

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged:	Originating process (Rule 2.2): Federal Court (Corporations) Rules 2000 form 2
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File Number:	NSD1063/2022
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v MCPHERSON'S LIMITED (ACN 004 068 419) & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Form 2

Federal Court of Australia

District Registry: New South Wales

Division: General

No. NSD of 2022

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

McPHERSON'S LIMITED (ACN 004 068 419) AND OTHERS NAMED IN THE SCHEDULE

Defendants

ORIGINATING PROCESS

A. DETAILS OF APPLICATION

This application is made under sections 206C(1), 206E(1), 1101B, 1317E and 1317G of the *Corporations Act 2001* (Cth) (**Corporations Act**) and sections 21 and 23 of the *Federal Court of Australia Act 1976* (Cth).

The Plaintiff seeks declarations of contraventions by the First Defendant (**McPherson's**) of section 674(2) of the Corporations Act (as in force during the period from 20 October 2020 to 1 December 2020), declarations of contraventions by the Second Defendant of sections 180(1) and 1309(12) of the Corporations Act, orders that the First Defendant and the Second Defendant each pay to the Commonwealth a pecuniary penalty or penalties and orders disqualifying the Second Defendant from managing corporations for a period to be determined by the Court. The Plaintiff also seeks declarations in relation to contraventions by McPherson's of section 1041H(1) of the Corporations Act and section 12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**).

On the facts stated in the Plaintiff's concise statement, the Plaintiff seeks the following orders:

Declarations

Contraventions of s 674(2) of the Corporations Act by McPherson's

1. A declaration pursuant to s 1317E(1) of the Corporations Act that during the period from about 30 October 2020 to 1 December 2020, McPherson's contravened s 674(2) of the Corporations Act by failing to comply with ASX Listing Rule 3.1 in:
 - (a) not notifying the ASX that ABM Au Limited (**ABM**) had provided it with a draft revised purchasing forecast for FY21 inclusive of year-to-date sales, which

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff		
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forecast ABM sales of \$26 million for the full year FY21 and \$5.3 million for the first half FY21 (**Revised ABM Purchasing Forecast**); and

- (b) not withdrawing, or updating, McPherson's Q1 FY21 Trading Update released to the ASX on 20 October 2020 (**October Profit Forecast**).
2. Alternatively, a declaration pursuant to s 1317E(1) of the Corporations Act that during the period from about 2 November 2020 to 1 December 2020, McPherson's contravened s 674(2) of the Corporations Act by failing to comply with ASX Listing Rule 3.1 in:
- (a) not notifying the ASX of the Revised ABM Purchasing Forecast; and
 - (b) not withdrawing, or updating, the October Profit Forecast.
3. Alternatively, a declaration pursuant to s 1317E(1) of the Corporations Act that during the period from about 12 November 2020 to 1 December 2020, McPherson's contravened s 674(2) of the Corporations Act by failing to comply with ASX Listing Rule 3.1 in:
- (a) not notifying the ASX of the Revised ABM Purchasing Forecast;
 - (b) not notifying the ASX that, for the key sales event known as "11/11" or "singles day" (**11/11 Event**), ABM had achieved sales of 105.76 RMB (about \$21 million) down from ABM's forecasted sales of 154RMB (about \$31 million) (**11/11 Sales Results**); and
 - (c) not withdrawing, or updating, the October Profit Forecast.

Contraventions of s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act by McPherson's

4. A declaration that:
- (a) by issuing a cleansing notice on 2 November 2020 (**Cleansing Notice**), McPherson's represented that as at the date of that notice:
 - (i) it had complied with s 674(2) of the Corporations Act (**First Cleansing Notice Representation**); and
 - (ii) there was no "excluded information" as defined in s708A(7) of the Corporations Act (**Second Cleansing Notice Representation**);
 - (b) the First Cleansing Notice Representation was misleading or deceptive in that McPherson's had not complied with s 674(2) of the Corporations Act, in light of the matters referred to in paragraphs 1 and 2 above;
 - (c) the Second Cleansing Notice Representation was misleading or deceptive in that, as at the date of the Cleansing Notice, McPherson's had received the Revised ABM Purchasing Forecast on or about 30 October 2020 which, if it was not required to be announced pursuant to the ASX Listing Rules, that was because it was "excluded information" as defined in s 708A(7) of the Corporations Act; and
 - (d) McPherson's contravened s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act by making the First Cleansing Notice Representation and the Second Cleansing Notice Representation (or either of them).



5. A declaration that:
 - (a) at the McPherson's annual general meeting on 4 November 2020 (**4 November AGM**), McPherson's represented that:
 - (i) McPherson's forecast growth in underlying profit before tax (**PBT**) in first half FY21 was in the range of 20-30% above FY20;
 - (ii) McPherson's forecast growth in PBT for full year FY21 was in the range of 5-10% above FY20; and
 - (iii) sales to ABM of \$48 million were forecast for FY21,
 (together, the **AGM Representations**);
 - (b) the AGM Representations were misleading or deceptive in that, having received the Revised AGM Purchasing Forecast on or about 30 October 2020, McPherson's did not have reasonable grounds for making the AGM Representations on 4 November 2020; and
 - (c) McPherson's contravened s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act by making the AGM Representations;
6. A declaration that McPherson's contravened s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act by each of the following:
 - (a) failing to disclose the Revised ABM Purchasing Forecast, and its likely effect on the October Profit Forecast, in the period from about 30 October 2020 to 1 December 2020;
 - (b) failing to disclose the 11/11 Sales Results, and its likely effect on the October Profit Forecast, in the period from about 12 November 2020 to 1 December 2020; and
 - (c) failing to withdraw or update the October Profit Forecast in the period from about 30 October 2020 (or alternatively, 12 November 2020) to 1 December 2020.

Contravention of s 180(1) of the Corporations Act by the Second Defendant

7. A declaration pursuant to s 1317E(1) of the Corporations Act that, during the period from 30 October 2020 to 1 December 2020, the Second Defendant contravened s 180(1) of the Corporations Act in that he failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised, in failing to take adequate steps to prevent the conduct of McPherson's constituting contraventions of ss 674(2) and 1041H(1) of the Corporations Act and of s 12DA(1) of the ASIC Act.

Contraventions of s 1309(12) of the Corporations Act by the Second Defendant

8. A declaration that the Cleansing Notice was false or misleading in a material particular in that:
 - (a) McPherson's had not complied with s 674(2) of the Corporations Act; and
 - (b) further or alternatively, as at the date of the Cleansing Notice, McPherson's had received the Revised ABM Purchasing Forecast on or about 30 October 2020 which, if it was not required to be announced pursuant to the ASX Listing Rules,



that was because it was “excluded information” as defined in s 708A(7) of the Corporations Act

9. A declaration pursuant to s 1317E(1) of the Corporations Act that the Second Defendant contravened s 1309(12) of the Corporations Act by making available or giving, or alternatively authorising or permitting the making available or giving of, the Cleansing Notice to the ASX and shareholders of McPherson’s without having taken reasonable steps to ensure the information was not false or misleading in a material particular.
10. A declaration that:
 - (a) by issuing a Trading Update announcement to the ASX dated 1 December 2020 (**1 December Announcement**), McPherson’s represented that (**1 December Representations**):
 - (i) the meeting on 27 November 2020 between Livia Wang of ABM and the Second Defendant was the first time McPherson’s had become aware that the 11/11 Event had performed below expectation;
 - (ii) McPherson’s decision to revise down its profit forecast was a result of feedback provided during that meeting; and
 - (b) the 1 December Representations were false or misleading in a material particular in that by 1 December 2020, McAllister and consequently McPherson’s had been aware of the Revised ABM Purchasing Forecast for more than a month, and of the 11/11 Sales Results for almost 3 weeks.
11. A declaration pursuant to s 1317E(1) of the Corporations Act that the Second Defendant contravened s 1309(12) of the Corporations Act by making available or giving, or alternatively authorising or permitting the making available or giving of, the 1 December Announcement without having taken reasonable steps to ensure the information was not false or misleading in a material particular.

Pecuniary penalties

12. An order pursuant to s 1317G(1) of the Corporations Act that the First Defendant pay to the Commonwealth a pecuniary penalty or pecuniary penalties in an amount or amounts to be fixed by the Court in respect of each contravention of s 674(2) of the Corporations Act.
13. An order pursuant to s 1317G(1) of the Corporations Act that the Second Defendant pay to the Commonwealth a pecuniary penalty or pecuniary penalties in an amount or amounts to be fixed by the Court in respect of each contravention of s 180(1) of the Corporations Act.
14. An order pursuant to s 1317G(1) of the Corporations Act that the Second Defendant pay to the Commonwealth a pecuniary penalty or pecuniary penalties in an amount or amounts to be fixed by the Court in respect of each contravention of s 1309(12) of the Corporations Act.

Disqualification order

15. An order pursuant to s 206C(1) and/or s 206E(1) of the Corporations Act disqualifying the Second Defendant from managing corporations for a period to be determined by the Court.

17. Such further or other orders as the Court thinks fit.



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**C. FILING**

Date of filing: 8 December 2022

Registrar

This originating process is filed by the Australian Securities and Investments Commission.

D. SERVICE

The Plaintiff's address for service is: HWL Ebsworth Lawyers

Place: Level 8, 447 Collins Street, Melbourne VIC

Email: rjaffe@hwle.com.au

The Plaintiff's address is Level 5, 100 Market Street, Sydney NSW 2000

It is intended to serve a copy of this originating process on each defendant.

**SCHEDULE**

No. NSD of 2022

Federal Court of Australia
District Registry: New South Wales
Division: General

Plaintiff	Australian Securities and Investments Commission
First Defendant	McPherson's Limited (ACN 004 068 419)
Second Defendant	Laurence McAllister