FEDERAL COURT OF AUSTRALIA

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

File number:	NSD 163 of 2023
Judgment of:	**JACKMAN J**
Date of judgment:	5 August 2024
Catchwords:	**CORPORATIONS** – continuous disclosure regime for entities listed on the Australian Stock Exchange – civil penalty – where 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 **REPRESENTATIVE PROCEEDINGS** – whether civil penalty should be paid into court – where interveners have initiated representative proceedings in the Supreme Court of Victoria
Legislation:	*Corporations Act 2001* (Cth) ss 674, 1317G, 1317QF
Cases cited:	*Australian Building and Construction Commission v Pattinson* (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 Australian Safeway Stores Pty Ltd* [1997] FCA 450; (1997) 145 ALR 36 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 *Australian Competition and Consumer Commission v Dell Australia Pty Ltd (No 2)* [2023] FCA 983 *Australian Competition and Consumer Commission v Equifax Australia Information Services and Solutions Pty Ltd* [2018] FCA 1637 *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA 1018 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640

Australian Securities and Investments Commission v Chemeq Ltd [2006] FCA 936; (2006) 234 ALR 511

Australian Securities and Investments Commission v Holista Colltech Ltd (No 2) [2024] FCA 516

Australian Securities and Investments Commission v Westpac Banking Corporation [2019] FCA 2147

Commonwealth v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; (2015) 258 CLR 482

Construction, Forestry, Mining and Energy Union v Cahill [2010] FCAFC 39; (2010) 269 ALR 1

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

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

James Hardie Industries NV v Australian Securities and Investments Commission [2010] NSWCA 332; (2010) 274 ALR 85

Markarian v R [2005] HCA 25; (2005) 228 CLR 357

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

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134; (1996) 71 FCR 285

Singtel Optus Pty Ltd v Australian Competition and Consumer Commission (2012) 287 ALR 249

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

Division:	General Division
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National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	98
Date of hearing:	18 July 2024
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Counsel for the Interveners:	Ms K O'Gorman SC and Ms E Levine
Solicitor for the Interveners:	Slater and Gordon Lawyers and Phi Finney McDonald

ORDERS

NSD 163 of 2023

BETWEEN:	**AUSTRALLIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**NOUMI LIMITED ACN 002 814 235** First Defendant
	RORY MACLEOD Second Defendant
	CAMPBELL NICHOLAS Third Defendant
	NICHOLAS GEHRKE AND LESTER BUSCH Interveners

ORDER MADE BY:	**JACKMAN J**
DATE OF ORDER:	**5 AUGUST 2024**

THE COURT DECLARES THAT:

1. Pursuant to s 1317E(1) of the *Corporations Act 2001* (Cth) (**Act**), in the period on and from 29 August 2019 until 25 May 2020, the First Defendant (**FFG**) contravened s 674(2) of the Act by failing to notify the ASX of the FY19 Information, namely that:

    (a) the FY19 Disclosed Inventories (being the inventories disclosed as current assets in the FY19 Financial Report) were $120.2 million which included Not Saleable Inventory of approximately $31.77 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 approximately $31.77 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 on and from 27 February 2020 until 25 May 2020, the First Defendant contravened s 674(2) of the Act by failing to notify the ASX of the HY20 Inventory Information and the HY20 Revenue Information (together, the HY20 Combined Information), namely that:

(a) the HY20 Disclosed Inventories (being the inventories disclosed as current assets in the HY20 Financial Report) were $122.3 million which included Not Saleable Inventory of approximately $36.6 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 approximately $36.6 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 FFG's Inventory Accounting Policy;

(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 Inferfood, 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.

THE COURT ORDERS THAT:

3. Pursuant to s 1317G(1) of the Act, and subject to orders 4 and 5, FFG pay to the Commonwealth of Australia a pecuniary penalty in the amount of $5 million in respect of the contraventions of s 674(2) of the Act referred to in paragraphs 1 and 2 above.

4. The pecuniary penalty payable under order 3 be paid by FFG in the following instalments:

   (a) $2,000,000 within 28 days of the date of this order;

   (b) $1,500,000 within 12 months of the date of this order; and

   (c) $1,500,000 within 24 months of the date of this order.

5. Subject to further order, including any orders under s 1317QF(3) of the Act, the pecuniary penalty payable under order 3 is to be paid into Court pursuant to r 2.42(1)(b) of the Federal Court Rules.

6. FFG pay the costs of the Plaintiff (**ASIC**) of its proceedings against FFG fixed in the amount of $50,000.

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

REASONS FOR JUDGMENT

JACKMAN J:

Introduction

1 These reasons address the agreed declarations and orders that the Plaintiff (**ASIC**) seeks by way of relief against the First Defendant, Noumi Limited, formerly named Freedom Foods Limited (**FFG**), following the admissions made by FFG in the proceedings and the facts agreed between ASIC and FFG recorded in an amended statement of agreed facts dated 12 July 2024 (**ASAF**). In this proceeding, ASIC alleges that FFG contravened s 674(2) of the *Corporations Act 2001* (Cth) (**Act**). By its defence dated 11 August 2023 and the Statement of Agreed Facts dated 15 December 2023, FFG admits that it engaged in two contraventions of s 674(2) of the Act: ASAF [105]. The terms of the admitted contraventions are set out in the agreed declarations which I have made today.

2 The parties submit, and I accept, that the imposition of a pecuniary penalty is necessary and appropriate in the circumstances. ASIC further submits that an appropriate penalty is $5 million, comprising $2.5 million for the contraventions in relation to each financial reporting period. The parties submit, and I accept, that it is appropriate that payment of that penalty be by way of instalments, and that it be paid into Court at this stage in view of certain representative proceedings in the Supreme Court of Victoria in which compensation is sought by group members against FFG.

3 Despite the agreement of the parties, it is necessary that the Court be satisfied that:

(a) as a matter of fact and law, the admitted contraventions occurred; and

(b) the proposed penalty is appropriate having regard to the relevant legal principles, facts and circumstances.

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 as follows:

> 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: ASAF [102(c)]. The relevant rules are the Listing Rules of the Australian Securities Exchange (**ASX**).

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(2) and (3), which provide 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(1) provides that:

> For the purposes of sections 674 and 675, a reasonable person would be taken to expect 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 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 notion of constructive awareness, expressed by the concept of information which an officer of the entity ought reasonably to have, was explained by Jagot and Murphy JJ in *Crowley v Worley Ltd* [2022] FCAFC 33; (2022) 293 FCR 438. After stating at [176] that the word "information", as used in the definition of "aware", embraces "facts", "circumstances", and "opinions", their Honours said (at [178]):

> If the evidence shows that: (a) the information in fact existed, (b) reasonable information systems or management procedures ought to have brought the information to the attention of a relevant company officer, and (c) acting reasonably the company officer ought to have discerned the significance of the information, then s 674 and the Listing Rules deem the company to have had the information. This conclusion gives effect to the language of the Listing Rules and s 674, and it achieves the legislative purpose of those provisions.

12 The continuous disclosure obligation in Listing Rule 3.1 is subject to certain exceptions set out in Listing Rule 3.1A. It is an agreed fact that Listing Rule 3.1 required immediate disclosure of the FY19 Information and the Combined HY20 Information as defined below (ASAF [103(d)] and [104(d)], and that therefore none of the exceptions applied to it.

13 The statutory purpose of the continuous disclosure regime has been considered in two recent Full Court decisions. In *Grant-Taylor v Babcock & Brown Ltd (in liq)* [2016] FCAFC 60; (2016) 245 FCR 402, Allsop CJ, Gilmour and Beach JJ 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]).

14 Similarly, in *Crowley v Worley Ltd*, 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].

Agreed facts and elements of the contraventions

15 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: ASAF [10].

16 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**): ASAF [13]. 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**"): ASAF [14].

17 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;

(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**): ASAF [15].

18 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.

19 FFG used an enterprise resource planning software (known as QAD) to carry out inventory management: ASAF [24]. QAD contained a record of FFG's inventory levels (by number of items and inventory values in dollars): ASAF [24]. Within QAD, inventory was recorded in terms of whether it was available for sale (where coded as "nettable" and "available") or not ("non-nettable"): ASAF [25]. 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): ASAF [26]. Some of the inventory recorded in QAD did not exist. This was referred to by some FFG employees as "virtual stock" or "phantom stock": ASAF [27].

20 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**): ASAF [28].

21 At all relevant times, FFG's chief executive officer was Mr Rory Macleod (**Mr Macleod**) and its chief financial officer was Mr Campbell Nicholas (**Mr Nicholas**). From around June 2018, Mr Macleod had (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 **CEO Instructions**): ASAF [36]. 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: ASAF [38].

22 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 (ASAF [59]) and Mr Nicholas (ASAF [45], [47], [48], [53], [58], [59]–[62]). Sales revenue was monitored through regular "accounts receivable reports" circulated to management including Mr Macleod and Mr Nicholas: ASAF [75].

23 The inventory reports and their contents were also available through a business intelligence software program and application called Power BI: ASAF [32]–[33]. Power BI is a web-hosted platform. There were two Power BI apps that obtained and displayed data concerning inventory (and inventory status); namely, a Business Operations app and a Site Operations app: ASAF [33]. Employees of FFG who were authorised users were able to access the Power BI applications through a web browser or by installing the relevant application on a device such as a mobile phone or tablet: ASAF [33].

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

(a) received access to the Power BI Business Operations application on their desktop computers and mobile phones which displayed, among 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 (ASAF [49]); and

(b) accessed (and at least Mr Macleod used) the Business Operations application and were able to see the value of non-nettable inventory and the value of FFG's inventory for each status code (ASAF [50]).

25 As a consequence of the CEO Instructions, a practice developed until May 2020 of not writing off Not Saleable Inventory and instead storing it (to the extent it existed) in FFG's warehouses and keeping it recorded in QAD as "non-nettable" inventory: ASAF [39]. Because of the CEO Instructions and the absence of Mr Macleod authorising any significant disposal or write-down of inventory, Mr Macleod and Mr Nicholas (at the very

least) ought to have known that FFG was not applying the Inventory Accounting Policy: ASAF [39].

26 Obsolete, rejected or expired stock held by FFG increased from 2018. So much so, that from 2018, FFG leased additional warehouses in Shepparton and Mooroopna and some of the obsolete, rejected or expired stock was stored in those additional warehouses: ASAF [41].

27 In early 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: ASAF [41]. On 6 November 2019, Mr Nicholas sent Ms Graham an arrestingly frank and colloquial text message in which he said: "I have just walked though all the hidden factories at shepparton - holy holy crap!" and Ms Graham responded "yep, photos don't do it justice": ASAF [42].

28 From time to time, some FFG staff requested approval from Mr Macleod to write off stock, or raised the issue of obsolete stock. Mr Macleod did not provide approval to write off stock: ASAF [43].

29 As a result of the CEO Instructions 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: ASAF [44]. This was information which (at the very least) ought reasonably to have come into the possession of Mr Macleod and Mr Nicholas. There was also information provided to Mr Macleod and Mr Nicholas which disclosed that FFG had material amounts of Not Saleable Inventory, which is addressed further below.

30 By 29 August 2019, Mr Nicholas had received inventory reports, and Mr Macleod and Mr Nicholas had accessed the Power BI Business Operations app, which showed that FFG had non-nettable stock in excess of $28 million: ASAF [48]–[53].

31 On 29 August 2019, FFG provided the FY19 Financial Report to the ASX which disclosed that (ASAF [54]):

(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; and

(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.

32 On and from 29 August 2019 until 25 May 2020 (ASAF [56]):

(a) the FY19 Disclosed Inventories were $120.2 million which included material Not Saleable Inventory which was recorded in the FY19 Financial Report at a value of approximately $31.77 million (and, in any event, more than $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 materially overstated by approximately $31.77 million (and, in any event, more than $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**).

33 Between September 2019 and March 2020, Mr Macleod and Mr Nicholas had received inventory reports, and had accessed the Power BI Business Operations app, which showed that FFG had non-nettable stock in excess of $29 million: ASAF [51], [58]–[62], [69], [71].

34 On 27 February 2020, FFG released its HY20 Financial Report in which FFG disclosed that (ASAF [65]):

(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 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.

35 On and from 27 February 2020 until 25 May 2020 (ASAF [67]):

(a) the HY20 Disclosed Inventories were $122.3 million which included Not Saleable Inventory recorded in the HY20 Financial Report at a value of approximately $36.6 million (and, in any event, more than $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 materially overstated by approximately $36.6 million (and, in any event, more than $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) 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**).

36 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 4.7% to 5.8% of the sale price, resulting in a margin of at least 94%: ASAF [72].

37 In April 2019, FFG received a lucrative purchase order from a Singaporean company, Interfood Pte Ltd (**Interfood**), for 4,000kg of lactoferrin at a price of USD1,950 per kg, representing a total price of USD7.8 million: ASAF [73]. 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: ASAF [74].

38 Between 1 July 2019 and 31 December 2019, FFG raised 16 invoices to Interfood in respect of lactoferrin (**Lactoferrin Invoices**), amounting to a total price of USD6.8 million, being at least AUD9.8 million (**Lactoferrin Invoice Amounts**): ASAF [75]–[76]. FFG recognised and recorded in its accounts the Lactoferrin Invoice Amounts as soon as the Lactoferrin Invoices were raised, and did not record any cost of goods sold: ASAF [77]–[78].

39 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**): ASAF [79].

40 Mr Macleod and Mr Nicholas received regular accounts receivable reports (ASAF [75]), and knew that, as at 7 February 2020, no payment had been received by FFG from Interfood in respect of the Lactoferrin Invoices: ASAF [80]. On or about 26 March 2020, Ms Shepherd informed Mr Nicholas that lactoferrin sales to Interfood with a P&L impact of -$9,309,375 had not been shipped: ASAF [81]. The Lactoferrin Invoice Amounts contributed at least $8.5 million towards FFG's gross profit recorded in the HY20 Financial Report (**Lactoferrin Profit Information**): (ASAF [82]).

41 From 27 February 2020 until 25 May 2020 (ASAF [83]):

(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**).

42 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: ASAF [103(d)] and [114(d)].

43 Both Mr Macleod and Mr Nicholas received inventory reports and had access to the Power BI application which showed them the level and value of non-nettable inventory. If Mr Macleod and Mr Nicholas had taken steps from at least 29 August 2019 and before 25 May 2020 to have FFG's inventory, or at least its non-nettable inventory, valued in accordance with the Inventory Accounting Policy, this would have revealed to them that the amount by which the FY19 Disclosed Inventories were overstated was approximately $31.77 million: ASAF [97]. FFG was therefore aware of the FY19 Information from about August 2019 until 25 May 2020, because Mr Macleod and Mr Nicholas ought reasonably to have come into possession of the FY19 Information during that period, as officers of FFG: ASAF [98] and [103(a)].

44 Further, if Mr Macleod and Mr Nicholas had taken steps from at least 27 February 2020 and before 25 May 2020 to have FFG's inventory, or at least its non-nettable inventory, valued in accordance with the Inventory Accounting Policy, this would have revealed to

them that the amount by which the HY20 Disclosed Inventories were overstated was approximately $36.6 million: ASAF [99].

45 FFG was therefore aware of the HY20 Inventory Information from on or shortly after 27 February 2020 and before 25 May 2020, because it was information that Mr Macleod and Mr Nicholas ought reasonably to have come into possession of, as officers of FFG: ASAF [100] and [104(a)]. FFG was also aware of the HY20 Revenue Information on and from 27 February 2020 until 25 May 2020 (ASAF [101] and [104(a)] because it was information that Mr Macleod and Mr Nicholas ought reasonably to have come into possession of, as officers of FFG, particularly in light of the fact that they each received regular accounts receivable reports (ASAF [75]) and knew that no payment had been received in respect of the Lactoferrin Invoices (ASAF [80]) and Mr Nicholas had been informed that lactoferrin sales with a P&L impact of -$9,309,375 had not shipped (ASAF [81]).

46 The FY19 Information, the HY20 Inventory Information and the HY20 Revenue Information was not generally available: ASAF [103(b)] and [104(b)]. 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 costs of goods of lactoferrin and accounts receivable reports, which were confidential and had not been disclosed.

47 The FY19 Information (alone) and the HY20 Inventory Information and the HY20 Revenue (in combination) was 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: ASAF [103(c)] and [104(c)].

48 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 (ASAF [96(d)]), to confirm the correctness of the conclusion as to materiality: *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332; (2010) 274 ALR 85 at [532]–[537] (Spigelman CJ, Beazley and Giles JJA).

Agreed declarations of contravention

49 ASIC and FFG agree that FFG engaged in two contraventions of s 674(2), namely (ASAF [105]):

(a) by failing to notify the ASX of the FY19 Information on and from about 29 August 2019 until at least 25 May 2020; and

(b) by failing to notify the ASX of the HY20 Inventory Information and the HY20 Revenue Information on and from about 27 February 2020 until at least 25 May 2020.

50 By operation of s 1317QA of the Corporations Act, these contraventions were continuing contraventions which continued until at least 25 May 2020, with a separate contravention occurring on each trading day in the relevant periods (29 August 2019 to 25 May 2020 in which there were around 184 trading days, and 27 February 2020 to 25 May 2020 in which there were around 60 trading days). Section 1317QA was introduced into the Act by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act* 2019 (Cth), with the amendment taking effect from 13 March 2019.

51 If the Court is satisfied that the contraventions occurred (which I am), pursuant to s 1317E(1) of the Act, it must make a declaration of contravention. 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.

Penalty provisions and relevant legal principles

Section 1317G(1)(c)

52 Section 674(2) of the Act is a civil penalty provision, and is also 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(2) 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.

53 ASIC and FFG agree that each contravention materially prejudiced the interests of FFG, materially prejudiced the interests of shareholders and was serious: ASAF [107].

54 The contraventions in the present case materially prejudiced the interests of acquirers of shares in FFG, and were serious, because they substantially affected the price of those shares by reason of non-disclosure of matters overseen by FFG's CEO and CFO. 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: ASAF [106]. 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: ASAF [96(d) and (f)].

55 In addition, the parties submit, and I accept, that the contraventions materially prejudiced the interests FFG's shareholders because (ASAF [107(a) and (b)]):

(a) they harmed FFG's standing with its providers of debt and equity and required FFG to be recapitalised (with capital raisings being conducted in May 2021 and May 2022 by way of convertible note issues);

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

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

56 Accordingly, the discretion under s 1317G(1)(c) to order FFG to pay a pecuniary penalty is enlivened.

Approach to agreed relief

57 The proper approach to civil penalty orders which are sought on an agreed basis was explained in *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482 (***FWBII***). The High Court there reaffirmed the practice of acting upon agreed penalty submissions, as explained in *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 and *Minister*

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

58 In *FWBII*, French CJ, Kiefel, Bell, Nettle and Gordon JJ emphasised the "important public policy involved in promoting predictability of outcome in civil penalty proceedings" which "assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention": at [46]. Their Honours went on to state at [58] (emphasis in original):

> Subject to the court being sufficiently persuaded of the accuracy of the parties' agreement as to facts and consequences, and that the penalty which the parties propose is *an* appropriate remedy in the circumstances thus revealed, it is consistent with principle and … highly desirable in practice for the court to accept the parties' proposal and therefore impose the proposed penalty.

59 The regulator such as ASIC in a civil penalty proceeding is not a disinterested party, and its views concerning the appropriate penalty are a relevant consideration in determining whether the proposed penalty is appropriate: *FWBII* at [60]. That being the case, the Court's determination of whether the Agreed Penalty is appropriate ought properly take account of ASIC's informed view regarding the effects of contraventions of the nature admitted by FFG, and the level of penalty necessary to achieve compliance: at [60].

Principles for assessment of the penalty

60 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*** (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). 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) 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) 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].

61 Further guidance as to the approach to be adopted in assessing the quantum of an appropriate penalty may 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], [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], [39]);

(e) factors pertaining to the character of the contravening conduct and the character of the contravenor 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], [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], [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]); and

(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]).

62 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].

63 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; and

(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.

64 The penalty that is appropriate by way of general deterrence may be moderated by the 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. However, these must not be considered a "rigid catalogue of matters for attention": *Pattinson* at [19].

65 As to the maximum penalty section 1317G(4) provides that the pecuniary penalty applicable to the contravention of a civil penalty provision by a body corporate is the greatest of:

(a) 50,000 penalty units; and

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

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

At the time of the contraventions, 50,000 penalty units was $10.5 million.

66 The benefit derived and detriment avoided because of the contraventions in the present case cannot readily be calculated. Therefore, ss 1317G(4)(b) of the Act does not assist in calculating the maximum penalty.

67 The annual turnover of FFG was $461.8 million for FY2019, $253.1 million for HY2020 and $580.1 million for FY2020: Myers affidavit 13.10.23, ex. PDM–1, p 14; ASAF [95(b)]. The annual turnover of FFG:

(a) for the 12-month period ending 29 August 2019 was approximately $460 million (ASAF [109]); and

(b) for the 12-month period ending 27 February 2020 was at least $460 million (ASAF [110]).

68 Accordingly, 10% of FFG's annual turnover for the relevant periods was $46 million. That is less than 2.5 million penalty units but greater than the other relevant amounts in s 1317G(4), which means that the maximum penalty for present purposes is $46 million.

69 When one takes into account that s 1317QA has the effect that separate contraventions occurred on each trading day in the relevant periods, the maximum penalty becomes the astronomically high figure of $46 million multiplied by 244 contraventions, namely $11.2 billion. In some cases, such as this one, the arithmetic maximum penalty in aggregate is so disproportionately large that it is not helpful to the Court: see the cases which I cited in *Australian Competition and Consumer Commission v Dell Australia Pty Ltd (No 2)* [2023] FCA 983 at [10]. In the present case, the problem is resolved by the "course of conduct" principle.

70 Where there is an interrelationship between the factual and legal elements of two or more contraventions, consideration might be given to whether or not it is appropriate to impose a single overall penalty for that course of conduct: *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA 1018 at [36] (Beach J). As Moore, Middleton and Gordon JJ expressed the matter in *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [39] (emphasis in original), the course of conduct principle:

> recognises that where there is an interrelationship between *the legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is "the same criminality"

> and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.

71 As their Honours said in *Cahill* at [41], however, the principle is only a tool of analysis which can, but need not, be used in any give case in order to ensure an appropriate deterrent effect. As Lee J expressed the point in *Australian Competition and Consumer Commission v Equifax Australia Information Services and Solutions Pty Ltd* [2018] FCA 1637 at [86], the principle is:

> merely a discretionary tool or analytical expedient along the way to determining an appropriate penalty. A precise allocation of the number of courses of conduct is not some sort of calculus which results in various outcomes, depending upon the characterisation of the contravening conduct, as falling into one or other of the identified courses of conduct.

72 In the present case, there are two courses of conduct, corresponding to the two admitted contraventions of s 674(2) of the Act, namely:

(a) the failure to notify the ASX of the FY19 Information on and from 29 August 2019 until at least 25 May 2020; and

(b) the failure to notify the ASX of HY20 Combined Information on and from 27 February 2020 until at least 25 May 2020.

73 In addition, the totality principle requires the Court to review the "aggregate" penalty to ensure that it is just and appropriate, and not out of proportion to the contravening conduct considered "as a whole" or the "totality of the relevant contravening conduct": *Australian Securities and Investments Commission v Westpac Banking Corporation* [2019] FCA 2147 at [272] and [308] (Wigney J). It involves a "final overall consideration of the sum of the penalties determined" by consideration of all the relevant factors, and requires the Court to make a final check of the penalties to be imposed on a wrongdoer, considered as a whole: *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* [1997] FCA 450; (1997) 145 ALR 36 at 53 (Goldberg J). The totality principle will not necessarily result in a reduction from the penalty that would otherwise be imposed. In cases where the Court considers that the cumulative total of the penalties to be imposed would be too low or too high, the Court should alter the final penalties to ensure that they are just and appropriate: *Australian Safeway Stores* at 53. The totality principle is distinct from the course of conduct principle in performing a check at the end of the reasoning process.

74 In fixing a pecuniary penalty, the Court will engage in an "intuitive or instinctive synthesis" of all the relevant matters by weighing together all relevant factors, rather than engage in a sequential, mathematical process: *Markarian v R* [2005] HCA 25; (2005) 228 CLR 357 as applied to civil penalty proceedings in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at [6] (Allsop CJ).

The appropriate penalty in this case

75 The parties submit, and I accept, that the appropriate penalty is $5 million, comprising $2.5 million for the contraventions for each reporting period. A penalty in this amount is appropriate because it achieves the principal object of protecting the public interest by deterring future contraventions of the Act, having the necessary sting or burden to secure such a deterrent effect, but not being so great as to be oppressive.

76 The salient features of the present case, as reflected in the aspects of the ASAF set out above, which support the proposed penalties are set out below. These overlap with, and thereby address, the mandatory factors referred to in s 1317G(6) of the Act.

77 *First*, FFG's failure to disclose the relevant information to the market forms 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.

78 *Second*, FFG was aware of the relevant information through the knowledge and involvement of its most senior executive officers, namely its CEO (Mr Macleod) and CFO (Mr Nicholas). The relevant information was also information of a kind which the company was monitoring closely, was critical for a consumer goods business such as it, and was readily available to it. Further, neither Mr Macleod nor Mr Nicholas informed the Board until 28 May 2020 of the existence of the information: ASAF [84], [123]. This is despite Mr Nicholas being the disclosure officer under FFG's Continuous Disclosure Policy: ASAF [20]–[22]. It should therefore be inferred that the company did not have adequate processes in place to ensure that material information flowed to the Board and that its Continuous Disclosure Policy, though notionally in existence (ASAF [20]), was ineffective.

79 *Third*, Mr Macleod's and Mr Nicholas's awareness of the facts and circumstances giving rise to the relevant information (ASAF [44]–[83]), especially as to the mounting non-

nettable inventory, of concerns expressed to them by senior employees (ASAF [40]–[42]), the admitted "CEO Instructions" (ASAF [36]), and Mr Macleod's refusal to write off stock even when requested by FFG staff (ASAF [43]), give rise to the clear inference that the omission of the relevant information from the financial reports was deliberate, or at least reckless, conduct by Mr Macleod and Mr Nicholas.

80 *Fourth*, the relevant information was internal to the company, and would not have been discoverable by a third party. The market therefore relied on the company to comply with its continuous disclosure obligations in order to trade on an informed basis.

81 *Fifth*, the failure to disclose the relevant information to the market was significant as it may have raised questions as to whether FFG was operating at an overall loss in FY19 and HY20. FFG's Restated Results announced that the value of profit or loss before tax for HY20 was restated from a profit of $6.9 million to a loss of $50.2 million: ASAF [95(d)]. If such information had been disclosed, it is even more likely to have affected the price of FFG's shares. The ultimate fall in FFG's share price (being 82.39%: ASAF [96(d)]) and the increase in the volume of shares traded (being 1,042.81%: ASAF [96(f)]) 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.

82 *Sixth*, while it is likely that the corrective disclosures by FFG of its reduced inventory valuation, revenue and profit would have resulted in a fall in the share price in any event, the contraventions delayed the resultant fall. I therefore infer 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 at which the shares would have traded had the FY19 Inventory Information, HY20 Inventory Information and the HY20 Revenue Information been disclosed on 29 August 2019 and 27 February 2020, respectively.

83 *Seventh*, 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: ASAF [106]), the potential effect of the contravening conduct on the market and harm to investors was significant.

84 *Eighth*, the CEO Instructions, 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 (ASAF [44]), 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 (ASAF [72(e)], [77] and [79]), reveals that there was a corporate culture at a senior management level not conducive to compliance with the Act, particularly in relation to FFG's financial reporting obligations and associated market disclosure.

85 *Ninth*, despite FFG's current chief financial officer (Mr Myers) giving evidence of FFG's deteriorating financial position, he also observed that in FFG's FY23 Annual Report, FFG improved its operational earnings performance and reported positive adjusted operating EBITDA of $30.4 million: affidavit of 13.10.23 at [13]–[14]. Further, none of FFG's witnesses, including Mr Myers, its chief executive officer (Mr Perich) and non-executive director (Mr Black) have suggested that FFG cannot pay a penalty in the amount of $5 million by instalments, if ordered to do so by the Court.

86 Against the background of the preceding factors, I take into account the following mitigating circumstances.

87 *First*, the conduct giving rise to the admitted contraventions was engaged in without the knowledge of the Board: ASAF [123]; affidavit of Mr Perich of 13.10.23 at [37], [46], [58], [68] and [69].

88 *Second*, FFG, through its current chief executive officer, Mr Perich, has acknowledged the seriousness of the contraventions and of the failings which it represents on the part of FFG and has apologised for the conduct giving rise to the contraventions: affidavit of 13.10.23 at [10]–[11].

89 *Third,* FFG has introduced a new Board and Executive Leadership Team and has made a number of changes to the company's policies, procedures, operations and culture so that the contravening conduct cannot be repeated: affidavits of Mr Perich of 13.10.23 at [12], [85]–[110]; Mr Black of 13.10.23 at [25]–[52]; Mr Myers of 13.10.23 at [52]–[60]. Mr Macleod and Mr Nicholas are no longer employed by, or otherwise involved in, FFG and almost all of those employees who reported to them have left the company: ASAF [111]–[113].

90 *Fourth,* FFG has not previously been found to have contravened the Act: affidavit of Mr Perich of 13.10.23 at [13].

91 *Fifth*, FFG has provided significant cooperation to ASIC, including by making admissions of fact and contravention in its defence and the ASAF (and before that in the Statement of Agreed Facts dated 15 December 2023) and by ultimately agreeing the amount of the penalty. FFG has communicated with ASIC about the matters underlying these proceedings since shortly after they came to the attention of the board on 28 May 2020, with FFG's solicitors providing information and documents to ASIC from 6 July 2020. This cooperation reflects FFG's contrition and desire to do better in the future, and has assisted ASIC to perform its regulatory role.

92 *Sixth*, it is relevant, in the context of penalties for contraventions of the continuous disclosure provisions, that the costs of deterrence will ultimately be borne by shareholders, some of whom are the very shareholders who were harmed by the contraventions. A similar point was made by French J in *Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; (2006) 234 ALR 511 at [98]. In the present case, the potential impact on shareholders is significant, given that FFG's market capitalisation on 26 June 2024 was $30.47 million: affidavit of Mr Myers of 27.6.24 at [29].

Payment by Instalments

93 The parties submit, and I accept, that it is appropriate that the penalty be payable in the following instalments:

(a) $2 million payable 28 days from delivery of judgment;

(b) $1.5 million payable 12 months after the date in (a) above;

(c) $1.5 million payable 24 months from the date in (a) above.

94 It is open to the Court to order the payment of penalties by instalments where there is sufficient financial material before the Court to justify the instalment arrangements. The authorities were recently and helpfully collected by Sarah C Derrington J in *Australian Securities and Investments Commission v Holista Colltech Ltd (No 2)* [2024] FCA 516 at [4]–[10].

95 In this respect, Noumi relies on three affidavits of its current CFO, Mr Myers (the third of them and parts of the first two of them being subject to a suppression order under s 37AF of the *Federal Court of Australia Act 1976* (Cth)) and the confidential affidavit of Mr Marsden. Mr Myers has held the position of CFO at a number of ASX-listed companies, and has particular expertise in business turnarounds, financial restructuring, and corporate transformation. His evidence explains that:

(a) Noumi has a significant deficiency of assets over liabilities, with an asset position as at 31 December 2023 of negative $235.2 million: 27.6.24 affidavit at [10]. Noumi has reported deteriorating negative net assets since FY22. In addition, it has reported a net loss after tax each year since FY20 (as restated).

(b) Noumi has significant financial liabilities, in particular, in respect of the convertible notes. From October 2023, Noumi was required to start paying a minimum 5% quarterly cash interest on the notes, which for FY25 equates to approximately $4.5 million per quarter (or approximately $18.4 million per year): 27.6.24 affidavit at [22]–[26]. The maturity date of the notes is May 2027. At maturity, the noteholders can elect to redeem the notes or convert the face value of the notes into shares at a set conversion price. The notes are recorded in Noumi's balance sheet at a "fair value," which as at 31 December 2023 was $331.8 million. However, fair value does not reflect either the face value of the notes plus accrued interest or the amount payable on redemption. As at 31 December 2023, the face value of the notes plus accrued interest was $356.3 million and the redemption value was $537.5 million: 27.6.24 affidavit at [27]. In circumstances where, as at 26 June 2024, Noumi's shares were trading at 11 cents per share and the average conversion price was 63.5 cents, there is currently little commercial incentive for a noteholder to exercise the conversion rights: 27.6.24 affidavit at [28]–[29].

(c) Noumi has restrictions on access to the undrawn capacity on its credit facilities. Noumi has three types of credit facility: a revolving credit facility, equally funded by HSBC and NAB (**Revolver Facility**), a full recourse and limited recourse debtor finance facility provided by HSBC, and equipment financing facilities. The current undrawn limit on the Revolver Facility is $18 million, which can be drawn down for general corporate purposes, excluding cash payments in connection with the convertible notes, or settlement or other litigation costs (Senior Syndicated Facility Agreement (**SFA**), cl 3.1). The undrawn limits on the debtor finance facilities are only available to the extent Noumi has unsold qualifying invoices. As Noumi sells all qualifying invoices to HSBC on a timely basis, there is no opportunity to further access these limits. Noumi's equipment financing facilities are fully drawn.

(d) Noumi's limited cash reserves and cash flows are required to meet ongoing trading obligations. Noumi's free cash flow for FY23 was negative $8.6 million and, as at 27 June 2024, Noumi continued to forecast a negative cash flow for FY24. Noumi's latest reported cash balance (as at 31 March 2024) was approximately $10 million higher than

it otherwise would have been as a result of expenses that were expected to be paid that quarter but shifted into later quarters. The adjusted balance, taking into account those deferred expenses, is $14.7 million. Further, any consideration of Noumi's available cash reserves needs to take into account that end-of-month cash balances are not representative of the low-point of Noumi's monthly liquidity cycle.

(e) Noumi's EBITDA for HY24 was $23.1 million. While this was an improvement on HY23, that improvement was budgeted and needs to continue in order to satisfy Noumi's existing liabilities.

96 On the basis of that evidence, supplemented by the confidential evidence, Noumi submits, and I accept, that $5 million payable in the proposed instalments is consistent with, and will promote, the objects of specific and general deterrence. So far as specific deterrence is concerned, there is no doubt that Noumi will feel the sting of a $5 million penalty, even where payable over two years. So far as general deterrence is concerned, this is primarily achieved by the total figure, which is not materially diminished by the relatively short period over which the penalty is payable. The proposed instalments, which see a significant component of the penalty paid upfront and the remainder payable across two years, are reasonable and appropriate and do not ameliorate the effect of the penalty by extending payment over an excessively long period of time.

Section 1317QF

97 Section 1317QF, which was introduced in March 2019, requires relevantly that, in circumstances where the Court considers that it is appropriate to make a pecuniary penalty order, the Court must consider the effect that making the order would have on the amount available to pay certain kinds of statutory compensation, and to give preference to making an appropriate amount available for making that compensation. The section does not specify any particular way in which that preference is to be given, which will depend on the particular circumstances of the case.

98 There is currently a representative proceeding in the Supreme Court of Victoria brought by Mr Gehrke and Mr Buch (the **Interveners**) on behalf of those who acquired shares and other securities in FFG between 7 December 2014 and 24 June 2020, in relation to allegations which include, but extend beyond the agreed contraventions in the present case. In light of those proceedings, the agreed position between ASIC and FFG is that, subject to further order, the amounts of the penalty order should be paid into Court. That strikes me as a sensible measure.

ASIC has indicated that it wishes to consider whether any further orders should be made pursuant to s 1317QF, and I have extended an opportunity to ASIC to consider what (if any) further orders it may wish to seek. In the meantime, it is appropriate to order that (subject to further order) the instalments of the amount of the pecuniary penalty order be paid into Court.

I certify that the preceding ninety-eight (98) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackman.

Associate:

Dated: 5 August 2024