



IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDINGS LIST

Case: S ECI 2021 04391

Filed on: 24/02/2022 10:25 AM  
No. S ECI 2021 04391

B E T W E E N:

**DANIEL JOSEPH BATCHELOR**

Plaintiff

and

**NUIX LIMITED (ACN 117 140 235)**

First Defendant

and

**MACQUARIE CAPITAL (AUSTRALIA) LIMITED (ACN 123 199 548)**

Second Defendant

and

**MACQUARIE GROUP LIMITED (ACN 122 169 279)**

Third Defendant

### STATEMENT OF CLAIM

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Date of Document:	24 February 2022	Solicitors Code:	110756
Filed on behalf of:	The Plaintiff	DX:	N/A
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## A. PRELIMINARY

### A.1. Plaintiff and Group Members

1. The Plaintiff:

- (a) is a natural person; and
- (b) acquired shares in the First Defendant (**Nuix**):
  - (i) by subscription in the Initial Public Offering (as defined in paragraph 18 below); and
  - (ii) on the Australian Securities Exchange (**ASX**) during the Inflation Period (as defined in paragraph 2 below).

#### *Particulars*

*The Plaintiff acquired shares in Nuix as set out in Annexure A.*

2. The Plaintiff brings this proceeding as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1984* (Vic) on behalf of himself and all persons who acquired shares in Nuix:

- (a) by subscription in the Initial Public Offering; or
- (b) on the ASX at any time during the period from 4 December 2020 to 29 June 2021 inclusive (**Inflation Period**);

and who:

- (c) are alleged to have suffered loss or damage by reason of the matters set out below; and
- (d) as at the date of commencement of this proceeding, are not:
  - (i) directors or officers, or a close associate (as defined by s 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**) of any of the Defendants; or
  - (ii) a related party (as defined by s 228 of the *Corporations Act*) of any of the Defendants; or
  - (iii) a related body corporate (as defined by s 50 of the *Corporations Act*) of any of the Defendants; or
  - (iv) an associated entity (as defined by s 50AAA of the *Corporations Act*) of any of the Defendants; or
  - (v) a judge, associate justice or registrar of the Supreme Court of Victoria, or justice of the High Court of Australia;

**(Group Members).**

3. As at the date of the commencement of this proceeding there are, as against each Defendant, seven or more persons who have, against that Defendant, the claims set out herein.

**A.2. Nuix**

4. At all relevant times, Nuix was:
- (a) a corporation incorporated under the *Corporations Act*, and capable of being sued;
  - (b) a trading corporation within the meaning of the *Australian Securities and Investments Commission Act 2001* (Cth) (*ASIC Act*); and
  - (c) a person within the meaning of:
    - (i) sections 1041E and 1041H of the *Corporations Act*;
    - (ii) section 12DA of the *ASIC Act*; and
    - (iii) section 18 of the Australian Consumer Law (**ACL**) set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), as applicable pursuant to s 131 of the CCA and one or more of the following:
      - 1. section 12 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic);
      - 2. section 28 of the *Fair Trading Act 1987* (NSW);
      - 3. section 16 of the *Fair Trading Act 1989* (Qld);
      - 4. section 6 of the *Australian Consumer Law (Tasmania) Act 2010* (Tas);
      - 5. section 19 of the *Fair Trading Act 2010* (WA);
      - 6. section 14 of the *Fair Trading Act 1987* (SA);
      - 7. section 7 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT); and/or
      - 8. section 27 of the *Consumer Affairs and Fair Trading Act* (NT).
5. At all material times, Nuix *inter alia* operated a business of selling investigative analytics and intelligence software.

***Particulars***

*Nuix described itself in the Prospectus (as defined in paragraph 16 below) at section 2.1.1 as ‘a leading provider of investigative analytics and intelligence software to customers in 78 countries’.*

**A.3. Macquarie Entities**

6. At all material times, each of the Second Defendant (**MCAL**) and Third Defendant (**MGL**) was:
- (a) a corporation incorporated under the *Corporations Act 2001* and capable of being sued;
  - (b) a person within the meaning of:
    - (i) sections 1041E and 1041H of the *Corporations Act*; and
    - (ii) section 12DA of the *ASIC Act*.
7. MCAL was:
- (a) an underwriter of the issue and sale of shares in Nuix pursuant to the Prospectus; and
  - (b) involved in preparing the Prospectus.

***Particulars***

*The involvement of MCAL in preparing the Prospectus is to be inferred from its role as underwriter and from the reference to it throughout the Prospectus, including in sections 6.4.1 and 6.7.*

*Further particulars may be provided after discovery.*

8. At all relevant times, MCAL:
- (a) was a subsidiary of MGL; and
  - (b) in the premises – was controlled by MGL within the meaning of section 50AA of the *Corporations Act*.
9. At the time of the Prospectus, MGL and MCAL each controlled Nuix (within the meaning of section 50AA of the *Corporations Act*).

***Particulars***

*Insofar as the Plaintiff can say prior to discovery:*

- (a) *Nuix was controlled by MGL by reason of 76.2% of Nuix Shares being held by Macquarie Corporate Holdings (MCH). In turn, MCH was a subsidiary of MGL;*
- (b) *Nuix was controlled by MCAL by reason of MCAL being a subsidiary of MCH, and by 76.2% of Nuix Shares being held by MCH.*

10. MGL was involved in the preparation of the Prospectus.

***Particulars***

*The involvement of MGL in preparing the Prospectus is to be inferred from the references to it throughout the Prospectus, including in sections 6.4.1 and 6.7.*

*Further particulars may be provided after discovery.*

**A.4. Standen and Phillips**

11. From 9 June 2011 until 18 November 2020, David Standen (**Standen**):

- (a) was an officer of MCAL;
- (b) was an officer of MGL;
- (c) was appointed by MCAL, further or alternatively MGL, to the Board of Nuix; and
- (d) was a director of Nuix; and
- (e) was required by MCAL, further or alternatively MGL, to report to MCAL or MGL as the case may be, regarding *inter alia* the financial performance and prospects of Nuix.

***Particulars***

*The requirement in 'e' is to be inferred from the circumstance that Standen was appointed by MCAL, alternatively MGL, to the Board of Nuix. Further particulars may be provided after discovery.*

12. In the premises, at all material times the knowledge of Standen in relation to the conduct described in this Statement of Claim is to be attributed to MCAL, further or alternatively MGL.
13. From 9 June 2011, Daniel Phillips (**Phillips**):
- (a) was an officer of MCAL;
  - (b) was an officer of MGL;
  - (c) was appointed by MCAL, further or alternatively MGL, to the Board of Nuix;
  - (d) was a director of Nuix; and
  - (e) was required by MCAL, further or alternatively MGL, to report to MCAL or MGL as the case may be, regarding *inter alia* the financial performance and prospects of Nuix.

***Particulars***

*The requirement in 'e' is to be inferred from the circumstance that Phillips was appointed by MCAL, alternatively MGL, to the Board of Nuix. Further particulars may be provided after discovery.*

14. In the premises, at all material times the knowledge of Phillips in relation to the conduct described in this Statement of Claim is to be attributed to MCAL, further or alternatively MGL.

**B. NUIX SECURITIES MARKET**

**B.1. Initial Public Offering**

15. At all material times on and from 18 November 2020 (the **Prospectus Date**), there existed a market of investors or potential investors in Nuix Shares (**Nuix Securities Market**).

***Particulars***

*The said investments were effected by:*

- (a) *subscription under the Prospectus; further or alternatively*
- (b) *trading on the ASX.*

*Further particulars may be provided after discovery and receipt of experts' reports.*

16. On the Prospectus Date, Nuix issued a prospectus (the **Prospectus**) in respect of:
- (a) the issue of new ordinary shares; and
  - (b) the sale of existing ordinary shares;
- (together, **Nuix Shares**).

***Particulars***

*The Prospectus was dated 18 November 2020 and stated that '[t]he offer contained in this Prospectus involves an initial public offering to acquire fully paid ordinary shares in the capital of Nuix (Shares) (the Offer)'. A copy of the Prospectus is available upon request from the plaintiff's solicitors.*

*Further particulars may be provided after discovery.*

17. The Prospectus was required to comply with the provisions of Part 6D of the *Corporations Act*.

18. The Prospectus:

- (a) with MCAL's consent named MCAL as underwriter of the Prospectus; and
- (b) constituted an offer to sell Nuix Shares to investors or potential investors in the Nuix Securities Market;

**(Initial Public Offering)**.

***Particulars***

*The Prospectus stated that '[t]he offer contained in this Prospectus involves an initial public offering to acquire fully paid ordinary shares in the capital of Nuix (Shares) (the Offer)'.*

**B.2. Secondary (on-market) trading**

19. At all material times during the Inflation Period, Nuix Shares were:



- (a) listed on a financial market operated by the ASX;
  - (b) ED securities within the meaning of s 111AE of the *Corporations Act*;
  - (c) quoted ED securities within the meaning of s 111AM of the *Corporations Act*; and
  - (d) financial products within the meaning of the *Corporations Act*.
20. In the premises, at all material times during the Inflation Period, Nuix was:
- (a) a listed disclosing entity within the meaning of s 111AL(1) of the *Corporations Act*; and
  - (b) subject to and bound by the Listing Rules of the ASX (**ASX Listing Rules**).
21. By reason of the matters in paragraphs 19 to 20, Nuix was an entity to which:
- (a) during the Inflation Period up to 22 March 2021—s 674(2) of the *Corporations Act* applied, as modified by:
    - (i) *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020*; and
    - (ii) *Corporations (Coronavirus Economic Response) Determination (No. 4) 2020*;(together, the **Coronavirus Determinations**); and
  - (b) during the Inflation Period on and from 23 March 2021—s 674(2) of the *Corporations Act* applied.

## **C. LEAD-UP TO IPO**

### **C.1. Nuix Management Information**

#### ***C.1.1. 'Red lights' on Nuix products***

22. By not later than January 2021, Nuix had conducted internal reviews of its products and product development projects which reviews:
- (a) identified numerous significant projects as affected by critical problems (**'red lights'**);
  - (b) reported serious doubts about the quality of Nuix products; and
  - (c) reported serious doubts as to Nuix's ability to achieve in FY21 revenue growth above its FY20 result.

***Particulars***

*Insofar as the Plaintiff say prior to discovery, Nuix conducted two internal reviews in the period, being a review in around mid-2020 and another in around January 2021.*

*One or both of these reviews reported:*

- (a) that six of Nuix’s key products had ‘red lights’ and that even if Nuix boosted resources it would take between 18 months and two years to “turn the situation around”;*
- (b) “We immediately need 8 people to slow the bleeding” and another 43 people to “turn” the situation; and*
- (c) “... lack of engineering capacity prohibits our ability to capture additional market share”.*

*In connection with the said reviews, Nuix executives prepared the table set out in Annexure B hereto (entitled ‘Overall Program Health Check’) in or around January 2021, listing ten Nuix products, of which six (6) were given a ‘red light’ status denoting that those products were affected by critical problems for the reasons identified in the table.*

*Further particulars may be provided after discovery.*

***C.1.2. Engineering staff and research & development***

23. On or about 30 March 2019, six senior Nuix executives hosted a presentation for Phillips and Standen, in which it was reported by the executives that or to the effect that, *inter alia*:

- (a) Nuix had missed key budget forecasts; and
- (b) staff morale and turnover were major headwinds for Nuix.

***Particulars***

*Insofar as the Plaintiff can say prior to discovery, the presentation was called ‘Nuix 2.0’. Further particulars, including particulars of the identities of the executives, will be provided after discovery.*

24. By 30 June 2020, Nuix over the course of FY20 had:

- (a) reduced the number of engineers it employed by 30%; and

- (b) underspent its research and development (**R&D**) budget by 16.5%.

***Particulars***

*The reduction and underspend are described in an article published in the Australian Financial Review on 18 May 2021 entitled ‘Slow the bleeding’: Nuix review flashed red weeks after listing’.*

*Further particulars may be provided after discovery.*

***C.1.3. Nature of FY20 earnings result***

25. Nuix’s reported FY20 earnings result was materially derived from cuts to engineering headcount and underinvestment in R&D, and not growth in revenue relative to FY19.

***Particulars***

*The matters are described in an article published in the Australian Financial Review on 17 May 2021 entitled ‘The infighting behind the \$2.7b Nuix meltdown’.*

*Further particulars will be provided after discovery and receipt of experts’ reports.*

***C.1.4. Inability accurately to forecast financial performance***

26. In the period from and including FY17 to the Prospectus Date, Nuix’s actual revenue results had repeatedly fallen short of its internal forecasts.
27. In April 2019, the Board of Nuix told Rod Vawdrey (**Vawdrey**), then Executive Director and Chief Executive Officer, that the Board did not believe that Nuix’s forecast of \$180m revenue in FY19 was achievable.

***Particulars***

*The statement was recorded in an email sent by Vawdrey to persons presently unknown to the Plaintiff, and otherwise described in an article published in the Australian Financial Review on 9 June 2021 entitled ‘ASIC turns blowtorch on who controlled Nuix IPO’.*

*Further particulars may be provided after discovery.*

28. In April 2019, Vawdrey stated to Nuix staff that or to the effect that Nuix's sales forecasts were:
- (a) not able to be achieved; and
  - (b) the product of a desire by the forecasts' authors to reflect budget numbers instead of being actual forecasts.

***Particulars***

*The statement is recorded in an email sent by Vawdrey to persons presently unknown to the Plaintiff, and otherwise described in an article published in the Australian Financial Review on 9 June 2021 entitled 'ASIC turns blowtorch on who controlled Nuix IPO'.*

*Further particulars may be provided after discovery.*

29. In October 2019, Stephen Doyle (**Doyle**), Chief Financial Officer, reported to Vawdrey and other Nuix executives that or to the effect that:
- (a) Nuix throughout Q1 had been tracking toward a miss against its sales forecast for 1H20; and
  - (b) Doyle considered that Nuix's forecasting procedures were such that Nuix executives, as a group, were not able reliably to predict Nuix's financial results.

***Particulars***

*The statements were described in an article published in the Australian Financial Review on 9 June 2021 entitled 'ASIC turns blowtorch on who controlled Nuix IPO'.*

*Further particulars may be provided after discovery.*

30. By not later than the Prospectus Date, Nuix knew or ought reasonably to have known that or to the effect that Nuix could not reliably produce accurate forecasts for its business.

***Particulars***

*The said knowledge was or ought to have been had by Vawdrey, Doyle and other senior officers of Nuix. The Plaintiff refers to the matters in paragraphs 22 to 29 above.*

*Further particulars may be provided after discovery.*

***C.1.5. Castagna's influence over Nuix management***

31. From time to time during the period from March 2019 until 4 December 2020, Standen, Phillips, and other officers of Nuix, MCAL or MGL:
- (a) visited Anthony Castagna, a co-founder and former officer of Nuix (**Castagna**), whilst the latter was serving a prison sentence;
  - (b) during the said visits, discussed the management of Nuix's business; and
  - (c) thereafter followed directions given or adopted suggestions made by Castagna regarding the management of Nuix's business.

***Particulars***

*Castagna was found guilty of conspiracy to defraud, conspiracy to dishonestly cause loss to a third person, and dealing with proceeds of crime, by a jury of the Supreme Court of New South Wales on 18 April 2018 and was in prison from at least that date.*

*Standen visited Castagna in prison on dates not presently known to the Plaintiff.*

*Phillips visited Castagna in prison on dates not presently known to the Plaintiff but including on or around 30 March 2019.*

*The visits of Castagna by Standen, Phillips and other officers of Nuix, MCAL and MGL are otherwise described in an article published in the Australian Financial Review on 17 May 2021 entitled 'The infighting behind the \$2.7b Nuix meltdown'.*

*Castagna was later acquitted.*

*Further particulars, including the identities of other officers who visited Castagna may be provided after discovery and subpoenas.*

32. At the times when Castagna was visited by the officers referred to in the paragraph above, Castagna held a substantial interest (within the meaning of the *Corporations Act*) in Nuix.

***Particulars***

*Insofar as the Plaintiff can say prior to discovery, Castagna was the beneficiary of a retirement fund maintained by Delrick Limited, a company limited by guarantee incorporated in Vanuatu, which in turn owned Blackall Limited, a New Zealand incorporated company and*

*legal and beneficial owner of 9.3% of Nuix Shares. The structure is otherwise described on page 42 of the Prospectus.*

*Further particulars may be provided after discovery.*

*C.1.5.1. Knowledge of Nuix, MCAL and MGL as at Prospectus Date*

33. By not later than the Prospectus Date, each of Nuix, MCAL and MGL knew or ought reasonably to have known each of the matters in paragraphs 22 to 32 above (the **Management Information**).

***Particulars***

- (a) *The matters in paragraphs 22, 23, 27, 28, 29 and 30 were known to the Nuix officers referred to therein as making or receiving the said communications.*
- (b) *The matters in paragraphs 24, 25 and 26 relate to the actual financial performance of Nuix, and therefore were actually known by Nuix.*
- (c) *The matters in paragraph 31 were known to the Nuix officers undertaking the visits or implementing the directions or suggestions.*
- (d) *Knowledge of the said matters is to be attributed to MCAL and MGL by reason of:*
- i. the attendance or participation of Standen and Phillips in the communications, visits and conduct referred to in 'a' to 'c' of these particulars; and*
  - ii. the roles of Standen and Phillips as nominees of MCAL and/or MGL to the Board of Nuix.*
- (e) *Knowledge of Castagna's interest in Nuix, referred to in paragraph 32, can be inferred in each of Nuix, MCAL and MGL because the said interests were described in the Prospectus (at page 42), which each of Nuix, MCAL and MGL were (by their officers or servants) involved in preparing as set out in paragraphs 7 and 10.*

*Further particulars may be provided after discovery.*

## **C.2. Nuix Structural Information**

### ***C.2.1. Customer shift towards consumption-based pricing***

34. Further and in the alternative to the matters in paragraphs 22 to 33, at the Prospectus Date, Nuix had a revenue recognition policy under which:
- (a) in relation to its contracts for software delivered on a customer's premises, or in a customer-hosted 'cloud' environment – the total revenue to be recognised in respect of such contracts, was known at the time of entry into the contract (**Non-Consumption Model**); and
  - (b) in relation to its contracts for software delivered on a Nuix-hosted cloud environment – the total revenue to be recognised in respect of such contracts:
    - (i) was calculated by reference to the amount of data processed or hosted by Nuix, and not known at the time of entry into the contract; and
    - (ii) was recognised over the life of the contract;**(Consumption Model)**.

#### ***Particulars***

*The revenue recognition policy is set out in section 4.2.4.1 of the Prospectus.*

35. Licences sold by Nuix under the Consumption Model had a negative impact on Nuix's short-term revenues, relative to the impact of licences sold under the Non-Consumption Model.

#### ***Particulars***

*(a) Nuix stated in its Prospectus at section 5.1.13 that 'If Nuix moves to a consumption-based pricing model, and the proportion of Nuix's revenue generated from Consumption Licences increases, Nuix expects to experience generally longer periods over which it collects cash from customers, which may have a negative impact on Nuix's operating cash flows (in addition to impacting the timing of Nuix's recognition of affected revenue)'.*

*(b) Nuix stated to the market on 21 April 2021 that the ‘transition to consumption licences [has] a near-term negative impact on statutory revenue recognition’. A copy of the statement is available upon request from the plaintiff’s solicitors.*

*Further particulars may be provided after discovery and receipt of experts’ reports.*

36. From not later than July 2019, Nuix’s customers were increasingly seeking to purchase software licences, including from Nuix, on a Consumption Model instead of a Non-Consumption Model.

***Particulars***

*(a) The acquisition of software licences by customers on a Consumption Model is more favourable to the customer in that it involves lower upfront costs, provides scalability and permits remote working, compared to software purchased under a Non-Consumption Model.*

*(b) The trend toward greater uptake of Consumption Model licences was further accelerated during the COVID pandemic, as Nuix’s customers tended to have more of their employees ‘working from home’.*

*(c) During FY19 and into FY20 Nuix was actively pursuing a strategy of transitioning some of its customers to Consumption Model pricing.*

*Further particulars may be provided after discovery and receipt of experts’ reports.*

37. At the Prospectus Date, Nuix was not able reliably to forecast:

- (a) the rate of customer transition from Non-Consumption Model licences to Consumption Model licences referred to in the previous paragraph; or
- (b) the likely financial consequences of (a) for Nuix.

***Particulars***

*So far as the Plaintiff is able to say prior to discovery and receipt of expert reports, the inability to forecast is to be inferred from:*



- (a) *the matters referred to in paragraphs 28 and 29 above; and*
- (b) *an acknowledgement by Vawdrey to The Australian newspaper reported on 7 June 2021 that ‘The increasing rate of adoption of consumption licenses has happened faster than anticipated and means that some of the revenue upside expected for financial year 2021 will occur in future years in line with customer usage and data growth’.*

*Further particulars may be provided after discovery.*

### ***C.2.2. Knowledge of Nuix, MCAL and MGL as at Prospectus Date***

38. By not later than the Prospectus Date, each of Nuix, MCAL and MGL knew or ought reasonably to have known of, or known to the effect of, the matters in paragraph 37 above (the **Structural Change Information**).

#### ***Particulars***

- (a) *Nuix’s knowledge of the said matters is to be inferred from the matters set out in the particulars to paragraph 37.*
- (b) *Further or alternatively, Nuix ought reasonably to have known the said matters because:*
- i. the matters set out in the particulars to paragraph 37 had been reported at senior management level and to directors within Nuix; and*
  - ii. the said matters related to Nuix’s financial forecasts, being forecasts:*
    - 1. important to its business;*
    - 2. affecting Nuix’s obligations under inter alia s 674 of the Corporations Act; and*
    - 3. in the premises in ‘1’ and ‘2’ – were matters of which its senior management ought to have been aware in the course of their duties.*

(c) *The knowledge of MCAL and MGL is to be inferred from:*

- i. *the matters set out in 'b' hereof; and*
- ii. *the involvement of their nominees Standen and Phillips in the management of Nuix.*

*Further particulars may be provided after discovery and receipt of expert reports.*

### **C.3. US Political Risk Information**

39. Further and in the alternative to the matters in paragraphs 22 to 38, at the Prospectus Date, a material portion of Nuix's customer base was comprised of United States public sector customers.

#### ***Particulars***

*Insofar as the Plaintiff can say prior to discovery, as at the Prospectus Date, Nuix had established a subsidiary, Nuix USG Inc, to contract directly with United States public sector customers. Around 55.5% of the Nuix group's FY20 total revenue was from customers in the United States of America and Canada, and 19.9% from public sector customers.*

*Further particulars may be provided after discovery and receipt of experts' reports.*

40. By not later than the Prospectus Date, each of Nuix, MCAL and MGL knew that there was material uncertainty as to:

- (a) whether Nuix's United States public sector customers would renew their contracts with Nuix in FY21; further or alternatively
- (b) the terms on which they might so renew.

(the **US Political Uncertainties**).

#### ***Particulars***

*(a) The terms on which those United States public sector customers might renew their contracts which the Plaintiff alleges were affected by material uncertainty are the terms relating to the length*

*of the contract, and at what points in the life of the contract Nuix would be paid and in what amounts.*

*(b) The material uncertainty arose from:*

- i. the budget of the United States government from 1 October 2020 to 11 December 2020 being set by a 'continuing resolution' which provided limited and temporary funding, instead of a regular appropriations bill;*
- ii. whether there would be a change in presidency and how any transition might occur;*
- iii. government expenditure being delayed or restructured by covid-19.*

*Further particulars may be provided after discovery and receipt of experts' reports.*

41. By not later than the Prospectus Date, each of Nuix, MCAL and MGL knew or ought reasonably to have known that the US Political Uncertainties materially increased the inability of Nuix reliably to forecast:
- (a) its financial performance, referred to in paragraph 30 above (beyond the unreliability referred to therein); further or alternatively
  - (b) the rate of transitions by customers, referred to in paragraph 37 above (beyond the unreliability referred to therein);
- (the **Political Risk Information**).

#### ***Particulars***

*The said information ought reasonably to have been known because the fact of US Political Uncertainties was disclosed in the Prospectus together with the risk that developments in respect of the Uncertainties could result in an 'unexpected change to Nuix's financial performance or prospects' but without disclosure that Nuix's existing forecasting systems already were not able reliably to forecast its financial performance.*

## **D. IPO CONTRAVENTIONS**

### **D.1. Prospectus Revenue Growth Forecast**

42. The Prospectus included a forecast that Nuix revenue for FY21 would be \$193.5m, reflecting approximately 10% growth over its FY20 result of \$175.9m (**Prospectus Revenue Growth Forecast**).

#### *Particulars*

*The Prospectus Revenue Growth Forecast is set out at pp 38 and 135 of the Prospectus.*

### **D.2. Prospectus Omissions**

43. At the Prospectus Date, each of:

- (a) the Management Information;
- (b) the Structural Change Information; further or alternatively
- (c) the Political Risk Information;

was information that investors and their professional advisers would have reasonably required to make an informed assessment of the assets and liabilities, financial position and performance, profits and losses and prospects of Nuix, within the meaning of s 710 of the *Corporations Act*.

44. The Prospectus omitted:

- (a) the Management Information;
- (b) the Structural Change Information; and
- (c) the Political Risk Information;

45. In the premises set out in the preceding paragraph, Nuix contravened s 728(1)(b) of the *Corporations Act*.

### D.3. Misleading or deceptive conduct

46. Further and in the alternative, at the time of making the Prospectus Revenue Growth Forecast:

- (a) Nuix, by providing the said Forecast in the Prospectus, implied to the Nuix Securities Market that or to the effect that:
  - (i) Nuix had undertaken all necessary and reasonable investigations before making the Forecast, and had satisfied itself on reasonable grounds following those investigations that the Forecast was based on reasonable grounds and was not misleading or deceptive in any respect; further or alternatively
  - (ii) no information had come to the attention of Nuix that:
    - 1. was likely to be material to an assessment of the reliability of the Forecast or otherwise material to the investment decisions of investors, and that investors would expect to be disclosed but which had not been disclosed; or
    - 2. reasonably indicated any material risk that Nuix would fall materially short of the Forecast;

(the **Prospectus Implied Representations**);

(b) each of:

- (i) the Management Information;
- (ii) the Structural Change Information; and
- (iii) the Political Risk Information;

was information that:

- 1. existed;
- 2. indicated that Nuix did not have reasonable grounds for the Prospectus Revenue Growth Forecast;
- 3. further or in the alternative to '2', indicated the existence of a material risk that the Prospectus Revenue Growth Forecast would not be achieved, but instead would be missed by a material margin;
- 4. in the circumstances set out in paragraphs 22 to 40, was known or ought reasonably to have been known by each of Nuix, Standen, Phillips, MCAL and MGL; and
- 5. in the premises, was material to an assessment of the reliability of the Prospectus Revenue Growth Forecast; and

- (c) in the premises in ‘a’ and ‘b’:
  - (i) the Prospectus Revenue Growth Forecast was a misleading or deceptive statement within the meaning of s 728(1)(a)(i) of the *Corporations Act*; and
  - (ii) Nuix, by making the Prospectus Revenue Growth Forecast, contravened s 728(1)(a)(i) of the *Corporations Act*.

## **E. LOSS AND DAMAGE – IPO CONTRAVENTIONS**

47. By reason of the contraventions referred to in the two preceding paragraphs (**IPO Contraventions**), the Plaintiff and some of the Group Members (**IPO Claimants**):

- (a) acquired Nuix Shares by subscription under the Prospectus:
  - (i) at a price that was:
    1. set at 4 December 2020 reflecting all material information concerning those shares that was disclosed by Nuix in accordance with the ASX Listing Rules and the *Corporations Act*;
    2. higher than the price they would have been willing to pay but for the said contraventions; further or alternatively
    3. higher than the price at which Nuix would have been able successfully to place the shares but for the said contraventions;

(the extent of the said higher price being **Inflation**);
  - (ii) further or alternatively to ‘i’, in reliance on:
    1. the Prospectus Revenue Growth Forecast; further or alternatively
    2. the Prospectus Implied Representations;
- (b) thereafter retained the said Nuix Shares:
  - (i) while the price at which they traded on the ASX (**Trading Price**) declined, and thereby suffered loss and damage (**Transaction Loss**); further or alternatively
  - (ii) until after one or more of Disclosure Events (as defined at paragraph 94 below), and thereby suffered loss and damage (**Inflation Loss**) when the market reaction to the disclosure(s) resulted in a decline in the Trading Price reflecting a correction to remove the Inflation;

(the losses in ‘i’, further or alternatively ‘ii’, being **IPO Claimants’ Loss and Damage**).

***Particulars***

*The loss suffered by each IPO Claimant is the greater of:*

- (a) the difference between the price at which each IPO Claimant acquired Nuix Shares and the value of those shares “left in hand” at trial, or as realised upon a sale of those shares during the Inflation Period (**Left-in-hand Loss**);*
- (b) alternatively, the amount of the difference in (i) attributable to the correction of information effected by the IPO Contraventions, net of market movements or unrelated movements in the Trading Price (**Peak Inflation Loss**);*
- (c) alternatively, Peak Inflation Loss, less any inflation recovered upon a sale of any Nuix Shares during the Inflation Period (**Net Inflation Loss**);*
- (d) alternatively, the difference between the price at which they acquired their interest in Nuix Shares and the price at which the shares would have been set had the contraventions not occurred (**Potts v Miller Loss**);*
- (e) alternatively, for those IPO Claimants who, but for the IPO Contraventions, would have acquired an alternative investment—the difference, at the date of hearing, between:*
  - i. their actual position as a result of having acquired an interest in Nuix Shares; and*
  - ii. the position in which they would have been had they made the alternative investment;*

**(“No Transaction” Loss).**

*Particulars of the Plaintiff’s loss will be provided following expert evidence. Particulars of the individual losses of other IPO Claimants will be provided following the trial of common questions.*

## **F. LIABILITY – IPO CONTRAVENTIONS**

### **F.1. Nuix’s liability**

48. In the premises set out in paragraphs 45 and 46, pursuant to s 729(1) of the *Corporations Act*, Nuix is liable for the IPO Claimants’ Loss and Damage caused by Nuix’s contraventions of s 728 of the *Corporations Act*.

### **F.2. Liability of other Defendants**

49. Further to paragraph 48:

(a) MCAL was the underwriter of the Prospectus:

- (i) omitting the information referred to in paragraph 44;
- (ii) conveying the Prospectus Implied Representations; further or alternatively
- (iii) containing the Prospectus Revenue Growth Forecast;

within the meaning of item 4 in s 729(1) of the *Corporations Act*; further or alternatively

(b) each of Standen, Phillips, MCAL and MGL was involved in the preparation of the Prospectus including:

- (i) the omissions referred to in paragraph 44;
- (ii) the misleading statement referred to in paragraph 46; further or alternatively
- (iii) the Prospectus Revenue Growth Forecast;

within the meaning of item 6 in s 729(1) of the *Corporations Act*.

#### ***Particulars***

*Standen, Phillips, MCAL and MGL were each involved in the preparation of the Prospectus because of the matters in paragraphs 7, 10, 11, 12, 13 and 14.*

*Further particulars may be provided after discovery.*

50. By reason of the matters in:

- (a) paragraph 49(a)—MCAL; and
- (b) paragraph 49(b)—each of MCAL and MGL;

is liable for the IPO Claimants’ Loss and Damage, pursuant to s 729(1) of the *Corporations Act*.



## G. SECONDARY MARKET – DECEMBER 2020

### G.1. Non-disclosure

51. On and from 4 December 2020:

(a) each of:

- (i) the Prospectus Revenue Growth Forecast; and
- (ii) the Prospectus Implied Representations;

remained current in the Nuix Securities Market, being information provided by Nuix and not withdrawn or corrected;

(b) each of:

- (i) the Management Information;
- (ii) the Structural Change Information; further or alternatively
- (iii) the Political Risk Information;

was information:

- 1. that existed;
- 2. that Nuix had; and
- 3. of which Nuix was aware (within the meaning of Rule 3.1 of the ASX Listing Rules);

(c) Nuix ought reasonably to have known that:

- (i) it did not have reasonable grounds for the Prospectus Revenue Growth Forecast; further or in the alternative
- (ii) there existed a material risk that the Prospectus Revenue Growth Forecast would not be achieved but instead would be missed by a material margin;

(the **Prospectus Correction Information**).

#### *Particulars*

*Nuix ought reasonably to have known of the matters in 'c' above because the Prospectus Revenue Growth Forecast was materially related to each of the Management Information, Political Risk*

*Information and Structural Change Information (those being information which Nuix knew or ought reasonably to have known by reason of the matters in paragraphs 22 to 39 above).*

*Further particulars may be provided after discovery and receipt of expert reports.*

52. Each of:

- (a) the Management Information;
- (b) the Structural Change Information;
- (c) the Political Risk Information; further or alternatively
- (d) the Prospectus Correction Information;

(together and severally, **December Information**) was information that was not generally available to the Nuix Securities Market, within the meaning of s 676 of the *Corporations Act*.

53. During the Inflation Period up to 22 March 2021, Nuix:

- (a) knew or ought reasonably to have known the December Information would or was likely to influence investors in deciding whether to acquire or dispose of Nuix shares;

***Particulars***

*That Nuix knew or ought reasonably to have known of the matters alleged is to be inferred:*

*(a) insofar as it concerns the Management Information—from the change in the price of Nuix Shares as a result of the 17 May Press Disclosure and the 18 May Press Disclosure (as defined in paragraphs 69 and 71 below);*

*(b) insofar as it concerns the Political Risk Information—from Nuix’s disclosure to the market in a statement dated 8 March 2021 in which Nuix referred to ‘a delay in spending with the US government associated with the US election’;*

*(c) insofar as it concerns the Structural Change Information—inferred from Nuix’s disclosure to the market in the Transitions Partial Disclosure (as defined in paragraph 64(b)(i) below).*

*Further particulars may be provided after discovery and expert evidence.*

- (b) omitted to correct or withdraw:
    - (i) the Prospectus Revenue Growth Forecast; and
    - (ii) the Prospectus Implied Representations; and
  - (c) in the premises, within the meaning of s 674(2)(c) of the *Corporations Act* (as modified by the Coronavirus Determinations):
    - (i) knew;
    - (ii) was reckless as to whether; alternatively
    - (iii) was negligent as to whether;

the December Information would have a material effect on the price or value of Nuix Shares.
54. Further, during the Inflation Period on and from 23 March 2021, the December Information was information that a reasonable person would have expected to have a material effect on the price or value of Nuix Shares, within the meaning of:
- (a) Rule 3.1 of the ASX Listing Rules; and
  - (b) s 674(2) of the *Corporations Act*.
55. In the premises set out in the three preceding paragraphs, on and from 4 December 2020, Nuix was required immediately to notify the ASX of the December Information.
56. During the Inflation Period, Nuix took no or no adequate step or steps to notify the ASX of the December Information.
57. In the premises, on and from 4 December 2020, Nuix contravened s 674(2) of the *Corporations Act*.

## G.2. Misleading conduct

58. Further and in the alternative, on and from 4 December 2020, Nuix, by failing to correct or withdraw:

- (a) the Prospectus Revenue Growth Forecast; further or alternatively
- (b) the Prospectus Implied Representations;

engaged in conduct that was:

- (i) false or misleading in contravention of:
  1. s 12DB of the *ASIC Act*; further or alternatively
  2. s 1041E of the *Corporations Act*; further or alternatively
- (ii) misleading or deceptive or likely to mislead or deceive in contravention of:
  1. s 12DA of the *ASIC Act*;
  2. s 1041H of the *Corporations Act*; further or alternatively
  3. s 18 of the *ACL*.

## H. SECONDARY MARKET – POST-DECEMBER 2020

### H.1. February 2021

59. On 26 February 2021, Nuix released to the ASX an update (**February Update**) which included:

- (a) information that revenue for 1HFY21 was 4.0% lower than the previous corresponding period; but also
  - (b) a re-affirmation of the Prospectus Revenue Growth Forecast (**February Reaffirmation**);
- (together, the **February Express Representations**).

#### *Particulars*

*The February Update was entitled '1H FY21 Financial Results', and the matters which comprise the February Express Representations are set out at pp 10 and 15.*

60. The February Express Representations caused the removal of some but not all of the Inflation in the price of Nuix Shares.

***Particulars***

*The price of Nuix Shares fell on 26 February 2021 from \$8.97 at the opening of trade to \$6.06 at the close of trade.*

*So far as the Plaintiff is able to say prior to discovery and receipt of expert reports, the information in paragraph 59(a) slightly reduced expectations in the Nuix market as to Nuix's likely financial performance, and thereby removed some of the Inflation impounded in the Trading Price as a consequence of the misleading conduct alleged in paragraph 58, but the corrective effect was offset by the re-affirmation of the Prospectus Revenue Growth Forecast and the effect of the February Implied Representations referred to below.*

*Further particulars may be provided after receipt of experts' reports.*

61. By the February Reaffirmation, Nuix represented to the Nuix Securities Market that or to the effect that:
- (a) it had undertaken all necessary and reasonable investigations before making the February Express Representations and had satisfied itself on reasonable grounds following those investigations that the Prospectus Revenue Growth Forecast was substantially accurate and not misleading or deceptive in any respect; and
  - (b) no information had come to the attention of it that:
    - (i) was likely to be material to the assessment of the reliability of the February Express Representations or otherwise to the investment decisions of investors, and that investors would expect to be disclosed, but which had not been disclosed; or
    - (ii) meant that there was any material risk that it would fall materially short of the February Express Representations;
- (together, the **February Implied Representations**).

62. The February Implied Representations caused or were a material contribution to the Trading Price of Nuix Shares continuing to be higher than it would have been but for the said Representations.

***Particulars***

*But for the February Implied Representations, Nuix would have disclosed to the effect that it was not able reliably to maintain the*

*Prospectus Growth Forecast, or reliably forecast any revenue growth above FY20 results.*

*Further particulars may be provided after discovery and receipt of experts' reports.*

63. At no time prior to 21 April 2021 did Nuix take any or any adequate steps to withdraw or qualify any of the February Express Representations or February Implied Representations, which were accordingly continuing representations.

## **H.2. April 2021**

64. On 21 April 2021, Nuix released to the ASX an update (**April Update**) in which it stated that or to the effect that:
- (a) forecast revenue for FY21 would not be \$193.5m but instead between \$180m and \$185m (**April Downgraded Forecast**); and
  - (b) the April Downgraded Forecast was due to:
    - (i) faster-than-anticipated transitioning of Nuix's customer base to product models which were on financial terms less favourable to Nuix (**Transitions Partial Disclosure**); and
    - (ii) a failure to complete sales of new licences that had previously been anticipated;
- (together, the **April Express Representations**).

### ***Particulars***

*The April Update was entitled 'Nuix revises FY21 forecasts', a copy of which is available upon request from the plaintiff's solicitors.*

65. The April Express Representations caused the removal of some but not all of the Inflation in the price of Nuix Shares.

### ***Particulars***

*The price of Nuix Shares fell on 21 April 2021 from \$4.48 at the opening of trade to \$4.29 at the close of trade.*

*So far as the Plaintiff is able to say prior to discovery and receipt of expert reports, the April announcement slightly reduced expectations*

*in the Nuix market as to Nuix's likely financial performance, and thereby removed some of the Inflation impounded in the trading price as a consequence of the misleading conduct alleged in paragraph 58, but the corrective effect was limited by the small quantum of the April Downgraded Forecast and the effect of the April Implied Representations referred to below.*

*Further particulars may be provided after receipt of experts' reports.*

66. By the April Express Representations, Nuix represented to the Nuix Securities Market that or to the effect that:

- (a) it had undertaken all necessary and reasonable investigations before making any statement or representation as to the state of its business and accounts and had satisfied itself on reasonable grounds following those investigations that the public statements were substantially accurate and not misleading or deceptive in any respect; and
- (b) no information had come to the attention of it that:
  - (i) was likely to be material to the investment decisions of investors, and that investors would expect to be disclosed, but which had not been disclosed; or
  - (ii) meant that there was any material risk that it would not achieve the April Downgraded Forecast;

(together, the **April Implied Representations**).

67. The April Implied Representations were a cause of or materially contributed to the Trading Price of Nuix Shares continuing to be higher than it would have been but for the said Representations.

***Particulars***

*But for the April Implied Representations, Nuix would have disclosed to the effect that it was not able reliably to maintain the Prospectus Growth Forecast, or reliably forecast any revenue growth above FY20 results. Further particulars may be provided after discovery and receipt of experts' reports.*

68. At no time prior to the end of the Inflation Period did NuiX take any or any adequate steps to withdraw or qualify any of the April Express Representations or April Implied Representations, which were accordingly continuing representations.

### **H.3. May 2021**

69. On 17 May 2021, articles were published in *The Australian Financial Review* newspaper which included aspects of the Management Information referred to at paragraphs 23, 24, 25 and 30 above (**17 May Press Disclosure**).

#### *Particulars*

*The articles were entitled 'NuiX defends corporate culture as shares plunge', 'NuiX investors urge leadership overhaul', 'NuiX share price collapse hurts Macquarie's brand' and 'The infighting behind the \$2.7b NuiX meltdown'.*

70. The 17 May Press Disclosure caused the removal of some but not all of the Inflation in the price of NuiX Shares.

#### *Particulars*

*The price of NuiX Shares fell on 17 May 2021 from \$3.32 at the opening of trade to \$3.06 at the close of trade.*

*So far as the Plaintiff is able to say prior to discovery and receipt of expert reports, the 17 May Press Disclosure slightly increased risk assessments applied by the NuiX Securities Market to NuiX's previous forecasts, but did not disclose the whole of the Management Information, the Political Risk Information, the Structural Change Information or the Prospectus Correction Information.*

*Further particulars may be provided after receipt of experts' reports.*

71. On 18 May 2021, articles were published in *The Sydney Morning Herald* and *The Australian Financial Review* newspapers which included further aspects of the Management Information referred to at paragraphs 22 and 23 above (**18 May Press Disclosure**).



***Particulars***

*The articles were entitled ‘‘Slow the bleeding’’: Nuix review flashed red weeks after listing’, ‘Nuix class action predicted by Macquarie shareholder’, ‘Building trust our top priority,’ says embattled Nuix chairman’, and ‘Nuix documents reveal internal concerns weeks after Macquarie-led IPO’.*

72. On 18 May 2021, Nuix delivered to investors, and released to the ASX, a presentation (**First May Update**) in which it did not amend or qualify the April Downgraded Forecast.

***Particulars***

*The First May Update was entitled ‘Investor Day Presentation’.*

73. By reason of the matters in the preceding paragraph, Nuix represented to the Nuix Securities Market that or to the effect that:
- (a) it had undertaken all necessary and reasonable investigations before making any statement or representation as to the state of its business and accounts and had satisfied itself on reasonable grounds following those investigations that the public statements were substantially accurate and not misleading or deceptive in any respect;
  - (b) no information had come to the attention of it that:
    - (i) was likely to be material to the investment decisions of investors, and that investors would expect to be disclosed, but which had not been disclosed; or
    - (ii) meant that there was any material risk that it would not achieve the Prospectus Revenue Growth Forecast;

(together, the **18 May Implied Representations**).

74. In the circumstances in paragraphs 69 to 71, and by reason of the matters in the preceding paragraph, the 18 May Implied Representations:
- (a) reinstated the Inflation which had otherwise been removed by the 17 May Press Disclosure, and
  - (b) otherwise caused the price of Nuix Shares to be higher than the price they would have been but for the said representations.

***Particulars***

*The price of Nuix Shares rose on 18 May 2021 from \$3.07 at the opening of trade to \$3.50 at the close of trade, part or all of which is re-inserted Inflation.*

*But for the said representations, Nuix would have disclosed to the effect that it was not able reliably to maintain the Prospectus Growth Forecast, or reliably forecast any revenue growth above FY20 results.*

*Further particulars will be provided after receipt of experts' reports.*

75. On 31 May 2021, Nuix released to the ASX an update (**Second May Update**) in which it stated that or to the effect that:
- (a) forecast revenue for FY21 would not be between \$180m and \$185m but instead would be \$177.5m (**31 May Downgrade**); and
  - (b) the 31 May Downgrade was due to completing fewer sales of new licences than had previously been anticipated;
- (together, the **31 May Express Representations**).

***Particulars***

*The Second May Update was entitled 'Nuix Revises FY21 Forecast Range', in which the matters which comprise the 31 May Express Representations were stated.*

76. The 31 May Express Representations caused the removal of some but not all of the Inflation in the price of Nuix Shares.

***Particulars***

*The price of Nuix Shares fell on 31 May 2021 from \$3.05 at the opening of trade to \$2.77 at the close of trade.*

*So far as the Plaintiff is able to say prior to discovery and receipt of expert reports, the 31 May Express Representations Forecast slightly reduced expectations in the Nuix Securities Market as to Nuix's likely financial performance, and thereby removed some of the Inflation impounded in the trading price as a consequence of the misleading conduct alleged in paragraph 58, but the corrective effect was limited by the small quantum of the downgrade announced and the effect of the 31 May Implied Representations referred to below.*

*Further particulars may be provided after receipt of experts' reports.*

77. By the 31 May Express Representations, Nuix represented to the Nuix Securities Market that or to the effect that:
- (a) it had undertaken all necessary and reasonable investigations before making any statement or representation as to the state of its business and accounts and had satisfied itself on reasonable grounds following those investigations that the public statements were substantially accurate and not misleading or deceptive in any respect;
  - (b) no information had come to the attention of it that:
    - (i) was likely to be material to the investment decisions of investors, and that investors would expect to be disclosed, but which had not been disclosed; or
    - (ii) meant that there was any material risk that it would not achieve the FY21 Revenue Further Downgrade;

(together, the **31 May Implied Representations**).

78. The 31 May Implied Representations were a cause of or materially contributed to the Trading Price of Nuix Shares continuing to be higher than it would have been but for the said Representations.

***Particulars***

*But for the 31 May Implied Representations, Nuix would have disclosed to the effect that it was not able reliably to maintain the Prospectus*

*Growth Forecast, or reliably forecast any revenue growth above FY20 results. Further particulars may be provided after discovery and receipt of experts' reports.*

79. At no time prior to the end of the Inflation Period did Nuix take any or any adequate steps to withdraw or qualify any of the 31 May Implied Representations, which were accordingly continuing representations.

#### **H.4. Corrective disclosure**

80. On 29 June 2021, articles were published in *The Sydney Morning Herald* and *The Age* (**June Fairfax Articles**) which included the information that a former officer of Nuix was the subject of a criminal investigation into allegations of insider trading (**June Press Disclosure**).

##### ***Particulars***

*The articles were entitled 'Nuix rocked by insider trading allegations against former executive' and 'Watchdog seeks emergency travel ban on relative of terminated Nuix CFO'. Copies of the articles are available on request from the plaintiff's solicitors.*

81. The June Fairfax Articles caused the removal of the remaining Inflation in the price of Nuix Shares.

##### ***Particulars***

*The price of Nuix Shares fell on 30 June 2021 from \$2.54 at the close of trade (on 29 June 2021) to \$2.21 at the close of trade.*

*Following the June Fairfax Articles, and as a result of all of the February Express Representations, April Express Representations, 17 May Press Disclosure, 18 May Press Disclosure, 31 May Express Representations and the June Fairfax Articles, the Nuix Securities Market had all of the information which ought to have been disclosed by Nuix at the start of the Inflation Period, and accordingly incorporated all of that information into the Trading Price of Nuix Shares.*

*Further particulars may be provided after expert evidence.*

## I. SECONDARY MARKET – POST-DECEMBER CONTRAVENTIONS

### I.1. Continuous disclosure

82. At all material times by and following:

- (a) the February Update;
- (b) the April Update;
- (c) the First May Update; further or alternatively
- (d) the Second May Update;

each of:

- (i) the Management Information;
- (ii) the Structural Change Information;
- (iii) the Political Risk Information; further or alternatively
- (iv) the Prospectus Correction Information;

(together and severally, the **Disclosable Information**) was not generally available (within the meaning of subsection 676 of the *Corporations Act*).

83. At all material times referred to in the preceding paragraph Nuix had the Disclosable Information, within the meaning of:

- (a) Rule 3.1 of the ASX Listing Rules; and
- (b) subsection 674(2) of the *Corporations Act*.

84. During the Inflation Period up to 22 March 2021, Nuix:

- (a) knew ought reasonably to have known the Disclosable Information would or was likely to influence investors in deciding whether to acquire or dispose of Nuix Shares;
- (b) omitted to correct or withdraw:
  - (i) the Prospectus Revenue Growth Forecast; and
  - (ii) the Prospectus Implied Representations; and

(c) in the premises, within the meaning of s 674(2)(c) of the *Corporations Act* (as modified by the Coronavirus Determinations):

- (i) knew;
- (ii) was reckless as to whether; alternatively
- (iii) was negligent as to whether;

the Disclosable Information would have a material effect on the price or value of Nuix Shares.

85. Further, during the Inflation Period on and from 23 March 2021, the Disclosable Information was information that a reasonable person would have expected to have a material effect on the price or value of Nuix Shares, within the meaning of:

- (a) Rule 3.1 of the ASX Listing Rules; and
- (b) s 674(2) of the *Corporations Act*.

86. In the premises set out in the three preceding paragraphs, on and from the time of:

- (a) the February Update;
- (b) the April Update;
- (c) the First May Update; further or alternatively
- (d) the Second May Update;

Nuix was required immediately to notify the ASX of the Disclosable Information.

87. During the Inflation Period, Nuix took no or no adequate step or steps to notify the ASX of the Disclosable Information.

88. In the premises, on and from the time of:

- (a) the February Update;
- (b) the April Update;
- (c) the First May Update; further or alternatively
- (d) the Second May Update;

Nuix contravened s 674(2) of the *Corporations Act*.

## **I.2. False or misleading statements**

89. By reason of the matters in paragraphs 22 to 40, each of the:

- (a) re-affirmation of the Prospectus Revenue Growth Forecast in the February Update (**February Re-affirmation**);
- (b) April Express Representations; and
- (c) 31 May Express Representations;

was:

- (i) false in a material particular or materially misleading;
- (ii) a statement or information that was or was likely to:
  - 1. induce persons in this jurisdiction to dispose of or acquire Nuix Shares; and/or
  - 2. have the effect of increasing, reducing, maintaining or stabilising the price of trading in Nuix Shares;
- (iii) made when Nuix knew or ought reasonably to have known, that the statements or information were false in a material particular or were materially misleading, or did not care whether the statements or information were true.

### ***Particulars***

*That Nuix knew or ought reasonably to have known of the false or misleading nature of the statements or information, or did not care whether the statements or information were true, is to be inferred from Nuix's knowledge as alleged in paragraphs 31 and 39.*

90. By reason of the matters in paragraph 89, Nuix contravened:

- (a) section 1041E of the *Corporations Act*;
- (b) section 12DB of the *ASIC Act*.

## **I.3. Misleading or deceptive conduct**

91. Further and in the alternative, by reason of the matters in paragraphs 22 to 40, Nuix:

- (a) did not have reasonable grounds for making either of the:
  - (i) February Re-affirmation; or
  - (ii) April Downgraded Forecast;
- (b) accordingly, made representations that were misleading.

92. Further or in the alternative, by reason of the matters in paragraphs 22 to 40, the:

- (a) February Re-affirmation;
- (b) February Implied Representations;
- (c) April Express Representations;
- (d) April Implied Representations;
- (e) 18 May Implied Representations;
- (f) 31 May Express Representations; further or alternatively
- (g) 31 May Implied Representations;

were misleading or deceptive or likely to mislead or deceive within the meaning of:

- (i) section 12DA of the *ASIC Act*;
- (ii) subsection 1041H(1) of the *Corporations Act*; further or alternatively
- (iii) section 18 of the *ACL*.

93. By reason of the matters in paragraphs 91 to 92, Nuix contravened:

- (a) section 12DA of the *ASIC Act*;
- (b) subsection 1041H(1) of the *Corporations Act*; further or alternatively
- (c) section 18 of the *ACL*.

## **J. LOSS AND DAMAGE – SECONDARY MARKET CONTRAVENTIONS**

94. By reason of the contraventions alleged in:

- (a) paragraph 57 (regarding Nuix’s contraventions of s 674 in relation to the December Information);



- (b) paragraph 88 (regarding Nuix's contraventions of s 674 in relation to the Disclosable Information);
  - (c) paragraph 90 (regarding the false or misleading statements); further or alternatively
  - (d) paragraph 93 (regarding the misleading or deceptive conduct);
- the Plaintiff and some or all of the Group Members (**ASX Claimants**):

- (i) acquired Nuix Shares:
  - 1. at a price which reflected all material information concerning those shares that was disclosed by Nuix in accordance with the ASX Listing Rules and the *Corporations Act*;
  - 2. further or alternatively to '1', in reliance on some or all of the:
    - a. Prospectus Revenue Growth Forecast;
    - b. Prospectus Implied Representations;
    - c. February Express Representations;
    - d. February Implied Representations;
    - e. April Downgraded Forecast;
    - f. April Implied Representations;
    - g. 31 May Downgrade;
    - h. 31 May Implied Representations;

(the matters in 'c' to 'h' being the **Disclosure Events**);
- (ii) by reason of the Inflation, paid a higher price than the ASX Claimants otherwise would have paid;
- (iii) thereafter retained the said shares:
  - 1. while the Trading Price declined, and thereby suffered Transaction Loss; further or alternatively
  - 2. until after one or more of the Disclosure Events, and thereby suffered Inflation Loss;

(the losses in 'i', further or alternatively 'ii', being **ASX Claimants' Loss and Damage**).

***Particulars***

*The loss suffered by each ASX Claimant is the greater of:*

- (a) Left-in-hand loss;*
- (b) Peak Inflation Loss;*
- (c) Net Inflation Loss;*
- (d) Potts v. Miller loss;*
- (e) alternatively, for those ASX Claimants who, but for the contraventions, would have acquired an alternative investment—  
No Transaction loss.*

*Particulars of the Plaintiff's loss will be provided following expert evidence.*

*Particulars of the individual losses of other ASX Claimants will be provided following the trial of common questions or otherwise as the Court may direct.*

**K. LIABILITY – SECONDARY MARKET CONTRAVENTIONS**

**K.1. Nuix's liability**

95. In the premises set out in the preceding paragraph, Nuix is liable for the ASX Claimants' Loss and Damage:
- (a) caused by Nuix's contraventions of s 674 of the *Corporations Act* – pursuant to s 1317HA of the *Corporations Act*;
  - (b) caused by Nuix's false and misleading conduct – pursuant to:
    - (i) s 12GF of the *ASIC Act*; further or alternatively
    - (ii) s 1041I of the *Corporations Act*;
  - (c) caused by Nuix's misleading and deceptive conduct – pursuant to:
    - (i) s 12DA of the *ASIC Act*;
    - (ii) s 1041H of the *Corporations Act*; further or alternatively
    - (iii) s 18 of the *ACL*.

**K.2. Liability of other Defendants – knowing involvement**

96. Standen was knowingly involved in the contraventions alleged in:

- (a) paragraph 57 (regarding Nuix’s contraventions of s 674 in relation to the December Information);
- (b) paragraph 88 (regarding Nuix’s contraventions of s 674 in relation to the Disclosable Information).

***Particulars***

*Standen’s knowledge that the said information was likely to be material to the Nuix Securities Market but had not been disclosed to the said Market is to be inferred from:*

- (a) the matters in paragraph 11 concerning the roles held by Standen;*
- (b) the matters in paragraph 23 concerning Standen being made aware of the matters the subject of ‘Nuix 2.0’;*
- (c) the participation of Standen in decisions made by the board of Nuix to respond to ‘Nuix 2.0’;*
- (d) the matters in paragraph 31 concerning Standen regularly visiting Castagna in prison and taking direction from Castagna;*
- (e) Standen being responsible for developing an investor ‘Fact Pack’ concerning Nuix, which was distributed to private equity firms to gauge their interest in acquiring Nuix prior to Nuix instead being subject of the Initial Public Offering;*
- (f) Standen being responsible for (or involved in) deciding what information would be made available and withheld from a data room for the potential private equity investors referred to in ‘e’ hereof.*

*Further particulars may be provided after discovery.*

97. Phillips was knowingly involved in the contraventions alleged in:

- (a) paragraph 57 (regarding Nuix’s contraventions of s 674 in relation to the December Information);

- (b) paragraph 88 (regarding Nuix’s contraventions of s 674 in relation to the Disclosable Information);
- (c) paragraph 90 (regarding the false or misleading statements); further or alternatively
- (d) paragraph 93 (regarding the misleading or deceptive conduct).

***Particulars***

*Phillips’ knowledge that the said information was likely to be material to the Nuix Securities Market but had not been disclosed to the said Market is to be inferred from:*

- (a) the matters in paragraph 13 concerning the roles held by Phillips;*
- (b) the matters in paragraph 23 concerning Phillips being made aware of the matters the subject of ‘Nuix 2.0’;*
- (c) the participation of Phillips in decisions made by the board of Nuix to respond to ‘Nuix 2.0’;*
- (d) the matters in paragraph 31 concerning Phillips regularly visiting Castagna in prison and taking direction from Castagna;*
- (e) Phillips being responsible for the preparation and presentation of financial information in the Prospectus, as set out at p 122 thereof.*

*Further particulars may be provided after discovery.*

98. In the premises set out in the preceding paragraphs, each of:

- (a) MCAL; further or alternatively
- (b) MGL, as:
  - (i) Standen’s and Phillips’ employer; further or alternatively
  - (ii) a person to whom Standen’s and Phillips’ knowledge is to be attributed;

is liable for the ASX Claimants’ Loss and Damage.

***Particulars***

*The Plaintiff refers to the matters in paragraphs 12 and 14.*

## L. COMMON QUESTIONS

99. The common questions of fact and law are:

- (a) whether and if so at what time(s) the Management Information, Political Risk Information and Structural Change Information existed;
- (b) whether and if so at what time(s) Nuix had the Management Information, Political Risk Information and Structural Change Information;
- (c) whether Nuix contravened s 728 of the *Corporations Act* in respect of the Management Information, Political Risk Information and Structural Change Information, and if so how;
- (d) if Nuix contravened s 728 of the *Corporations Act*:
  - (i) whether MCAL, MGL, Standen or Phillips were involved in the said contravention;
  - (ii) whether MCAL and MGL are or either of them is liable for any involvement by Standen or Phillips in the said contravention;
- (e) whether Nuix contravened s 674 of the *Corporations Act* in respect of the Management Information, Political Risk Information and Structural Change Information, and if so when and how;
- (f) if Nuix contravened s 674 of the *Corporations Act*:
  - (i) whether MCAL, MGL, Standen or Phillips were involved in the said contravention;
  - (ii) whether MCAL and MGL are or either of them is liable for any involvement by Standen or Phillips in the said contravention;
- (g) whether Nuix made the alleged false or misleading statements;
- (h) whether Nuix engaged in the alleged misleading or deceptive conduct;
- (i) if Nuix contravened the provisions referred to in Questions (g) or (h):
  - (i) whether MCAL, MGL, Standen or Phillips were involved in the said contravention;
  - (ii) whether MCAL and MGL are or either of them is liable for any involvement by Standen or Phillips in the said contravention;
- (j) what are the applicable principles for establishing whether any of the contraventions referred to in Questions (a) to (i) was a cause of the IPO or ASX Claimants' Loss and Damage; and
- (k) what are the applicable principles for measuring the compensable amount of the IPO or ASX Claimants' Loss and Damage.

**AND THE PLAINTIFF CLAIMS** on his own behalf and on behalf of the group members:

- A. Compensation pursuant to:
  - a. s 729 of the *Corporations Act*;
  - b. s 1041I of the *Corporations Act*;
  - c. s 1317HA of the *Corporations Act*;
  - d. s 12GF of the *ASIC Act*; further or alternatively
  - e. s 236 of the ACL
- B. Interest.
- C. Costs.
- D. Such further or other orders as the Court may deem appropriate.

Dated: 24 February 2022

L W L Armstrong

M W Guo

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**Phi Finney McDonald**

Solicitors for the Plaintiff

## M. INDEX TO DEFINED TERMS

**April Downgraded Forecast** is defined in paragraph 64(a).

**April Express Representations** is defined in paragraph 64.

**April Implied Representations** is defined in paragraph 66.

**April Update** is defined in paragraph 64.

*ASIC Act* means the *Australian Securities and Investments Commission Act 2001* (Cth) and is defined in paragraph 4(b).

**ASX** is defined in paragraph 1(b)(ii).

**ASX Claimants** is defined in paragraph 94.

**ASX Claimants' Loss and Damage** is defined in paragraph 94(d).

**ASX Listing Rules** is defined in paragraph 20(b).

**Castagna** is defined in paragraph 31(a).

**Consumption Model** is defined in paragraph 34(b).

**Coronavirus Determinations** is defined in paragraph 21(a).

*Corporations Act* means the *Corporations Act 2001* (Cth) and is defined in paragraph 2(d)(i).

**December Information** is defined in paragraph 52.

**Disclosable Information** is defined in paragraph 82.

**Disclosure Events** is defined in paragraph 94(d)(i)2.

**Doyle** is defined in paragraph 29.

**February Express Representations** is defined in paragraph 59.

**February Implied Representations** is defined in paragraph 61.

**February Reaffirmation** is defined in paragraph 59(b).

**February Update** is defined in paragraph 59.

**First May Update** is defined in paragraph 72.

**Group Members** is defined in paragraph 2.

**Inflation** is defined in paragraph 47(a)(i).

**Inflation Loss** is defined in paragraph 47(b)(ii).

**Inflation Period** is defined in paragraph 2(b).

**Initial Public Offering** is defined in paragraph 18.

**IPO Claimants** is defined in paragraph 47.

**IPO Claimants' Loss and Damage** is defined in paragraph 47(b).

**IPO Contraventions** is defined in paragraph 47.

**June Fairfax Articles** is defined in paragraph 80.

**June Press Disclosure** is defined in paragraph 80.

**Left-in-hand Loss** is defined in paragraph 47 Particulars (a).

**Management Information** is defined in paragraph 33.

**MCAL** is defined in paragraph 6.

**MGL** is defined in paragraph 6.

**Net Inflation Loss** is defined in paragraph 47 Particulars (c).

**“No Transaction” Loss** is defined in paragraph 47 Particulars (e).

**Non-Consumption Model** is defined in paragraph 34(a).

**Nuix** is defined in paragraph 1(b).

**Nuix Securities Market** is defined in paragraph 15.

**Nuix Shares** is defined in paragraph 16.

**Peak Inflation Loss** is defined in paragraph 47 Particulars (b).

**Phillips** is defined in paragraph 13.

**Political Risk Information** is defined in paragraph 41.

**Potts v Miller Loss** is defined in paragraph 47 Particulars (d).

**Prospectus** is defined in paragraph 16.

**Prospectus Correction Information** is defined in paragraph 51(c).

**Prospectus Date** is defined in paragraph 15.

**Prospectus Implied Representations** is defined in paragraph 46(a).

**Prospectus Revenue Growth Forecast** is defined in paragraph 42.

**R&D** is defined in paragraph 24(b).



'**red lights**' is defined in paragraph 22(a).

**Second May Update** is defined in paragraph 75.

**Standen** is defined in paragraph 11.

**Structural Change Information** is defined in paragraph 38.

**Transitions Partial Disclosure** is defined in paragraph 64(b)(i).

**Trading Price** is defined in paragraph 47(b)(i).

**Transaction Loss** is defined in paragraph 47(b)(i).

**US Political Uncertainties** is defined in paragraph 40.

**Vawdrey** is defined in paragraph 27.

**17 May Press Disclosure** is defined in paragraph 69.

**18 May Implied Representations** is defined in paragraph 73.

**18 May Press Disclosure** is defined in paragraph 71.

**31 May Downgrade** is defined in paragraph 75(a).

**31 May Express Representations** is defined in paragraph 75.






















**31 May Implied Representations** is defined in paragraph 77.

**N. ANNEXURE A—PLAINTIFF’S ACQUISITION AND DISPOSAL OF NUIX SHARES**

<b>Date</b>	<b>Type</b>	<b>Quantity</b>	<b>Average price per share (\$)</b>
8/12/2020	Buy	3,766	5.31
9/12/2020	Buy	9,334	8.57
3/03/2021	Buy	11,234	5.74
9/03/2021	Buy	6,663	5.00
22/03/2021	Buy	8,337	5.00
6/04/2021	Sell	-20,568	5.30
7/05/2021	Buy	20,000	3.60
1/06/2021	Buy	20,000	2.80
11/06/2021	Sell	-23,994	2.73
15/06/2021	Sell	-4,772	2.73

## O. ANNEXURE B—‘RED LIGHTS’ REFERRED TO IN PARAGRAPH 22

### Overall Program Health Check

Product	Notes	Status	Go to Green Plan (If Applicable)
 Nuix Workstation  Nuix Engine	Technical debt continues to increase leading to poor customer experience and delayed releases. Lack of engineering capacity prohibits our ability to capture additional market share. Resource allocation not aligned with revenue share. Lost resources due to team realignment, resignations.		Increase technical debt allocation from 8-10% to 20-25%. Additional resources required.
 Nuix Connectors	New customer requests for additional connectors far exceeds our ability to deliver in expected timeframe . Current resource (1.5 Dev 1 test)		Add additional engineering resources. Acquiring or partnering options need to be pursued.
 Nuix Cloud License Server	Currently unable to expand CLS to a wider audience due to delays in authentication implementation due to customer commitments. Further delays to occur with only 1.5 resources assigned. Inability to roll our consumption-based pricing to a wider audience.		Add additional engineering resources. Additional resources required.
 Nuix SDK	Moving forward as best as possible with 1 engineer and shared testing resources but effectively at a crawl. Heavy dependences on CLS & engine.		Drive alignment across engineering, marketing, training, documentation to do more with less. Specific staffing requests & justifications already submitted.
 Nuix Automation	No solid plan for GTM or long-term direction. Betas ongoing with Key Customers.		Automation PM starts Feb. 1 <sup>st</sup> to begin putting together the plan
 Nuix Discover®	Dev capacity not aligned with business needs/goals. Unpredictable backlog makes planning and delivery estimation challenging.		Continue to actively recruit for open positions and bring new hires up to to speed.
 Nuix Investigate®	Steady, but slow progress towards enterprise readiness. Chat & Mobile features well received by market and continue to be focus. Progressing A&I replacement blocked by competing Engine priorities. Falling behind competition in delivering best in market analytics and dashboards. Current license model needs updating due to high availability changes.		Actively recruiting for open positions.
 Nuix Adaptive Security	Lack of QA is slowing development and leading to increased support/maintenance and customer dissatisfaction. Looming "at scale" deployments at Pfizer and FAA which we are unprepared for.		Stop most feature development to address scaling issues at the architectural level
 Nuix Enterprise Collection Center	Encountering a significant number of challenges in corporations due to lack of enterprise requirements. Unable to take on any development that touches server code-base due to lack of skillset on the remaining team.		Put together a hiring plan to bring on experienced server developer w/ enterprise product experience
 Nuix Collector Suite	Slight declining trend in directly attributed revenue, likely due to decrease in bundles being used.		Create a unified collections/connector platform which drives monetization through increased data volumes

1. Place of trial—Melbourne.
2. Mode of trial—Judge.
3. This writ was filed for the Plaintiff by Phi Finney McDonald, Level 3, 325 Flinders Lane, Melbourne VIC 3000.
4. The address of the Plaintiff is Level 3, 325 Flinders Lane, Melbourne VIC 3000.
5. The address for service of the Plaintiff is c/- Phi Finney McDonald, Level 3, 325 Flinders Lane, Melbourne VIC 3000.
6. The email address for service of the Plaintiff is [diana.young@phifinneymcdonald.com](mailto:diana.young@phifinneymcdonald.com).
7. The address of the First Defendant is Level 27, 1 Market Street, Sydney NSW 2000.
8. The address of the Second Defendant is Level 6, 50 Martin Place, Sydney NSW 2000.
9. The address of the Third Defendant is Level 6, 50 Martin Place, Sydney NSW 2000.