IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

No. S ECI 2020 04505

BETWEEN

NICHOLAS JOHN GEHRKE AND LESTER BUCH

Joint Plaintiffs

-and-

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

First Defendant

DELOITTE TOUCHE TOHMATSU (A FIRM) (ABN 74 490 121 060)

Second Defendant

DEFENCE

Date of document: 8 April 2022
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NOTE: Unless otherwise stated, a defined term in this Defence has the same meaning as assigned to it in the Consolidated Statement of Claim dated 16 December 2021 (**SOC**).

NOTE: Headings and sub-headings utilised in the SOC have been replicated in this Defence. The defendant does not make any admissions by use of these headings.

NOTE: Where the contents of a document are admitted or otherwise referred to, the admission or reference to that document is subject to reference to the full terms and effect of the document at trial.

In answer to the SOC, the First Defendant (**Noumi**) says as follows.

A. INTRODUCTION

A.1 The Plaintiffs and the Group Members

1. As to paragraph 1, it:

   (a) denies that any person referred to in paragraph 1.1 of the SOC suffered loss or damage by reason of the matters pleaded in paragraph 1.2 of the SOC; and

   (b) otherwise does not plead to paragraph 1 as there are no allegations pleaded against it.

2. As to paragraph 2, it:

   (a) admits that:

      (i) on or about 27 March 2018, the First Plaintiff acquired an interest in 1,154 FNP Shares; and

      (ii) on or about 19 June 2019, the First Plaintiff acquired an interest in another 64 FNP Shares at a price of $4.80 per share; and

   (b) otherwise does not admit paragraph 2.

3. As to paragraph 3, it:

   (a) admits that on or about 23 June 2020, the Second Plaintiff acquired an interest in 6,000 FNP Shares; and

   (b) otherwise does not admit paragraph 3.

4. As to paragraph 4, it:

   (a) refers to and repeats paragraph 1 above; and

   (b) otherwise does not admit paragraph 4.

A.2 The Defendants

A.2.1 First Defendant (Noumi)

5. As to paragraph 5, it:

   (a) says that on 18 November 2021, it changed its company name to Noumi Limited; and

   (b) otherwise admits paragraph 5.

6. It admits paragraph 6.

7. It does not admit paragraph 7.

8. It does not admit paragraph 8.

A.2.2 Second Defendant (Deloitte)

9. It does not plead to paragraph 9 as there are no allegations pleaded against it.

B. OFFICERS OF NOUMI DURING THE CLAIM PERIOD

B.1 Officers

10. It admits paragraph 10.

11. As to paragraph 11, it:

    (a) admits that Mr Gunner was, at all material times during the Claim Period until 30 June 2019, an independent, non-executive director of Noumi but otherwise denies paragraph 11.1;

    (b) says further that Mr Gunner was, at all material times during the Claim Period from 30 June 2019 onwards, a non-independent, non-executive director of Noumi; and

    (c) otherwise admits paragraphs 11.2 to 11.5.

12. It admits paragraph 12.

13. As to paragraph 13, it:

(a) admits paragraphs 13.1 and 13.2;

(b) admits that Mr A Perich was a member of the Finance and Audit Committee and the Risk and Compliance Committee at all material times during the Claim Period from 1 July 2019 but otherwise does not admit paragraph 13.3; and

(c) otherwise admits paragraph 13.4.

14. It admits paragraph 14.

15. It admits paragraph 15 and says further that Mr Macleod was the Company Secretary of Noumi at all material times during the Claim Period until 12 September 2016.

16. As to paragraph 16, it:

(a) admits paragraph 16.1;

(b) denies paragraph 16.2 and says that Mr Allen was, at all material times during the Claim Period from 23 June 2020, a non-independent, executive director of Noumi;

(c) admits paragraph 16.3;

(d) admits paragraph 16.4 and says further that, from 6 June 2019 to 4 March 2020, Mr Allen was the Chairman of the Risk and Compliance Committee;

(e) admits paragraph 16.5 and says further that Mr Allen was the Company Secretary of Noumi only on an interim basis until 9 July 2020; and

(f) admits paragraph 16.6.

17. It admits paragraph 17.

18. It admits paragraph 18.

19. It admits paragraph 19.

20. As to paragraph 20, it:

(a) admits paragraph 20.1;

(b) admits paragraphs 20.2, 20.3 and 20.4 as to the period until 30 June 2015; and

(c) otherwise does not admit paragraph 20.

21. As to paragraph 21, it:

(a) does not admit paragraph 21.1;

(b) admits paragraphs 21.2 to 21.5;

(c) admits paragraph 21.6 as to the period from 1 July 2016; and

(d) otherwise does not admit paragraph 21.

22. As to paragraph 22, it:

(a) denies paragraph 22.1 and says further that Mr Collis held the positions of Group Commercial Finance Manager, General Manager Group Finance and then Group General Manager – Nutritionals and Milk Inputs (Commercial) until 6 May 2020; and

(b) denies paragraphs 22.2 and 22.3.

23. It denies paragraph 23.

24. As to paragraph 24, it:

(a) does not admit paragraphs 24.1 and 24.2; and

(b) denies paragraphs 24.3 and 24.4.

25. It admits paragraph 25.

26. As to paragraph 26, it:

(a) admits that Mr Nicholas was the Company Secretary of Noumi between 12 September 2016 and 23 June 2020 but otherwise denies paragraph 26.2; and

(b) otherwise admits paragraph 26.

27. As to paragraph 27, it:

(a) admits paragraphs 27.1 and 27.2;

(b) admits that, from 31 October 2019 to 8 March 2020, Ms Stanley was:

(i) in her capacity as a Company Secretary of Noumi, a person who made, or participated in making decisions that affected the whole, or a substantial part, of the business of Noumi, and/or had the capacity to affect significantly Noumi's financial standing; and

(ii) by reason of paragraph 27(b)(i) above, an 'officer' of Noumi within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.12; and

(c) otherwise denies paragraphs 27.3 and 27.4.

28. As to paragraph 28, it:

(a) admits that Ms Graham was the Group Financial Controller from 22 March 2018 to 14 December 2018 and says further that, for the period 12 March 2018 to 22 March 2018 she was the Group Finance Manager, and otherwise denies paragraph 28.1;

(b) admits paragraph 28.2; and

(c) denies paragraphs 28.3 and 28.4.

29. It does not admit paragraph 29.

B.2 Knowledge of officers of Noumi is the knowledge of Noumi

30. As to paragraph 30, it:

(a) says that at all material times ASX Listing Rule 3.1 provided:

> "*Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities the entity must immediately tell ASX that information.*"

(b) says that at all material times ASX Listing Rule 19.12 included the following definition of "aware":

> ***"aware*** *an entity becomes aware of information if, and as soon as, an officer of the entity (or, in the case of a trust, an officer of the responsible entity) has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity"*

(c) says that s 674 of the Corporations Act only requires an entity to notify the ASX of information of the kind referred to in that section if the entity "has" the information; and

(d) otherwise denies paragraph 30.

C. FINANCIAL REPORTING

C.1 FNP's Reporting Obligations

C.1.1 Full-Year Financial Reports and Half-Year Financial Reports – Corporations Act

31. It admits paragraph 31.

32. It admits paragraph 32.

33. It admits paragraph 33.

C.1.2 ASX Listing Rules

34. It admits paragraph 34.

35. It admits paragraph 35.

C.2 Deloitte's auditing obligations

36. It does not plead to paragraph 36 as there are no allegations pleaded against it.

37. It does not plead to paragraph 37 as there are no allegations pleaded against it.

38. It does not plead to paragraph 38 as there are no allegations pleaded against it.

39. It does not plead to paragraph 39 as there are no allegations pleaded against it.

D. NOUMI ACCOUNTING POLICIES

D.1 Noumi FY2013/2014 Policies

40. As to paragraph 40, on the basis that the reference to "FY2014" means financial year 2013/2014, it:

(a) admits paragraph 40.1;

(b) admits paragraph 40.2;

(c) in relation to paragraph 40.3, it:

(i) admits that in accordance with the FY 2014 Full Year Financial Report, during FY2014:

(1) construction in progress was stated at cost;

(2) 'cost' included expenditure that was directly attributable to the acquisition or construction of the item; and

(3) in the event that settlement of all or part of the purchase consideration was deferred, cost was determined by discounting the amounts payable in the future to their present value as at the date of acquisition;

(ii) says further that during FY2014, the practice of Noumi in relation to the capitalisation of expenses was consistent with the Capitalisation and Expenses Policy approved and adopted by the Audit & Risk Committee on 27 February 2017;

(iii) says further that determining:

(1) when an asset is operating in the manner intended by management; and

(2) what costs are directly attributable to bringing an asset to the condition and location necessary of operating in the manner intended by management,

is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations;

(d) admits paragraph 40.4; and

(e) admits paragraph 40.5.

D.2 Noumi FY2014/2015 Policies

41. As to paragraph 41, on the basis that the reference to "FY2015" means financial year 2014/2015, it:

(a) admits that Noumi's inventory policy was:

(i) as set out in its FY2014/2015 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report;

(b) admits that Noumi's tangible assets policy was:

(i) as set out in its FY2014/2015 Full Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report;

(c) in relation to paragraph 41.3, it:

(i) admits that in accordance with the FY 2015 Full Year Financial Report, during FY2014 construction in progress was stated at cost;

(ii) says further that during FY2015, Noumi's practice in relation to the capitalisation of expenses was consistent with the Capitalisation and Expenses Policy approved and adopted by the Audit & Risk Committee on 27 February 2017;

(iii) says further that determining:

(1) when an asset is operating in the manner intended by

management; and

(2) what costs are directly attributable to bringing an asset to the condition and location necessary of operating in the manner intended by management,

is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations;

(d) admits paragraph 41.4; and

(e) admits that Noumi's intangible asset impairment policy was:

(i) as set out in its FY2014/2015 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report.

D.3 Noumi FY2015/2016 Policies

42. As to paragraph 42, on the basis that the reference to "FY2016" means financial year 2015/2016, it:

(a) admits that Noumi's inventory policy was:

(i) as set out in its FY2015/2016 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report;

(b) admits that Noumi's tangible assets policy was:

(i) as set out in its FY2015/2016 Full Year Financial Report; and

(ii) to the same effect as that set out in its 2013/2014 Full-Year Financial Report;

(c) in relation to paragraph 42.3, it:

(i) admits that in accordance with the FY2016 Full Year Financial Report, during FY2016 construction in progress was stated at cost;

(ii) says further that during FY2016, capitalisation of expenses was undertaken by Noumi in accordance with the Capitalisation and Expenses Policy approved and adopted by the Audit & Risk Committee on 27 February 2017;

Particulars

Freedom Foods Group Limited Capitalisation and Expenses Policy to comply with AASB 116 Property, Plant and Equipment and AASB 138 Intangible Assets approved and adopted by the Audit & Risk Committee on 27 February 2017.

(iii) says further that determining:

(1) when an asset is operating in the manner intended by management; and

(2) what costs are directly attributable to bringing an asset to the condition and location necessary of operating in the manner intended by management,

is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations;

(d) admits that Noumi's revenue policy was:

(i) as set out in its FY2015/2016 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2014/2015 Full-Year Financial Report; and

(e) admits that Noumi's intangible asset impairment policy was:

(i) as set out in its FY2015/2016 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial

Report.

D.4 Noumi FY2016/2017 Policies

43. As to paragraph 43, on the basis that the reference to "FY2017" means financial year 2016/2017, it:

(a) admits that Noumi's inventory policy was:

(i) as set out in its FY2016/2017 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report;

(b) admits that Noumi's tangible assets policy was:

(i) as set out in its FY2016/2017 Full Year Financial Report; and

(ii) to the same effect as that set out in its 2013/2014 Full-Year Financial Report;

(c) in relation to paragraph 43.3, it:

(i) admits that in accordance with the FY 2017 Full Year Financial Report, during FY2017, capital work in progress was determined in accordance with the matters set out in sub-paragraphs (a) to (e); and

(ii) says further that during FY2017, capitalisation of expenses was undertaken by Noumi in accordance with the Capitalisation and Expenses Policy approved and adopted by the Audit & Risk Committee on 27 February 2017;

Particulars

Freedom Foods Group Limited Capitalisation and Expenses Policy to comply with AASB 116 Property, Plant and Equipment and AASB 138 Intangible Assets approved and adopted by the Audit & Risk Committee on 27 February 2017.

(iii) says further that determining:

(1) when an asset is operating in the manner intended by management; and

(2) what costs are directly attributable to bringing an asset to the condition and location necessary of operating in the manner intended by management,

is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations.

(d) admits that Noumi's revenue policy was:

(i) as set out in its FY2016/2017 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2014/2015 Full-Year Financial Report;

(e) in relation to paragraph 43.5, it:

(i) admits that in accordance with the FY 2017 Full Year Financial Report, during FY2017, Noumi's capitalised development policy was to the effect set out in sub-paragraphs (a) to (e);

(ii) says further that during FY2017, capitalisation in respect of development projects was undertaken by Noumi in accordance with the Capitalisation and Expenses Policy approved and adopted by the Audit& Risk Committee on 27 February 2017;

Particulars

Freedom Foods Group Limited Capitalisation and Expenses Policy to comply with AASB 116 Property, Plant and Equipment and AASB 138 Intangible Assets approved and adopted by the Audit & Risk Committee on 27 February 2017.

(iii) says further that determining the matters in paragraph 43.5(b)(i) to (vi) is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations; and

(f) admits that Noumi's intangible asset impairment policy was:

(i) as set out in its FY2016/2017 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report.

D.5 Noumi FY2017/2018 Policies

44. As to paragraph 44, on the basis that the reference to "FY2018" means financial year 2017/2018, it:

(a) admits that Noumi's inventory policy was:

(i) as set out in its FY2017/2018 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report;

(b) admits that Noumi's tangible assets policy was:

(i) as set out in its FY2017/2018 Full-Year Financial Report;

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report;

(c) in relation to paragraph 44.3, it:

(i) admits that in accordance with the FY 2018 Full Year Financial Report, during FY2018, capital work in progress was determined in accordance with the matters set out in sub-paragraphs 43.3(a) to (e) of the SOC; and

(ii) says further that during FY2018, capitalisation of expenses was undertaken by Noumi in accordance with the Capitalisation of Expenses Policy v2 dated October 2018;

Particulars

Freedom Foods Group Limited Capitalisation of Expenses Policy to comply with AASB 116 Property, Plant and Equipment and AASB 138 Intangible Assets v2 dated October 2018.

(iii) says further that, determining:

(1) when an asset is operating in the manner intended by management; and

(2) what costs are directly attributable to bringing an asset to the condition and location necessary of operating in the manner intended by management,

is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations;

(d) admits that Noumi's revenue policy was:

(i) as set out in its FY2017/2018 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2014/2015 Full-Year Financial Report;

(e) in relation to paragraph 44.5, it:

(i) admits that in accordance with the FY 2018 Full Year Financial Report, during FY2018, Noumi's capitalised development policy was to the effect set out in sub-paragraphs (a) to (e);

(ii) says further that during FY2018, capitalisation in respect of development projects was undertaken by Noumi in accordance with the Capitalisation and Expenses Policy approved and adopted by the Audit & Risk Committee on 27 February 2017;

Particulars

Freedom Foods Group Limited Capitalisation and Expenses Policy to comply with AASB 116 Property, Plant and

Equipment and AASB 138 Intangible Assets approved and adopted by the Audit & Risk Committee on 27 February 2017.

(iii) says further that determining the matters in paragraph 44.5(b)(i) to (vi) is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations; and

(f) admits that Noumi's intangible asset impairment policy was:

(i) as set out in its FY2017/2018 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report.

D.6 Noumi FY2018/2019 Policies

45. As to paragraph 45, on the basis that the reference to "FY2019" means financial year 2018/2019, it:

(a) admits that Noumi's inventory policy was:

(i) as set out in its FY2018/2019 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report;

(b) admits that Noumi's tangible assets policy was:

(i) as set out in its FY2018/2019 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report;

(c) in relation to paragraph 45.3, it:

(i) admits that in accordance with the FY 2019 Full Year Financial Report, during FY2019, capital work in progress was determined in accordance with the matters set out in sub-paragraphs (a) to (e) of the SOC;

(ii) says further that during FY2019, capitalisation of expenses was undertaken by Noumi in accordance with the Capitalisation of Expenses Policy v2 dated October 2018;

Particulars

Freedom Foods Group Limited Capitalisation of Expenses Policy to comply with AASB 116 Property, Plant and Equipment and AASB 138 Intangible Assets v2 dated October 2018.

(iii) says further that determining:

(1) when an asset is operating in the manner intended by management; and

(2) what costs are directly attributable to bringing an asset to the condition and location necessary of operating in the manner intended by management,

is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations;

(d) admits paragraph 45.4;

(e) in relation to paragraph 45.5, it:

(i) admits that in accordance with the FY 2019 Full Year Financial Report, during FY2019, Noumi's capitalised development policy was to the effect set out in sub-paragraphs (a) to (e);

(ii) says further that during FY2019, capitalisation in respect of development projects was undertaken by Noumi in accordance with the Capitalisation and Expenses Policy approved and adopted by the Audit & Risk Committee on 27 February 2017;

Particulars

Freedom Foods Group Limited Capitalisation and Expenses Policy to comply with AASB 116 Property, Plant and Equipment and AASB 138 Intangible Assets approved and adopted by the Audit & Risk Committee on 27 February 2017.

(iii) says further that determining the matters in paragraph 44.5(b)(i) to (vi) is a matter of opinion and judgement, in relation to which reasonable minds might differ; and

(iv) otherwise denies the allegations.

(f) admits that Noumi's intangible asset impairment policy was:

(i) as set out in its FY2018/2019 Full-Year Financial Report; and

(ii) to the same effect as that set out in its FY2013/2014 Full-Year Financial Report.

E. HALF-YEARLY AND ANNUAL RESULTS & EQUITY RAISING – FINANCIAL POSITION AND PERFORMANCE REPRESENTATIONS (FNP AND DELOITTE)

E.1 FNP's Full-Year Financial Report and Half-Year Financial Report representations: 1H2015-1H2020

46. As to paragraph 46, it:

(a) admits paragraph 46.1 and says that the "financial results presented in each of the Full-Year Financial Reports and Half-Year Financial Reports" included matters of opinion, judgment and/or impression, in relation to which reasonable minds might differ;

(b) admits paragraph 46.2 and says that whether the "FNP Financial Reports had been prepared in compliance with, *inter alia*, the Corporations Act and the Australian Accounting Standards" included matters of opinion, judgment and/or impression, in relation to which reasonable minds might differ;

(c) admits paragraph 46.3 and says that the "financial position and performance" conveyed by the FNP Financial Reports included matters of opinion, judgment and/or impression, in relation to which reasonable minds might differ;

Particulars (46(a) to 46(c))

Noumi refers to and repeats the particulars to paragraph 79 below.

(d) denies paragraph 46.4; and

(e) otherwise denies paragraph 46.

E.2 Deloitte's Full-Year Audit Report and Half-Year Review Report representations: 1H2015-1H2020

Half-Year Financial Reports

47. It does not plead to paragraph 47 as there are no allegations pleaded against it.

48. It does not plead to paragraph 48 as there are no allegations pleaded against it.

Deloitte Full-Year Audit Reports

49. It does not plead to paragraph 49 as there are no allegations pleaded against it.

50. It does not plead to paragraph 50 as there are no allegations pleaded against it.

E.3 Noumi Equity raising representations: FY2014/2015, FY2015/2016, FY2017/2018 and FY2018/2019

51. It admits paragraph 51.

52. As to paragraph 52, it:

(a) admits paragraphs 52.1 and 52.2; and

(b) denies paragraph 52.3.

53. As to paragraph 53, it:

(a) says that the allegation that the FNP Equity Raising Representations were each "continuing representations" is embarrassing in that it does not identify the basis upon which each such representation was "continuing", such as whether it is alleged that:

(i) each representation had been falsified to the knowledge of Noumi, such that there may be a duty to speak; or

(ii) each representation was repeatedly or continuously remade,

and it objects to pleading to it; and

(b) under cover of the objection in (a) above:

(i) refers to and repeats paragraph 52(b) above; and

(ii) otherwise denies paragraph 53.

F. RELEVANT 2020 MARKET DISCLOSURES BY NOUMI

54. As to paragraph 54, it:

(a) admits that on 29 May 2020, Noumi released a statement to the ASX titled "COVID 19 Trading Update" (**29 May 2020 Trading Update**) by which it stated, among other things:

(i) "The Company has historically experienced low levels of provisioning for doubtful debts. It is expected that provision of approximately $4m will be required to be created in 2H FY2020 in respect of an export account. The Company does not foresee any other material doubtful debts in its export markets" (page 3);

(ii) "The consolidation of external warehousing activities together with a detailed review of product offerings and formats will result in a one-off non-cash write down of the carrying value of inventory in FY 20. Initial estimates indicate that the write down will be approximately $25 million. Final details will be announced with the release of the FY 20 results. Additional amortisation of new product development charges may be required" (page 4);

(iii) "It is anticipated that the full year earnings result will be materially impacted by COVID 19 issues and one off charges referred to above" (page 4);

(iv) "As advised in February, the Company is accelerating the final stages of its capital investment program, with a large proportion of the remaining program to be completed in FY2020, from the previously expected timing of FY2021. The Company expects total capital expenditure in FY2020 to be in the range of $120 million to $130 million, with a materially reduced capital expenditure program in FY2021" (page 4); and

(v) "As indicated, the Company as a prudent measure to ensure financial flexibility deferred the H1 FY2020 dividend as announced on 28 February 2020 to a payment date to be determined. The Company has now decided to cancel this dividend. The Company does not anticipate paying a full year dividend" (page 4); and

(b) otherwise denies paragraph 54.

55. It admits paragraph 55.

56. It admits paragraph 56.

57. It admits paragraph 57.

58. It admits paragraph 58.

59. As to paragraph 59, it:

(a) admits that on 25 June 2020, Noumi released a statement to the ASX titled "Corporate Update" (**25 June 2020 Update**) by which it stated, among other things:

(i) (**CEO**) "The Company advises that it is not in a position to make any further comment at this time in relation to the employment position of Rory Macleod. A further announcement will be made early next week" (page 1);

(ii) (**Inventory**) "The Company continues to review its inventory levels and the carrying value of inventory. On 29 May, 2020, the Company advised that the consolidation of external warehousing activities and a detailed review of product offerings will result in a one-off non-cash write-down of the carrying value of inventory in FY20. The initial estimate indicated the write down would be approximately $25 million. Further analysis undertaken since then suggest the need for further write downs to reflect provisioning for obsolete stock, out of date stock and product withdrawals. The revised estimate is for an additional write-down of $35 million, bringing the aggregate inventory write down for FY20 to be approximately $60 million. This revised estimate is subject to further analysis, year-end review processes and audit as part of the finalisation of the FY20 results. In addition, the company is awaiting information as to whether any finished goods inventory held outside Australia should be subject to write-down. At 31 May 2020, the carrying value of inventory held outside Australia was $2.0m. The write-down relates to obsolete and out-of-date stock, dating from the current year back to 2017. The initial estimate included amounts expected to be recovered from re-processing inventory but the Company has now concluded that the re-processing risks, time commitments and costs are not likely to be realised. The company has also become aware that the initial estimate did not include inventory write-offs related to FY2020 product withdrawals and deletions and accounting matters relating to costs of goods carried forward as a capital item that should have been included as cost of sales. This latter matter requires further investigation." (pages 1 - 2);

(iii) (**Revenue recognition and doubtful debts**) "In the 29 May announcement, Freedom Foods noted that it is expected that a provision of approximately $4 million will be required in 2H FY20 in respect of an export account. This has caused the company to undertake a more detailed review of its revenue recognition and doubtful debt provisioning more generally. As a result of that review it is now expected that further bad debt provisioning and reversal of prior period revenue recognition will be required in FY20. The EBITDA impact of these adjustments is expected to be a further negative adjustment of approximately $10 million. It may also be necessary to include adjustments to the timing of the recognition of revenue that was reported in prior periods and debtor balances in the balance sheet. Again, this revised estimate is subject to further analysis, year-end review processes and audit as part of the finalization of the FY20 results" (page 2); and

(iv) (**Employee share plan**) "On 9 March, 2020, the Company announced that it was in the process of reviewing administration and disclosure matters under its employee share option plans and the issue of shares to employees. An announcement of the intention to issue up to 2.1 million shares to employees was made on 17 March, 2020, following a review of correspondence received by staff in relation to employee options issues that were not completed. Announcements of the issue of 1.385 million shares and 0.16 million shares were made on 27 March, 2020, and 27 April, 2020, respectively in connection with the review. No further issues of shares in relation to the review are planned. The calculation of non-cash share based payments expense in relation to these issues has been completed and a charge of $5.9 million will need to be brought to account, either wholly in FY2020 or spread across FY2020 and prior periods" (page 2); and

(b) otherwise denies paragraph 59.

60. As to paragraph 60, it:

(a) (**CEO**) admits paragraphs 60.1;

(b) (**Inventory**) admits paragraph 60.2, 60.3 and 60.4 and says further that during the 25 June 2020 Teleconference, Mr Gunner stated:

(i) "We had five external warehouses and we're now moving our stock to within our own warehouses. There was an amount of stock that had been put aside for rework. On further examination of the possibilities of rework, it became evident that it was not practical nor profitable to rework that stock, so we believe the appropriate decision is to write that stock off. That provision will need to include some disposal costs and you can't just throw it away, you have to go through a proper process to dispose of it. That's why the provision has been increased, or the likely provision has been increased from $25 million to $60 million";

(ii) "…there were various possibilities of how this stock can be reworked, but the practicality and the profitability of reworking it didn't stack up. Therefore, we have decided to write that stock off";

(iii) "I think the important thing is we have now recognised it and we're going to deal with it, but stock that was set aside for rework, of course, would have been stocktake. It's just the impracticality of that process that has caused us to indicate that we'll have to make this provision"; and

(iv) "Think the opportunities to rework milk would be to have it dried as powder, to put it through our protein fractionation plant. The difficulty is the cost of getting that milk out of the packages and into a vat, if you like, to allow it to be reprocessed, does not justify the protein or the value of the milk powder that you would obtain from doing it, so, there was a hope, but I think the practicality and profitability of it is not there";

(c) (**Revenue recognition**) admits paragraph 60.5;

(d) (**Employee share plan**) admits paragraph 60.6 and says further that during the 25 June 2020 Teleconference, Mr Gunner stated: "there are two issues that arose. One, we had one plan that the employees were unable to exercise, due to blackouts, that hadn't been accommodated in the share plan. So, the Board thought it unfair on those staff to miss out on the options, because of the blackout periods, obviously, weren't planned at the time. The other one was due to the options not being properly recorded, and therefore not properly valued at the time. As you know, you take a charge whenever options are created. The charge was not properly identified, and included in the accounts"; and

(e) otherwise denies paragraph 60.

61. It admits paragraph 61.

62. It admits paragraph 62.

63. It admits paragraph 63.

64. It admits paragraph 64.

65. As to paragraph 65, it:

(a) admits paragraph 65.1 and says further that:

(i) in relation to the capitalisation of capital works costs, on 30 November 2020, the Audit & Risk Committee approved Property, Plant and Equipment – Accounting Policy, which replaced the Freedom Foods Group Limited Capitalisation of Expenses Policy;

Particulars

Minutes of meeting of Audit & Risk Committee held on 30 November 2020; Property, Plant and Equipment – Accounting Policy approved on 30 November 2020.

(b) admits paragraph 65.2 and says further that the 30 November 2020 Announcement states: "This is a deeply disappointing set of results for Freedom Food Group, its people and its shareholders. The results reflect the significant costs of past accounting and operational matters – matters we have identified with the assistance of independent experts and are taking steps to remedy" (page 2);

(c) admits paragraph 65.3 and says further that the 30 November 2020 Announcement states: "We have implemented a clear focus on operational accountability, improved cashflow reporting, reduced outstanding payables and improved customer and supplier terms. We have reviewed and improved many of the governance frameworks and policies, undertaken a culture review and improved engagement with employees" (page 2);

(d) admits paragraph 65.4;

(e) admits paragraph 65.5;

(f) admits that the 30 November 2020 Announcement states: "These matters have resulted in a material restatement of the Group's FY19, FY18 and prior period accounts and material write-downs and adjustments" (page 3);

(g) admits paragraph 65.7; and

(h) otherwise denies paragraph 65.

66. It admits paragraph 66.

67. It admits paragraph 67.

68. As to paragraph 68, it:

(a) admits paragraphs 68.1 to 68.4; and

(b) says further that the FY2020 Deloitte Full-Year Audit Report states:

(i) "The determination of identifiable costs attributable to the construction of assets requires significant judgments. This includes evaluating:

- Whether internal labour costs were directly attributable to the construction of [Noumi's] production and processing assets and can be accurately quantified
- Whether costs, including manufacturing variances, related to the commissioning phase of new production lines and processing facilities were directly attributable to the construction of the assets, and whether they could be accurately quantified; and
- The period in which to commence and cease capitalising directly attributable internal costs to CWIP." (page 118); and

(ii) "The investigations resulted in material adjustments to the quantities, the cost and the net realisable value ("NRV") of inventory. The determination of the quantum of these adjustments and the period in which they should be recognised, are subject to considerable judgements and estimates" (page 119).

69. As to paragraph 69, it:

(a) admits that during the 30 November 2020 Teleconference, Mr Gunner said (among other things):

(i) "So what have we been doing? And this is not an exhaustive list. We've engaged with our customers and suppliers. We've secured a $45 million interim liquidity facility, guaranteed by our majority shareholder and a standstill agreement with our lenders. We have conducted independent investigations into historical matters, I mentioned that previously. We've undertaken product range and operational reviews, we've been trying to simplify our business, which is something we noted on 20 June, when we last spoke to you. We've been rebuilding our management team and our culture, including the review and improvement of remuneration framework and policies. We've rebuilt the financial reporting, cash flow monitoring and improved our financial reporting tools. We've updated costing standards and accounting policies and practices. We've improved internal management processes, for example, inventory control, delegation of authority, clearer focus on operational KPIs and reporting. The external audit, as you will notice, included a restatement of historical financial audited accounts. We assessed recapitalisation alternatives to provide the Company with more flexible capital and a runway for turnaround and growth. We've kept the regulatory authorities informed, both ASIC and ASX. We've addressed matters and commenced legal actions relating to the almond paste supplier, Blue Diamond. We've reviewed and improved governance and risk frameworks and policies and they have been released"; and

(ii) "My focus will be on the consumer first, closely followed by employees, ensure the culture in the business values quality, honesty, trust and innovation. We want to have sustainable growth, we want to optimise utilisation, yield enhancement and cost efficiencies and improvement in controls and reporting across the entire business is extremely important to drive profitability and transparency back into this business";

(b) admits paragraph 69.1(b); and

(c) otherwise denies paragraph 69.

70. It admits paragraph 70.

71. It admits paragraph 71.

72. It admits paragraph 72.

73. It admits paragraph 73.

74. It admits paragraph 74.

G. ALLEGED MISLEADING OR DECEPTIVE CONDUCT

G.1 Noumi Accounts Representations

75. It admits paragraph 75.

76. It admits paragraph 76.

77. As to paragraph 77, it:

    (a) refers to and repeats paragraph 46 above;

    (b) admits that the conduct alleged in paragraphs 46.1 to 46.3 of the SOC was:

        (i) in trade or commerce, within the meaning of s 18 of the ACL;

        (ii) in trade or commerce, and in relation to financial services (being FNP Shares, FNP ADRs and FNP Equity Swaps), within the meaning of s 12DA of the ASIC Act; and/or

        (iii) in relation to a financial product or financial service (being FNP Shares, FNP ADRs and FNP Equity Swaps), within the meaning of s 1041H of the Corporations Act; and

    (c) otherwise denies paragraph 77.

78. As to paragraph 78, it:

    (a) refers to and repeats paragraphs 59 and 60 above;

    (b) says further that the allegation that the FNP Accounts Representations were each "continuing representations" is embarrassing in that it does not identify the basis upon which each such representation was "continuing", such as whether it is alleged that:

        (i) each representation had been falsified to the knowledge of Noumi, such that there may be a duty to speak; or

        (ii) each representation was repeatedly or continuously remade,

    and it objects to pleading to it; and

(c) otherwise denies paragraph 78.

79. As to paragraph 79, it:

(a) (**Earnings and Profit**):

(i) admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its earnings and net profit that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraph 66.6(a) of the SOC;

(ii) says that in the form pleaded:

(1) the phrase "properly measured" in paragraph 79.1(b)(i) of the SOC is embarrassing and it objects to pleading to it; and

(2) the allegation in paragraph 79.1(b)(ii) is embarrassing in that it does not identify whether "revenue from sale of goods" refers to revenue from the sale of <u>all</u> goods or only to some goods and, if the latter, which goods, and it objects to pleading to it; and

(iii) says further that the determination of the quantum and materiality of the adjustments and the period in which they should be recognised, involved matters of opinion, impression and judgment, in relation to which reasonable minds might differ;

(b) (**Assets**):

(i) admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its total assets and net assets that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraphs 66.6(b) and 66.7(a) of the SOC; and

(ii) says further that the determination of the quantum and materiality of the adjustments and the period in which they should be recognised, involved matters of opinion, impression and judgment, in relation to which reasonable minds might differ;

(c) (**CWIP**):

(i) admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its CWIP that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraph 66.6(c) of the SOC;

(ii) denies that CWIP was not calculated and/or recorded in a manner consistent with the CWIP policy in effect at all material times during the Claim Period; and

(iii) says further that the determination of the quantum and materiality of the adjustments and the period in which they should be recognised, involved matters of opinion, impression and judgment, in relation to which reasonable minds might differ;

(d) (**Other Assets, Liabilities and Expenditure**):

(i) (**Trade and other receivables**): admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its trade and other receivables that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraphs 66.6(d)(i)(A) and 66.7(b)(i)(A) of the SOC;

(ii) (**Inventories**):

(1) says that, in the form pleaded, the phrase "material quantity of stock" is embarrassing and it objects to pleading to it; and

(2) admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its inventories that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraphs 66.6(d)(i)(B) and 66.7(b)(i)(B) of the SOC;

(iii) (**Property, Plant and Equipment**) admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its non-current tangible assets, property plant and equipment that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraphs 66.6(d)(ii) and 66.7(b)(ii) of the SOC;

(iv) (**Non-current intangible assets**) admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its non-current intangible assets being goodwill, brand names, software acquisition and development and capitalised development that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraphs 66.6(d)(iii) and 66.7(b)(iii) of the SOC;

(v) denies that capitalised development costs were not measured, impaired and/or recorded in accordance with the capitalised development policy in effect at all material times during the Claim Period;

(vi) says further that the determination of the quantum and materiality of the adjustments referred to in paragraphs 79(d)(i) to (iv) above and the period in which they should be recognised, involved matters of opinion, impression and judgment, in relation to which reasonable minds might differ;

Particulars

1. As to adjustments to trade and other receivables, such as those set out in paragraph 79(d)(i) above:

   a. Noumi's FY2018 Full-Year Financial Report stated that it would adopt AASB 15 Revenue from Contracts with Customers for financial years starting from 1 July 2018, which would replace AASB 118 Revenue.

   b. Paragraph 14 of AASB 118 Revenue stated that:

      "Revenue from the sale of goods shall be recognised when all the following conditions have been satisfied:

(a) the entity has transferred to the buyer the significant risks and rewards of ownership of the goods;

(b)the entity retains neither continuing managerial involvement to the degree usually associated with ownership nor effective control over the goods sold;

(c) the amount of revenue can be measured reliably;

(d) it is probable that the economic benefits associated with the transaction will flow to the entity; and

(e) the costs incurred or to be incurred in respect of the transaction can be measured reliably."

c. Paragraph 9 of AASB 115 Revenue from Contracts with Customers stated that:

"An entity shall account for a contract with a customer that is within the scope of this Standard only when all of the following criteria are met:

(a) the parties to the contract have approved the contract (in writing, orally or in accordance with other customary business practices) and are committed to perform their respective obligations;

(b) the entity can identify each party's rights regarding the goods or services to be transferred;

(c) the entity can identify the payment terms for the goods or services to be transferred;

(d) the contract has commercial substance (ie the risk, timing or amount of the entity's future cash flows is expected to change as a result of the contract); and

(e) it is probable that the entity will collect the consideration to which it will be entitled in exchange for the goods or services that will be transferred to the customer. In evaluating whether collectability of an amount of consideration is probable, an entity shall consider only the customer's ability and intention to pay that amount of consideration when it is due. The amount of consideration to which the entity will be entitled may be less than the price stated in the contract if the consideration is variable because the entity may offer the customer a price concession (see paragraph 52)."

d. Paragraph 85 of the Framework for the Preparation and Presentation of Financial Statements (**Framework**) stated:

"The concept of probability is used in the recognition criteria to refer to the degree of uncertainty that the future economic benefits associated with the item will flow to or from the entity. The concept is in keeping with the uncertainty that characterises the environment in which an entity operates. Assessments of the degree of uncertainty attaching to the flow of future economic benefits are made on the basis of the evidence available when the financial statements are prepared. For example, when it is probable that a receivable owed by an entity will be paid, it is then justifiable, in the absence of any evidence to the contrary, to recognise the receivable as an asset…"

e. Paragraph 86 of the Framework stated that:

"The second criterion for the recognition of an item is that it possesses a cost or value that can be measured with reliability. In many cases, cost or value must be estimated. The use of reasonable estimates is an essential part of the preparation of financial statements and does not undermine their reliability. When, however, a reasonable estimate cannot be made the item is not recognised in the balance sheet or income statement…"

f. Paragraph QC11 of the Framework stated that:

"Information is material if omitting it or misstating it could influence decisions that users make on the basis of financial information about a specific reporting entity. In other words, materiality is an entity-specific aspect of relevance based on the nature or magnitude, or both, of the items to which the information relates in the context of an individual entity's financial report. Consequently, the Board cannot specify a uniform quantitative threshold for materiality or predetermine what could be material in a particular situation."

g. Until 31 December 2017, paragraph 7 of AASB 101 Presentation of Financial Statements stated, *inter alia*, that:

> "Omissions or misstatements of items are material if they could, individually or collectively, influence the economic decisions that users make on the basis of the financial statements. Materiality depends on the size and nature of the omission or misstatement judged in the surrounding circumstances. The size or nature of the item, or a combination of both, could be the determining factor. Assessing whether an omission or misstatement could influence economic decisions of users, and so be material, requires consideration of the characteristics of those users…"

h. From 1 January 2018, paragraph 7 of AASB 101 Presentation of Financial Statements stated, *inter alia*, that:

> "Information is material if omitting, misstating or obscuring it could reasonably be expected to influence decisions that the primary users of general purpose financial statements make on the basis of those financial statements, which provide financial information about a specific reporting entity. Materiality depends on the nature or magnitude of information, or both. An entity assesses whether information, either individually or in combination with other information, is material in the context of its financial statements taken as a whole…"

2. As to adjustments to inventories, such as those set out in paragraph 79(d)(ii) above, at all material times:

a. AASB 102 Inventories stated, in paragraph 9, that:

> "Inventories shall be measured at the lower of cost and net realisable value."

b. AASB 102 Inventories stated, in paragraph 28, that:

> "The cost of inventories may not be recoverable if those inventories are damaged, if they have become wholly or partially obsolete, or if their selling prices have declined.

The cost of inventories may also not be recoverable if the estimated costs of completion or the estimated costs to be incurred to make the sale have increased. The practice of writing inventories down below cost to net realisable value is consistent with the view that assets should not be carried in excess of amounts expected to be realised from their sale or use."

c. AASB 102 Inventories stated, in paragraph 30, that:

"Estimates of net realisable value are based on the most reliable evidence available at the time the estimates are made, of the amount the inventories are expected to realise."

d. AASB 102 Inventories stated, in paragraph 32, that:

"Materials and other supplies held for use in the production of inventories are not written down below cost if the finished products in which they will be incorporated are expected to be sold at or above cost…"

e. Paragraph 85 of the Framework contained the statements set out in sub-paragraph 1.d of the particulars above.

f. Paragraph 86 of the Framework contained the statements set out in sub-paragraph 1.e of the particulars above.

g. Paragraph QC11 of the Framework contained the statements set out in sub-paragraph 1.f of the particulars above.

h. Until 31 December 2017, paragraph 7 of AASB 101 contained the statements set out in sub-paragraph 1.g of the particulars above.

i. From 1 January 2018, paragraph 7 of AASB 101 contained the statements set out in sub-paragraph 1.h of the particulars above.

j. Estimation of the net realisable value that inventories are expected to realise may require opinion and/or judgment to be exercised as to the:

A. identification of inventory which can be re-worked (and which would otherwise be obsolete, out-of-date, expired and/or unsaleable);

B. practicality of re-working the inventory, including consideration of the steps that may need to be taken in order to re-work or re-process the inventory and other technical analysis;

C. profitability of re-working the inventory, including (if required) the preparation of a business case and other financial analysis; and

D. appropriate time required to investigate and consider such matters, so as to properly inform the opinion and/or judgment to be exercised.

3. As to adjustments to non-current intangible assets comprising goodwill and brand names, such as those set out in paragraph 79(d)(iv) above:

   a. AASB 136 Impairment of Assets required that where the recoverable amount of an asset (determined as the higher of its fair value less cost to dispose or its value in use, was less than its carrying amount then the asset was required to be written down to its recoverable amount).

   b. Determining whether goodwill and other intangible assets are impaired requires an estimation of the recoverable amount of the cash generating units (CGU) to which the goodwill or other intangible assets have been allocated. The recoverable amount is determined using a value in use or fair value less cost to sell method.

   c. Impairment testing requires judgement in assessing whether the carrying value of assets is supported by their recoverable amount. These calculations require the use of assumptions, including estimated discount rates based on the current cost of capital and growth rates of the estimated future cash flows.

   d. The determination of the recoverable amount of goodwill and other intangible assets may require opinion and/or judgment to be exercised as to the:

A. The fiscal year forecast;

B. Sales and gross margin growth rates;

C. Discount rates applied to the projected cash flows;

D. Royalty rates;

E. Terminal growth rates; and

F. "Fair value" (as used in AASB 138 Intangible Assets and AASB Impairment of Assets).

(e) (**Current liabilities**):

(i) admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its current liabilities that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraphs 66.6(d)(iv) and 66.7(b)(iv) of the SOC; and

(ii) says further that the determination of the quantum and materiality of the adjustments and the period in which they should be recognised, involved matters of opinion, impression and judgment, in relation to which reasonable minds might differ;

Particulars

1. At all material times, AASB 138, paragraph 69(c) provided that marketing expenditure was required to be expensed when it is incurred. AASB 138, paragraph 69A and IAS 38BC, paragraph BC46C provided that an expense was incurred when goods are constructed by the supplier in accordance with the terms of a contract, or services are performed by the supplier.

2. At all material times, AASB 138, paragraph 70 provided that a prepayment for trade marketing expenditure may be recorded as an asset on the balance sheet if the payment was made before the marketing and promotional costs were incurred.

3. At all material times, AASB 138, paragraph 15 provided that if the timing or the amount of an expense was uncertain, the

expense should be recognised and a corresponding provision (a liability) recorded once all of the following conditions were met:

a. the entity has a present obligation (legal or constructive) as a result of a past event;

b. it is probable that an outflow of economic resources will be required to settle the obligation; and

c. a reliable estimate can be made of the obligation.

(f) (**Employee share plan**):

(i) admits that, in Alternative Claim Period "(l)", by its FY2020 Full-Year Financial Report, Noumi made adjustments to its share-based payments expense that impacted the opening position in its financial statements as at 1 July 2018 and its financial performance and position reported at 30 June 2019, being those set out in paragraph 66.6(d)(v) of the SOC; and

(ii) says further that the determination of the quantum and materiality of the adjustments and the period in which they should be recognised, involved matters of opinion, impression and judgment, in relation to which reasonable minds might differ; and

(g) otherwise does not admit paragraph 79.

80. As to paragraph 80, it:

(a) refers to and repeats paragraphs 68.4 and 79 above;

(b) as to paragraph 80.2:

(i) says that, in the form pleaded, the term "adequate" is embarrassing and it objects to pleading to it;

(ii) under cover of the objection in (b)(i) above, it denies the allegation and says further that Noumi's systems and controls during the Claim Period relevantly included:

(1) interim audits, half-year reviews and full-year audits carried out by Deloitte;

(2) the Audit Committee to whom Deloitte presented:

A. written reports after the close of each financial year, with the stated purpose of assisting the Committee in fulfilling its governance obligations for that financial year, as to those matters which had come to Deloitte's attention as a result of its audit procedures and which Deloitte believed required the attention of the Committee and which included as 'Key Audit Matters' the following: CWIP; Investments and accounting for acquisitions; Revenue recognition; Rebates and trade spend; Impairment of assets; Inventory; Trade and other receivables; Borrowings; Income taxes; Share incentive program; and

B. written audit plans for the current financial year, including identification of the Key Audit Matters for that audit;

(3) from June 2019, the Risk Committee, which met on a quarterly basis (at least);

(4) ad hoc reviews conducted by the finance team of the CWIP register to determine whether any projects should be transferred to the fixed asset register; and

(5) from August 2018, quarterly meetings and reviews conducted to identify CWIP that had been completed and transferred to plant property and equipment;

(c) admits that:

(i) in its FY2020 Deloitte Full-Year Audit Report, Deloitte made the following statements (among others):

(1) "As a result of the findings from the investigations and the significant control deficiencies identified during our work there was an increased risk of management override of controls and therefore was a key audit matter" (at page 122);

(2) (at page 122) "Our audit procedures included, amongst others:

- Obtaining an understanding of the financial reporting process and assessing the design and testing the implementation of the relevant controls therein in the context of the findings from the investigations. As a result of this work, we identified significant control deficiencies and determined that a substantive approach was appropriate

- Making inquiries of the Board on their assessment and response to the risk of management override of controls
- Refining the criteria used in our selection of journal entries processed during the current period for testing
- Extending the procedures performed on accounts receivable, related party transactions and unrecorded liabilities; and
- Reviewing accounting estimates and judgements for bias including the estimated useful life of property, plant and equipment, the date on which assets moved from CWIP to property, plant and equipment, inventory costings and net realisable value, the expected credit losses, lease liabilities, make good provisions and the treatment of tax losses";

(ii) the following exchange occurred during the 25 June 2020 Teleconference, between Mr Gunner and a conference call participant (transcript pp 10-11):

> "QUESTION: Well, I don't understand how when you had so many expert directors on the panel that it got to this state, like how did all of this occur? If this has been going on since back to 2017 we're talking about nearly three years. I don't understand how this hasn't been picked up beforehand. I'm sorry to say it sounds like you've been asleep at the wheel.
>
> Mr Gunner: Expert directors can only act on the information they're provided with. We were only provided with the information of the additional $35 million today. We were provided obviously with the information about $25 million at our last Board meeting in May after which we gave an update.

QUESTION: You believe what the employees told you, is that what you're saying? They just told you certain things and then you believed it.

Mr Gunner: I don't think Boards go out and do stocktakes, particularly when there are a number of warehouses. I mean to do a stocktake of our stock would take days; I don't think that's the role of the Board.

QUESTION: Perhaps it might have been, it might have been rather than getting into this situation.

Mr Gunner: Well that's hindsight, that's hindsight. I'm not aware of any Board that goes and does stocktakes.

QUESTION: You trusted what they said and they told you the wrong thing.

Perry Gunner: We trusted what they said that was an audited figure."

(d) otherwise does not admit paragraph 80.

81. It denies paragraph 81.

G.2 Noumi Equity Raising Representations

82. As to paragraph 82, it:

(a) refers to and repeats paragraph 52 above;

(b) admits that the conduct alleged in paragraphs 52.1 and 52.2 of the SOC was:

(i) in trade or commerce, within the meaning of s 18 of the ACL;

(ii) in trade or commerce, and in relation to financial services (being FNP Shares, FNP ADRs and FNP Equity Swaps), within the meaning of s 12DA of the ASIC Act; and/or

(iii) in relation to a financial product or financial service (being FNP Shares, FNP ADRs and FNP Equity Swaps), within the meaning of s 1041H of the Corporations Act; and

(c) otherwise denies paragraph 82.

83. As to paragraph 83

(a) says that the allegation that the FNP Equity Raising Representations (or any of them) were each "continuing representations" is embarrassing in that it does not identify the basis upon which each such representation was "continuing", such as whether it is alleged that:

(i) each representation had been falsified to the knowledge of Noumi, such that there may be a duty to speak; or

(ii) each representation was repeatedly or continuously remade,

and it objects to pleading to it; and

(b) under cover of the objection in (a) above, denies paragraph 83.

84. As to paragraph 84, it:

(a) refers to and repeats paragraphs 79 and 80 above;

(b) admits that the FNP Cleansing Notices did not include the information set out in paragraph 79 of the SOC; and

(c) otherwise denies paragraph 84.

85. As to paragraph 85, it:

(a) refers to and repeats paragraphs 79 and 80 above; and

(b) otherwise denies paragraph 85.

86. As to paragraph 86, it:

(a) refers to and repeats paragraphs 79 and 80 above; and

(b) otherwise denies paragraph 86.

87. It denies paragraph 87.

H. DELOITTE'S ALLEGED FALSE, MISLEADING OR DECEPTIVE CONDUCT

H.1 Alleged Misleading or deceptive conduct

88. It does not plead to paragraph 88 as there are no allegations pleaded against it.

89. It does not plead to paragraph 89 as there are no allegations pleaded against it.

90. It does not plead to paragraph 90 as there are no allegations pleaded against it.

91. It does not plead to paragraph 91 as there are no allegations pleaded against it.

H.2 Alleged False or misleading statements

92. It does not plead to paragraph 92 as there are no allegations pleaded against it.

93. It does not plead to paragraph 93 as there are no allegations pleaded against it.

94. It does not plead to paragraph 94 as there are no allegations pleaded against it.

95. It does not plead to paragraph 95 as there are no allegations pleaded against it.

I. ALLEGED BREACHES OF CONTINUOUS DISCLOSURE OBLIGATIONS

96. As to paragraph 96, it:

    (a) refers to and repeats paragraphs 79 and 80 above;

    (b) says that:

        (i) as alleged in paragraphs 79 and 80 above, those matters included matters of opinion, impression and judgment, in relation to which reasonable minds might differ; and

        (ii) Noumi was only "aware" of such matters, within the meaning of Rules 3.1 and/or 19.12 of the ASX Listing Rules, if:

            (1) the opinion, impression or judgment was actually held by an officer of Noumi; or

            (2) if the opinion was held by someone other than an officer of Noumi, and ought reasonably to have come into possession of an officer of Noumi in the course of the performance of their duties as an officer of Noumi; and

    (c) otherwise denies paragraph 96.

97. As to paragraph 97, it:

    (a) refers to and repeats paragraphs 79 , 80 and 96 above; and

    (b) on the basis that the True Position did not comprise information, denies paragraph 97.

98. As to paragraph 98, it:

(a) refers to and repeats paragraphs 30(c), 79, 80 and 96(b) above; and

(b) denies the paragraph on the basis that the True Position comprised opinions that had not been formed, and therefore:

(i) the True Position did not comprise information; and

(ii) it did not "have" that information.

99. It denies paragraph 99.

100. It denies paragraph 100.

J. LOSS AND DAMAGE

101. It does not admit paragraph 101.

102. It denies paragraph 102.

103. It denies paragraph 103.

104. It denies paragraph 104.

105. It denies paragraph 105.

K. COMMON QUESTIONS OF LAW OR FACT

106. As to paragraph 106, it:

(a) says that the identification of the common questions for determination at the initial trial is a matter to be determined by the Court (and not the plaintiffs);

PARTICULARS

Ethicon Sàrl v Gill [2021] FCAFC 29; 387 ALR 494 at [54] – [61].

(b) otherwise does not plead to paragraph 106 as there are no allegations pleaded against it.

107. As to paragraph 107, it refers to and repeats paragraph 106 above.

108. As to paragraph 108, it refers to and repeats paragraph 106 above.

L. PROPORTIONATE LIABILITY

109. In further answer to the whole of the SOC, if Noumi is found to be liable to the plaintiffs as alleged or at all, which is denied, it relies on the matters set out in

paragraphs 110 to 117 below.

110. For the purpose of this Defence and without admission, Noumi refers to and repeats the allegation made by the plaintiffs against the second defendant (**Deloitte**) which are contained in paragraphs 9 and 36 to 39 of the SOC.

111. At all material times during the Relevant Period, Deloitte was retained by Noumi to:

(a) audit the financial reports of Noumi and its subsidiaries which comprise the consolidated statement of financial position for each half-year and full-year period during the Relevant Period;

(b) audit the remuneration Report of Noumi and its subsidiaries included in the directors' report for each half-year and full-year period during the Relevant Period;

(c) review the half-year and full-year financial report of Noumi and its subsidiaries;

(d) review all significant accounting policies of Noumi and its subsidiaries and advise the Board and Board Committees (as appropriate) in relation to same,

(**Retainer**).

PARTICULARS

The Retainer was express and/or implied.

Insofar as it was express, it was contained in the following documents:

Letter of engagement dated 6 February 2014 for HY14 and FY14.

Letter of engagement dated 17 December 2014 for HY15 and FY15.

Letter of engagement dated 3 December 2015 for HY16 and FY16.

Letter of engagement dated 13 December 2016 for HY17 and FY17.

Letter of engagement dated 12 December 2017 for HY18 and FY18.

Letter of engagement dated 22 January 2019 for HY19 and FY19.

Letter of engagement dated 19 February 2020 for HY20 and FY20.

Insofar as it was implied, Noumi refers to the conduct of Deloitte in performing the Retainer.

112. It was a term of the Retainer that Deloitte would carry out the services provided pursuant to the Retainer with reasonable care and skill.

PARTICULARS

The term was implied by law.

113. Further, by reason of the Retainer, Deloitte owed Noumi a duty in tort to take reasonable care to avoid loss to Noumi in carrying out the services to be provided by the Retainer.

M. CONCURRENT WRONGDOING

114. If the plaintiffs have suffered loss and damage as alleged (which is not admitted but expressly denied), then it was as a result of the conduct of Deloitte in failing to perform the services provided pursuant to the Retainer with reasonable care and skill in breach of the duties set out in paragraphs 112 and 113 above.

115. The claims made by the plaintiffs against Noumi in paragraph 81 of the SOC are apportionable claims within the meaning of:

(a) s 1041L(1) of the *Corporations Act 2001* (Cth), by reason of the fact that each is a claim for damages for economic loss alleged to have been caused by a contravention of s 1041H of the said Act;

(b) s 12GP(1) of the *ASIC Act 2001* (Cth), by reason of the fact that each is a claim for damages for economic loss alleged to have been caused by a contravention of s 12DA of the said Act; and

(c) s 87CB(1) of the *Competition and Consumer Act 2010* (Cth), by reason of the fact that each is a claim for damages for economic loss alleged to have been caused by a contravention of s 18 of the Australian Consumer Law.

116. If Noumi is liable to the plaintiffs as alleged (which is not admitted and is expressly denied), then Deloitte is:

(a) a person who is one of 2 or more persons whose acts or omissions caused, independently of each other or jointly, the alleged loss or damage that is the subject of the claim of the plaintiffs;

(b) a concurrent wrongdoer as regards the claim of the plaintiffs within the meaning of:

(i) s 1041L(3) of the *Corporations Act 2001* (Cth);

(ii) s 12GP(3) of the *ASIC Act 2001* (Cth); and

(iii) s 87CB(3) of the *Competition and Consumer Act 2010* (Cth).

117. In the premises, if Noumi is liable to the plaintiffs as alleged (which is not admitted but expressly denied) then its liability is limited to an amount reflecting that proportion of the loss and damage claimed that the Court considers just having regard to the extent of its responsibility for the loss and damage and judgment must not be given against it for more than that amount in relation to the claim under:

(a) s 1041N(1) of the *Corporations Act 2001* (Cth);

(b) s 12GR(1) of the *ASIC Act 2001* (Cth); and

(c) s 87CD(1) of the *Competition and Consumer Act 2010* (Cth).

DATED 8 APRIL 2022

RG Craig
JA Findlay
AN McRobert

Arnold Bloch Leibler

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Arnold Bloch Leibler
Solicitors for the First Defendant