person acting as Chief Financial Officer and Company Secretary of a company in FFG's circumstances would have exercised in:

(a) causing or permitting FFG to disclose the HY20 Financial Report;

(b) failing to ensure FFG had devised and implemented adequate policies and procedures for the write down of Not Saleable Inventory,

(c) failing to ensure FFG had devised and implemented adequate policies and procedures for the recognition of revenue;

(d) failing to ensure FFG had devised and implemented adequate policies and procedures for the preparation of financial statements in accordance with the Act and Australian accounting standards;

(e) failing to take reasonable steps to qualify, withdraw or correct the HY20 Financial Report to mitigate the risk that FFG's financial statements were inaccurate or misleading;

(f) failing to take all reasonable steps to disclose the HY20 Combined Information to the Board and to the ASX, or alternatively, mitigate the risk of such non-disclosure;

(g) failing to take all reasonable steps to ensure that he had sufficient knowledge of FFG's inventories including the value of the Not Saleable Inventory; and

(h) failing to take all reasonable steps to ensure that the HY20 Financial Report gave a true and fair view of the financial position and performance of FFG.

81 Mr Nicholas also admits, and I find, that he contravened s 180 of the Act from 27 February 2020 until 30 April 2020 by failing to exercise the degree of care and diligence that a reasonable person acting as Chief Financial Officer and Company Secretary of a company in FFG's circumstances would have exercised in causing or permitting (or failing to prevent) FFG to contravene s 674(2) of the Act, in circumstances where it was reasonably foreseeable that such conduct might harm the interests of the company and expose it to the risk of legal proceedings for contraventions of the Act, legal costs and penalties.

82 Mr Nicholas admits he engaged in four contraventions of s 1309(2) in respect of his signing and giving a "representation letter" to the Board of FFG and to FFG's auditors, Deloitte (as required by s 295A of the Act).

83 Mr Nicholas engaged in four contraventions of s 1309(2) by:

(a) providing the August 2019 Representation Letter to FFG's Board of Directors in respect of the FY19 Financial Report;

(b) providing the August 2019 Representation Letter to FFG's auditors, Deloitte, in respect of the FY19 Financial Report;

(c) providing the February 2020 Representation Letter to FFG's Board of Directors in respect of the HY20 Financial Report; and

(d) providing the February 2020 Representation Letter to Deloitte in respect of the HY20 Financial Report.

84 The contraventions of s 1309(2) arose on each occasion on which Mr Nicholas provided the relevant representation letter to the Board or Deloitte because each letter contained an express statement to the effect that the relevant financial report to which it related (either the FY19 Financial Report or the HY20 Financial Report):

(a) was prepared and presented in accordance with the Act;

(b) gave a true and fair view of FFG's financial position as at the reporting date;

(c) complied with Australian Accounting Standards; and

(d) had no inventory stated at an amount in excess of net realisable value.

85 The representations (being the FY19 Financial Report Representations and the HY20 Financial Report Representations) were:

(a) information that relates to the affairs of FFG (within the meaning of s 1309(2) of the Act); and

(b) false or misleading in a material particular (being in a significant and not inconsequential respect) because they omitted the FY19 Information and HY20 Combined Information respectively.

86 If the FY19 Information and the HY20 Combined Information had been disclosed, it would have revealed that each of the FY19 Financial Report and HY20 Financial Report:

(a) was not prepared and presented in accordance with the Act;

(b) did not give a true and fair view of FFG's financial position as at the reporting date;

(c) did not comply with Australian Accounting Standards (as to inventory or revenue); and

(d) had inventory stated at an amount in excess of net realisable value.

87 During the period 29 August 2019 until 30 April 2020, despite having knowledge of the FY19 Information and the HY20 Combined Information, Mr Nicholas failed to take reasonable steps to:

(a) inform the Board of Directors of FFG, and Deloitte, of the FY19 Information and the HY20 Combined Information; and

(b) ensure the FY19 Financial Report Representations and HY20 Financial Report Representations were not false or misleading in a material particular or did not omit the FY19 Information and the HY20 Combined Information.

88 By reason of his conduct, Mr Nicholas admits, and I find, that he contravened s 1309(2) (and thereby also s 1309(12) of the Act):

(a) between 29 August 2019 and 30 April 2020, in respect of the August 2019 Representation Letter; and

(b) between 27 February 2020 and 30 April 2020, in respect of the February 2020 Representation Letter.

Proposed declarations of contravention and applicable principles

89 Provided the Court is satisfied that the contraventions occurred, pursuant to s 1317E(1) of the Act, it must make a declaration of contravention.

90 Pursuant to s 1317E(2) of the Act, the declaration must specify, relevantly:

(a) the court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision; and

(d) the conduct that constituted the contravention.

91 As a general principle a Court does not make declarations on matters relating to public rights, or rights analogous thereto, by consent or on admissions, but only if it is satisfied by evidence: *ASIC v Rich* [2004] NSWSC 836; (2004) 50 ACSR 500 (***Rich***) at [10] (White J). Having regard to s 1317F, and the disqualification order which might be made consequent upon the declaration under s 1317E, the present case involves public or other analogous rights: *Rich* at [11].

92 One of the reasons the Court may decline to make declarations by consent is the absence of a contradictor. However, because s 1317E provides that the Court must make a declaration if satisfied that the person has contravened a civil penalty provision, the absence of a contradictor is only relevant if it means that the Court does not reach a state of satisfaction on the materials presented: *Rich* at [12].

93 Although a declaration cannot be made under s 1317E unless the court is satisfied that the contravention has occurred, the material which may produce that satisfaction may include a statement of agreed facts and admissions by the parties: *Rich* at [15]; *Australian Securities and Investments Commission v Macquarie Bank Ltd* [2024] FCA 416 at [56] (Wigney J). It is also consistent with the course adopted by Austin J in *Dean-Willcocks Pty Ltd v Commissioner of Taxation (No 2)* [2004] NSWSC 286; (2004) 49 ACSR 325, in which his Honour observed (at [28]):

> A court is never bound by admissions made inter parties or in the pleadings: *Termijtelen v Van Arkel* [1974] 1 NSWLR 525. It may decline to act on admissions if, for example, they are made so as to attract a jurisdiction that is not naturally present. However, in most cases it is appropriate to allow and even encourage parties to simplify litigation by making admissions so as to achieve the just, quick and cheap resolution of their dispute. …

94 In *Dean-Willcocks*, Austin J also said (at [27]) that there is no general principle preventing a court from being "satisfied" of the matters that it is required by statute to address before making orders, where there is an admission between parties; nor is there any principle requiring a court in those circumstances to undertake its own factual inquiry when the parties invite it to do no more than act upon their consent. It is up to the court to consider, in the circumstances of the case, whether admissions are sufficient to warrant its being "satisfied". In *ASIC v Healey*, the Court made declarations of contravention in respect of the chief financial officer on the basis of his admissions only: *Healey* at [4], [6] and [587] (Middleton J); *ASIC v Healey (No 2)* [2011] FCA 1003; (2011) 196 FCR 430 at [8] and [81] (Middleton J).

95 In *Australian Securities & Investments Commission v Cash King Pty Ltd* [2005] FCA 1429, Stone J said at [3] that a declaration, being a judicial act, ought not to be made merely on admissions or by consent, but only if the Court is satisfied by evidence. However, *Cash King* concerned a declaration under s 21 of the *Federal Court Act 1976* (Cth), in which the Court has a broad discretion unconstrained by the mandatory language of declarations under statutes: *ASIC v Mercer Superannuation (Australia) Limited* [2024] FCA 850 at [67] (Horan J); see also *ASIC v Holista Colltech Ltd* [2024] FCA 244 at [42]–[51] (Sarah C Derrington J), as to the distinct considerations in the exercise of the statutory power to make declarations under s 1317E and the discretion under s 21 of the *Federal Court Act* where declarations are sought by consent. Under s 1317G, if the Court is satisfied that a person has contravened a civil penalty provision, it has no discretion to refuse to make the declaration: *Rich* at [10]. The mandatory terms of the section necessarily override the discretionary considerations to which a court might otherwise have given weight, in declining to make a declaration: *Mayfair Wealth Partners Pty*

Ltd v Australian Securities and Investments Commission [2022] FCAFC 170 at [184] (Jagot, O'Bryan and Cheeseman JJ) in respect of the analogous s 12GBA of the *Australian Securities and Investments Commission Act 2001* (Cth).

96 ASIC submits, and I accept, that the material before the Court, which includes Mr Nicholas's admissions as well as a selection of documentary material to support those admissions, is appropriate and sufficient to allow the Court to reach the necessary state of satisfaction to enliven the operation of s 1317G of the Act.

Disqualification orders and relevant legal principles

97 The Court has power to order disqualification under s 206C and s 206E of the Act.

98 Section 206C of the Act provides that:

> (1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:
>
> (a) a declaration is made under:
>
> (i) section 1317E (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision or subsection 670A(4), 727(6), 728(4) or 1309(12); or
>
> …; and
>
> (b) the Court is satisfied that the disqualification is justified.
>
> (2) In determining whether the disqualification is justified, the Court may have regard to:
>
> (a) the person's conduct in relation to the management, business or property of any corporation; and
>
> (b) any other matters that the Court considers appropriate.

99 It is appropriate that a disqualification order is considered first, and before any pecuniary penalty is assessed: *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; (2022) 292 FCR 627 at [143]–[145] (Allsop CJ, Jackson and Anderson JJ).

100 The principles which guide the exercise of the Court's power to order disqualification pursuant to s 206C of the Act were identified by Santow J in *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); ASIC v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 at [56]. They include, relevantly:

> (i) Disqualification orders are designed to protect the public from harmful use of the corporate structure or from use that is contrary to proper commercial standards;
>
> (ii) The banning order is designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office;

(iii) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors;
(iv) The banning order is protective against present and future misuse of the corporate structure;
(v) The order has a motive of personal deterrence, though it is not punitive;
(vi) The objects of general deterrence are also sought to be achieved;
(vii) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company;
(viii) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty;
(ix) In assessing an appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public;
(x) It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct;
(xi) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming;
(xii) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs (WA) v Ekamper* (1987) 12 ACLR 519 have been influential. It was held that in making such an order it is necessary to assess:
- character of the offenders;
- nature of the breaches;
- structure of the companies and the nature of their business;
- interests of shareholders, creditors and employees;
- risks to others from the continuation of offenders as company directors;
- honesty and competency of offenders;
- hardship to offenders and their personal and commercial interests; and
- offenders' appreciation that future breaches could result in future proceedings;

[authorities omitted].

Penalty provisions and relevant legal principles

101 Sections 674(2A), 180(1) and 1309(12) of the Act are each a civil penalty provision, contravention of which requires that the Court must make a declaration of contravention (s 1317E(1)).

102 Section 674(2A) is a "financial services civil penalty provision" (s 1317E(3)(c)). Therefore, once a declaration of contravention has been made under s 1317E(1) of the Act, the Court may, under s 1317G(1)(c) of the Act, order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of s 674(2A) if the contravention:

(a) materially prejudices the interests of acquirers or disposers of the relevant financial products; or

(b) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or

(c) is serious.

103 Section 180(1) is a "corporation/scheme civil penalty provision" (s 1317E(3)(b)). Therefore, once a declaration of contravention has been made under s 1317E(1) of the Act, the Court may, under s 1317G(1)(b) of the Act, order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of s 180(1) if the contravention:

(a) materially prejudices the interests of acquirers or disposers of the relevant financial products; or

(b) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation or scheme, the members of that corporation or scheme; or

(c) is serious.

104 As I discuss further below, Mr Nicholas admits, and I accept, that each contravention of s 674(2A) and s 180(1) materially prejudiced the interests of shareholders and was serious.

105 In respect of s 1309(12), once a declaration of contravention has been made under s 1317E(1) of the Act, the Court may, under s 1317G(1)(a) of the Act, order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention.

106 Section 1317G(3) provides that the pecuniary penalty applicable to the contravention of a civil penalty provision by an individual is the greater of:

(a) 5,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3.

107 Between 1 July 2017 and 30 June 2020, a penalty unit was $210: s 4AA *Crimes Act 1914* (Cth). At the time of the contraventions, 5,000 penalty units was $1,050,000.

108 The benefit derived and detriment avoided because of the contraventions cannot readily be calculated. Therefore, ss 1317G(3)(b) of the Act does not assist in calculating the maximum penalty.

109 Section 1317G(6) of the Act provides that, in determining the pecuniary penalty, the Court must take into account all relevant matters, including:

(a) the nature and extent of the contravention;

(b) the nature and extent of any loss or damage suffered because of the contravention;

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in foreign country) to have engaged in similar conduct.

110 Contraventions that involve a breach of continuous disclosure obligations are, by their very nature, serious contraventions: *ASIC v Helou (No 2)* [2020] FCA 1650 at [149] (Beach J); *ASIC v Blue Star Helium Limited (No 4)* [2021] FCA 1578; (2021) 158 ACSR 196 at [82] (Banks-Smith J). In the present case, in the period from 29 August 2019 until 25 May 2020, the average volume of FFG shares traded on the ASX each day was 702,860 and a total of 131,434,905 trades in FFG shares occurred. Following corrective disclosure on 22 March 2021, the closing price of FFG's shares was 82.39% lower and the volume of shares traded was 1,042.81% higher than when trading was last halted on 24 June 2020.

111 ASIC and Mr Nicholas also agree that the contraventions of s 674(2A) and s 180(1) materially prejudiced the interests of FFG's shareholders, being the interests of acquirers or disposers of shares in FFG, within the meaning of s 1317G(1)(c)(iii) of the Act.

112 The contraventions materially prejudiced the interests of FFG's shareholders because:

(a) FFG shares were traded, and shareholders bought and sold their shares, in an uninformed market from 29 August 2019 until 25 May 2020; and

(b) the non-disclosure of the information harmed FFG and caused its share price to collapse after the information was belatedly revealed.

113 The purpose of a civil penalty regime is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the relevant Act by the deterrence, specific and general, of further contraventions: *Australian Building and Construction Commission v Pattinson* [2002] HCA 13; (2022) 274 CLR 450 at [9], [15] and [31] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3; (2018) 262 CLR 157 at [87] (Keane, Nettle and Gordon JJ).

114 The penalty must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business: *Australian Competition and*

Consumer Commission v TPG Internet Pty Ltd [2013] HCA 54; (2013) 250 CLR 640 at [66] (French CJ, Crennan, Bell and Keane JJ); *Pattinson* at [17]. In other words, those engaged in trade and commerce must be deterred from the cynical calculation involved in weighing up the risk of penalty against the profits to be made from contravention: *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [63] (Keane CJ, Finn and Gilmour JJ). However, the penalty should not be greater than is necessary to achieve the object of deterrence, and severity beyond that is oppression: *Pattinson* at [40] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

115 Further guidance as to the approach to be adopted in assessing the quantum of an appropriate penalty is to be drawn from the joint reasons of Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ in *Pattinson* as follows:

(a) The prescribed maximum penalty is one yardstick that ordinarily must be applied and must be treated as one of a number of relevant factors (at [54]).

(b) The maximum penalty is not to be reserved for the most serious cases and there is no place for the notion that the penalty must be proportionate to the seriousness of the conduct that constituted the contraventions (at [10], [49] and [51]).

(c) The required relationship between the statutory maximum and the penalty in a particular case is established where the penalty as imposed does not exceed what is reasonably necessary to achieve general and specific deterrence (at [10]).

(d) Neither retribution nor rehabilitation has any part to play in economic regulation where civil penalties are to be imposed where there is a failure to comply with the regulatory requirements (at [15] and [39]).

(e) Factors pertaining to the character of the contravening conduct and the character of the contravener may be considered, but there is no legal checklist and the task is to determine the appropriate penalty in the circumstances of the particular case (at [19] and [44]).

(f) The discretion to assess the appropriate penalty must be exercised fairly and reasonably for the purpose of protecting the public interest by deterring future contraventions (at [40] and [48]).

(g) The penalty must not be oppressive by being greater than is necessary to achieve the object of deterrence and, in that particular sense, must be proportionate (at [40]–[41]).

(h) Concepts from criminal sentencing such as totality, parity and course of conduct may be usefully deployed in the assessment of what is reasonably necessary to deter further contravention (at [45]).

(i) It will be appropriate to consider whether the conduct involves a deliberate flouting of the law, whether the person responsible was aware of the law and whether they have been disciplined for their conduct (at [46]).

116 What is required is a "reasonable relationship between the theoretical maximum and the final penalty imposed": *Pattinson* at [10]. That relationship is established where the maximum penalty does not exceed what is reasonably necessary for specific and general deterrence of future contraventions of a like kind by the contravener and by others: *Pattinson* at [10]. This may be established by reference to the circumstances of the contravener and the contravening conduct: *Pattinson* at [55].

117 The penalty that is appropriate by way of general deterrence may be moderated by factors of the kind adverted to by French J in *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 to the extent that they bear upon an assessment of what is required to deter future contraventions: *Pattinson* at [47]. However, these must not be considered a "rigid catalogue of matters for attention": *Pattinson* at [19]. Those factors (which substantially overlap with the mandatory factors in section 1317G(6) of the Act) are, relevantly, (1) the nature and extent of the contravening conduct, (2) the amount of loss or damage caused, (3) the circumstances in which the conduct took place, (4) the size of the contravening company, (5) the degree of power it has, as evidenced by its market share and ease of entry into the market, (6) the deliberateness of the contravention and the period over which it extended, and (7) whether the contravention arose out of the conduct of senior management or at a lower level.

The appropriate disqualification period and penalty in this case

118 A Court will usually give significant weight to what the regulator, as ASIC is here, considers necessary to achieve specific and general deterrence: *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72; (2004) ATPR 41-993 at [51] in which the Full Court distilled the key propositions which emerged from *NW Frozen Foods Pty Ltd v ACCC* (1996) 71 FCR 285. The task for the Court is to satisfy itself that the submitted penalty, or disqualification period, is appropriate: *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate Construction, Forestry, Mining and Energy Union v*

Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482 at [48].

119 ASIC submits, and I accept, that the appropriate disqualification period is 4 years and the appropriate penalty is $100,000. A period of disqualification of this length is appropriate to achieve the protective objects of a disqualification order. A penalty in this amount is appropriate because it achieves the principal object of general deterrence, having the necessary sting or burden to secure such a deterrent effect, but not being so great as to be oppressive, particularly given Mr Nicholas will have been disqualified from managing corporations.

120 The salient features of the present case which support the proposed disqualification and penalties are as follows.

121 *First,* Mr Nicholas's involvement in FFG's failure to disclose the relevant information to the market stems from the deliberate withholding of material, financial information by a senior officer from the Board and auditors.

122 *Second,* Mr Nicholas's contraventions form part of a course of conduct that spanned eight months and two financial reporting periods. It therefore cannot be said to be isolated, or a momentary lapse in judgement.

123 *Third,* Mr Nicholas held senior positions of responsibility within FFG, being Chief Financial Officer, Company Secretary and a Disclosure Officer under FFG's Continuous Disclosure Policy. The relevant information (being inventory and revenue information) was the very information Mr Nicholas was responsible for monitoring during the period of contraventions. Inventory information was monitored through inventory reports, and the revenue information was monitored through accounts receivable reports. The information, by its nature, was critical to FFG as a consumer goods business. It was readily available to Mr Nicholas including on the Power BI app on his phone and desktop computer. Despite the availability and importance of the information, Mr Nicholas failed to inform the Board of its existence.

124 *Fourth*, Mr Nicholas's awareness of the facts and circumstances giving rise to the relevant information, especially as to the mounting non-nettable inventory, of concerns expressed to him by senior employees, the admitted No Write Off Policy and the advice given to Mr Nicholas that the lactoferrin issue was likely to cause a P&L loss of $9,309,375 gives rise to an inference that the omission of the relevant information from the financial reports was deliberate or at least reckless conduct by Mr Nicholas.

125 *Fifth,* the relevant information was internal to the company, and would not have been discoverable by a third party. The Board of FFG (and the market) therefore relied on Mr Nicholas as Chief Financial Officer and Disclosure Officer under the Continuous Disclosure Policy, to ensure FFG complied with its continuous disclosure obligations in order to trade on an informed basis.

126 *Sixth,* despite Mr Nicholas's knowledge of the FY19 Information and the HY20 Combined Information, he did not take steps to inform the FFG Board of this information. The minutes of the FFG Board meeting on 28 May 2020 evidence that the FFG Board was unaware of the information prior to that date.

127 *Seventh*, the failure to disclose the relevant information to the market was significant as the ultimate fall in FFG's share price (-82.39%) and the increase in the volume of shares traded (+1,042.81%) when the relevant information was disclosed is also indicative of the significance and price sensitive nature of the relevant information, with the potential to significantly affect the market and cause loss to investors.

128 *Eighth,* it may be inferred that investors are likely to have acquired shares in the period between 29 August 2019 and 27 February 2020 at a price that was higher than the price the shares would have traded at had the FY19 Inventory Information, HY20 Inventory Information and the HY20 Revenue Information been disclosed on 29 August 2019 and 27 February 2020, respectively.

129 *Ninth,* in light of FFG's market capitalisation and the volume of shares traded on the ASX during the period of contravention (a total of 131,434,905), the potential effect of the contravening conduct on the market and harm to investors was significant. During the period of the contravention (namely 29 August 2019 to 25 May 2020), the value of FFG shares traded on market was $723.5 million.

130 *Tenth,* the No Write Off Policy, and the practices that developed because of it (before May 2020), such that FFG failed to apply the Inventory Accounting Policy and accumulated material amounts of Not Saleable Inventory which it did not write-off, as well as FFG's practice of recognising lactoferrin revenue when the customer was still entitled to cancel the order, before the lactoferrin was shipped and before payment was received, reveal that there was a corporate culture at the level of senior management which Mr Nicholas occupied, which was not conducive to compliance with the Act, and in respect of which Mr Nicholas was (at the very

least) complacent, particularly in relation to FFG's financial reporting obligations and associated market disclosure.

131 Against the background of the preceding factors, there are mitigating circumstances as follows.

132 *First*, Mr Nicholas has admitted all of the contraventions from an early stage of the proceeding, has not filed a defence, and has accepted that he ought to pay a penalty for his contraventions. This cooperation reflects Mr Nicholas's contrition, has assisted ASIC to perform its regulatory role and has spared the Court's resources.

133 *Second*, Mr Nicholas has provided a signed written statement dated 24 August 2024 in which he has expressed contrition, remorse and has unreservedly apologised for his conduct.

134 *Third,* it is not known whether Mr Nicholas is currently employed. Mr Nicholas is 58 years old and is unlikely to have the opportunity to start a new career in management if so desired, after the disqualification period ends. Mr Nicholas does not own any property.

135 *Fourth*, Mr Nicholas has not previously been found to have contravened the Act.

136 However, I do not regard it as being of any significance in assessing the appropriate disqualification period and penalty that Mr Nicholas has previously given evidence to ASIC that, as ASIC accepts for the purposes of assessing the appropriate relief in this case:

(a) Mr Nicholas perceived that Mr Macleod had complete authority and control over all messaging to the Board;

(b) Mr Nicholas felt that the corporate culture created by Mr Macleod was autocratic and generated an environment where Mr Nicholas did not feel that he could be frank with the Board and alert them to the inventory and revenue issues that are the subject of these proceedings even though Mr Nicholas knew about them; and

(c) by early March 2020, the impact of being aware of the inventory and revenue issues that are the subject of these proceedings, but feeling pressured by Mr Macleod not to disclose them to the Board, was impacting Mr Nicholas's mental health to the point where he was drinking more than a bottle of wine every night, his relationship with his wife and family had broken down, and he felt as though he was close to going over the edge from the stress.

137 It is not necessary for me to make any findings as to the matters in the previous paragraph and I do not do so. Mr Nicholas had an important and vital role in the management and governance

of FFG. He regularly attended board meetings, in which he reported directly to and interacted in person with the directors of FFG. He was the Disclosure Officer. He provided direct representations to the Board, in which he asserted there were no problems with the financial statement when he knew that to be false. If he perceived the corporate structure and culture were not conducive to him being truthful and frank with the Board, that would only emphasise why it is important for the Court to impose appropriate relief in this case, so as to provide the necessary specific and general deterrence to seek to protect investors in public companies from similar conduct in the future.

Costs

138 ASIC seeks an order that Mr Nicholas pay ASIC's costs of the proceedings solely against him as agreed or taxed. I accept that that is an appropriate costs order in the circumstances, given that Mr Nicholas has admitted all contraventions.

I certify that the preceding one hundred and thirty-eight (138) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate: 

Dated: 14 October 2024