



**ASIC**

Australian Securities & Investments Commission

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# **Memphasys Limited (formerly NuSep Limited)**

## **Enforceable Undertaking Summary of Expert Reports**

11 July 2018

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## A Background

### Background

- 1 On 18 December 2014, ASIC accepted an enforceable undertaking from Memphasys Limited (formerly NuSep Holdings Limited) (Memphasys) pursuant to section 93AA of the ASIC Act 2001 (Enforceable Undertaking).
- 2 Prior to accepting the Enforceable Undertaking, we had concerns relating to potential contraventions of provisions of the Corporations Act 2001 (Corporations Act). These included suspected contraventions relating to continuous disclosure, fundraising, self-acquisition of shares, lodging documents with ASIC, record keeping and other corporate governance matters. These suspected contraventions took place under the leadership of former directors and officers of Memphasys.
- 3 We accepted the Enforceable Undertaking as an alternative to commencing civil proceedings against Memphasys. We considered that, given Memphasys' circumstances at the time including the appointment of a new board of directors and their implementation of certain revised governance procedures, accepting an undertaking was a more effective regulatory outcome to ensure lasting improvement in the corporate governance practices of Memphasys.
- 4 Under the Enforceable Undertaking, Memphasys agreed to implement revised procedures to improve its record keeping and corporate governance practices, to appoint an independent compliance expert to review and make recommendations in relation to its disclosure and corporate governance compliance procedures, to engage this independent compliance expert to conduct periodic reviews of adherence to these revised compliance procedures, and to report to the board and ASIC in relation to these reviews.
- 5 Further details in relation to the Enforceable Undertaking and ASIC's concerns in relation to Memphasys are outlined in the Enforceable Undertaking itself, available on ASIC's public enforceable undertakings register at <http://asic.gov.au/online-services/search-asics-registers/additional-searches/enforceable-undertakings-register/>.
- 6 On 8 January 2015, Memphasys appointed Lyn Nicholson of Holding Redlich as the independent compliance expert (Compliance Expert).
- 7 The Compliance Expert prepared five reports in connection to the Enforceable Undertaking. The key observations and findings from these reports are summarised by this report prepared by ASIC.

## B Requirements under the Enforceable Undertaking

### Compliance Procedures

- 8 Pursuant to the Enforceable Undertaking, in terms of changes to internal compliance procedures, Memphasys undertook to:
- (a) continue implementing revised internal procedures related to ensuring accurate and timely minute keeping for board meetings and alike, as well as company record keeping practices generally (Existing Procedures);
  - (b) adopt revised executive remuneration policies consistent with ASX Corporate Governance Principles and Recommendations and ensure the engagement terms of any new executives included certain provisions reflecting best practice; and
  - (c) ensure that Memphasys' Corporate Governance Statements discloses certain matters in relation to the Enforceable Undertaking (together, New Procedures).

### Compliance Expert's role

- 9 The Compliance Expert was engaged by Memphasys to, as a term of the Enforceable Undertaking, review and report on Memphasys' adherence to the Existing Procedures and New Procedures.
- 10 Specifically, the Compliance Expert was engaged to:
- (a) review the effectiveness of, and compliance of Memphasys with, the Existing Procedures;
  - (b) identify any deficiencies and recommend improvements, which are consistent with industry best practice for a company of Memphasys' size and kind, concerning:
    - (i) the Existing Procedures;
    - (ii) the New Procedures;
    - (iii) Memphasys approving the issue of securities;
    - (iv) Memphasys lodging documents with ASIC;
    - (v) any assistance Memphasys gives to members to fulfil their obligations under section 671B of the Corporations Act; and

- (vi) Memphasys' continuous disclosure procedures (collectively, the Compliance Procedures);
- (c) assess and report to Memphasys' board in relation to the matters in subparagraphs (a) and (b) above;
- (d) review and make recommendations in relation to the effectiveness and operation of the Compliance Procedures, and report to Memphasys' board;
- (e) review the corporate governance statement prepared by Memphasys in respect of its financial year ended 30 June 2015 and report to Memphasys' board about the completeness and accuracy of that compliance governance statement;
- (f) conduct two subsequent annual reviews of Memphasys' continuing compliance with the Compliance Procedures and report to Memphasys' board.

## C Summary of Compliance Expert's reports

- 11 As an outcome of the Compliance Expert's engagement, the Compliance Expert prepared five reports for Memphasys' board. Each of these reports were provided to ASIC pursuant to the Enforceable Undertaking.
- 12 Below we summarise the key observations and findings from each of these reports for the purposes of making available for public inspection a copy of the text of a statement that refers to the content of these reports.

### Initial assessment report

- 13 On 17 March 2015, the Compliance Expert reported to Memphasys' board following its assessment conducted during the period 20 February 2015 to 13 March 2015.
- 14 The Compliance Expert reported that it considered Memphasys had been adequately adhering to the terms of the EU, and noted that a number of cultural changes had occurred at Memphasys, primarily driven by a new board of directors being appointed that had not been involved in the suspected contraventions, that had a direct positive impact on corporate compliance conduct and culture at Memphasys.
- 15 In reviewing the operation of the Existing Procedures and New Procedures, the Compliance Expert reported that they considered:
- (a) Memphasys had maintained and improved on the Existing Procedures (following certain recommendations to improve minute keeping practices made by the Compliance Expert); and
  - (b) Memphasys was still working through implementing the New Procedures, but was advancing with implementation in a way that is reasonable having regard to all the circumstances of Memphasys, including its size.
- 16 The Compliance Expert noted that, as this initial assessment covered a period of limited corporate activity (due to the Christmas and New Year break), there were limited processes to test. It was envisaged that by the time of the first upcoming review, there would be a number of board meetings and ongoing compliance of with the Existing Procedures could be better tested. Similarly, the New Procedures should be more fully developed by that time.
- 17 ASIC understands that given this limited corporate activity, the Compliance Expert was unable to substantively review the effectiveness of, or compliance with, the Existing Procedures. Nor identify deficiencies or make

any further recommendations in relation to the Compliance Procedures (other than the Existing Procedures).

## First review report

- 18 On 24 July 2015, the Compliance Expert reported to Memphasys' board following its first review. The scope of this report covered the status of the Existing Procedures and the New Procedures as well as Memphasys' compliance with its continuous disclosure obligations. This report also addressed benchmarking of Memphasys against similar listed biotechnology based companies in relation to continuous disclosures obligations.
- 19 The Compliance Expert reported that, subject to the adoption of recommendations made, they considered Memphasys was complying with the terms of the Enforcement Undertaking in relation to the Existing Procedures and New Procedures, and they were operating effectively.
- 20 As part of the Compliance Expert's review of the operation of the Existing Procedures, recommendations were made to:
- (a) amend the recording of minutes of meetings to record 'for' and 'against' votes and abstentions for each director. This was because the prevailing practice was to only record resolutions as being passed unanimously, which by implication, indicates there were no abstentions;
  - (b) procure that each counterpart of any circular resolutions of directors be placed into the minute book and be numbered sequentially;
  - (c) amend template board meeting documents (i.e. an actions list) to more accurately record and monitor the status of action items identified during prior meetings;
  - (d) introduce a standing agenda item at all director meetings to discuss any continuous disclosure issues arisen at that meeting that may require further action; and
  - (e) introduce a standing agenda item for audit committee meetings to review compliance with authorisation procedures relating to market announcements.
- 21 As part of the Compliance Expert's review of the progress of the New Procedures, the Compliance Expert reported that revisions to remuneration policies consistent with the ASX Corporate Governance Principles and Recommendations had been adopted by the board. It was also noted as no new executives had been engaged by Memphasys in the review period and the Corporate Governance Statement had not yet commenced, these elements remained untested. No specific recommendations were made by the Compliance Expert in relation to the New Procedures.

- 22 In identifying deficiencies and recommending improvements for the Compliance Procedures (other than Existing Procedures and New Procedures explained above), the Compliance Expert reported that:
- (a) no securities had been issued during the review period and therefore nothing had been identified and no recommendations were made;
  - (b) a review of documents lodged with ASIC indicated timely lodgement had occurred; and
  - (c) in relation to any Memphasys assistance to be given to members to fulfil their obligations under section 671B of the Corporations Act, the directors meeting regularly monitored movements in shareholdings.
- 23 Finally, in benchmarking Memphasys to certain companies with similar market capitalisations and company sectors, the Compliance Expert reported that this review did not indicate any deficiency in the corporate governance or disclosure compliance by Memphasys against the benchmarked peers.

## Corporate governance report

- 24 On 27 November 2015, the Compliance Expert reported to Memphasys' board after reviewing the corporate governance statement for Memphasys' financial year ended 30 June 2015.
- 25 The Compliance Expert reported that in their opinion, the corporate governance statement was generally compliant with the ASX's Corporate Governance Principles and Recommendations, and where the statement was not compliant, Memphasys provided adequate explanation for the departure in accordance with ASX Listing Rule 4.10.3.
- 26 The Compliance Expert also reported that:
- (a) the corporate governance statement had been drafted in a clear and concise manner, disclosed the existence of the Enforceable Undertaking and included statements explaining the progress and changes made by Memphasys to implement the Enforceable Undertaking; and
  - (b) in its opinion, the Compliance Procedures adopted by Memphasys had resulted in better disclosure by Memphasys in its corporate governance statement and that security holders have been provided with appropriate information regarding the corporate governance procedures of Memphasys.



## Annual review report for 2016

- 27 On 22 December 2016, the Compliance Expert reported to Memphasys' board following its annual review for the period to 1 October 2016. This review focused on Memphasys' ongoing adherence to the Compliance Procedures.
- 28 The Compliance Expert reported that the same Compliance Procedures remained in place and continued to operate since the first review, and no new recommendations were made following this annual review.
- 29 The Compliance Expert reported however that certain recommendations to the Existing Procedures that were previously raised with Memphasys remained outstanding. These were that:
- (a) Memphasys' audit committee introduce a standing agenda item to review compliance with authorising procedures relating to market announcements; and
  - (b) any director circular resolutions should be sequentially numbered and included in the minute book.

## Annual review report for 2017

- 30 On 11 December 2017, the Compliance Expert reported to Memphasys' board following its annual review for the period to 1 October 2017. This review again focused on Memphasys' ongoing adherence to the Compliance Procedures.
- 31 The Compliance Expert reported that, subject to the adoption of recommendations, Memphasys continued to comply with the Compliance Procedures.
- 32 As part of the review, the Compliance Expert identified that following a change of company secretary personnel at Memphasys, there was a relapse in the practices relating to recording board resolutions without complete details of votes cast for, against or abstained. To ensure best practice, the Compliance Expert recommended re-implementing the recording of specific details of voting. The Compliance Expert confirmed that after the date of the report, procedures to record the specific details of director voting were re-instated.
- 33 The Compliance Expert made no further recommendations.