

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

PART 9.4AA OF THE CORPORATIONS ACT 2001
INFRINGEMENT NOTICE

To: Midway Limited ACN 005 616 044
10 The Esplanade
NORTH SHORE VIC 3214

TAKE NOTICE: The Australian Securities and Investments Commission (**ASIC**) hereby issues an Infringement Notice to Midway Limited ACN 005 616 044 (**Midway**) under subsection 1317DAC(1) of the *Corporations Act 2001* (**Act**). This Infringement Notice requires Midway to:

- (i) pay a penalty to ASIC, on behalf of the Commonwealth, in the sum of \$33,000 (**Penalty**).

This Infringement Notice is issued on 12 January 2023.

DETAILS OF THE ALLEGED CONTRAVENTION**The Facts**

Midway conducts business in plantation management and woodfibre export.

Midway was admitted to the official list of the ASX Limited (**ASX**) on 8 December 2016 and official quotation of its securities commenced on that date. Midway has been listed since that time.

Forecast and outlook statements

On 26 August 2021, Midway released its 30 June 2021 full year results on the ASX's markets platform. This included an analyst and investor presentation which contained a forecast of sales volumes for FY22 of 3,069,000 geometric tonnes. This figure represented an approximately 25% increase in the amount of sales volume from the previous year.

During an investor conference call on 26 August 2021, Midway's managing director and CEO made the following statements which were summarised and released in an announcement on the ASX:

'Trading Conditions and Outlook

- *Improved global economic conditions and the prospect of increased pulp production in the next few years is driving improved trading outlook.'*

***'Issues Raised by Investors and Midway's Responses
Sales Volumes and Pricing in FY22***

- *A table showing the projected export and domestic sales volumes for FY22 and FY23 is included in the Midway FY21 results investor presentation lodged with the ASX. This table shows an increase in the forecast sales volumes across the Company in FY22 but with some ups and downs within the overall number...'*

'Profits in FY22 and in future years

- *...Midway expects much better result in FY22 on the back of higher sales volumes and prices.'*

On 21 September 2021, Midway released its annual report to shareholders. The annual report contained further commentary on expected trading conditions under the title 'Outlook'.

Half year results - Auditor review

On 9 February 2022, Midway's CFO and financial controller met with Midway's auditors to discuss the half year review. The agenda for this meeting stated that the half year review status was '*substantially complete*'.

On 11 February 2022, the auditors provided Midway's financial controller with a copy of a draft half year results and draft investor roadshow presentation with the auditor's workings. The auditor marked the figure of \$91.2 million for revenue, as '*Internal Consistency as per current year*' and marked the figure \$150.9 million for 1H21 as '*Prior Year Check*'.

Half year results – Papers to the directors

On 11 February 2022, meeting papers for Midway's Audit and Risk Management Committee to be held on 15 February 2022 were circulated to Midway's directors, CEO, CFO and company secretary. These papers included Midway's half year results and investor presentations which contained statements that Midway's first half 2022 consolidated sales revenue figure was down 39.6% compared to the previous corresponding period.

Half year results – Release to market

On 24 February 2022, prior to the market opening, Midway released its half yearly report and accounts, the 1H22 results announcement and the 1H22 analyst and investor presentation.

Following these announcements, the share price of Midway opened at \$1.10, a fall of 9.09% from the previous closing price of \$1.21 on 23 February 2022. Midway's share price closed at \$0.92 on 24 February 2022, a fall of 23.97% from the previous day's close.

On 25 February 2022, Midway released a transcript of an investor conference held the previous day. The transcript recorded that Midway's managing director made the following statements:

'The headline results are obviously disappointing and caused by a number of factors out of the company's control as well as underperformance of some business units.'

'Revenue and EBITDA were substantially down on expectations...'

'The numbers show what can only be described as a disappointing result. There is a lot of red ink on this page which is primarily driven by a large drop in revenue.'

Response to ASX Aware letter

On 30 March 2022, Midway stated, in its response to an ASX Aware Letter dated 22 March 2022 that:

'[Midway] considers the Information [that the 31 December 2021 consolidated revenue is down 39.6% on the previous corresponding half year] to be information that a reasonable person would expect to have a material effect on the price or value of its securities.'

'Finalised metrics for 1H22 were provided to [Midway] on 24 February 2022, at which point [Midway] can be said to have become 'aware' of the information such that disclosure was required by it under Listing Rule 3.1.'

"... [Midway] understands that anything it was aware of prior to the announcement on 24 February 2022 (ie that its consolidated revenue may differ from internal or market expectation) was not required to be disclosed to the market in reliance on Listing Rule 3.1A, being matters of supposition or that are insufficiently definite to warrant disclosure..."

The Contravention

This Infringement Notice has been issued because ASIC has reasonable grounds to believe that Midway contravened subsection 674(2) of the Act in the period from 11 February 2022 to 23 February 2022, in that:

- (a) Midway was an entity to which subsection 674(2) of the Act applied.
- (b) On 11 February 2022, Midway was aware that its consolidated sales revenue for the first half of the 2022 financial year was materially lower than the previous corresponding period (**Information**) when the papers for Midway's Audit and Risk Management Committee were circulated to the Midway directors, CEO, CFO and company secretary. The papers contained statements that Midway's first half 2022 consolidated sales revenue figure was down 39.6% compared to the previous corresponding period.
- (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 Midway because:
 - (i) the fall of Midway's first half 2022 consolidated sales revenue figure of 39.6% compared to the previous corresponding period was significant;
 - (ii) Midway had previously forecast an increase of sales volumes for FY22 and made positive comments about Midway's outlook for sales volumes. Whilst not the sole factor, lower sales volumes were a key driver in the fall in Midway's sales revenue;
 - (iii) Midway's share price fell following the release of Midway's 31 December 2021 half year results which included the Information;
 - (iv) in an investor presentation released on 25 February 2022, Midway acknowledged its results were disappointing and that revenue was down on expectations; and

- (v) in a letter to the ASX on 30 March 2022, Midway acknowledged that its sales revenue result was material information.
- (d) ASX Listing Rule 3.1 required Midway to tell ASX of the Information from 11 February 2022 until Midway released its half year results on 24 February 2022.
- (e) ASX Listing Rule 3.1A (the exception to ASX Listing Rule 3.1) did not apply to the Information because:
 - (i) a reasonable person would expect the Information to be disclosed to ASX given Midway's prior commentary regarding its expected FY22 sales volume, the size of the fall in its first half 2022 financial year consolidated sales revenue compared to the prior corresponding period and because this fall is the primary driver in Midway's disappointing first half year's results; and
 - (ii) the Information was not a matter of supposition or insufficiently definite to warrant disclosure given Midway's auditor had checked the revenue figure.
- (f) The Information was not generally available prior to 24 February 2022.

Compliance with the Infringement Notice

Midway may choose to comply with this Infringement Notice by paying the Penalty within the compliance period.

The compliance period for this Infringement Notice begins on 13 January 2023 and expires on 9 February 2023: subsection 1317DAH(1) of the Act. ASIC may extend the compliance period for this Infringement Notice once, by up to 28 days: subsection 1317DAH(3) of the Act. If this occurs, ASIC will notify Midway in writing.

Effect of issue and compliance with the Infringement Notice

The issue of this Infringement Notice, and subsequent compliance with it, is not an admission of liability by Midway and cannot be regarded as a finding that Midway has contravened subsection 674(2) of the Act for any other purpose: subsection 1317DAF(4) of the Act.

ASIC cannot take civil or criminal proceedings against Midway for the alleged contravention specified in this Infringement Notice, either during the compliance period or after the Infringement Notice is complied with: subsection 1317DAF(5) of the Act. However, certain proceedings may be commenced or continued against Midway by third parties or by ASIC on behalf of third parties: subsection 1317DAF(6) of the Act.

Effect of failure to comply with the Infringement Notice

ASIC cannot enforce compliance with this Infringement Notice: section 1317DAF of the Act. However, if this Infringement Notice is not withdrawn in accordance with section 1317DAI of the Act, it is open to ASIC to take the following action against Midway:

- (a) ASIC may (if applicable) make an order under section 91 of the *Australian Securities and Investments Commission Act* (the **ASIC Act**) for recovery of expenses of its investigation into the breach specified in this Infringement Notice. ASIC can also bring proceedings to enforce that order; and

- (b) ASIC can make a determination under subsections 708AA(3), 708A(2), 713(6), 713(23), 1012AA(3), 1012DA(2) or 1013FA(3) of the Act, or accept an enforceable undertaking under section 93AA of the ASIC Act and bring proceedings to enforce the undertaking: section 1317DAG of the Act.

Certain other proceedings may also be commenced or continued against Midway by third parties or by ASIC on behalf of third parties: subsection 1317DAG(4) of the Act.

Withdrawal of infringement notice

ASIC may withdraw this Infringement Notice at any time prior to compliance if it considers it appropriate to do so. If this Infringement Notice is withdrawn, any enforcement action may be taken by ASIC against Midway, including:

- (a) civil proceedings under Part 9.4B of the Act; or
- (b) a prosecution for an offence based on the provision specified in the notice.

Midway may seek the withdrawal of this Infringement Notice by making a written representation to ASIC: subsections 1317DAI(1) of the Act. Material provided to ASIC in such a representation is not admissible in evidence in proceedings against Midway or a representative of the company: subsections 1317DAI(2) of the Act.

Publication

If Midway complies with this Infringement Notice ASIC may publish details of Midway's compliance in the manner set out in subsections 1317DAJ(2) or (3) of the Act: subsection 1317DAJ(1) of the Act.



Andrew Stecher
Delegate
Australian Securities and Investments Commission