



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

Case: S ECI 2020 04505

No. S ECI 2020 04505  
ECI 2020 04505 2022 07:28 PM

BETWEEN

**NICHOLAS JOHN GEHRKE**

First Plaintiff

**LESTER BUCH**

Second Plaintiff

AND

**NOUMI LIMITED (FORMERLY FREEDOM FOODS GROUP LIMITED) (ACN 002 814 235)**

First Defendant

**DELOITTE TOUCHE TOHMATSU (A FIRM)**

Second Defendant

### **DEFENCE OF THE SECOND DEFENDANT**

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Date of document: 8 April 2022

Filed on behalf of: The Second Defendant

Prepared by:

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For the purposes of this defence, terms defined in the Consolidated Statement of Claim dated 16 December 2021 (**CSOC**) and are adopted unless the context indicates otherwise.

Nothing in this defence should be taken to amount to an express or implied waiver of any privilege against self-incrimination or privilege against exposure to penalty belonging to any of the partners, directors, principals, officers, consultants or employees of the Second Defendant (**Deloitte**).

In answer to the allegations in the CSOC, Deloitte says as follows.

**A.**

**A.1.**

1. In answer to paragraph 1, Deloitte:
  - (a) admit that the proceeding is commenced as a representative proceeding pursuant to Part 4 of the *Supreme Court Act 1986* (Vic) by the plaintiffs in their individual capacity and in a representative capacity; and
  - (b) otherwise, do not know and therefore do not admit the paragraph.
2. Deloitte do not know and therefore cannot admit paragraph 2.
3. Deloitte do not know and therefore cannot admit paragraph 3.
4. Deloitte do not know and therefore cannot admit paragraph 4.

**A.2.**

**A.2.1**

5. As to paragraph 5, Deloitte:
  - (a) say in relation to subparagraph 5.6(a) that s 8 is the relevant section of the *Australian Consumer Law and Fair Trading Act 2012* (Vic); but
  - (b) otherwise, admit the allegations in that paragraph.
6. As to paragraph 6, Deloitte:
  - (a) admit subparagraph 6.1;
  - (b) admit subparagraph 6.2;
  - (c) admit subparagraph 6.3;
  - (d) as to subparagraph 6.4:
    - (i) admit that, on and from the commencement of the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) on 26 October 2018, FNP Shares were “financial services” within the meaning of ss 12BAA, 12BAB and 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) by reason of s 12BAB(1AA) of the ASIC Act;

- (ii) do not admit that FNP Shares were financial services within the meaning of ss 12BAA, 12BAB and 12DA of the ASIC Act prior to 26 October 2018;
- (iii) say that the term “financial product” does not appear in s 12DA of the ASIC Act;
- (iv) otherwise, admit the subparagraph; and
- (v) admit subparagraph 6.5.

7. Deloitte do not admit paragraph 7.

8. Deloitte do not admit paragraph 8.

#### **A.2.2**

9. As to paragraph 9, Deloitte:

- (a) admit subparagraph 9.1;
- (b) admit subparagraph 9.2;
- (c) as to subparagraph 9.3:
  - (i) say that the only proper persons who the proceedings may be brought against in the partnership name are those persons who were partners as at the dates at which the alleged causes of action accrued; and
  - (ii) otherwise admit the subparagraph;
- (d) admit subparagraph 9.4;
- (e) as to subparagraph 9.5:
  - (i) say that pursuant to s 761F of the *Corporations Act 2001* (Cth) (**Corporations Act**), and subject to an express or implied contrary intention in a provision or provisions of Chapter 7 of the Corporations Act, that Chapter applies to a partnership as if the partnership were a person, but it applies with the following changes:

- (A) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;
- (B) any contravention of a provision of Chapter 7 of the Corporations Act, or a provision of the Corporations Act that relates to a requirement in a provision of that Chapter, that would otherwise be a contravention by the partnership is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each partner who:
  - a. aided, abetted, counselled or procured the relevant act or omission; or
  - b. was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner);
- (ii) say further that Deloitte is not a person for the purposes of the statutory provisions alleged to have been contravened in the CSOC and all allegations of contravention of such provisions by reference to Deloitte are embarrassing; and
- (iii) in the premises, deny the subparagraph;
- (f) as to subparagraph 9.6:
  - (i) admit that they were governed, inter alia, by the *Partnership Act 1892* (NSW) and the *Partnership Act 1958* (Vic), to the extent those provisions are not inconsistent with s 761F of the Corporations Act, and will rely upon the full terms, meaning and effect of those statutory provisions; and
  - (ii) otherwise, deny the subparagraph;
- (g) as to subparagraph 9.7:
  - (i) say that, for the purposes of Pt 2M.4 of the Corporations Act, the firm trading as Deloitte was FNP's appointed auditor for, relevantly, the

FY2014, FY2015, FY2016, FY2017, FY2018, FY2019 and FY2020 financial periods;

(ii) say further that the lead auditor (for the purposes of s 324AF of the Corporations Act) during these financial periods was:

1. Catherine Hill in respect of FY2014;
2. Andrew Coleman in respect of 1H2015 to FY2019; and
3. David White in respect of 1H2020 to FY2020;

(iii) otherwise, deny the subparagraph;

(h) note that in the interests of economy, in the balance of this Defence, Deloitte have not repeated the contentions at subparagraphs (c), (e), (f) and (g), but that the whole of this Defence is subject to those matters and Deloitte's position that the membership of the firm changed from time to time; and

(i) otherwise, deny the paragraph.

**B.**

**B.1**

10. Deloitte admit paragraph 10.
11. Deloitte admit paragraph 11.
12. Deloitte admit paragraph 12.
13. Deloitte admit paragraph 13.
14. Deloitte admit paragraph 14.
15. Deloitte admit paragraph 15.
16. Deloitte admit paragraph 16.
17. Deloitte admit paragraph 17.
18. Deloitte admit paragraph 18.
19. Deloitte admit paragraph 19.
20. Deloitte admit paragraph 20.

- 21. Deloitte admit paragraph 21.
- 22. Deloitte admit paragraph 22.
- 23. Deloitte admit paragraph 23.
- 24. Deloitte admit paragraph 24.
- 25. Deloitte admit paragraph 25.
- 26. Deloitte admit paragraph 26.
- 27. Deloitte admit paragraph 27.
- 28. Deloitte admit paragraph 28.
- 29. Deloitte admit paragraph 29.

## **B.2**

- 30. Deloitte admit paragraph 30.

## **C.**

### **C.1**

#### ***C.1.1***

- 31. Deloitte admit paragraph 31.
- 32. As to paragraph 32, Deloitte:
  - (a) rely on the referenced statutory provisions for their full meaning and effect; and
  - (b) otherwise, admit the paragraph.
- 33. As to paragraph 33, Deloitte:
  - (a) rely on the referenced statutory provisions for their full meaning and effect; and
  - (b) otherwise, admit the paragraph.

#### ***C.1.2***

- 34. As to paragraph 34, Deloitte:
  - (a) rely on the referenced ASX Listing Rules for their full meaning and effect; and

- (b) otherwise, admit the paragraph.

35. As to paragraph 35, Deloitte:

- (a) rely on the referenced ASX Listing Rules for their full meaning and effect; and
- (b) otherwise, admit the paragraph.

## C.2

36. As to paragraph 36, Deloitte:

- (a) as to subparagraph 36.1:
  - (i) rely on s 307 of the Corporations Act for its full meaning and effect; and
  - (ii) otherwise, admit the subparagraph;
- (b) as to subparagraph 36.2:
  - (i) rely on s 307A of the Corporations Act for its full meaning and effect;
  - (ii) rely on all applicable and/or relevant auditing standards issued by the Auditing and Assurance Standards Board (**AUASB**) for their full meaning and effect to the extent that they were in force and in the form in which they existed at the time, and say that those standards (as referred to in s 307A of the Corporations Act and subparagraph 36.2 of the CSOC) recognised the following matters (in successive iterations and notwithstanding non-material changes in language):
    1. the financial report subject to audit is that of the entity, prepared by the management of the entity, with oversight from those charged with governance;

### Particulars

*Auditing Standard AUS 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards) (version approved 11 November 2013) at paragraph 4.*

2. the auditor's opinion on the financial report deals with whether the financial report is prepared, in all material respects, in accordance with the applicable financial reporting framework. Such an opinion

is common to all audits of financial reports. The auditor's opinion therefore does not assure, for example, the future viability of the entity nor the effectiveness with which management has conducted the affairs of the entity;

### **Particulars**

*Auditing Standard AUS 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards) (version approved 11 November 2013) at paragraph A1.*

3. the auditing standards require the auditor to, in forming their audit opinion, obtain reasonable assurance about whether the financial report as a whole is free from material misstatement, whether due to fraud or error. Reasonable assurance is a high level of assurance. It is obtained when the auditor has obtained sufficient appropriate audit evidence to reduce audit risk to an acceptably low level. However, reasonable assurance is not an absolute level of assurance, because there are inherent limitations of an audit which result in most of the audit evidence on which the auditor draws conclusions and based the auditor's opinion being persuasive rather than conclusive;

### **Particulars**

*Auditing Standard AUS 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards) (version approved 11 November 2013) at paragraph 5.*

4. an auditor is not expected to, and cannot, reduce audit risk to zero and cannot therefore obtain absolute assurance that the financial report is free from material misstatement due to fraud or error. This is because there are inherent limitations in an audit, which result in most of the audit evidence on which the auditor draws conclusions and bases the auditor's opinion being persuasive rather than conclusive. The inherent limitations of an audit arise from: (a) the nature of financial reporting; (b) the nature of audit procedures; and



(c) the need for the audit to be conducted within a reasonable period of time and at a reasonable cost;

#### **Particulars**

*Auditing Standard AUS 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards) (version approved 11 November 2013) at paragraph A45.*

5. professional judgement is essential to the proper conduct of an audit and is necessary in particular regarding decisions about: (a) materiality and audit risk; (b) evaluating whether sufficient appropriate audit evidence has been obtained; and (c) the drawing of conclusions based on the audit evidence obtained (for example, assessing the reasonableness of estimates made by management in preparing the financial report);

#### **Particulars**

*Auditing Standard AUS 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards) (version approved 11 November 2013) at paragraph A23. The considerations listed as (a), (b) and (c) are some, but not all, of the considerations identified in paragraph A23 of ASA 200.*

6. audit risk is a function of the “risks of material misstatement” (being the risks that the financial report is materially misstated prior to audit) and “detection risk” (being the risk that the procedures performed by the auditor to reduce audit risk to an acceptably low level will not detect a misstatement that exists and that could be material, either individually or when aggregated with other misstatements). The assessment of risks is a matter of professional judgement, rather than a matter capable of precise measurement;

#### **Particulars**

*Auditing Standard AUS 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards)*

*(version approved 11 November 2013) at paragraphs 13 and A32.*

7. detection risk relates to the nature, timing and extent of the auditor's procedures that are determined by the auditor to reduce risk to an acceptably low level. It is therefore a function of the effectiveness of an audit procedure and of its application by the auditor. Matters such as: (a) adequate planning; (b) proper assignment of personnel to the engagement term; (c) the application of professional scepticism; and (d) supervision and review of the audit work performed, assist to enhance the effectiveness of an audit procedure and of its application and reduce the possibility that an auditor might select an inappropriate audit procedure, misapply an appropriate audit procedure, or misinterpret the audit results;

**Particulars**

*Auditing Standard AUS 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards) (version approved 11 November 2013) at paragraph A43.*

8. the audit process involves the exercise of professional judgement by the auditor in planning and performing an audit of a financial report;

**Particulars**

*Auditing Standard AUS 200 (Overall Objectives of the Independent Auditor and the Conduct of an Audit in Accordance with Australian Auditing Standards) (version approved 11 November 2013) at paragraph 16.*

- (iii) say further that, by reason of the matters identified in (ii):
  1. the provision of audit services (of a kind as provided by Deloitte) in accordance with the Corporations Act necessarily involved the exercise by an auditor of his or her professional judgement and the forming by the auditor of professional opinions in respect of which reasonable minds could differ; and

2. in providing such audit services, an auditor was not providing absolute assurance and was not verifying or warranting the accuracy of the contents of the financial report that had been prepared by the management of the entity the subject of the audit and for which that entity was responsible;
  - (iv) otherwise, admit the subparagraph;
  - (c) as to subparagraph 36.3:
    - (i) rely on s 308 of the Corporations Act for its full meaning and effect; and
    - (ii) otherwise, admit the subparagraph;
  - (d) as to subparagraph 36.4:
    - (i) rely on s 311 of the Corporations Act for its full meaning and effect; and
    - (ii) otherwise, admit the subparagraph.
37. As to paragraph 37, Deloitte:
- (a) as to subparagraph 37.1:
    - (i) rely on s 309 of the Corporations Act for its full meaning and effect; and
    - (ii) otherwise, admit the subparagraph;
  - (b) as to subparagraph 37.2:
    - (i) rely on s 307A of the Corporations Act for its full meaning and effect;
    - (ii) rely on all applicable and/or relevant auditing standards issued by AUASB for their full meaning and effect to the extent that they were in force and in the form in which they existed at the time, including ASRE 2410;
    - (iii) say that ASRE 2410 recognises, *inter alia*, the following matters:
      1. the objective of the auditor is to plan and perform the review to enable the auditor to express a conclusion whether, on the basis of the review, anything has come to the auditor's attention that causes the auditor to believe that the financial report, or complete

set of financial statements, is or are (as the case may be) not prepared, in all material respects, in accordance with the applicable financial reporting framework;

**Particulars**

*Auditing Standard ASRE 2410 (Review of a Financial Report Performed by the Independent Auditor of the Entity) at paragraph 4.*

2. the objective of a review of a financial report differs significantly from that of an audit conducted in accordance with Australian Auditing Standards. A review of a financial report does not provide a basis for expressing an opinion whether the financial report gives a true and fair view, or is presented fairly, in all material respects, in accordance with the applicable financial reporting framework;

**Particulars**

*Auditing Standard ASRE 2410 (Review of a Financial Report performed by the Independent Auditor of the Entity) at paragraph A2.*

3. a review, in contrast to an audit, is not designed to obtain reasonable assurance that the financial report is free from material misstatement. A review consists of making enquiries, primarily of persons responsible for financial and accounting matters, and applying analytical and other review procedures. A review may bring significant matters affecting the financial report to the auditor's attention, but it does not provide all of the evidence that would be required in an audit; and

**Particulars**

*Auditing Standard ASRE 2410 (Review of a Financial Report performed by the Independent Auditor of the Entity) at paragraph A3.*

4. a review ordinarily does not require tests of the accounting records through inspection, observation or confirmation. Procedures for performing a review of a financial report ordinarily are limited to making enquiries, primarily of persons responsible for financial and accounting matters and applying analytical and other review procedures, rather than corroborating information obtained concerning matters relating to the financial report. The auditor's understanding of the entity and its environment, including its internal control, the results of the risk assessments relating to the preceding audit and the auditor's consideration of materiality as it relates to the financial report, affects the nature and extent of the enquiries made, and analytical and other review procedures applied; and

### **Particulars**

*Auditing Standard ASRE 2410 (Review of a Financial Report performed by the Independent Auditor of the Entity) at paragraph A19.*

- (iv) otherwise, do not admit the subparagraph.

38. As to paragraph 38, Deloitte:

- (a) refer to and repeat paragraph 36(b)(ii) and (iii) above; and
- (b) otherwise, do not admit the paragraph.

39. As to paragraph 39, Deloitte:

- (a) refer to and repeat paragraph 37(b)(ii) and (iii) above; and
- (b) otherwise, do not admit the paragraph.

## **D.**

### **D.1**

40. As to paragraph 40, Deloitte:

- (a) admit that FNP's significant accounting policies in FY2014, as disclosed in the FY2014 Full-Year Financial Report, included:
  - (i) measuring inventories at the lower of cost and net realisable value;

- (ii) plant and equipment, motor vehicles and equipment under finance lease being stated at cost less accumulated depreciation and impairment;
- (iii) construction in progress being stated at cost, with cost:
  - 1. including expenditure that is directly attributable to the acquisition or construction of the item; and
  - 2. being determined, in the event that settlement of all or part of the purchase consideration was deferred, by discounting the amounts payable in the future to their present value as at the date of acquisition;
- (iv) a general revenue policy, and a revenue policy with respect to the sale of goods, in the terms alleged at subparagraph 40.4;
- (v) the following with respect to impairment:
  - 1. cash generating units (**CGUs**) to which goodwill had been allocated, and intangible assets with indefinite useful lives and intangible assets not yet available, were tested for impairment annually (or more frequently if events or changes in circumstances required) according to whether the recoverable amount of the CGU (or group of CGUs) was less than the carrying amount of the CGU (or group of CGUs);
  - 2. the recoverable amount was the higher of fair value less costs to sell and value in use, and in assessing value in use, FNP discounted the estimated future cash flows to their present value using a post-tax discount rate that reflected current market assessments of the time value of money and the risks specific to the asset for which the estimates of future cash flows had not been adjusted;
- (b) rely on the full terms and effect of FNP's statement of significant accounting policies in the FY2014 Full-Year Financial Report; and
- (c) otherwise, do not admit the paragraph.

## **D.2**

41. As to paragraph 41, Deloitte:

- (a) refer to paragraph 40 above;
- (b) rely on the full terms and effect of FNP's statement of significant accounting policies in the FY2015 Full-Year Financial Report;
- (c) admit that FNP had a general revenue policy, and a revenue policy with respect to the sale of goods, in the terms alleged at subparagraph 41.4; and
- (d) otherwise, do not admit the paragraph.

## **D.3**

42. As to paragraph 42, Deloitte:

- (a) refer to paragraphs 40 and 41 above;
- (b) rely on the full terms and effect of FNP's statement of significant accounting policies in the FY2016 Full-Year Financial Report; and
- (c) otherwise, do not admit the paragraph.

## **D.4**

43. As to paragraph 43, Deloitte:

- (a) refer to paragraphs 40 and 41 above;
- (b) rely on the full terms and effect of FNP's statement of significant accounting policies in the FY2017 Full-Year Financial Report;
- (c) admit that the significant accounting policies under 'Note 11. Non-current assets – property, plant and equipment' in the FY2017 Full-Year Financial Report included statements to the effect alleged at subparagraph 43.3;
- (d) admit that the significant accounting policies under 'Note 12. Non-current assets – intangibles' in the FY2017 Full-Year Financial Report included statements to the effect alleged at subparagraph 43.5; and
- (e) otherwise, do not admit the paragraph.

## **D.5**

44. As to paragraph 44, Deloitte:

- (a) refer to paragraph 40 above;
- (b) rely on the full terms and effect of FNP's statement of significant accounting policies in the FY2018 Full-Year Financial Report;
- (c) admit that 'Note 14. Non-current assets – intangibles' to the FY2018 Full-Year Financial Report included statements to the effect alleged at subparagraph 44.5; and
- (d) otherwise, do not admit the paragraph.

## **D.6**

45. As to paragraph 45, Deloitte:

- (a) refer to paragraphs 40 and 44(c) above;
- (b) rely on the full terms and effect of FNP's statement of significant accounting policies in the FY2019 Full-Year Financial Report;
- (c) admit that the significant accounting policies under 'Note 14. Non-current assets – property, plant and equipment' in the FY2019 Full-Year Financial Report included statements to the effect alleged at subparagraph 45.3;
- (d) admit that the significant accounting policies under 'Note 5. Revenue' in the FY2019 Full-Year Financial Report included statements to the effect alleged at subparagraph 45.4; and
- (e) otherwise, do not admit the paragraph.

## **E.**

### **E.1**

46. Deloitte do not plead to paragraph 46 as it makes not allegations against them.

### **E.2**

47. As to paragraph 47, Deloitte:

- (a) deny that, during the Claim Period, each of FNP's Half-Year Financial Reports included an Independent Auditor's Half-Year Review Report;



- (b) say that, during the Claim Period, each of FNP's Half-Year Financial Reports was accompanied by an Independent Auditor's Half-Year Review Report on the relevant Half-Year Financial Report (**Deloitte Half-Year Review Reports**);
- (c) say that each of the Deloitte Half-Year Review Reports referred to in paragraph 47(b) above was:
  - (i) prepared by Deloitte; and
  - (ii) signed by the relevant lead audit partner on behalf of Deloitte; and
- (d) otherwise deny paragraph 47.

48. As to paragraph 48, Deloitte:

- (a) say that, in respect of each half year reporting period, FNP (through Rory Macleod (1H2015–1H2020), Sharon Maguire (1H2015), Cassie Ruiz (1H2016) and Campbell Nicholas (1H2017–1H2020) provided management representation letters to Deloitte as to matters concerning the Half-Year Financial Report (**Half-Year Management Representation Letters**);
- (b) say that in each of FNP's Half-Year Financial Reports each of FNP's directors gave a declaration pursuant to s 303(5) of the Corporations Act (**Half-Year Directors' Declarations**);
- (c) rely on the Half-Year Management Representation Letters and Half-Year Directors' Declarations for their full content and meaning;
- (d) say that, after the giving of the Half-Year Management Representation Letters and Half-Year Directors' Declarations, the relevant lead audit partner (referred to in paragraph 9(g)(ii) above), relying on the Half-Year Management Representation Letters and the Half-Year Directors' Declarations, signed the applicable Deloitte Half-Year Review Report, in their name and in the name of Deloitte pursuant to s 324AB(3) of the Corporations Act;
- (e) say that each of the Deloitte Half-Year Review Reports included statements to the effect that (as was the case):
  - (i) Deloitte had reviewed the accompanying Half-Year Financial Report of FNP;

- (ii) the directors of FNP were responsible for the preparation of the Half-Year Financial Report that gives a true and fair view in accordance with Australian Accounting Standards and the Corporations Act and for such internal control as the directors determines was necessary to enable the preparation of the Half-Year Financial Report that gave a true and fair view and was free from material misstatement, whether due to fraud or error;
- (iii) Deloitte's responsibility was to express a conclusion on the Half-Year Financial Report based on its review;
- (iv) Deloitte's review was conducted in accordance with ASRE 2410;
- (v) a review of a Half-Year Financial Report consists of making enquiries, primarily of persons responsible for financial and accounting matters, and applying analytical and other review procedures;
- (vi) a review is substantially less in scope than an audit conducted in accordance with Australian Auditing Standards and consequently does not enable Deloitte to obtain assurance that the firm would become aware of all significant matters that might be identified in an audit;
- (vii) Deloitte did not, therefore, express an audit opinion;
- (viii) based on Deloitte's review, which was not an audit, Deloitte had not become aware of any matter that made it believe that the relevant Half-Year Financial Report of FNP was not in accordance with the Corporations Act, including:
  - 1. giving a true and fair view of FNP's financial position as at the end of the relevant half-year and of its performance for that half-year; and
  - 2. complying with Accounting Standard AASB 134 *Interim Financial Reporting* and the Corporations Regulations.
- (f) will rely at trial on the Deloitte Half-Year Review Reports and the FNP Half-Year Financial Reports for their full content and meaning;
- (g) refer to paragraph 37(b)(iii) above; and

- (h) otherwise, deny the paragraph.
49. As to paragraph 49, Deloitte:
- (a) deny that, during the Claim Period, each of FNP's Full-Year Financial Reports included an Independent Auditor's Report;
  - (b) say that, during the Claim Period, each of FNP's Full-Year Financial Reports was accompanied by an Independent Auditor's Report on the relevant Full-Year Financial Report (**Deloitte Full-Year Audit Reports**);
  - (c) say that each of the Deloitte Full-Year Audit Reports referred to in paragraph 49(b) above was:
    - (i) prepared by Deloitte; and
    - (ii) signed by the relevant lead audit partner; and
  - (d) otherwise deny paragraph 49.
50. As to paragraph 50, Deloitte:
- (a) say that in respect of each full year reporting period FNP (through Rory Macleod (FY2014–FY2019), Sharon Maguire (FY2014 and FY2015), Luke Collis (FY2016) and Campbell Nicholas (FY2017–FY2019)) provided management representation letters to Deloitte as to matters concerning the Full-Year Financial Report (**Full-Year Management Representation Letters**);
  - (b) say that in respect of each full year reporting period each of FNP's directors gave a declaration pursuant to s 295(5) of the Corporations Act as to the Full-Year Financial Report (**Full-Year Directors' Declarations**);
  - (c) rely on the Full-Year Representation Letters and the Full-Year Directors' Declarations for their full content and meaning;
  - (d) say that, after the giving of the Full-Year Management Representation Letters and the Full-Year Directors' Declarations, the relevant lead audit partner, relying on the Full-Year Management Representation Letters and Full-Year Directors' Declarations, signed the applicable Deloitte Full-Year Audit Report, in their name and in the name of Deloitte pursuant to s 324AB(3) of the Corporations Act;

- (e) say that each Deloitte Full-Year Audit Report contained a section titled “Directors’ Responsibility for the Financial Report” or “Responsibility of the Directors for the Financial Report”, which provided, *inter alia*, that (as was the case) the directors are responsible for:
  - (i) the preparation of the financial report that gives a true and fair view in accordance with Australian Accounting Standards and the Corporations Act; and
  - (ii) such internal control as the directors determine is necessary to enable the preparation of the financial report that gives a true and fair view and is free from material misstatement, whether due to fraud or error.
- (f) say that the FY2014 Deloitte Full-Year Audit Report, FY2015 Deloitte Full-Year Audit Report and FY2016 Deloitte Full-Year Audit Report contained a section titled “Auditor’s Responsibility”, which provided, *inter alia*, that (as was the case):
  - (i) Deloitte’s responsibility was to express an opinion on the financial report based on their audit. Deloitte conducted their audit in accordance with the Australian Auditing Standards. Those standards required that Deloitte comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance whether the financial report was free from material misstatement;
  - (ii) an audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial report. The procedures selected depend on the auditor’s judgement, including the assessment of the risks of material misstatement of the financial report, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to FNP’s preparation and presentation of the financial report, in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of FNP’s internal control;

- (iii) an audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the FNP directors, as well as evaluating the overall presentation of the financial report; and
- (iv) Deloitte believed that the audit evidence they had obtained was sufficient and appropriate to provide a basis for their audit opinion;
- (g) say that the FY2017 Deloitte Full-Year Audit Report, FY2018 Deloitte Full-Year Audit Report and FY2019 Deloitte Full-Year Audit Report contained:
  - (i) a section titled “Auditor’s Responsibilities for the Audit of the Financial Report” which provided, *inter alia*, that (as was the case):
    1. Deloitte’s objectives as auditor are to obtain reasonable assurance about whether the financial report as a whole is free from material misstatement, whether due to fraud or error, and to issue an auditor’s report that includes our opinion;
    2. Reasonable assurance is a high level of assurance, but is not a guarantee that an audit conducted in accordance with the Australian Auditing Standards will always detect a material misstatement when it exists. Misstatements can arise from fraud or error and are considered material if, individually or in the aggregate, they could reasonably be expected to influence the economic decisions of users taken on the basis of this financial report;
    3. As part of an audit in accordance with the Australian Auditing Standards, Deloitte exercise professional judgement and maintain professional scepticism throughout the audit. Deloitte also:
      - a. identify and assess the risks of material misstatement of the financial report, whether due to fraud or error, design and perform audit procedures responsive to those risks, and obtain audit evidence that is sufficient and appropriate to provide a basis for our opinion. The risk

of not detecting a material misstatement resulting from fraud is higher than for one resulting from error, as fraud may involve collusion, forgery, intentional omissions, misrepresentations, or the override of internal control;

- b. obtain an understanding of internal control relevant to the audit in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of FNP's internal control;
  - c. evaluate the appropriateness of accounting policies used and the reasonableness of accounting estimates and related disclosures made by the directors;
  - d. conclude on the appropriateness of the directors' use of the going concern basis of accounting and, based on the audit evidence obtained, whether a material uncertainty exists related to events or conditions that may cast significant doubt on the Group's ability to continue as a going concern;
  - e. evaluate the overall presentation, structure and content of the financial report, including the disclosures, and whether the financial report represents the underlying transactions and events in a manner that achieves fair presentation;
  - f. obtain sufficient appropriate audit evidence regarding the financial information of the entities or business activities within FNP to express an opinion on the financial report; and
  - g. Deloitte are responsible for the direction, supervision and performance of the audit and for the audit opinion.
4. Deloitte communicate with the directors regarding, among other matters, the planned scope and timing of the audit and significant

audit findings, including any significant deficiencies in internal control that Deloitte identify during their audit;

5. Deloitte also provide the directors with a statement that the firm has complied with relevant ethical requirements regarding independence;
6. From the matters communicated with the directors, Deloitte determined those matters that were of most significance in the audit of the financial report of the current period and are therefore the key audit matters. Deloitte describe these matters in its auditor's report (unless law or regulation precludes public disclosure or in other exceptional circumstances).

(ii) a section titled "Basis for Opinion" which provided, *inter alia*, that (as was the case):

1. Deloitte conducted the audit in accordance with Australian Auditing Standards;
2. Deloitte were independent of FNP in accordance with the auditor independence requirements of the Corporations Act and the ethical requirements of the Accounting Professional and Ethical Standards Board's APES 110 Code of Ethics for Professional Accountants that are relevant to the audit of a financial report in Australia; and
3. Deloitte believed that the audit evidence they had obtained was sufficient and appropriate to provide a basis for their audit opinion;

(iii) a section titled "Key Audit Matters" which provided, *inter alia*, that (as was the case):

1. key audit matters are those matters that, in Deloitte's professional judgement, were of most significance in their audit of the financial report for the current period; and

2. these key audit matters were addressed in the context of Deloitte's audit of the financial report as a whole, and in forming their opinion thereon, and Deloitte did not provide a separate opinion on these matters.
- (h) say that each Deloitte Full-Year Audit Report contained a section which stated, *inter alia*, that (as was the case) in Deloitte's opinion the relevant Full-Year Financial Report was in accordance with the Corporations Act, including:
- (i) giving a true and fair view of the consolidated entity's financial position at the end of that financial year and of its performance for the that year; and
  - (ii) complying with the Australian Accounting Standards and the Corporations Regulations.
- (i) will rely at trial on each Deloitte Full-Year Audit Report and each Full-Year Financial Report for their full content and meaning;
- (j) refer to paragraph 36(b)(ii) and (iii) above; and
- (k) otherwise, deny the paragraph.

### **E.3**

51. Deloitte admit paragraph 51.
52. Deloitte do not plead to paragraph 52 as it makes no allegation against them.
53. Deloitte do not plead to paragraph 53 as it makes no allegation against them.

### **F.**

54. Subject to reference to the 29 May 2020 Trading Update for its full terms, meaning and effect, Deloitte admit paragraph 54.
55. Subject to reference (as necessary) to the 23 June 2020 CEO Announcement for its full terms, meaning and effect, Deloitte admit paragraph 55.
56. Subject to reference (as necessary) to the 24 June 2020 CEO Announcement for its full terms, meaning and effect, Deloitte admit paragraph 56.



57. Subject to reference (as necessary) to the relevant announcement for its full terms, meaning and effect, Deloitte admit paragraph 57.
58. Subject to reference (as necessary) to the relevant announcement for its full terms, meaning and effect, Deloitte admit paragraph 58.
59. Subject to reference (as necessary) to the 25 June 2020 Trading Update for its full terms, meaning and effect, Deloitte admit paragraph 59.
60. Subject to reference (as necessary) to the 25 June 2020 Teleconference for its full terms, meaning and effect, Deloitte admit paragraph 60.
61. Subject to reference (as necessary) to the 30 June 2020 Management Update for its full terms, meaning and effect, Deloitte admit paragraph 61.
62. Subject to reference (as necessary) to the 8 July 2020 Update for its full terms, meaning and effect, Deloitte admit paragraph 62.
63. Subject to reference (as necessary) to the 20 October 2020 Announcement for its full terms, meaning and effect, Deloitte admit paragraph 63.
64. Subject to reference (as necessary) to the 30 October 2020 Update for its full terms, meaning and effect, Deloitte admit paragraph 64.
65. Subject to reference (as necessary) to the 30 November 2020 Update for its full terms, meaning and effect, Deloitte admit paragraph 65.
66. Subject to reference (as necessary) to the FY2020 Full-Year Financial Report for its full terms, meaning and effect, Deloitte admit paragraph 66.
67. As to paragraph 67, Deloitte:
  - (a) deny that FNP's FY2020 Full-Year Financial Report included a Deloitte Full-Year Audit Report;
  - (b) say that FNP's FY2020 Full-Year Financial Report was accompanied by a Deloitte Full-Year Audit Report;
  - (c) otherwise deny paragraph 67.
68. As to paragraph 68, Deloitte:

- (a) admit that the FY2020 Deloitte Full-Year Audit Report contained statements to the effect alleged in the paragraph;
  - (b) say that the FY2020 Deloitte Full-Year Audit Report also contained statements to the same effect as those set out in paragraph 50(e) and 50(g)(i) and (ii) above;
  - (c) will rely on the FY2020 Deloitte Full-Year Audit Report for its full meaning and effect;
  - (d) refer to and repeat paragraph 36(b)(ii) and (iii) above; and
  - (e) otherwise, do not admit the paragraph.
69. Subject to reference (as necessary) to the 30 November 2020 Teleconference for its full terms, meaning and effect, Deloitte admit paragraph 69.
70. Subject to reference (as necessary) to the 30 November 2020 Investor Presentation for its full terms, meaning and effect, Deloitte admit paragraph 70.
71. Subject to reference (as necessary) to the 19 March 2021 Market Announcement for its full terms, meaning and effect, Deloitte admit paragraph 71.
72. Subject to reference (as necessary) to the FY2021 Full-Year Financial Report for its full terms, meaning and effect, Deloitte admit paragraph 72.
73. As to paragraph 73, Deloitte
- (a) deny that FNP's FY2021 Full-Year Financial Report included a Deloitte Full-Year Audit Report;;
  - (b) say that FNP's FY2021 Full-Year Financial Report was accompanied by a Deloitte Full-Year Audit Report;;
  - (c) otherwise deny paragraph 73.
74. As to paragraph 74, Deloitte:
- (a) admit that the FY2021 Deloitte Full-Year Audit Report contained statements to the effect alleged in the paragraph;
  - (b) say that the FY2021 Deloitte Full-Year Audit Report also contained statements to the same effect as those set out in paragraph 50(e) and 50(g)(i) and (ii) above;

- (c) will rely on the FY2021 Deloitte Full-Year Audit Report for its full meaning and effect;
- (d) refer to and repeat paragraph 36(b)(ii) and (iii) above; and
- (e) otherwise, do not admit the paragraph.

**G.**

**G.1**

- 75. Deloitte admit paragraph 75.
- 76. Deloitte admit paragraph 76.
- 77. Deloitte do not plead to paragraph 77 as it makes no allegation against them.
- 78. Deloitte do not plead to paragraph 78 as it makes no allegation against them.
- 79. Deloitte do not admit paragraph 79.
- 80. Deloitte do not admit paragraph 80.
- 81. Deloitte do not plead to paragraph 81 as it makes no allegation against them.

**G.2**

- 82. Deloitte do not plead to paragraph 82 as it makes no allegation against them.
- 83. Deloitte do not plead to paragraph 83 as it makes no allegation against them.
- 84. Deloitte do not plead to paragraph 84 as it makes no allegation against them.
- 85. Deloitte do not plead to paragraph 85 as it makes no allegation against them.
- 86. Deloitte do not plead to paragraph 86 as it makes no allegation against them.
- 87. Deloitte do not plead to paragraph 87 as it makes no allegation against them.

**H.**

**H1.**

- 88. As to paragraph 88, Deloitte:
  - (a) say that, at all material times, if they were conducting themselves in relation to “financial services” within the meaning of s 12DA of the ASIC Act and/or “a financial service” within the meaning of s 1041H of the Corporations Act

(which in each case is denied), then that service was an “exempt service” within the meaning of the Corporations Regulations; and

**Particulars**

*Corporations Regulations, r 7.1.29*

*Corporations Act, s 766A(2)*

*ASIC Act, s 5(3)*

(b) otherwise, deny the paragraph.

89. Deloitte deny paragraph 89.

90. Deloitte:

(a) do not admit paragraph 90.1; and

(b) deny each of paragraphs 90.2 to 90.10.

91. Deloitte deny paragraph 91.

**H2.**

92. Deloitte deny paragraph 92.

93. Deloitte deny paragraph 93.

94. Deloitte deny paragraph 94.

95. Deloitte deny paragraph 95.

**I.**

96. Deloitte do not plead to paragraph 96 as it makes no allegation against them.

97. Deloitte do not plead to paragraph 97 as it makes no allegation against them.

98. Deloitte do not plead to paragraph 98 as it makes no allegation against them.

99. Deloitte do not plead to paragraph 99 as it makes no allegation against them.

100. Deloitte do not plead to paragraph 100 as it makes no allegation against them.

**J.**

101. As to paragraph 101, Deloitte:
- (a) admit subparagraphs 101.2 and 101.2; and
  - (b) otherwise, do not plead to the paragraph.
102. Deloitte deny paragraph 102 insofar as it makes allegations against them, and otherwise do not plead to the paragraph.
103. Deloitte deny paragraph 103 insofar as it makes allegations against them, and otherwise do not plead to the paragraph.
104. Deloitte deny paragraph 104 insofar as it makes allegations against them, and otherwise do not plead to the paragraph.
105. Deloitte deny paragraph 105 insofar as it makes allegations against them, and otherwise do not plead to the paragraph.

**K.**

106. Deloitte do not plead to paragraph 106 as it makes no allegations against them.
107. Deloitte do not plead to paragraph 107 as it makes no allegations against them.
108. Deloitte do not plead to paragraph 108 as it makes not allegations against them.

**L. PROPORTIONATE LIABILITY**

109. In respect of each claim alleged against Deloitte in the CSOC that is an apportionable claim for the purposes of s 87CB(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), s 1041L of the Corporations Act, s 12GP of the ASIC Act and s 34 of the *Civil Liability Act 2002* (NSW) (**CLA**) and the corresponding provisions in the legislation of the States and Territories (**Apportionable Claims**), if Deloitte is liable to the Plaintiffs or Group Members in respect of the alleged contraventions the subject of those claims (which is denied), and if the Plaintiffs or Group Members have suffered loss and damage by reason of those alleged contraventions (**Claimed Loss**), then for the purposes of this Defence only:
- (a) FNP is a person whose acts or omissions caused the Claimed Loss and it is legally liable to the Plaintiffs and Group Members for that Claimed Loss;

- (b) FNP is a concurrent wrongdoer in respect of the Apportionable Claims within the meaning of s 1041L(3) of the Corporations Act, s 12GP(3) of the ASIC Act and s 87CB(3) of the CCA and the corresponding provisions in the legislation of the States and Territories; and
- (c) Deloitte's liability (if any) (which is denied) to the Plaintiffs or Group Members is, by that reason, limited by s 87CD(1) of the CCA, s 1041N(1) of the Corporations Act, s 12GR(1) of the ASIC Act, s 35(1) of the CLA and the corresponding provisions in the legislation of the States and Territories, to an amount reflecting that proportion of the damage or loss claimed that the Court considers is just having regard to the extent of Deloitte's responsibility for that damage or loss.

### **Particulars**

*Solely for the purpose of this Defence and on the assumption that the Plaintiffs establish they have suffered loss or damage on the basis of one or more of the Apportionable Claims alleged in the CSOC, Deloitte relies on and repeats the allegations made against FNP in sections A to G and I and J of the CSOC, including paragraphs 75 to 87 and paragraphs 96 to 98 of the CSOC which allege contraventions by FNP (**FNP's Contraventions**).*

*If Deloitte contravened s 1041H of the Corporations Act, s 12DA of the ASIC Act and s 18 of the ACL as alleged by the Plaintiffs in the CSOC (which is denied), and if those contraventions caused the Claimed Loss (which is also denied), then each of FNP's Contraventions caused and/or contributed to the Claimed Loss and FNP is liable to the Plaintiffs and Group Members for that same loss and damage.*

### **M. RELIEF FROM LIABILITY**

- 110. Further, or in the alternative, as to the whole of the CSOC, Deloitte says that if it is liable to the Plaintiffs or any Group Members by reason of the facts and matters alleged in the CSOC (which is denied), then Deloitte acted honestly and having regard to all of the circumstances of the case, ought fairly be excused from any such liability (in whole,

or in the alternative, in part) pursuant to s 1317S (by reason of s 1041I(4)) and/or s 1318 of the Corporations Act.

## **N. LIMITATION OF LIABILITY**

111. In further answer to the claims against Deloitte alleged in the CSOC, if, which is denied, Deloitte is liable for any of the loss alleged in the CSOC, that liability is limited in accordance with:

- (a) schemes approved under the *Professional Standards Act 1994* (NSW) (**PS Act**); and/or

### **Particulars**

*Schemes applicable to Deloitte and approved under the PS Act during the Claim Period included schemes promulgated by Chartered Accountants Australia and New Zealand and the Institute of Chartered Accountants in Australia (**Schemes**).*

*The Schemes apply to limit Deloitte's liability in respect of the following contraventions:*

- (i) *s 1041H of the Corporations (by force of s 1044B of the Corporations Act);*
  - (ii) *s 12DA of the ASIC Act (by force of s 12GNA of the ASIC Act);*
  - (iii) *s 18 of the ACL (by force of s 137 of the Competition and Consumer Act 2010 (Cth)).*
- (b) Clause 13 of the Deloitte Standard Terms and Conditions effective from 21 March 2013 (**Deloitte Standard Terms and Conditions**) which formed part of the retainer entered into between FNP and Deloitte in respect of each financial year in the Claim Period and which provided, relevantly, that Deloitte would not be liable for any Loss (defined to mean any losses, liabilities, claims, damages, costs or expenses, judgments or orders arising as a result of the services or the retainer) which arises as a result of Deloitte relying on any false, misleading or incomplete information provided by FNP.

### **Particulars**

*On 6 February 2014, Deloitte was retained by FNP to (relevantly) audit the FY2014 FNP Financial Report (**FY14 Deloitte Retainer**). The terms*

*of the FY2014 Deloitte Retainer were set out in a letter dated 6 February 2014 from Deloitte to Rory Macleod, Managing Director of FNP which provided a link to the Deloitte Standard Terms and Conditions.*

*On 17 December 2014, Deloitte was retained by FNP to (relevantly) audit the FY2015 FNP Financial Report and to review FNP's 1H2015 Half-Year Financial Report (**FY15 Deloitte Retainer**). The terms of the FY15 Deloitte Retainer were set out in a letter dated 17 December 2014 from Deloitte to Rory Macleod, Managing Director of FNP which enclosed the Deloitte Standard Terms and Conditions.*

*On 3 December 2015, Deloitte was retained by FNP to (relevantly) audit the FY2016 FNP Financial Report and to review FNP's 1H2016 Half-Year Financial Report (**FY16 Deloitte Retainer**). The terms of the FY16 Deloitte Retainer were set out in a letter dated 13 December 2015 from Deloitte to Rory Macleod, Managing Director of FNP which enclosed the Deloitte Standard Terms and Conditions.*

*On 13 December 2016, Deloitte was retained by FNP to (relevantly) audit FY2017 FNP Financial Report and to review FNP's 1H2017 Half-Year Financial Report (**FY17 Deloitte Retainer**). The terms of the FY17 Deloitte Retainer were set out in a letter dated 13 December 2016 from Deloitte to Rory Macleod, Managing Director of FNP which enclosed the Deloitte Standard Terms and Conditions.*

*On 12 December 2017, Deloitte was retained by FNP to (relevantly) audit the FY2018 FNP Financial Report and to review FNP's 1H2018 Half-Year Financial Report (**FY18 Deloitte Retainer**). The terms of the FY18 Deloitte Retainer were set out in a letter dated 12 December 2017 from Deloitte to Rory Macleod, Managing Director of FNP which enclosed the Deloitte Standard Terms and Conditions.*

*On 22 January 2019, Deloitte was retained by FNP to (relevantly) audit the FY2019 FNP Financial Report and to review FNP's 1H2019 Half-Year Financial Report (**FY19 Deloitte Retainer**). The terms of the FY19 Deloitte Retainer were set out in a letter dated 22 January 2019 from*



*Deloitte to Rory Macleod, Managing Director and CEO of FNP which enclosed the Deloitte Standard Terms and Conditions.*

*On 19 February 2020, Deloitte was retained by FNP to (relevantly) review FNP's 1H2020 Half-Year Financial Report (**HY20 Deloitte Retainer**). The terms of the HY20 Deloitte Retainer were set out in a letter dated 19 February 2020 from Deloitte to Rory Macleod, Managing Director and CEO of FNP which enclosed the Deloitte Standard Terms and Conditions.*

**Dated: 8 April 2022**

**W A HARRIS**

**K A LOXLEY**



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**Corrs Chambers Westgarth**  
**Solicitors for Deloitte**