Details of infringement notice issued to Nufarm

Nufarm Ltd (Nufarm) has paid a $66,000 penalty following an infringement notice issued by ASIC for an alleged failure by the company to disclose material information regarding its year to date financial results in the period from 11 February 2010 to 2 March 2010.

The facts

Nufarm is a global agrichemical company listed on the ASX.

By 11 February 2010, Nufarm was aware of the following information:

Nufarm’s financial year-to-date results for the period from 1 August 2009 to 31 December 2009 consisted of:

(a) an after-tax net loss of $61.8 million; and

(b) an after-tax operating net loss of $55.6 million

(‘the Information’).

The Information was presented at a meeting of Nufarm’s board of directors on 11 February 2010. All of Nufarm’s then current directors as well as a number of the company’s senior executives were present at the meeting.

Given the Information, Nufarm faced uncertainty regarding its expected half-year profit. There is evidence that Nufarm considered there were significant possibilities of a break even result, a small after tax net profit or a small after tax net loss. There is evidence that Nufarm senior executives expected an operating profit in the region of $5-7 million for the half year ending January 2010. An operating profit of $7 million would represent an 89% fall from the after-tax net operating profit in the previous corresponding period (1 August 2008 to 31 January 2008).

ASX Guidance Note 8 on Continuous Disclosure states:

‘As a general policy, a variation in excess of 10% to 15% [of a previously released financial forecast or expectation] may be considered material, and should be announced as soon as the entity becomes aware of the variation. If the entity has not made a forecast, a similar variation from the previous corresponding period will need to be disclosed’

Nufarm did not release a financial forecast or expectation for the 2010 financial year or half year until 2 March 2010.

Nufarm did provide some commentary on its expectation for its half year results to 31 January 2010 in addresses by its chairman and managing director to the company’s Annual General Meeting released on 3 December 2009. The chairman’s AGM address said:
'From a Nufarm perspective in 2010, glyphosate raw materials are being purchased at market competitive prices and our margins will start to recover over the balance of the 2010 year. As a result of this product margin mix, our profit in the first half of this year will be significantly down on the previous year, however in line with our internal projections.',

while the managing director’s AGM address said:

‘Our forecast group result for the six months ending in January 2010 is below that for the same period of last year.’

ASX Guidance Note 8 states:

‘In making such disclosure, the entity must provide some details, however qualified, of the extent of the variation’

Neither of these addresses nor any other ASX announcement by Nufarm made prior to 2 March 2010 provided details of the extent of the variation.

Nufarm did not disclose the Information and it was superseded by an ASX announcement on 2 March 2010 containing addresses by Nufarm’s chairman and managing director to the company’s Extraordinary General Meeting. The managing director’s address said:

‘I expect the company to be reporting a headline loss for the six months of approximately $40 million. Of this figure, some $33 million represents material items including glyphosate trading impacts.’

The contravention

The infringement notice has been issued because ASIC believes that Nufarm contravened subsection 674(2) of the Corporations Act in the period from 11 February 2010 (from which time Nufarm was aware of the Information) to 2 March 2010 (at which time Nufarm released an announcement containing disclosures that superseded the Information to ASX), in that:

(a) Nufarm is an entity to which subsection 674(2) of the Corporations Act applies.

(b) By 11 February 2010, Nufarm was aware of the Information.

(c) The 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 securities of Nufarm.

(d) From 11 February 2010, ASX Listing rule 3.1A (the exception to ASX Listing rule 3.1) did not apply to the Information because a reasonable person would have expected the Information to be disclosed to ASX.
(e) Consequently, from 11 February 2010, ASX Listing Rule 3.1 required Nufarm to tell ASX of the Information.

(f) Between 11 February 2010 and 2 March 2010, the Information was not generally available.

(g) Nufarm did not disclose the Information until 2 March 2010 when Nufarm disclosed its expected half year results.

**Compliance with the infringement notice**

Nufarm has elected to comply with the infringement notice by paying the $66,000 penalty. As stated in the Corporations Act, compliance with the notice is not an admission of guilt or liability. Nufarm is not regarded as having contravened subsection 674(2) of the Corporations Act.