Federal Court of Australia

Australian Securities and Investments Commission v Holista Colltech Ltd [2024] FCA 244

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| File number: | WAD 177 of 2021 |
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| Judgment of: | **SARAH C DERRINGTON J** |
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| Date of judgment: | 19 March 2024 |
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| Catchwords: | **CORPORATIONS** – alleged contraventions of ss 674(2) and 1041H(1) of the ***Corporations Act*** *2001* (Cth) – where company failed to notify the Australian Securities Exchange of certain information in breach of continuous disclosure obligations – where company engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive, or likely to mislead or deceive – whether company knew if non-disclosed information would, if generally available, have a material effect on the price or value of the company shares – application for declaratory relief under s 1317E of the *Corporations Act* or s 21 of the *Federal Court of Australia Act 1976* (Cth) – determination of appropriate penalty under s 1317G of the *Corporations Act* **DIRECTORS’ DUTIES** – alleged contraventions of ss 180(1), and 1309(2) or 1309(12) of the *Corporations Act* – whether director made available or gave, or alternatively authorised or permitted the making available or giving of, information related to the affairs of the company and that was false or misleading in a material particular – attribution of knowledge or recklessness of director to conduct of the company – disqualification order under s 206C(1) of the *Corporations Act* – determination of appropriate penalty under s 1317G of the *Corporations Act* |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) ss 1(2)(b), 1(2)(g), 12GBA*Crimes Act 1958* (Cth) s 4AA*Criminal Code Act 1995* (Cth) Sch *Criminal Code* ss 5.2, 5.3, 5.4*Corporations Act 2001* (Cth) ss 9, 92,111AD(1), 111AK, 180(1), 206C(1), 674(2), 674A, 675, 675A, 676, 677, 727, 728, 761A, 764A, 1041H(1), 1211B, 1309(2)/(12), 1311(1), 1317E, 1317F, 1317G(1)*Evidence Act 1995* (Cth) s 191*Fair Work Act 2009* (Cth) s 546*Federal Court of Australia Act 1976* (Cth) s 21*Strengthening Corporate and Financial Sector Penalties Act 2019* (Cth)*Treasury Laws Amendment (2021 Measures No.1) Act 2021* (Cth) ss 674, 675, 674A, 675A*Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth ss 5, 8) |
|  |  |
| Cases cited: | *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68*Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450*Australian Competition and Consumer Commission v Reckitt Benickser (Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25 *Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247; ATPR 42-091*Australian Competition and Consumer Commission v Leahy Petroleum (No 2)* [2005] FCA 254; 215 ALR 281*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2023] FCA 256 *Australian Securities and Investments Commission v GetSwift Ltd (Penalty Hearing)* [2023] FCA 100*Australian Securities and Investments Commission v Wilson (No 3)* [2023] FCA 1009*Australian Securities and Investments Commission v Rio Tinto (No 2)* [2022] FCA 184*Australian Securities and Investments Commission v Westpac Banking Corp* [2022] FCA 359; 158 ACSR 647*Australian Securities and Investments Commission v Blue Star Helium Ltd (No 4)* [2021] FCA 1578; 158 ACSR 196*Australian Securities and Investments Commission v Helou (No 2)* [2020] FCA 1650*Australian Securities and Investments Commission v Vocation Ltd (in Liq) (No 2)* [2019] FCA 1783; 140 ACSR 382*Australian Securities and Investments Commission v Westpac Banking Corp (No 2)* [2018] FCA 751; 357 ALRC 240*Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* [2016] FCA 1064 *Australian Securities and Investments Commission v Padbury Mining Limited* [2016] FCA 990; 116 ACSR 208*Australian Securities and Investments Commission v Mariner Corp* [2015] FCA 589; 241 FCR 502*Australian Securities and Investments Commission v Newcrest Mining Ltd* [2014] FCA 689; 101 ACSR 46*Australian Securities and Investments Commission v MacDonald* [2009] NSWSC 714; 73 ACSR 638*Australian Securities and investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80*Baden Delvaux & Lecuit v Société Générale pour Favoriser le Développement du Commerce at de l’Industrie en France SA* [1992] 4 All ER 161*Brambles Holdings Ltd v Carey* (1976) 15 SASR 270*Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482*Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 3)* [2018] FCA 1395*Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; 292 FCR 627*Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 *Hann v Commonwealth of Australia* [2004] SASC 86; 88 SASR 99*James Hardie Industries NV v Australian Securities and Investments Commission* [2010] 274 ALR 85; NSWCA 332; *Krakowski v Eurolynx Properties Ltd* [1995] HCA 68; 183 CLR 563*Mayfair Wealth Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170 *Minister for Industry, Tourism & Resources v Mobil Oil* (2004) ATPR 41-993*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; 71 FCR 285 *R v Alif, Amin and Zolmin* [2012] QCA 355; [2013] 2 Qd R 140*Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80*Re Chemeq Ltd; Australian Securities and Investments Commission v Chemeq Ltd* [2006] FCA 936; 234 ALR 511*R v Selim* [2007] NSWSC 362*Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 437, 448*Trade Practices Commission v CSR Ltd* [1990] FCA 762; [1991] ATPR 41-076 *Transport Workers’ Union of Australia v Registered Organisations Commission (No 2) (TWU)* [2018] FCAFC 203; 267 FCR 40*Westpac Banking Corp v Bell Group Ltd (in Liq) (No 3)* (2012)44 WAR 1; [2012] WASCA 157 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
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| Number of paragraphs: | 191 |
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| Date of hearing: | 6 December 2023  |
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| Counsel for the Plaintiff: | Dr O Bigos KC with Mr M Sherman |
|  |  |
| Solicitor for the Plaintiff: | Australian Government Solicitor |
|  |  |
| Counsel for the First Defendant: | Mr D Sulan SC with Mr B Smith |
|  |  |
| Solicitor for the First Defendant: | Jones Day |
|  |  |
| Counsel for the Second Defendant: | Ms J A Thornton |
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| Solicitor for the Second Defendant: | Edwards Mac Scovell |

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| **Table of Corrections** |  |
| 2 April 2024 | Order 1 amended |

ORDERS

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|  | WAD 177 of 2021 |
|   |
| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONPlaintiff |
| AND: | HOLISTA COLLTECH LTD ACN 094 515 992First DefendantDR RAJENDRAN MARNICKAVASAGARSecond Defendant |

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| order made by: | SARAH C DERRINGTON J |
| DATE OF ORDER: | 19 MARCH 2024 |

THE COURT DECLARES THAT:

Relief against the first defendant

1. Pursuant to s 1317E(1) of the *Corporations Act 2001* (Cth) (***Corporations Act***),the first defendant contravened s 674(2) of the *Corporations Act* by failing to notify the Australian Securities Exchange (**ASX**) of the following information (both individually

and collectively):

(a) between 9 April 2020 and 25 May 2020, prior to the commencement of the *Corporations (Coronavirus Economic Response) Determination (No. 2) 2020* (Cth) (***Coronavirus Determination***), that **Health Therapies** LLC had not placed orders for 415,000 bottles of NatShield totalling A$3.8 million for delivery between April and June 2020 (the **Placed Orders Information**);

(b) between 9 April 2020 and 25 May 2020, prior to the commencement of the *Coronavirus Determination*, that the first defendant was unlikely to receive orders for 415,000 bottles of NatShield totalling A$3.8 million from Health Therapies for delivery between April and June 2020 (the **Orders Shortfall Information**);and

(c) between 9 April 2020 and 25 May 2020, prior to the commencement of the *Coronavirus Determination*, that the first defendant was unlikely to record revenue of A$3.8 million from orders of 415,000 or 424,558 bottles of NatShield placed byHealth Therapies for delivery between April and June 2020 (the **Revenue Shortfall Information**),

in circumstances where:

(d) ASX Listing Rule 3.1 required that each of the Placed Orders Information, the Orders Shortfall Information and the Revenue Shortfall Information be disclosed to the ASX;

(e) in each case, the first defendant was aware of the Placed Orders Information, the Orders Shortfall Information and the Revenue Shortfall Information;

(f) each of the Placed Orders Information, the Orders Shortfall Information and the

Revenue Shortfall Information was not generally available; and

(g) the first defendant wasrecklesswith respect to whether each of the Placed Orders Information, the OrdersShortfall Information and the Revenue Shortfall Information was information thata reasonable person would expect, if it were generally available, to have amaterial effect on the price or value of shares in the first defendant.

1. Pursuant to s 1317E(1) of the *Corporations Act*, the first defendant contravened s 674(2) of the *Corporations Act* during the period between 26 May 2020 and 9 July 2020, on and from the commencement of the *Coronavirus Determination*, by failing to notify the ASX (both individually and collectively) of:

(a) the Placed Orders Information;

(b) the Orders Shortfall Information; and

(c) the Revenue Shortfall Information,

in circumstances where:

(d) ASX Listing Rule 3.1 required that each of the Placed Orders Information, the Orders Shortfall Information and the Revenue Shortfall Information be disclosed to the ASX;

(e) in each case, the first defendant was aware of the Placed Orders Information, the Orders Shortfall Information and the Revenue Shortfall Information;

(f) each of the Placed Orders Information, the Orders Shortfall Information and the

Revenue Shortfall Information was not generally available; and

(g) the first defendant was reckless with respect to whether the Placed Orders Information, the Orders ShortfallInformation and the Revenue Shortfall Information would, if it were generallyavailable, have a material effect on the price or value of shares in thefirst defendant.

1. Pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) that, by publishing an announcement on 9 April 2020 headed "Holista's U.S. Distributor Increases Orders of NatShield™ Amounting to A$3.8M", which stated that:

(a) Health Therapies had placed additional orders of 415,000 bottles, totalling A$3.8 million for delivery between April and June 2020 (**Orders Representation**); and

(b) Holista expects to record revenue of A$3.8 million from combined total orders of 424,558 bottles of NatShield™ received in the United States of America to date from Health Therapies (**Revenue Representation**),

the first defendant, in this jurisdiction, engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive or likely to mislead or

deceive, in contravention of s 1041H(1) of the *Corporations Act*.

Relief against the second defendant

1. Pursuant to s 1317E(1) of the *Corporations Act*, from 9 April 2020 to 9 July 2020, the second defendant contravened s 180(1) of the *Corporations Act* in that he failed to discharge his duties to the first defendant with the degree of care and diligence that a reasonable person would exercise, if he or she were the Managing Director and Chief Executive Officer of a corporation in the first defendant's circumstances and occupied the offices held by the second defendant, and had the same responsibilities within the first defendant, by failing to take all necessary steps to:

(a) ensure that any announcement or other document he approved for submission

to the ASX was not misleading or deceptive or likely to mislead or deceive; and

(b) qualify, withdraw or correct any existing announcement or document made to the ASX so that it was not misleading or deceptive or likely to mislead or deceive,

thereby causing or otherwise permitting the first defendant to contravene each or all of the following provisions:

(c) s 674(2) of the *Corporations Act*, and/or

(d) s 1041H of the *Corporations Act*

and exposing the first defendant to the risk of legal proceedings, including declarations of contravention and civil pecuniary penalties.

1. The contraventions in paragraph 4 were serious within the meaning of s 1317G(1)(b)(iii) of the *Corporations Act*.
2. Pursuant to s 1317E(1) of the *Corporations Act*, the second defendant contravened ss 1309(2) and 1309(12) of the *Corporations Act* in making available or giving, or alternatively authorising or permitting the making available or giving of:

(a) a letter dated 17 April 2020 to the ASX, in which the first defendant represented, prior to the press conference held on 20 February 2020, that a Binding Term Sheet was executed between Holista and GICC;

(b) a letter dated 20 April 2020 to the ASX and to members of the first defendant, in which Holista represented that it was prior to the press conference held on 20 February 2020 that a Binding Term Sheet was executed between Holista and GICC; and

(c) an ASX announcement dated 9 April 2020 to the ASX and to members of the first defendant, containing the Orders Representation and the Revenue Representation;

which was information that related to the affairs of the first defendant and that was false or misleading in a material particular without having taken reasonable steps to ensure that the information was not false or misleading in a material particular.

AND THE COURT ORDERS THAT:

1. Pursuant to s 1317G(1) of the *Corporations Act*, the first defendant pay to the **Commonwealth** of Australia a pecuniary penalty in the amount of $1,800,000 in respect of the contraventions of s 674(2) of the *Corporations Act*.

2. Pursuant to s 1317G(1) of the *Corporations Act*, within 28 days of service of this Order, the second defendant pay to the Commonwealth a pecuniary penalty in the

amount of $150,000 in respect of the contraventions of ss 180(1), 1309(2) and (12) of the *Corporations Act*.

3. Pursuant to s 206C(1) of the *Corporations Act*, the second defendant be disqualified from managing a corporation for a period of 4 years, from the date of this Order.

4. Within 28 days of service of this Order, the second defendant pay the plaintiff’s costs of the proceedings, fixed in the amount of $200,000.

5. The first defendant pay the plaintiff’s costs of the proceedings in so far as they exceed $200,000 to be taxed, if not agreed.

6. Within 14 days of service of this Order, the first defendant and the plaintiff file and serve written submissions, not exceeding three pages in length, as to whether the pecuniary penalty ordered to be paid by the first defendant should be paid in instalments.

7. The Orders 1 to 6 are taken to be entered forthwith.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

SARAH C DERRINGTON J

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# introduction

1. By originating application dated 4 August 2021, the Australian Securities and Investments Commission (**ASIC**) sought declaratory relief and pecuniary penalties against the first defendant, **Holista** Colltech Ltd, and its Managing Director and Chief Executive Officer, the second defendant, **Dr** Rajendran **Marnickavasagar**. As against Holista, ASIC alleged that it had contravened s 674(2) of the ***Corporations Act*** *2001* (Cth) by failing to notify the Australian Securities Exchange (**ASX**) of certain information, and that it had engaged in misleading or deceptive conduct in contravention of s 1041H(1) of the *Corporations Act*. As against Dr Marnickavasagar, ASIC alleged that he contravened s 180(1) of the *Corporations Act* in failing to discharge his duties to Holista with the degree of care and diligence of a reasonable person, or a reasonable person in the position of Managing Director or Chief Executive Officer of a company in Holista’s circumstances. ASIC further alleged against Dr Marnickavasagar that he contravened s 1309(12) of the *Corporations Act* by making available or giving to the ASX certain information which related to the affairs of Holista and which was false or misleading in a material particular, without having taken reasonable steps to ensure the information was not false or misleading in a material particular, within the meaning of s 1309(2) of the *Corporations Act*.
2. On 27 November 2023, the parties filed a Statement of Agreed Facts and Admissions (**SAFA**), pursuant to s 191 of the *Evidence Act 1995* (Cth). On the same date, amended joint submissions on liability were filed by all parties, and joint submissions by ASIC and Dr Marnickavasagar in relation to penalty.
3. Certain matters, however, were not agreed between the parties. In particular, as concerns Holista, there was no agreement as to whether its state of mind with respect to the materiality of the relevant information, during the time of operation of the *Corporations (Coronavirus Economic Response) Determination (No 2) 2020* (Cth) (***Coronavirus Determination***), was merely negligent, or whether Holista was reckless, or had knowledge. Consequently, the appropriate penalty for Holista has not been agreed.
4. As concerns Dr Marnickavasagar, the parties are agreed as to the appropriate penalty. As to liability, two matters remain in dispute, although they are said not to change the appropriateness of the agreed penalty. The first concerns Dr Marnickavasagar’s attempt to rely on the existence of a pre-existing distribution agreement and the provisions of a “sales projection” spreadsheet to diminish his culpability; the second, his alleged state of mind at the relevant time.

# THE Summary of agreed facts AND ADMISSIONS

1. As I have already mentioned, the parties filed a SAFA on 27 November 2023. The matters as I have framed them below are summarised from that document.
2. Dr Marnickavasagar was, at all relevant times, an “officer” of Holista within the meaning of s 9 of the *Corporations Act*. I observe that, in some of the relevant documents, Dr Marnickavasagar is referred to by shortened versions of his name, “Dr Rajen” or “Dr Manicka”.
3. At all relevant times, ordinary shares in Holista were “securities” within the meaning of: ss 92 and 761A of the *Corporations Act*; “ED securities” within the meaning of ss 111AD(1) and 111AK of the *Corporations Act*; and “financial products” as a consequence of s 764A(1)(a) of the *Corporations Act*.
4. Between 9 April 2020 and 9 July 2020 (the **Relevant Period**), Holista marketed a natural non-alcoholic sanitiser product under the brand name, “NatShield”, which utilised an active ingredient known as “Path-Away”. Path-Away is a proprietary formula owned or otherwise held by Global Infection Control Consultants LLC (**GICC**).
5. At least between 15 and 20 February 2020, Dr Marnickavasagar on behalf of Holista, and **Dr** Arthur **Martin** on behalf of GICC, engaged in discussions concerning Holista’s Path-Away distribution rights, product development, and other ancillary matters. As a result, a draft Binding Collaboration Term Sheet (**BCTS**) was prepared.
6. On 20 February 2020 at 5.08 pm AEDT, Holista provided the ASX with, and published on the Market Announcement Platform (**MAP**) an announcement (**20 February 2020 Announcement**) which stated, inter alia:

…

(e) *GICC LLC has agreed to grant Holista marketing and distribution rights of Path-Away® beyond ASEAN region to include UK and Europe. Holista will distribute NatShield™ Sanitiser and the nasal sanitising balm into the UK and Europe. Holista will also work collaboratively with GICC LLC in the North American market to market NatShield™ Sanitiser and the nasal sanitiser balm;*

(f) *“We are also grateful to Dr Martin and GICC LLC for granting Holista the distribution rights for Path-Away® to include the UK and Europe. We are excited to collaborate Dr Martin’s team in the North American market on the NatShield™ Sanitiser,” [Dr Marnickavasagar] added.*

1. In fact, as at the date of the 20 February 2020 Announcement, the BCTS had been executed by Holista, but not by GICC or its representatives.
2. The BCTS was subsequently executed by Dr Martin on behalf of GICC on 13 April 2020, following an urgent email request from Dr Marnickavasagar that he do so, after an ASX Aware Query was issued to Holista on 9 April 2020. The BCTS included the words “[a]greed to and accepted this 20th day of February, 2020” above the execution block.
3. On 18 March 2020, Holista entered into a distribution agreement with **Health Therapies** LLC (the **Distribution Agreement**), whereby Health Therapies was to be the exclusive distributor of NatShield in the **United States** of America for a period of three years.
4. On 19 March 2020 at 9.48 am (AEDT), Holista provided the ASX with and published an announcement on the MAP (**19 March 2020 Announcement**), which stated, inter alia:

(a) [Holista has] *appointed Health Therapies LLC (“Health Therapies”) as its Exclusive Distributor for the United States for the NatShield sanitiser amidst a sharp increase of Covid-19 coronavirus infection in the country;*

(b) *Health Therapies LLC has exclusivity for the U.S. market for 3 years and has committed to a minimum order of at least A$3.0 million per year;*

(c) *Shipment of the first 5,000 30-ml bottles will commence from Malaysia this week*;

(d) *Discussions have begun with U.S. bottlers who, as [sic] part of the logistic supply chain of GICC LLC, can commit up to 1,000,000 bottles per month with capacity to scale further.*

(Emphasis in original.)

1. On 8 April 2020, **Mr** Morrell **Maison**, a representative of Health Therapies, emailed Dr Marnickavasagar and **Mr** Edward **Tan** (who was appointed Chief Financial Officer in December 2019 and, as at 27 November 2023, remained so), attaching a Microsoft Excel spreadsheet document entitled “Health Therapies Sales Projections 2020\_04\_08” (the **Sales Projection Spreadsheet**). The Sales Projection Spreadsheet recorded, inter alia, that Health Therapies expected to sell 400,000 units of NatShield in May and June 2020, in addition to an order for 15,000 units, which had been placed on 8 April 2020.
2. Holista’s “Accounting Policy for Revenue from contracts with customers” (**Revenue Policy**) at the relevant time provided, inter alia:

(a) *"Revenue is recognised on a basis that reflects the transfer of promised goods or services to customers at an amount that reflects the consideration the Company expects to receive in exchange for those goods or services."*

(b) *"Revenue is recognised by applying a five-step process outlined in AASB 15 which is as follows:*

* *Identify the contract with a customer;*
* *Identify the performance obligation sin the contract and determine at what point they are satisfied;*
* *Determine the transaction price;*
* *Allocate the transaction price to the performance obligations; and*
* *Recognise the revenue as the performance obligations are satisfied.*

(c) ***"revenue is recognised when or as a performance obligation in the contract is satisfied, i.e. when the control of the goods*** *or services underlying the particular performance obligation* ***is transferred to the customer.*** *A performance obligation is a promise to transfer a distinct goods or service (or a series of distinct goods or services that are substantially the same and that have the same pattern of transfer) to the customer that is explicitly stated in the contract and implied in the Group's customary business practices."*

(d)  *the "[s]ale of health care products comprise revenue from supplements, food ingredients and infection control.* ***Revenue from sales of health care products is recognised at the point in time when control of the asset is transferred to the customer, i.e. upon delivery of goods*** *to the customers. Some contracts for the sale of health care products provide customers with a right of return and volume rebates. The rights of return and volume rebates give rise to variable consideration."*

(e)  *"[r]evenue from* ***single level direct selling of health care products is recognised at the point in time when control of the asset is transferred to the customer, i.e. upon delivery of goods*** *to the customers."*

(Emphasis added.)

1. On 9 April 2020, at approximately 9.25 am (AEST), Holista provided the ASX with, and published on the MAP an announcement containing the following statements (**9 April 2020 Announcement**):
2. Following the first and second shipment from Malaysia totalling 9,558 30-ml bottles of NatShield™ to date, Health Therapies has placed additional orders for 415,000 bottles totalling A$3.8 million for delivery between April and June 2020 **(Orders Representation)**;
3. Of the latter order 15,000 bottles of 30-ml will be shipped in April, while 400,000 60-ml bottles are expected to be delivered through May and June;
4. Holista expects to record revenue of A$3.8 million from combined total orders of 424,558 bottles of NatShield™ received in the United [States] of America to date from Health Therapies **(Revenue Representation)**.
5. The 9 April 2020 Announcement further stated, “[t]his announcement has been approved for release by all members of the Holista Board”, and was authorised by Dr Marnickavasagar.
6. On 8 April 2020, prior to the release of the 9 April 2020 Announcement, **Mr** Stuart Douglas **Usher** (appointed Company Secretary from 21 February 2020 until his resignation on 13 July 2020) provided a comment on the draft announcement. He wrote: “[c]an we include payment terms of the sales order, timing of cash received in the Coy?”.
7. On 9 April 2020, Holista’s shares recorded a 14.29% gain on 9 April 2020, rising to a high of 17 cents per share, before closing at 16 cents per share.
8. Prior to and on 9 April 2020, there was correspondence regarding purchases and projections between Mr Tan, Mr Maison and Dr Marnickavasagar. In particular:
9. Health Therapies had placed orders for a total of 26,558 units of NatShield for delivery dates between 24 February 2020 and 8 April 2020;
10. On 3 April 2020, Mr Tan and Mr Maison corresponded (copying Dr Marnickavasagar) regarding the pricing of NatShield products;
11. On 8 April 20202, Mr Maison emailed Mr Tan (copying Dr Marnickavasagar) regarding a purchase order of NatShield products;
12. On 8 April 20202, Mr Maison emailed Dr Marnickavasagar the Sales Projections Spreadsheet; and
13. On 9 April 2020, Mr Tan emailed Mr Maison and requested that he issue a revised purchase order.
14. On 9 April 2020, at approximately 12.53pm (AEST), Holista received an ASX Aware Query. Dr Marnickavasagar authorised, permitted or otherwise approved the provision of a response, which included information in two documents:
15. a letter from Holista to the ASX dated 17 April 2020 (**17 April ASX Response**) which, inter alia, stated that prior to the press conference held on 20 February 2020, “final negotiations were concluded, Board approval of the 20 February Announcement was received, with a ‘Binding Collaboration Term Sheet’ being executed, for the co-development of the Nasal Sanitising Balm for Global Markets”; and
16. a letter from Holista dated 20 April 2020 to the ASX (**20 April ASX Response**), which contained an amended version of the 17 April ASX Response, and noted, inter alia, that before 20 February 2020, the Board of Holista believed the transaction to be “sufficiently indefinite that the subject matter of the BCTS and the BCTS itself were not price sensitive”.
17. On 22 April 2020, at approximately 11.34am (AWST) (**22 April 2020 Email**), Mr Maison emailed Mr Tan and Dr Marnickavasagar, saying:
18. [he] never agreed to prepay for stock and hold it in the USA;
19. [he] [was] still selling the original order [he] had, and [had] more sales coming [that] week;
20. Dr Rajen and [Mr Maison] agreed the stock would be sent so that [they] had stock in the USA available as [they] sold to distributors, not that [Mr Maison] pay in advance for stock.
21. On 29 April 2020, Holista released an announcement to the ASX, entitled “Holista Colltech Limited **Appendix 4C** Quarterly Report”.
22. On 31 May 2020, Dr Marnickavasagar emailed Mr Masion, stating “the following” was “[needed]”:
23. weekly reports of sales (from Health Therapies) to the market;
24. a breakdown of all the sales channels;
25. a clear business plan with breakdown of sale, stock forecast, sales- related activities, marketing related activities and marketing budget allocation;
26. a monthly sales review;
27. websites to reflect the same message and needed to be reviewed.
28. On 4 June 2020, at a meeting of the Board of Holista, members discussed the need to make an announcement to the ASX if Holista was not going to meet its expected sales targets.
29. On 25 June 2020, Health Therapies submitted four purchase orders to Holista for orders totalling 302,400 bottles of NatShield (although these orders were ultimately not paid by Health Therapies).
30. Between 29 June 2020 and 8 July 2020, drafts of an ASX announcement providing an update on sales of NatShield were circulated amongst Mr Tan and members of the Board of Holista. Correspondence between Mr Tan and Mr Maison (copying in Dr Marnickavasagar) also occurred during the same period.
31. On 9 July 2020 at around 10.40am (AEST), Holista provided the ASX with and published an announcement on the MAP (**9 July 2020 Announcement**), pursuant to which it disclosed:

*(a)*  *As a result of the “lockdown”, travel restrictions and race related unrest in the United States supply chains have been disrupted including the availability of bottlers, retail listings have been delayed and to prevent price gouging major e-commerce platforms have imposed listing restrictions (especially in relation to new brands). Whilst these conditions have now eased somewhat, targeted sales of $A3.8 million from Health Therapies LLC by 30 June 2020 (as announced on 9 April 2020) had been scaled back and/or delayed by the purchasing parties; and*

*(b) Notwithstanding the above, for the six months ended 30 June 2020, Holista now expects to record revenue of A$0.5m for the sale of NatShield™ hand sanitisers globally, of which approximately a third is from Health Therapies LLC.*

1. On 9 July 2020, the Holista closing share price was $0.092.

# Holista’s Liability

## Legislative provisions relevant to liability

1. Section 674 of the *Corporations Act* imposes an obligation on a listed entity to disclose information in accordance with listing rules. At the time relevant to these proceedings, failure to comply with s 674(2) was both an offence (s 1311(1)) and a civil penalty provision (s 1317E): registered 27/09/2021 to C2004A00818. Relevantly, it provided:

**674 Continuous disclosure—listed disclosing entity bound by a disclosure requirement in market listing rules**

*Obligation to disclose in accordance with listing rules*

(1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.

(2) If:

(a) this subsection applies to a listed disclosing entity; and

(b) the entity has information that those provisions require the entity to notify to the market operator; and

(c) that information:

(i) is not generally available; and

(ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

the entity must notify the market operator of that information in accordance with those provisions.

1. As to when information is “generally available” and would be expected to have a “material effect on price or value”, ss 676 and 677 provided:

**676 Sections 674 and 675—when information is generally available**

(1) This section has effect for the purposes of sections 674 and 675.

(2) Information is generally available if:

(a) it consists of readily observable matter; or

(b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:

(i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and

(ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed

(3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(a) information referred to in paragraph 2(a);

(b) information made known as mentioned in subparagraph (2)(b)(i).

**677 Sections 674 and 675—material effect on price or value**

For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

1. From 26 May 2020, s 674(2) was temporarily modified by the *Coronavirus Determination*. By s 5, the *Coronavirus Determination* replaced s 674(2)(c) of the *Corporations Act* such that, for the purposes of the contraventions between 26 May 2020 and 9 July 2020, s 674(2) provided (provisions inserted by s 5 in bold below):

(2) If:

(a) this subsection applies to a listed disclosing entity; and

(b) the entity has information that those provisions require the entity to notify to the market operator; and

**(c) that information is not generally available; and**

**(d) the entity knows or is reckless or negligent with respect to whether that information would, if it were generally available, have a material effect on the price or value of ED securities of the entity;**

the entity must notify the market operator of that information in accordance with those provisions.

(Emphasis added.)

1. Section 8 of the *Coronavirus Determination* provided that “knowledge” and “recklessness” had the same meaning as in the ***Criminal Code*** (Schedule to the *Criminal Code Act 1995* (Cth)). “Negligence” is not defined. Rather, the ***Explanatory Statement***to the *Coronavirus Determination* (registered 25/05/2020 to F2020L00611) observed that, “[a]s a civil tort, it is a common law concept and appropriate for courts to decide what constitutes negligence in a given case”.
2. I interpolate that, as from 14 August 2021, by the *Treasury Laws Amendment (****2021 Measures*** *No.1)* ***Act*** *2021* (Cth) (see s 2), the modifications to s 674 and s 675 were made permanent through the insertion of s 674A and s 675A. Through those amendments, s 674(2) is preserved in its original form – a contravention of the section is a strict liability offence, but ceases to be a civil penalty provision. The same is true of s 675(2). A breach of ss 674A(2) or 675A(2), by contrast, invokes a civil penalty provision, but is not an offence.
3. Unlike the *Coronavirus Determination*, no definition of “knowledge” or “recklessness” as used in ss 674A(2) or 675A(2) was provided in the *2021 Measures*.
4. Chapter 3 of the ASX Listing Rules is concerned with continuous disclosure requirements. In particular, Rule 3.1 provides:

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.

1. Rule 3.1A provides an exception to rule 3.1:

Listing rule 3.1 does not apply to particular information while each of the following is satisfied in relation to the information:

3.1A.1 One or more of the following 5 situations applies:

* It would be a breach of a law to disclose the information;
* The information concerns an incomplete proposal or negotiation;
* The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
* The information is generated for the internal management purposes of the entity; or
* The information is a trade secret; and

3.1A.2 The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and

3.1A.3 A reasonable person would not expect the information to be disclosed.

1. Rule 19.12 under Chapter 19 provides that 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.

1. The prohibition on misleading or deceptive conduct is found in s 1041H of the *Corporations Act*. It provides, relevantly:

**1041H Misleading or deceptive conduct (civil liability only)**

1. A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.
2. The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:

(a) dealing in a financial product;

(b) without limiting paragraph (a):

(i) issuing a financial product;

(ii) publishing a notice in relation to a financial product;

 …

### The admitted contraventions of ss 674(2) and 1041H(1)

1. On and from 9 April 2020, or alternatively in respect of sub-paras (b) and (c) below, from at least 22 April 2020, Holista admits it was aware of three pieces of material information which were not disclosed (collectively, the **Non-Disclosed Information**), in contravention of s 674(2), per (a), (b) and (c) below:
2. Health Therapies had not placed orders for 415,000 bottles of NatShield totalling A$3.8 million for delivery between April and June 2020 (**Placed Orders Information**);
3. Holista was unlikely to receive orders of 415,000 bottles of NatShield totalling A$3.8 million from Health Therapies for delivery between April and June 2020 (**Orders Shortfall Information**); and
4. Holista was unlikely to record revenue of A$3.8 million from orders of 415,000 or 424,558 bottles of NatShield placed by Health Therapies for delivery between April and June 2020 (**Revenue Shortfall Information**);
5. and **admits**:
6. the Non-Disclosed Information was information which was not generally available within the meaning of ss 674(2)(c)(i) and 676 of the *Corporations Act*;
7. the Non-Disclosed Information was information which a reasonable person would expect, if it were generally available, to have a material effect on the price or value of Holista securities, as it would, or would have been likely to, influence persons who commonly invest in securities in deciding whether to acquire of dispose of Holista securities, for the purposes of ss 674(2)(c)(ii) and 677 of the *Corporations Act*;
8. the ASX Listing Rules required Holista to notify the ASX of the Non-Disclosed Information;
9. between 9 April 2020 (or alternatively in respect of the Orders Shortfall Information and the Revenue Shortfall Information, by at least 22 April) and 9 July 2020, it failed to notify the ASX of the Non-Disclosed Information;
10. between 9 April 2020 (or alternatively in respect of the Orders Shortfall Information and the Revenue Shortfall Information, by at least 22 April) and 25 May 2020, it contravened s 674(2) of the *Corporations Act*, as modified by the *Coronavirus Determination* in failing to notify the ASX of the Non-Disclosed Information;
11. its contraventions of s 674(2) were serious within the meaning of s 1317G(1)(c)(iii) of the *Corporations Ac*t;
12. in the period from 26 May 2020 to 9 July 2020, it was at least negligent as to whether the Non-Disclosed Information would, if it were generally available, have a material effect on the price or value of Holista Securities, for the purposes of ss 674(2)(c) and 677 of the *Corporations Act*, as modified by the *Coronavirus Determination*; and
13. by engaging in the conduct described which led to the Orders Representation and the Revenue Representation, it contravened s 1041H of the *Corporations Act*.

## Is it appropriate to make the agreed declarations in respect of Holista’s liability?

1. By its originating application, and in respect of the admitted contraventions of ss 674(2) and 1041H of the *Corporations Act* by Holista, ASIC has applied for, inter alia, declaratory relief pursuant to s 1317E of the *Corporations Act*, or alternatively, s 21 of the *Federal Court of Australia Act 1976* (Cth) (***FCA Act***).
2. Section 1317E is a mandatory provision. It provides, relevantly:

**1317E Declaration of contravention of a civil penalty provision**

*Declaration of contravention*

(1) If a Court is satisfied that a person has contravened a civil penalty provision, the Court must make a declaration of contravention.

(2) The declaration must specify the following:

(a) the Court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention;

(e) if the contravention is of a corporation/scheme civil penalty provision—the corporation, registered scheme or notified foreign passport fund to which the conduct related;

(f) if the contravention is of subsection 1211B(1) or (2) (complying with the Passport Rules for this jurisdiction) —the passport fund in relation to which the obligation was imposed on the person;

(g) if the contravention is of subsection 670A(4), 727(6), 728(4) or 1309(12) (misleading statements etc.)—the corporation, registered scheme or notified foreign passport fund to which the conduct related.

1. Section 1317F provides:

**1317F Declaration of contravention is conclusive evidence**

A declaration of contravention is conclusive evidence of the matters referred to in subsection 1317E(2).

1. Consequently, if I am satisfied that Holista has contravened s 674(2), it being a civil penalty provision, I must make a declaration in the terms prescribed by s 1317E(1). As was observed by the Full Court in ***Mayfair Wealth*** *Partners Pty Ltd v Australian Securities and Investments Commission* [2022] FCAFC 170 at [184] (per Jagot, O’Bryan and Cheeseman JJ) in respect of the analogous s 12GBA of the *Australian Securities and Investments Commission Act 2001* (Cth) (***ASIC Act***), the mandatory terms of the section necessarily override the discretionary considerations to which a court might otherwise have given weight, in declining to make a declaration.
2. Section 1317E(1) is not, however, relevant to the declaration sought in respect of the contravention of s 1041H, it not being a civil penalty provision. Hence ASIC’s reliance on s 21 of the *FCA Act*, which confers power on the Court to make binding declarations of right in civil proceedings in which it has original jurisdiction.
3. On the basis of the SAFA and the joint written submissions, I am satisfied that Holista has contravened ss 674(2) and 1041H of the *Corporations Act*. Accordingly, I am required by s 1317E(1) to make a declaration of contravention in respect of s 674(2).
4. It is also appropriate that I exercise the power conferred by s 21 of the *FCA Act* to make a declaration of contravention in respect of s 1041H. While the discretion conferred by s 21 of the *FCA Act* is broad, it should only be exercised where the question is real and not theoretical, the person raising it has a real interest to raise it, and there is a proper contradictor, being someone who has a true interest to oppose the declaration: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421,437-438, quoting Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 437, 448.
5. As has been observed on several occasions, the fact that the parties have agreed that a declaration of contravention should be made does not relieve the Court of the obligation to satisfy itself that the making of the declaration is appropriate: *Commonwealth v Director,* ***Fair Work*** *Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [48] and [59]; ***NW Frozen Foods*** [1996] FCA 1134; 71 FCR 285 at 290-291; *Minister for Industry, Tourism & Resources v Mobil Oil* (2004) ATPR 41-993 at 48, 626. It is not the role of the Court to simply “rubber stamp” orders agreed between a regulator and a person who has admitted a statutory contravention: *Re Chemeq Ltd; Australian Securities and Investments Commission v* ***Chemeq*** *Ltd* [2006] FCA 936; 234 ALR 511 at [100]; *Construction, Forestry, Mining and Energy Union v De Martin & Gasparini Pty Ltd (No 3)* [2018] FCA 1395 at [74]; *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited* [2023] FCA 256 at [50] (***ASIC v ANZ***).
6. As O’Bryan J went on to explain in *ASIC v ANZ* at [51]:

The making of declarations should have some utility: see *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53 (*Rural Press*) at [95] (Gummow, Hayne and Heydon JJ). However, this does not necessarily require a litigant to seek consequential relief in connection with the subject matter of the declaration: see, e.g. *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* (2012) 213 FCR 380 at [271] (Perram J); *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55 (*AMP Financial Planning*) at [143] (Lee J). In the context of proceedings brought by a regulatory body, declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court’s disapproval of the contravening conduct, vindicate a regulator’s claim that the respondent contravened the provisions, assist a regulator to carry out its duties, and deter other persons from contravening the provisions: *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2006] FCA 1730; ATPR 42-140 at [6] (Nicholson J), and the cases there cited.

1. I am satisfied that a declaration in respect of the admitted contravention of s 1041H will have the requisite utility, in that it will serve the public interest by identifying the contravening conduct and recording the Court’s disapproval of such conduct: *Australian Securities and Investments Commission v Ostrava Equities Pty Ltd* [2016] FCA 1064 at [51].

### The two matters in contention

1. There are two matters relevant to Holista’s liability as to which the parties were not agreed. The first is whether Holista was aware of the Orders Shortfall Information and the Revenue Shortfall Information prior to 22 April 2020. The second is the relevant state of mind that should be attributed to Holista in the period from 26 May 2020 to 9 July 2020 in respect of the Non-Disclosed Information, during the operation of the *Coronavirus Determination*.

#### The relevant date

1. Holista accepted that the Placed Orders Information was apparent from the Sales Projection Spreadsheet, and it was therefore aware of the Placed Orders Information from 9 April 2020. It submitted, however, that it was not aware of the Orders Shortfall Information and Revenue Shortfall Information until the 22 April 2020 Email from Mr Maison was received by Dr Marnickavasagar and Mr Tan, informing them, inter alia, that he had never agreed to prepay for stock and was still selling the original stock. ASIC submits that the evidence discloses that Holista was aware of the Orders Shortfall Information and the Revenue Shortfall Information on 9 April 2020. It points to the following matters:
2. On 18 March 2020, Holista had entered into the Distribution Agreement with health Therapies (SAFA [36]);
3. The “[m]inimum [c]ommitments” clause provided that Health Therapies was required to “order and provide buyers for, during each of the periods set forth in Exhibit A, at least the minimum quantities of each Product indicated in Exhibit A for such periods” – being “Natshield (60ml)”, with an initial price of $5.40; and “[m]inimum [q]uantities/[t]ime [p]eriods” of “200,000” and “Natshield (30ml)” with an initial price of $4.69 and “[m]inimum quantities/[t]ime periods” of “200,000”;
4. Between 18 March 2020 and 8 April 2020, Health Therapies placed orders for 26,558 units of NatShield (SAFA [44(b)]);
5. On 8 April 2020, Mr Maison emailed Mr Tan and Dr Marnickavasagar with the subject “HT Sales Projections”, attaching the Sales Project Spreadsheet. The spreadsheet contained a number of tabs. The first “PRE-LAB REPORT” had a total of $3,493,000 in sales, including sales with the customer name of “NJ Governor – Phil Turner” (emphasis in original). A second “POST – LAB REPORT” tab had a total of $4,520,940 in sales, and references to a customer with the name “NY Governor – Andrew Cuomo”. A third “POST – TRADEMARK REGISTRATION” tab had projections for $798,400 in sales of 60ml units between April and July 2020, and reference to a customer with the name “Tech Wiz Distributors” (SAFA [38]). The email accompanying those sales projections reads, relevantly, “I have based these numbers on actual discussions I am having with companies and have left out some of the large ones like Johnson & Johnson until the commit (in discussion) at least to numbers”;
6. Contrary to the statements in the 9 April 2020 Announcement, Health Therapies had not placed additional orders for 415,000 bottles of NatShield totalling A$3.8 million (SAFA [43]);
7. Dr Marnickavasagar knew that Health Therapies had not placed those orders referred to in (e) immediately above (SAFA [45]);
8. In the course of reviewing the draft 9 April 2020 Announcement, board member Mr Usher queried, “[c]an we include payment terms of the sales order, timing of cash received in the Coy?” (SAFA [67]);
9. By the point of market close on the day of the 9 April 2020 Announcement, there were significant increases in Holista’s share price (SAFA [49]).
10. I find that Holista was aware of the Orders Shortfall Information and the Revenue Shortfall Information on and from 9 April 2020. Nothing in the correspondence that passed between Mr Maison on behalf of Health Therapies, and Mr Tan and Dr Marnickavasagar on behalf of Holista, can reasonably be construed as evidencing that Holista would likely receive orders of 415,000 bottles of NatShield totalling A$3.8 million between April and June 2020, and was likely to record revenue of A$3.8 million. To the contrary, the fact that no further orders had been placed, coupled with nothing more than “[projections]” based on “discussions”, albeit described as “actual discussions”, made it highly unlikely that the Orders Representation and the Revenue Representation would be fulfilled.
11. It follows that the relevant period of time during which Holista contravened s 674(2) was from 9 April 2020 to 25 May 2020.

#### Holista’s state of mind

1. For the period between 26 May 2020 and 9 July 2020, and after the commencement of the *Coronavirus Determination*, Holista admits it was “at least negligent” with respect to whether the Non-Disclosed Information would, if was generally available, have a material effect on the price or value of the shares in Holista, or whether Holista knew or was reckless as to that matter.
2. ASIC submitted that the evidence establishes that, in the relevant period, Holista knew, or was reckless, as to the materiality of the Non-Disclosed Information. It urges such a finding in support of a higher penalty range. Holista submitted that it is unnecessary for the Court to make a finding as to knowledge or recklessness because Holista’s state of mind is not relevant as an aggravating factor in considering the quantum of the penalty. Holista submitted that the purpose of the *Coronavirus Determination* was not to give the Court an avenue for increasing penalties in certain circumstances.
3. The purpose of the *Coronavirus Determination* as described in the *Explanatory Statement* was “to temporarily modify the continuous disclosure provisions in the [*Corporations Act*] to facilitate the continuation of business in circumstances relating to COVID-19”, albeit that the modifications were subsequently made permanent. In other words, its purpose was to ameliorate the strict liability for breach of the continuous disclosure obligations under the *Corporations Act* by imposing liability only for breaches committed knowingly, recklessly, or negligently. During the operation of the *Coronavirus Determination*, and prior to the enactment of ss 674A and 675A by the *2021 Measures*, a failure to comply with the modified s 674(2) was both an offence and a civil penalty provision, even in cases of mere negligence. Whilst I accept Holista’s submission as to the purpose of the *Coronavirus Determination*, I do not accept that it is unnecessary for the Court to consider whether Holista had knowledge, or was reckless, as to the materiality of the Non-Disclosed Information. In assessing the appropriate penalty, the “deliberateness” of the contravention and the period over which it was extended is, at least, one of the many factors that courts have identified as generally relevant to the assessment of pecuniary penalties, in addition to any mandatory statutory considerations (in this case, those prescribed by s 1317G(6)): *Trade Practices Commission v* ***CSR*** *Ltd* [1990] FCA 762; [1991] ATPR ¶41-076 at 52,152-52,153; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68at [101]; *Australian Building and Construction Commissioner v* ***Pattinson*** [2022] HCA 13; 274 CLR 450 at [18], [19]. The use of the term ‘deliberateness’ in this context is shorthand for the relevant state of mind. ASIC does not contend that Holista deliberately contravened s 674(2).
4. Further, in *Australian Competition and Consumer Commission v* ***Reckitt Benickser*** *(Australia) Pty Ltd* [2016] FCAFC 181; 340 ALR 25, the Full Court said, at[132]:

Ultimately, a judge must form his or her own views on whether and if so what state of mind existed on the evidence that is before the Court, provided that a party has been given an opportunity to be heard. To do otherwise is to require a judge to surrender an essential judicial function, even if it is not as clear-cut for civil penalty proceedings as it is for criminal proceedings: the *CFMEU civil* *penalty case* at [61]. The Court cannot surrender the ultimate responsibility for making the necessary findings leading to penalty, even if any penalty agreed between the parties cannot easily be departed from. The determination of state of mind, if any, is a central judicial function.

1. It remains, of course, for the party asserting a particular state of mind, in this case ASIC, to prove its assertion.
2. I have already observed that the *Coronavirus Determination* incorporates the definitions of “knowledge” and “recklessness” from the *Criminal Code*, albeit in the context of a civil penalty provision. Therefore, it is perhaps important to recall and state the nature of the differences between criminal and civil regimes. In the course of considering civil penalty provisions under the ***Fair Work Act*** *2009* (Cth) in *Pattinson*, the High Court observed at [14]:

In *Commonwealth v Director, Fair Work Building Industry Inspectorate* (“the *Agreed Penalties Case*”), French CJ, Kiefel, Bell, Nettle and Gordon JJ said that civil penalty provisions of the kind enacted in s 546 have a “statutory function of securing compliance with provisions of the [statutory] regime”. Although **it is accepted in the authorities that the courts may adapt principles which govern criminal sentencing to civil penalty regimes**, “basic differences” between criminal prosecutions and civil penalty proceedings mean **there are limits to the transplantation of principles** from the former context to the latter. Indeed, **the Act is emphatic in drawing a distinction between its civil penalty regime and criminal proceedings**. For example: a contravention of a civil remedy provision is not an offence; the rules of evidence and procedure for civil matters are applicable to proceedings relating to a contravention of a civil remedy provision; and a court must not make a pecuniary penalty order for a contravention of a civil remedy provision against a person who has already been convicted of an offence for substantially the same conduct.

(Emphasis added.)

1. As is apparent from the text of the *Coronavirus Determination*, unlike the *Fair Work Act*, no “emphatic … distinction” has been drawn between the civil and criminal consequences of contravening s 674(2) of the *Corporations Act*. Such a breach enlivens both an offence and a civil penalty. It seems therefore that, by the incorporation of the definitions from the *Criminal Code*, the Parliament intended those definitions to apply to both the offence and the civil penalty provision created by ss 1311(1) and 1317E of the *Corporations Act*, respectively.
2. By virtue of the application of the definitions of “knowledge” and “recklessness” from the *Criminal Code* to the *Coronavirus Determination* (see s 8), “knowledge” is defined in relation to **circumstances and results**, but not conduct. Section 5.3 of the *Criminal Code* relevantly provides:

A person has **knowledge** of a circumstance or a result if he or she **is aware** that **it exists or will exist** in the ordinary course of events.

(Emphasis added.)

1. By contrast, “intention”, is defined in s 5.2 of the *Criminal Code* in the following way:
2. A person has intention **with respect to conduct** if he or she **means to engage in the conduct**.
3. A person has intention **with respect to a circumstance** if he or she **believes that it exists or will exists.**
4. A person has intention **with respect to a result** if he or she **means to bring it about or is aware that it will occur** in the ordinary course of events.

(Emphasis added.)

1. Although it is not elaborated upon in the *Explanatory Statement*, it may be presumed that the decision to incorporate “knowledge” in the *Coronavirus Determination* as the requisite fault element, rather than “intention”, was intended to better facilitate the prosecution of offences under ss 674 and 675 by only requiring proof of “awareness” of the requisite circumstance or result, rather than, for example, subjective belief in the existence of same: see *R v* ***Selim*** [2007] NSWSC 362 at [26].
2. “Recklessness” is defined in s 5.4 of the *Criminal Code*.

(1) A person is reckless with respect **to a circumstance** if:

(a) he or she is **aware of a substantial risk that the circumstance exists** or will exist; and

(b) having regard to the circumstances known to him or her, it is **unjustifiable to take the risk**.

(2) A person is reckless with respect **to a result if:**

(a) he or she is **aware of a substantial risk that the result will occur**; and

(b) having regard to the circumstances known to him or her, **it is unjustifiable to take the risk.**

(3) The question whether taking a risk is unjustifiable is one of face.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy the fault element.

(Emphasis added.)

1. As provided in s 5.4(3), the question of whether taking a risk is unjustifiable is a matter of fact. The concept of “unjustifiable risk” points to the application of an objective standard of reasonableness, assessed in light of the defendant’s knowledge: see, for example, *Australian Securities and Investments Commission (ASIC) v Mariner Corp* [2015] FCA 589; 241 FCR 502 at [261].
2. It is necessary to understand what is comprised by Holista’s admission of being “at least negligent”. Holista admits inter alia that, in the period from 9 April 2020 (or, notwithstanding the finding at paragraph [55] above, at least by 22 April 2020 with respect to the second and third pieces of information) to 9 July 2020:

(a) **it was aware** of the Non-Disclosed Information;

(b) the Non-Disclosed Information was not generally available;

(c) **a reasonable person would expect, if it were generally available,** **the Non-Disclosed Information to have a material effect** on the value of Holista’s securities. It also admits that it would, or would have been likely to, influence investors.

(Emphasis added.)

1. It admits that in the period from 26 May 2020 to 9 July 2020 it was at least negligent as to whether the Non-Disclosed Information would, if it was generally available, have a material effect on the price or value of Holista securities. This is an admission as to circumstances and results, not conduct.
2. It is uncontroversial that, as directors or officers of Holista, the knowledge of each of Dr Marnickavasagar and Mr Tan is to be attributed to Holista pursuant to s 769B of the *Corporations Act*, and as a matter of common law: *Krakowski v Eurolynx Properties Ltd* [1995] HCA 68; 183 CLR 563 at 582-3, quoting *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270 at 279 (Bright J). Moreover, knowledge of agents of a corporation engaged in a transaction can be aggregated to establish a company’s state of mind: *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1; [2012] WASCA 157 at [2183]-[2184], [2187].
3. Prior to the enactment of the *Coronavirus Determination*, Holista was strictly liable for any contravention of s 674(2). Nevertheless, its state of mind within that period could still be relevant to the appropriate penalty.
4. From 26 May 2020, it is necessary to establish not merely that Holista failed to notify the ASX of the Non-Disclosed Information, but that it also had the requisite state of mind. Holista has admitted to negligence. An admission that it was at least negligent as to those matters as from 26 May 2020 is to be construed as an admission that Holista fell short of the standard required by s 674(2) to notify the ASX of the Non-Disclosed Information. As Professor Bant has pointed out (Elise Bant, “Modelling Corporate States of Mind through Systems Intentionality” in Elise Bant (ed), *The Culpable Corporate Mind* (Hart, 2023) 231 at 241):

Negligence is a standard that may apply to conduct **and**, indeed, **to states of mind**. Consistently, a person may breach that same standard through conduct so as to attract liability in negligence without any mental state at all. Advertent or inadvertent conduct may both count as negligent: the main focus of the law is on whether the defendant’s conduct breached the required standard.

(Emphasis added.)

1. As to whether Holista *knew* the relevant information would have a material effect on the price of its shares, the incorporation of the *Criminal Code* definition of “knowledge” should be construed as displacing the usual classification of types of knowledge for the purposes of civil liability, as set out in ***Baden*** *Delvaux & Lecuit v Société Générale pour Favoriser le Développement du Commerce at de l’Industrie en France SA* [1992] 4 All ER 161, 235, 242-43. Consequently, what must be established is the first of the five *Baden* categories – actual knowledge – with the other categories being wilful blindness; wilfully and recklessly failing to undertake such inquires as would an honest and reasonable person; knowledge of circumstances that would indicate the facts to an honest and reasonable person; and knowledge of circumstances that would put a reasonable person on inquiry: see *Baden* at [250]. In *Selim* at [26], Fullerton J explained that:

Where knowledge as to a state of affairs might be taken to include a belief as to the existence of that state of affairs under the *Queensland Code* or at common law, this is not the position under the Code. **The definition of knowledge in s 5.3 of the *Criminal Code* eschews belief and imposes a more exacting standard of conscious awareness**.

(Emphasis added.)

1. Similarly, with respect to the definition of “recklessness” in the *Criminal Code*, it is not sufficient for ASIC to establish that the relevant risk was simply obvious or well known. Conscious awareness of the substantial risk is required: ***Hann*** *v Commonwealth of Australia* [2004] SASC 86; 88 SASR 99 at [26]; *R v Alif, Amin and Zolmin* [2012] QCA 355; [2013] 2 Qd R 140 at [68].
2. ASIC submits that the evidence enables a finding that Holista knew, or was reckless as to, the materiality of the Non-Disclosed Information. ASIC referred first to the 9 April 2020 Announcement, and submitted Holista’s decision to make the announcement was due to its knowledge that such an announcement would receive market interest. I accept that the only logical inference to be drawn from that announcement is that Holista knew that the market was likely to respond to such a “good news” story.
3. Secondly, the orders announced represented more than 50% of Holista’s revenue from the previous financial year. I infer that the significance of the increase in revenue would have been known to Holista. This inference is supported by Professor Putnan’s expert report, dated 17 April 2023, which was unchallenged, and noted that the positive return from 9 April 2020 was a price increase of 14.29% on the day of the 9 April 2020 Announcement and that such a return is substantial both in an absolute sense, and relative to Holista’s stock volatility. ASIC submitted that I may infer that, by 26 May 2020, when Mr Usher requested an amendment to the announcement, Holista knew the impact of its disclosure on the share price because it was readily observable. I accept that submission.
4. Thirdly, in his affidavit dated 24 August 2022, Mr Fraser’s unchallenged evidence was that he was aware of the materiality of the revenue forecast. He deposed:

This announcement was made to keep the market informed because this was a significant contract for Holista and was, accordingly, market sensitive and there was a high level of investor interest in Holista. **The amount of $3.8 million referred to in the announcement would make a major contribution to Holista’s revenue**.

(Emphasis added.)

1. Fourthly, Mr Usher’s comment on the draft 9 April 2020 Announcement queried “[c]an we include payment terms of the sales order, timing of cash received in the Coy?” I accept ASIC’s submission that this comment indicates a clear awareness of the materiality of the revenue forecast, and of the timing of the cash flow.
2. Fifthly, as at 9 April 2020, Holista knew that Health Therapies had placed orders for only 26,558 bottles of NatShield. Nothing occurred between that date and 22 April 2020, which would indicate that any further orders were yet to be placed. At best, Holista had received via email the Sales Projection Spreadsheet from Mr Maison on 8 April 2020, which were said to be based on “actual discussions”. On 22 April 2020, it was made pellucid that Health Therapies had not placed any further orders, and had not ever agreed to prepay for stock.
3. Holista contended that the absence of any evidence that this email was brought to the attention of the Board despite the 9 April 2020 Announcement suggests that Mr Tan and Dr Marnickavasagar were not consciously aware that it was material information. It must be recalled however, that Holista has admitted that, as at 9 April 2020 it was aware: (1) that it did not have orders for 415,000 bottles of NatShield totalling A$3.8M for delivery between April and June 2020; (2) of the unlikelihood of orders being fulfilled; and (3) of the unlikelihood of the revenue target being reached.
4. Prior to the release of the 9 April 2020 Announcement, Mr Usher had queried the omission of the payment terms and the timing of cash to be received, from the terms of the announcement. The only inference to be drawn from that inquiry is that Mr Usher considered it would be useful to inform the market of some details of the otherwise fairly general information regarding its dealings with Health Therapies, which employed language of market expectation in relation to delivery and revenue, in contrast to the very clear statement that Health Therapies only “[had] placed additional orders”. It is inconceivable that Mr Usher’s inquiry would not have drawn Mr Tan’s and Dr Marnickavasagar’s attention to the circumstance that, because Holista did not yet have orders for 415,000 bottles of NatShield, they could not respond to Mr Usher’s inquiry. There is no evidence that they did respond. It is not to the point that Mr Usher did not advise the Board not to release the 9 April 2020 Announcement without the additional information. In my view, through Mr Tan and Dr Marnickavasagar, Holista was, at this point in time, aware of a risk that the Non-Disclosed Information was material.
5. Sixthly, the draft announcement circulated on 27 April 2020 stated, “[t]he Company expects total sales of A$2,160,000 in the next quarter, an improvement as the Company anticipates increasing orders of NatShield™ to be realised in the 2nd quarter of 2020”. Mr Fraser commented:

9 April 2020, HCT announced it had confirmed sales from Health Therapies of $3.8m fulfilled by June 2020.

SO THIS NUMBER IS INCORRECT or THE ANNOUNCEMENT WAS INCORRECT

1. A further draft circulated on 28 April 2020 stated that Holista had:

booked a total cash inflow from customers of A$1,989,000 for the quarter ending 31st March 2020. The Company expects a total cash inflow from customers of A$2.467,000 in the next quarter, an improvement as the Company anticipates increasing orders of Natshield™ to be realised in the 2nd quarter of 2020.

1. On 28 April 2020, Mr Usher asked Mr Tan how confident he was on the June quarter cash inflows from sales receipts. Mr Tan sought to explain the discrepancy between the 9 April 2020 Announcement and the 29 April 2020 Announcement as being a difference between sales (A$3.8 million) and collection (A$2.467 million). ASIC submitted that this email chain demonstrates at least a level of recklessness about the materiality of information, which was undisclosed to the market in circumstances where, on 9 April 2020, a figure of A$3.8 million in recorded revenue between April and June 2020 had been announced. I accept that submission.
2. The final version of the 29 April 2020 Announcement made no express reference to the expected cash inflow in the second quarter.
3. Seventhly, on 31 May 2020, Dr Marnickavasagar emailed the executives of Health Therapies, noting, in particular, that “[Holista] are a publicly-traded company that has serious reporting obligations. By choosing to be [their] Exclusive distributor in North America, [Health Therapies] [had] to be part of [their] obligations”. He asked for a number of pieces of information including, relevantly, “weekly reports of sales (from Health Therapies) to the market”, a breakdown of “all the channels – online, offline, stores ect [sic]”, “a clear business plan with a breakdown of sales, stock forecast, sales-related activities, marketing-related activities, budgeting allocation”, and a “monthly sales review”.
4. Holista contended that this email suggested that Dr Marnickavasagar was still labouring under a misapprehension that no information of a material nature had come to light that would require the 9 April 2020 Announcement to be rectified. It is, however, equally consistent with Dr Marnickavasagar’s attempt to mitigate the associated risk, of which he was, by this time, aware. I accept ASIC’s submission that this email evidences Dr Marnickavasagar’s awareness of the importance of being able to substantiate the figures that had been disclosed to the market. That he was aware of the importance of these matters is reinforced by the fact that the request followed on from Mr Fraser’s request, described below.
5. Eighthly, on 22 May 2020, Mr Fraser wrote to all Board members requesting a Board Meeting on 28 May 2020 and asked Mr Tan to produce, “[a]s a minimum”:

the year to date financials by month,

the actual cashflow for YTD from January 2020,

Work papers for the reassessment of the cashflow for 2020,

Application of the $6M raised since January 2020, and

Schedule of all current distribution agreements for each category of product in HCT, and their performance to agreed terms.

1. Mr Fraser deposed to the several occasions between 9 April and May 2020 on which he had requested Dr Marnickavasagar to provide him with an update on the orders of NatShield.
2. The Board Meeting was held on 4 June 2020. Mr Usher deposed that there was a discussion about needing to make an announcement to the ASX if Holista was not going to meet its expected sales targets. He stated that Dr Marnickavasagar said, “he would prepare a market update on NatShield sales and would update the Board on those sales (the) next week”.
3. Ninthly, on 23 June 2020, the Board considered the management accounts. They revealed that in the period January to May, total sales amounted to A$202,000 against a budgeted amount of A$167,000. Following that meeting, an ASX announcement was prepared, to be issued on 30 June 2020. On 29 June 2020, Mr Fraser wrote to Mr Tan, copying in the Board, drawing attention to the need for there to be an explicit statement of reasons on the sales achieved for each product line and stating:

I would like to remind the board there is a process for ASX announcements and this must be followed. Attached is an article where such a procedure was not followed. Please provide the supporting material so each Board member can reference data for this release.

1. Later, on the same day, Mr Fraser wrote to Mr Tan, with the Board in copy, and said:

The continuous disclosure requirements prescribe keeping the market informed when the company becomes aware of any notifiable event. HCT must report on all its products if it seeks to keep the market informed not just NatShield.

…

Edward, if you seek to quote the ASX listing rules and guidelines that’s fine, as this is an area we are quite familiar so ensure you clearly understand these regulations. Details on the product sales should not wait to be released in the 4D, there is a material change to what has been announced – which if you understood the Listing rules you would know.

…

Specially there is a need for a narrative around SALES and ORDERs for each of HCT’s products and if there is a reference to previous announcements then put the date and headline of that announcement into the release.

(Errors in original.)

1. On 30 June 2020, Mr Usher wrote to the Board, relevantly expressing his concern as follows:

The ASX announcement dated 9 April, titled ‘US Distributor increases orders of NatShield amounting to $3.8M’. In this announcement it confirms that Health Therapies has placed additional orders for 415,000 bottles totalling $3.8M for delivery between May and June.

In the sales update announcement you say this order is now $1.9M. There is a reference to both sales and purchase orders, so the Company will need to ensure this is properly reconciled and is conveyed clearly on the announcement.

Nonetheless, the difference is a material change and as such should be immediately disclosed to ASX – and should disclosed from the moment the Company is in receipt of such information. From my understanding of the announcement the purchases have been carried forward/delayed through to August, so we will get the $3.8M of purchases – it’s just a timing difference. The Board should consider a trading halt until this is reconciled, resolved and disclosed to the ASX. Without suitable narrative around this shortfall it may likely raise concerns with ASX from a continuous disclosure obligation.

(Errors in original.)

1. Dr Marnickavasagar responded by agreeing that it was “just a timing issue”. It is apparent that Dr Marnickavasagar was of the view that the $3.8 million in sales would be realised, albeit not in the same quarter that had been announced to the market. His acknowledgment of a mere “timing issue” demonstrates that he was reckless as to the materiality of the information which remained undisclosed as at 30 June 2020.
2. Further draft announcements were circulated amongst the Board in the following days. On 7 July 2020, Mr Usher wrote:

In reference to my earlier email, dated 30 June, as attached, the revised announcement still fails to fully explain the reasons why, between 9 April, where it was disclosed that the company would achieve sales of $3.8M of NatShield by 30 June, to actual sales of $500K. This material variance is not fully explained within the announcement, nor is this announcement referenced.

…

I reiterate that I do not approve the announcement for lodgement as it fails various continuous disclosure requirements. However, as a board you have approved the announcement and I will therefore lodge it with MAP on your behalf.

Please re-confirm your instructions.

1. That same day, Mr Jonathan Pager, a Board member of Holista, responded with “[i]t would be good to know exactly which continuous disclosure requirements fail?”
2. Mr Usher responded by setting out ASX Listing Rules 3.1, 4.1 and 4.4 and s 677 of the *Corporations Act*. He also wrote:

Expect the ASX to make further enquiries to ascertain when management were first aware that sales of $3.8M were not going to be achieved and why this information had not been disclosed earlier. A false market has in effect been operating which needs to be corrected ASAP.

1. Holista contended that, aside from Mr Tan and Dr Marnickavasagar, the evidence demonstrates that the other members of the Board were not consciously aware of the true shortfall in orders until late June 2020. Even accepting that to be correct, it does not change the knowledge attributable to Holista by the knowledge of Mr Tan and Dr Marnickavasagar as and from 9 April 2020, as I have found. Corporate attribution does not depend upon every board member or senior manager having the same degree of knowledge at the same time: see *Australian Securities and Investments Commission v Westpac Banking Corp (No 2)* [2018] FCA 751; 357 ALR 240 at [1660].
2. I am satisfied that Holista was aware of a risk that the Non-Disclosed Information was material.

### Was that risk substantial?

1. In considering what is meant by “substantial risk”, Gray J in *Hann* observed, at [25]:

The term “substantial risk” does not appear to be defined in Australian legal dictionaries. However Carswell’s Words and Phrases, an American legal dictionary, describes the phrase as meaning “real and apparent on the evidence presented … not a risk that is without substance or which is fanciful or speculative”. The word “substantial” has been described in Australian legal dictionaries as “real or of substance as distinct from ephemeral or nominal”. “Risk” has been described as “a possibility, chance or likelihood”.

1. On the basis of Holista’s admissions, I find that the risk was substantial. It was neither fanciful, nor speculative. Further, having regard to the circumstances known to Holista, being the Non-Disclosed Information, it was unjustifiable to take the risk that the information was material.
2. I find that Holista was reckless with respect to whether the Non-Disclosed Information would, if it were generally available, have a material effect on the price or value of Holista’s securities. The declaration will record that finding.

# The appropriate PECUNIARY penalty for holista

## Legislative provisions relevant to Holista’s penalty

1. As has already been mentioned, s 1317G(1) provides that the Court **may** order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum.

**1317G Pecuniary penalty orders**

*Court may order person to pay pecuniary penalty*

(1) A Court may order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of a civil penalty provision if:

(a) a declaration of contravention of the civil penalty provision by the person has been made under section 1317E; and

…

(c) if the contravention is of a financial services civil penalty provision [that is not an excluded civil penalty provision under Part 7.7A], the contravention:

(i) materially prejudices the interests of acquirers or disposers of the relevant financial products; or

(ii) materially prejudices the issuer of the relevant financial products or, if the issuer is a corporation, scheme or fund, the members of that corporation, scheme or fund; or

(iii) is serious; …

…

The order is a ***pecuniary penalty order.***

*Maximum pecuniary penalty*

(2) The pecuniary penalty must not exceed the pecuniary penalty applicable to the contravention of the civil penalty provision.

…

*Pecuniary penalty applicable to the contravention of a civil penalty provision-by a body corporate*

1. The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by a body corporate is the greatest of:

(a) 50,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention-that amount multiplied by 3; and

(c) either:

(i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or

(ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units–2.5 million penalty units.

*…*

*Determining pecuniary penalty*

(6) In determining the pecuniary penalty, the Court must take into account **all relevant matters**, including:

(a) the nature and extent of the contravention; and

(b) the nature and extent of any loss or damage suffered because of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in foreign country) to have engaged in similar conduct.

…

 (Emphasis added.)

1. In respect of s 1317G(1), in the present case, subparagraph (a) is satisfied. A declaration of contravention by the person will have been made under s 1317E. Subparagraph (c) sets out what of three possible consequences must flow from the contravention, in order for a pecuniary penalty to be imposed. Holista admits that its contravention of s 674(2) of the *Corporations Act*, is *serious* within the meaning of subparagraph (iii) of s 1317G(1)(c). It is therefore unnecessary to consider the other two alternatives in subparagraph (c). Accordingly, the discretion to impose a pecuniary penalty is enlivened.
2. The maximum penalty that could be ordered against Holista in respect of each contravention of s 674(2) is $10.5 million.
3. ASIC submitted that, based on the admitted contraventions, a total penalty in the range of $1,800,000 to $2,000,000 is appropriate, regardless of the finding as to whether the contraventions arising from the Orders Shortfall Information and the Revenue Shortfall Information commenced on 9 April 2020 or 22 April 2020. It submitted that, if Holista was found to have been reckless, the appropriate penalty range would be $2,100,000 to $2,500,000. ASIC accepts that, applying the course of conduct principle, a single penalty ought to be imposed for all contraventions: *Transport Workers’ Union of Australia v Registered Organisations Commission (No 2) (****TWU****)* [2018] FCAFC 203; 267 FCR 40 at [90]:

That there can be one penalty from multiple contraventions was recognised by *The Agreed Penalties Case*. In some cases it is plain that thousands of contraventions (even if they can be calculated) cannot meaningfully be individually dealt with: *Australian Competition and Consumer Commission v* *Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405. Sometimes parties come with an agreed position that one penalty appropriately reflects the penalty for all contraventions. This is not, however, a function of a course of conduct limiting the penalty to one contravention (which the multiple contraventions are not) or limiting the penalty for multiple contraventions to one penalty by reference to one maximum penalty. The **task is to evaluate** the conduct and its course (called a course of conduct) and assess **what penalty is, or penalties are, appropriate for the proven contraventions**.

(Emphasis added.)

1. Holista submitted that an appropriate pecuniary penalty would be $500,000.

## The approach to the determination of an appropriate penalty

1. Although the High Court has warned against the use of prescriptive factors, in particular the “French factors”, as a “rigid catalogue of matters for attention” or a “legal checklist” (*Pattinson* at [19], quoting *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FCR 560 at [91]), there is a statutory mandate in the present context, set out in s 1317G(6), to take into account at least four matters, in addition to any others that may be relevant.
2. In addition to the statutory mandate in s 1317G(6), the Court’s task remains evaluative in determining what is appropriate in the circumstances of the particular case. As the majority said in *Pattinson* in relation to the discretion conferred by s 546 of the *Fair Work Act* , at [40]:

[It is] like any discretionary power conferred by statute on a court, to be exercised judicially, that is, fairly and reasonably having regard to the subject matter, scope and purpose of the legislation.

1. In undertaking its evaluative task, the Court is guided by the so-called “French factors”, which subsume the statutory considerations. These were first enunciated by French J in *CSR* at 52, 152-52, 153, and then expanded upon by his Honour in *Chemeq* at [99]:

… I extract the following factors relevant to the level of penalty for contravention of the continuous disclosure provisions. The list is non-exhaustive:

(1) The extent to which the information not disclosed would have been expected to and (if applicable) did affect the price of the contravening company’s shares (s 674(2)(c)).

(2) The extent to which the information, if not generally available, would have been discoverable upon inquiry by a third party (s 676(2)).

(3) The extent (if any) to which acquirers or disposers of the company’s shares were materially prejudiced by the non-disclosure (s 1317G(1A)).

(4) The extent to which (if at all) the contravention was the result of deliberate or reckless conduct by the corporation.

(5) The extent to which the contravention was the result of negligent conduct by the corporation.

(6) The period of time over which the contravention occurred.

(7) The existence, within the corporation, of compliance systems in relation to its disclosure obligations including provisions for and evidence of education and internal enforcement of such systems.

(8) Remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention.

(9) The seniority of officers responsible for the non-disclosure and whether they included directors of the company.

(10) Whether the directors of the corporation were aware of the facts which ought to have been disclosed and, if not, what processes were in place at the time, or put in place after the contravention to ensure their awareness of such facts in the future.

(11) Any change in the composition of the board or senior managers since the contravention.

(12) The degree of the corporation’s cooperation with the regulator including any admission of contravention.

(13) The prevalence of the particular class of non-disclosure in the wider corporate community.

1. In addition to these matters, other relevant considerations include the size of the contravening company: see *Pattinson* at [18], quoting *CSR* at 52, 152-52, 153.
2. In undertaking its evaluative task, the Court must be vigilant as to its purpose for doing so. That purpose is, and remains, deterrence (*Pattinson* at [15]) as stated by French J in *CSR* at 52, 136:

The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.

1. I turn then to consider the factors relevant to the circumstances of this case.

#### Maximum penalty

1. As I have already observed, the maximum penalty relevant to each contravention in this case is $10.5 million.
2. In *Pattinson* (at [49]-[55]), the High Court explained the relevance of a prescribed maximum penalty as a yardstick. It held that the Full Federal Court had erred in treating the statutory maximum “as implicitly requiring that all contraventions be graded on a scale of increasing seriousness, with the maximum to be reserved exclusively for the worst category of contravening conduct”: at [49]. The Court continued at [50]:

Considerations of deterrence, and the protection of the public interest, justify the imposition of the maximum penalty where it is apparent that no lesser penalty will be an effective deterrent against further contraventions of a like kind. Where a contravention is an example of adherence to a strategy of choosing to pay a penalty in preference to obeying the law, the court may reasonably fix a penalty at the maximum set by statute with a view to making continued adherence to that strategy in the ongoing conduct of the contravenor’s affairs as unattractive as it is open to the court reasonably to do.

1. There is no suggestion on the facts of this case that Holista adhered to a strategy of choosing to pay a penalty, in preference over obeying the law. What use then is to be made of the yardstick? The High Court drew attention to two important considerations that emerge from the reasoning of the Full Court in *Reckitt Benckiser* (2016) 34 ALR 25 at [155]-[156]. The first was their Honours’ recognition that the maximum penalty is “but one yardstick that ordinarily must be applied” and must be treated “as one of a number of relevant factors, albeit an important one”: *Pattinson* at [54], quoting *Reckitt* at [155]. The second was that the maximum penalty “does not constrain the exercise of the discretion” under s 546 of the *Fair Work Act* (or its analogues in other Commonwealth legislation), beyond requiring “some reasonable relationship between the theoretical maximum and the final penalty imposed”: *Pattinson* at [54]-[55].
2. Earlier in that case, the High Court had considered proportionality in the context of a civil penalty regime. In observing (*Pattinson* at [10], [38]) that the “notion of proportionality”, in the sense in which that expression is used in the criminal law, could not be translated coherently into civil penalty regimes, the Court (at [40]) approved the following statement of Burchett and Kiefel JJ in *NW Frozen Foods* at 293:

[I]nsistence upon the deterrent quality of a penalty should be balanced by insistence that it “not be so high as to be oppressive”. Plainly, if deterrence is the object, the penalty should not be greater than is necessary to achieve this object; severity beyond that would be oppression.

#### Nature and extent of the contravention

1. Continuous disclosure obligations are “based on the efficient market hypothesis that current share prices should reflect all available information”: Michael Legg, “Shareholder Class Actions in Australia – the Perfect Storm?” (2008) 31(3) *University of New South Wales Law Journal* 669 at 684. Professor Paul Davies QC has observed that the disclosure of information by companies is a crucial initial step in the process of price formation, whereby market participants rely on available information to evaluate securities and make investment decisions: see Paul Davies, “Liability for misstatements to the market: A discussion paper by Professor Paul Davies QC” (Discussion Paper, Treasury, March 2007). In *James Hardie Industries NV v Australian Securities and Investments Commission* [2010] 274 ALR 85; NSWCA 332 at [355] (per Spigelman CJ, Beazley and Giles JJA), the New South Wales Court of Appeal noted that the “timely disclosure of market information is essential to maintaining and increasing the confidence of investors in Australian markets, and to improving the accountability of company management”. Similar observations have been made more recently by Beach J in *Australian Securities and Investments Commission v* ***Helou (No 2)*** [2020] FCA 1650 at [149] and [157].
2. For all these reasons, contraventions of the continuous disclosure obligation are serious. Holista has, too, admitted that its contraventions were serious. As I have found, they persisted for three months, from 9 April 2020 until 9 July 2020, until a corrective disclosure was eventually made. They also persisted after the Board had been made aware, on 27 April 2020, of the likelihood that the 9 April 2020 Announcement was incorrect. Further, the information in question represented a very large proportion of Holista’s operating revenue.
3. There is no evidence to suggest that the contraventions were the result of a deliberate decision by Holista not to comply with its continuous disclosure obligations. There is no evidence of any profit or benefit to Holista as a result of the contraventions: cf *Australian Securities and Investments Commission v* ***GetSwift*** *Ltd (Penalty Hearing)* [2023] FCA 100 at [73]. Nevertheless, I have found that Holista was reckless as to the materiality of the Non-Disclosed Information.

#### Nature and extent of any loss or damage suffered

1. ASIC submitted, albeit faintly, that a false market persisted for an extended period of time, from April to July 2020. There is, however, as identified by ASIC, no evidence of any particular loss and damage having been suffered by investors. There is no evidence that acquirers or disposers of the company’s shares were materially prejudiced by the non-disclosure, nor that the contravening conduct was the result of any “plan” to mislead the market: see *Chemeq* at [99]; ***ASIC v Westpac*** *Banking Corp* [2022] FCA 359; 158 ACSR 647 at [122]. I am unable to find that there has been any relevant loss or damage suffered by investors, beyond what is theoretical.

#### Circumstances in which the contravention took place

1. Holista submits that the fact the non-disclosure took place during the uncertainty and difficulties faced by companies during the COVID-19 pandemic is a matter of mitigation. It submits, for example, that it is apparent that Dr Marnickavasagar was receiving “vague and uncertain” responses from Mr Maison regarding the status of orders from Health Therapies, and that uncertainty was at least, in part, causally connected to government lockdowns in the United States. Whilst ASIC accepts that COVID-19 contributed to the uncertainty in commercial markets, it points to the “heightened need for clear and compliant disclosure in capital markets” particularly when involving matters relating to the pandemic. The purpose of the *Coronavirus Determination* has already been described above. In circumstances where the policy settings were altered to ameliorate the consequences for breach of the continuous disclosure obligations, I accept that the difficulties faced by companies during the pandemic are, prima facie, mitigating factors. Nevertheless, despite the uncertainties and the vagueness with respect to Health Therapies’ position, I have found that Dr Marnickavasagar chose, perhaps optimistically, to take a substantial risk – one that I have found to have been reckless.

#### No prior contraventions

1. Holista has been listed on the ASX since 2009. It has never previously contravened the *Corporations Act* nor engaged in any other similar conduct: SAFA [8(a)].

#### Seniority of officers involved, knowledge of directors, and processes to inform directors of facts that ought to have been disclosed, change in senior officers or directors

1. Holista accepts that Dr Marnickavasagar, its most senior officer, was responsible for the contravening conduct. Dr Marnickavasagar has personally admitted liability and has agreed to pecuniary penalty and disqualification orders. The remainder of the Board was apparently not aware of the true extent of the non-disclosures until late June 2020.
2. Dr Marnickavasagar remains on the Board of Holista, pending the appointment of a replacement CEO, as does Mr Tan, who has been the company’s Chief Financial Officer (**CFO**) since December 2019. Otherwise, the composition of the Board has changed entirely. Dr David Deloub was appointed as the Non-Executive Chairperson on 6 April 2023, Ms Loren King was appointed a Non-Executive Director on 31 July 2021, and Mr Jay Stephenson was appointed as the Company Secretary on 1 September 2021: SAFA [121], [11]. The three new members of the Board were not involved in any contravening conduct: SAFA [121].
3. Although Holista had a **Continuous Disclosure Policy** in place at the time of the contraventions, it did not stipulate a procedure for the manner in which decisions were to be made regarding the information that was to be disclosed, or a procedure for the review of ASX announcements by Holista’s Board or its lawyers: SAFA [117].

#### Degree of cooperation with the regulator including any admission of contravention

1. Holista has substantially admitted liability and joined in an agreed statement of facts. Although the amount of the penalty was not agreed and there were two outstanding issues going to liability that were required to be litigated, Holista’s admissions have avoided the need for a significant contested hearing on all issues. Consequently, its cooperation and acknowledgment of wrongdoing “bears upon the evaluation of the need for specific deterrence in fixing the level of the penalty”, noting that “court resources have been saved and public resources (in the form of the regulators’ resources) then become available to be deployed in further regulatory activity”: *Australian Securities and Investments Commission v Newcrest Mining Ltd* [2014] FCA 689; 101 ACSR 46 at [61].

#### Existence of compliance systems, and provisions for and evidence of education and internal enforcement of such systems, remedial and disciplinary steps

1. Holista implemented a **Revised** Continuous Disclosure **Policy** in or around February 2022. The Revised Policy adopted procedures for the company secretary to oversee, coordinate and provide guidance on disclosure-related matters, and provides for a comprehensive procedure for the review and release of ASX announcements: SAFA [119].
2. Nevertheless, ASIC submitted that the evidence does not disclose a positive culture of compliance within Holista. Although the Board of Holista had discussed a draft revision to the policy on 4 June 2020, by which stage the gaps in the Continuous Disclosure Policy had become apparent, the revised draft was never finalised: SAFA [118]. The Revised Policy was adopted retroactively – approximately 6 months after the proceedings had been commenced – rather than proactively. On the one hand, that is a matter which tends to suggest a certain lack of appreciation about the importance of having an appropriate policy in place. On the other hand, the Revised Policy was adopted within five months of the appointment of Mr Stephenson, and prior to the appointment of Mr Deloub. This tends to suggest the newly appointed Board members were acutely aware of the need to adopt the Revised Policy expediently.
3. There is no evidence of any education in relation to corporate governance generally or of continuous disclosure obligations specifically.
4. There is no evidence of any disciplinary processes or internal enforcement procedures. It is remarkable that Dr Marnickavasagar remained on the Board at the date of trial, despite his admission of serious contraventions. It is also astonishing that no disciplinary action was taken against him by Holista. The explanation given, namely that it was difficult to find a replacement CEO, particularly while the proceedings remain on foot, is not a credible reason for retaining Dr Marnickavasagar as CEO, in the face of the conduct to which he has admitted. The evidence disclosed that no attempt had been made to find a replacement until 22 September 2023.

#### Holista’s size and capacity to pay

1. Holista relied on its size and capacity to pay as mitigating factors in the present case. As was said in *Australian Competition and Consumer Commission v Leahy Petroleum (No 2)* [2005] FCA 254; 215 ALR 281 at [9], where both factors were similarly relied upon in an attempt to mitigate the quantum of penalty:

Plainly, such factors can be relevant to the penalty that is necessary to deter the company from contravening the Act in the future. **Size** may also be **relevant to general deterrence** because other potential **contraveners are likely to take notice of penalties imposed on companies of a similar size.** However, a contravening company’s **capacity to pay a penalty is of less relevance to the objective of general deterrence** because that objective is not concerned with whether the penalties imposed have been paid. Rather, it involves a penalty being fixed that will deter others from engaging in similar contravening conduct in the future. Thus, general deterrence will depend more on the expected quantum of the penalty for the offending conduct, rather than on a past offender’s capacity to pay a previous penalty. I therefore respectfully agree with the observation of Smithers J, referred to by Burchett and Kiefel JJ in *NW Frozen Foods*, to the effect that, **a penalty that is no greater than is necessary to achieve the object of general deterrence, will not be oppressive**.

1. Similarly, in *Pattinson* at [41], the High Court accepted that a pecuniary penalty provision “requires the court to ensure that the penalty it imposes is ‘proportionate’, where that term is understood to refer to a penalty that strikes a reasonable balance between deterrence and oppressive severity”.
2. As to general deterrence, Holista submitted that the following matters were relevant to its size in urging a finding that, objectively, it is a small publicly listed company:
3. as at 27 October 2023, Holista’s market capitalisation was $2.78 million;
4. as at 30 June 2023, Holista had total assets of $4,314,819, total liabilities of $4,052,217, and net assets of $262,602; and
5. For the years ended 31 December 2020, 2021 and 2022, Holista recorded trading revenue of $7.1 million, $8 million, and $8.2 million respectively.
6. ASIC contended that Holista’s financial position is not a reason against imposing a penalty in the range it proposes. At the date of the 9 April 2020 Announcement, Holista’s market capitalisation was $45.43 million. That figure fell to $38.55 million at market close on 8 July 2020, the day before the corrective announcement, an approximate reduction of 16%. There is no evidence as to why the market capitalisation of Holista as at 27 October 2023 is so much lower than in 2020. Holista submitted that, in the absence of any such evidence, I could not draw any conclusion about the cause and so, for the purposes of assessing the general deterrent value of a penalty, I should be concerned only with comparing companies of a similar size to Holista, as at the date of imposition of the penalty.
7. Whilst I give some weight to Holista’s present financial position, I do not necessarily accept that the correct comparators are companies of a similar size to Holista *at* *present*. Rather, I consider the correct approach is to compare companies of a similar size *as at the date of the contravention*. One reason to adopt such an approach might be the relative risk appetites of larger companies, as compared with smaller companies, particularly in circumstances such as these, where I have found that Holista was reckless as to its continuous disclosure obligations under the *Corporations Act*. Were Holista to engage in similar contraventions today, and were there to be a similar market reaction to its conduct, it can reasonably be supposed that a 16% reduction in its present value would be of significantly greater consequence to shareholders in a company of its present size (cf *Chemeq* at [98], extracted below).
8. As to Holista’s capacity to pay, Holista contended that if it is ordered to pay a pecuniary penalty within the range proposed by ASIC, it will experience significant financial difficulties. Those difficulties arise from the following relevant facts: as at 31 October 2023, it had A$100,000 in cash or cash equivalents; the forecast residual cash available by December 2024 is approximately A$440,000; despite a reported 48% increase in unaudited sales in the October 2023, revenue is still down on the March 2023 quarter and has not materially altered the cash flow position; its unused debt facility could not be used to pay a pecuniary penalty; and repayments to Holista of the related-party loan to Galen Biomedical are already included in the cash forecasts. Whilst taking all of those factors into account, it was clear from the evidence given by Ms King under cross-examination that Holista’s financial prospects appear to be improving.
9. Holista submitted that any pecuniary penalty will have a significant effect on Holista’s financial position to the detriment of the very investors for whom the statutory continuous disclosure regime has been designed to protect. As French J observed in *Chemeq* at [98]:

Penalties imposed on the corporation may affect shareholders including those who have become shareholders on a set of assumptions induced by the very non-disclosure complained of. In some cases it is possible also that creditors may be affected. Who then is being deterred when only the corporation is penalised? I am not sure that there is a satisfactory answer to this concern within the present statutory scheme. One might imagine that if a penalty is to be significant to a corporation it will also be significant to its shareholders in its impact on the capital which backs their shares. In a company with capitalisation as high as that of Chemeq, the impact on individual shareholders may be insignificant. The penalties that count most are likely to be those imposed on the responsible individuals. Nevertheless the law as presently framed requires the assumption that the contravening corporation is a person distinct from its shareholders and that it can be deterred by the imposition of appropriate penalties.

1. Holista submitted that the pecuniary penalties proposed by ASIC are not necessary for specific deterrence in circumstances where there is minimal risk of reoffending, because of: the change in the composition of the Board, the Revised Continuous Disclosure Policy; Dr Marnickavasagar’s agreement to a four-year disqualification period; and the fact that Holista has not deliberately structured its business in a manner which ensures that minimal assets are available to pay any penalty.

#### Parity

1. The present case concerns conduct that occurred after the commencement of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties Act) (2019)* (Cth) (***Strengthening Penalties Act***), which significantly increased the level of pecuniary penalties. Analogising with cases decided before the implementation of that legislation is, therefore, problematic in an absolute sense, although some guidance may be drawn from penalties imposed as a percentage of the statutory maximum.
2. ASIC pointed to cases where companies had been ordered to pay a pecuniary penalty in the range of $650,000 – $800,000 in the context of a statutory maximum of $1 million. Each of the examples concerned corporations with an extent of market capitalisation that bears no correlation to that of Holista: see, for example, *Australian Securities and Investments Commission v Rio Tinto (No 2)* [2022] FCA 184 at [12]-[13], ~USD82 billion at the date of contravention/~USD123 billion at the date of penalty hearing; *Newcrest* at [72], ~USD7.5 billion at the date of contravention; *Chemeq* at [61], ~AUD474 million at the date of contravention. As O’Bryan J observed, however, in *ASIC v ANZ* at [72], the circumstances of each and every case differ, and it is particularly difficult to draw comparisons where the parties have reached an agreement on the level of pecuniary penalty.

#### What is the appropriate penalty?

1. I approach the assessment of the appropriate penalty in this case on the basis that there has been one contravention, stemming from the 9 April 2020 Announcement, and where the statutory maximum, as at the time of the contravention, is $10.5 million. Although Holista is not a large company, it was in a substantially superior financial position at the time of the contravention, compared to its present financial state. Moreover, regardless of its size, it is a listed entity, with its securities offered to the public at large on the ASX. They – shareholders and investors – are the persons for whom the continuous disclosure regime exists. Holista’s conduct had significant consequences for its financial position, and so for its investors, after the corrective disclosure.
2. I accept that the need for specific deterrence is reduced in this case, because of the renewal of the Board and Dr Marnickavasagar’s admissions and agreement to a significant period of disqualification. Nevertheless, I take into account that Mr Tan remains the CFO and that some members of the current Board appear to have elected to take no action to remove or even discipline Dr Marnickavasagar.
3. In circumstances where I have found that Holista’s conduct was reckless, the objects of general deterrence dictate that a significant penalty is warranted to deter others from reckless failure to disclose material information to the ASX.
4. In all the circumstances, I consider a penalty of $1.8 million, being the lowest end of the range proposed by ASIC, to be appropriate to achieve the objects of both specific and general deterrence. I am conscious that a penalty should not be beyond what is necessary to achieve this object and that there must be some “reasonable relationship” between the “theoretical maximum and the final penalty imposed”: *Reckitt Benckiser* at [156]. In arriving at this amount, I take into account Holista’s size and that, when considering its effect on general deterrence, it is an amount arrived at relative to companies of a similar size at the time of the contravention.
5. I have taken into account Holista’s submissions as to the associated financial burden, even from a penalty of $500,000. Relative to the applicable statutory maximum of $10.5 million, the sum I have arrived at represents a very small proportion of the applicable maximum liability as compared with comparator cases decided prior to the *Strengthening Penalties Act*, albeit in relation to much larger companies. I consider that any lower sum would provide little general deterrence. As was said by the Full Court in *Australian Competition and Consumer Commission v High Adventure Pty Ltd* [2005] FCAFC 247; ATPR 42-091 at [11]:

Moreover, as deterrence (especially general deterrence) is the primary purpose lying behind the penalty regime, there inevitably will be cases where the penalty that must be imposed will be higher, perhaps even considerably higher, than the penalty that would otherwise be imposed on a particular offender if one were to have regard only to the circumstances of that offender. In some cases the penalty may be so high that the offender will become insolvent. That possibility must not prevent the Court from doing its duty for otherwise the important object of general deterrence will be undermined.

# Liability of Dr Marnickavasagar

## Legislative provisions relevant to liability

1. Section 180(1) of the *Corporations Act* is a civil penalty provision (s 1317E). It provides:

**180 Care and diligence—civil obligation only**

*Care and diligence – directors and other officers*

(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

(a) were a director or officer of a corporation in the corporation’s circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

1. Section 1309(2) is concerned with the provision of false or misleading information by an officer or employee of a corporation to an operator of a financial market. Contravention of s 1309(2) is both an offence (s 1309(11)) and enlivens a civil penalty (s 1309(12)).

**1309 False information etc.**

…

(2) An officer or employee of a corporation who makes available or gives information, or authorises or permits the making available or giving of information, to:

(a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation; or

(b) if the corporation is taken for the purposes of Chapter 2M to be controlled by another corporation-an auditor of the other corporation; or

(c) an operator of a financial market (whether the market is operated in Australia or elsewhere) or an officer of such a market;

being information, whether in documentary or any other form, relating to the affairs of the corporation that:

(d) is false or misleading in a material particular; or

(e) has omitted from it a matter or thing the omission of which renders the information misleading in a material respect;

without having taken reasonable steps to ensure that the information:

(f) was not false or misleading in a material particular; and

(g) did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect;

contravenes this subsection.

…

(12) A person contravenes this subsection if the person contravenes subsection (2).

Note: This subsection is a civil penalty provision (see section 1317E).

### The admitted contravention of s 180(1)

1. Dr Marnickavasagar admits (SAFA [97]) that, by authorising the 9 April 2020 Announcement, in the circumstances of making the Non-Disclosed Information representations, and in the circumstances that occurred between 9 April 2020 and 9 July 2020 which have been outlined above, he failed to discharge his duties to Holista with the degree of care and diligence that a reasonable person would exercise if he or she were the Managing Director or Chief Executive Officer of a corporation in Holista’s circumstances, occupied the offices held by, and had the same responsibilities as, Dr Marnickavasagar. He **admits** he failed to:
2. ensure that any announcement which he approved was not misleading or deceptive or likely to mislead or deceive;
3. qualify, withdraw or correct any existing announcement he made or approved to that it was not misleading or deceptive or likely to mislead or deceive;
4. ensure that information which was required to be notified to the ASX pursuant to the Listing Rules was provided to the ASX;
5. ensure that each of the Orders Representation and the Revenue Representation was not misleading or deceptive or likely to mislead or deceive;
6. ensure that the 9 April 2020 Announcement was not misleading or deceptive or likely to mislead or deceive;
7. qualify, withdraw or correct the 9 April 2020 Announcement so that it was not misleading or deceptive or likely to mislead or deceive prior to the 9 July 2020 Announcement.
8. Dr Marnickavasagar **admits** that he thereby caused or permitted Holista to breach ss 674(2) and 1041H of the *Corporations Act* in the manner admitted to by Holista: SAFA [98]-[99].
9. Dr Marnickavasagar **admits** further that he exposed Holista to the risk of legal proceedings, including for declarations of contravention, in relation to Holista’s continuous disclosure obligations, the Orders Representation and the Revenue Representation, and costs: SAFA [100].
10. He also **admits** that his contravention of s 180 was serious within the meaning of s 1317G(1)(b)(iii) of the *Corporations Act*: SAFA [101].

### The admitted contraventions of ss 1309(2) and (12)

1. Dr Marnickavasagar **admits** (SAFA [105]-[107])that he contravened s 1309(2) and thereby also s 1309(12), in making available or giving, or alternatively authorising or permitting the making available or the giving of, the 9 April 2020 Announcement to the ASX and to members of Holista; the 17 April 2020 ASX Response to the ASX; and the 20 April 2020 ASX Response to the ASX and to members of Holista, on the basis that he **admits**:
2. the information in the 9 April Announcement which contained the Orders Representation and the Revenue Representation was false and misleading in a material particular (SAFA [102];
3. the information in the 17 April 2020 ASX Response was false and misleading in a material particular, being the date on which the Term Sheet was executed (SAFA [103]); and
4. the information in the 20 April 2020 ASX Response was false and misleading in a material particular, being the date on which the Term Sheet was executed (SAFA [104].
5. He **admits** further that each of the contraventions of ss 1309(2) and (12) referred to above were serious: SAFA [108].

### The two matters in contention

1. Two matters remain in dispute as between ASIC and Dr Marnickavasagar that bear on the extent of Dr Marnickavasagar’s liability. The firstis the extent to which Dr Marnickavasagar’s culpability is said to be mitigated by his reliance on the Distribution Agreement, and the provision of the Sales Projection Spreadsheet on 8 April 2020. The second is the extent to which he should bear any responsibility for the delay between 29 June 2020 and 9 July 2020 in publishing the corrective disclosure statement and, in that regard, the extent to which he was entitled to rely on other Board members.

#### The Distribution Agreement and Sales Projection Spreadsheet

1. As to the first matter, it is difficult to understand how it could be said that the Distribution Agreement assists in mitigating Dr Marnickavasagar’s culpability for the following reasons. The initial term of the Distribution Agreement was three years, as provided for in cl 2. Clause 7 of the Agreement provided:

**7. MINIMUM COMMITMENTS**

The Distributor shall order and provide buyers for, during each of the periods set forth in **Exhibit A**, at least the minimum quantities of each Product indicated in **Exhibit A** for such periods. The Supplier, at its sole discretion, may amend **Exhibit A** on 30 days’ prior written notice to the Distributor.

(Emphasis in original.)

1. Exhibit A did not provide for any “periods” as described in cl 7. Rather, it simply recorded that:

The following products are the subject of this distribution agreement. Any products not specifically listed are excluded from this agreement:

|  |  |  |
| --- | --- | --- |
| PRODUCT NAME | INITIAL PRICE  | MINIMUM QUANTITIES/TIME PERIOD |
| 1. Natshield (60ml) | $5.99 | 200,000 |
| 1. Natshield (30ml) | $4.69 | 200,000 |

1. It was apparent on the face of the Distribution Agreement that there was no commitment on part of Health Therapies to a “minimum” order of “at least A$3.0 million per year” as claimed in the 19 March 2020 Announcement. Still less did the Distribution Agreement provide grounds for the statement that “Health Therapies has placed additional orders for 415,000 bottles totalling A$3.8 million for delivery between April and June 2020”, as claimed in the 9 April 2020 Announcement.
2. Similarly, the Sales Projection Spreadsheet could not be said to have provided any reasonable basis for what Dr Marnickavasagar approved for announcement on 9 April 2020. The Sales Projection Spreadsheet comprised three separate tables attached to the email sent by Mr Maison on 8 April 2020.
3. The first had a notation on the far left, “PRE-LAB REPORT”, which signalled that the projections were generated before the results of the efficacy testing of the product. That table purported to suggest projected 700,000 sales of 60ml units, which comprised of: 200,000 in each of May and June 2020, split equally between “Avorit” and “NJ Governor – Phil Turner”; 300,000 in July 2020, 100,000 in projected sales to “Avorit” and the balance of 200,000 to “NJ Governor – Phil Turner”.
4. The second table had a similar notation, but was premised on projections “POST – LAB REPORT”. It projected 906,000 sales of 60ml units between April and July 2020 to five different purchasers.
5. The third table was premised on projections “POST – TRADEMARK REGISTRATION” and projected 160,000 sales of 60ml units between April and July 2020, to one distributor.
6. Dr Marnickavasagar submitted that by referring to only 400,000 units in the 9 April 2020 Announcement, he was taking a conservative view of these forecasts. He submitted that, although it was correct at the date of receiving the Sales Projection Spreadsheet that no order had been placed, he had no reason to doubt, and there was no evidence to doubt, that Mr Maison or Health Therapies would not follow through with their projections.
7. That submission cannot be accepted. A fair reading of the spreadsheets, and the email dated 8 April 2020 which accompanied it, could not reasonably have given Dr Marnickavasagar any confidence that the projections would eventuate as actual sales. First, the projections did not accord in any material respect with the Distribution Agreement entered into between Health Therapies and Holista, only three weeks previously. Secondly, the numbers were expressed to have been based only on “actual discussions” – there was no suggestion that any purchase commitments, whether in writing or otherwise, had in fact been made by Avorit or the New Jersey Governor, nor any of the other identified prospective purchasers who were expected to place orders post “[lab] [report]” and “[trademark] [registration]”. Thirdly, Mr Maison acknowledged expressly the “embryonic” nature of various discussions he had because the “science not being immediately available” was having an effect on “which sales process to follow and how much to invest in this particular venture”.
8. Dr Marnickavasagar also submitted that the Court should take into account his subjectively held belief that the forecasted sales on which he relied would be made good, which was a mistake. Again, even if it were relevant, which it is not, there is no evidence of Dr Marnickavasagar’s subjective state of mind.
9. I do not consider that Dr Marnickavasagar’s reliance on the Distribution Agreement or the Sales Projection Spreadsheet diminish his culpability. Indeed, I have already found that they were matters relevant to the conclusion I have reached that Holista, through Dr Marnickavasagar, acted recklessly.

#### Continuous disclosure obligations post 9 April 2020 Announcement

1. As to the second matter, it is difficult to see how Dr Marnickavasagar could continue to rely on the Distribution Agreement and the Sales Projection Spreadsheet as matters unfolded after the 9 April 2020 Announcement. The projections clearly did not eventuate and, as has already been discussed, Dr Marnickavasagar, in discussion with the Board about the discrepancy between the numbers announced on 9 April 2020 and those sought to be announced at the end of April, dismissing the Board’s concerns as a “timing issue” does not withstand scrutiny. In fact, it was contrary to Holista’s Revenue Policy. Further, Dr Marnickavasagar was apparently untroubled by the repeated attempts by fellow Board members to impress upon him the importance of Holista’s continuous disclosure obligations.
2. That attitude may well have been informed by his belief that he was entitled to rely on others within the company in delaying the 9 July 2020 Announcement between 29 June 2020 and 9 July 2020. Dr Marnickavasagar submitted that, because he was based in Malaysia and Holista had Australian company officers who were appointed specifically for their “capital market and corporate governance skills” (SAFA [10]), it would not have been unreasonable for him to have relied on their expertise.
3. Recently, in *Australian Securities and Investments Commission v Wilson (No 3)* [2023] FCA 1009 at [116]-[119], Jackson J reiterated the standard required of directors by s 180(1):

[116] The standard in s 180(1) concerns the exercise of powers and duties, so those powers and duties need to be identified before the provision can be applied: *Cassimatis v Australian* *Securities and Investments Commission* [2020] FCAFC 52; (2020) 275 FCR 533 (***Cassimatis*** ***FC***) at [452] (Thawley J). In ***Shafron*** *v Australian Securities and Investments Commission* [2012] HCA 18; (2012) 247 CLR 465 at [18], French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ described the standard set by s 180 as follows (emphasis in original):

The degree of care and diligence that is required by s 180(1) is fixed as an objective standard identified by reference to two relevant elements - the element identified in para (a): ‘the corporation’s circumstances’, and the element identified in para (b): the office *and* the responsibilities within the corporation that the officer in question occupied and had. No doubt, those responsibilities include any responsibility that is imposed on the officer by the applicable corporations legislation. But the responsibilities referred to in s 180(1) are not confined to statutory responsibilities; they include *whatever* responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.

[117] Thus the application of s 180(1) is not confined to the powers and duties which the law attaches to a particular office: see also *Australian Securities and Investments* *Commission v* ***King*** [2020] HCA 4; (2020) 270 CLR 1 at [33] (Kiefel CJ, Gageler and Keane JJ). The inquiry must be directed to the role the person in question plays in the corporation: *Shafron* at [23]; *King* at [35]. That is inevitably a factual inquiry which depends on all the relevant circumstances. It is concerned with whether the facts show that a putative officer has played a role in the corporation and the nature and extent of that role, not with some a priori classification of their position: *King* at [35].

[118] As to the ‘corporation’s circumstances’, these necessarily include any breach or potential breach of law by the corporation, as well as all of the relevant commercial and other circumstances and the conduct of the corporation: *Cassimatis FC* at [456].

119 Directors are required to take reasonable steps to place themselves in a position to guide and monitor the management of the company, but they are entitled to rely on others, unless they know, or by the exercise of ordinary care should know, facts that indicate that they cannot so rely: *Australian Securities and Investments Commission v* ***Maxwell*** [2006] NSWSC 1052 at [101] (Brereton J).

1. The fact of residence overseas does not relieve a director of an Australian listed entity from ensuring the company complies with its continuous disclosure obligations. Even if it were reasonable for Dr Marnickavasagar to have relied on his fellow board members in Australia, there is no evidence that he did so.
2. Dr Marnickavasagar was both the CEO and a member of the Board of Holista. He was intimately involved in the activities of Holista – the ASX responses were issued under his authority, he was responsible for the negotiations with GICC, he was involved in the backdating of the BCTS, he was privy to the communications with Mr Maison and Health Therapies. His liability is not mitigated by the factors to which he has pointed.

### Is it appropriate to make the agreed declarations in respect of Dr Marnickavasagar?

1. Consequently, being satisfied that Dr Marnickavasagar has contravened s 180(1), which at all times has been a civil penalty provision, and that he has contravened s 1309(12), I must make a declaration in the terms prescribed by s 1317E(1): see *Mayfair Wealth* at [184].

# The appropriate PECUNIARY penalty for Dr Marnickavasagar

1. Relevant to the contraventions by Dr Marnickavasagar, s 206C empowers the Court to disqualify a person from being a director of a company:

**206C Court power of disqualification-contravention of civil penalty provision**

(1) On application by ASIC, the Court may disqualify a person from managing corporations for a period that the Court considers appropriate if:

(a) **a declaration is made under:**

(i) **section 1317E** (civil penalty provision) that the person has contravened a corporation/scheme civil penalty provision or subsection 670A(4), 727(6), 728(4) or **1309(12)**; or

…; and

(b) the Court is satisfied that the disqualification is justified.

(2) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate.

…

1. Section 1317G provides, relevantly:

**1317G Pecuniary penalty orders**

*Court may order person to pay pecuniary penalty*

(1) A Court may order a person to pay to the Commonwealth a pecuniary penalty in relation to the contravention of a civil penalty provision if:

(a) a declaration of contravention of the civil penalty provision by the person has been made under section 1317E; and

(b) if the contravention is of a corporation/scheme civil penalty provision, the contravention:

(i) materially prejudices the interests of the corporation, scheme or fund, or its members; or

(ii) materially prejudices the corporation's ability to pay its creditors; or

(iii) is serious; and

 …

*Maximum pecuniary penalty*

(2) The pecuniary penalty must not exceed the pecuniary penalty applicable to the contravention of the civil penalty provision.

*Pecuniary penalty applicable to the contravention of a civil penalty provision-by an individual*

(3) The ***pecuniary penalty applicable***to the contravention of a civil penalty provision by an individual is the greater of:

(a) 5,000 penalty units; and

(b) if the Court can determine the benefit derived and detriment avoided because of the contravention-that amount multiplied by 3.

…

…

*Determining pecuniary penalty*

(6) In determining the pecuniary penalty, the Court must take into account all relevant matters, including:

(a) the nature and extent of the contravention; and

(b) the nature and extent of any loss or damage suffered because of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in foreign country) to have engaged in similar conduct.

## Disqualification

1. ASIC and Dr Marnickavasagar, jointly submit that it is appropriate for the Court to disqualify Dr Marnickavasagar from being a director pursuant to s 206C of the *Corporations Act* for a period of 4 years, and that he be ordered to pay a pecuniary penalty under s 1317G of $150,000 in respect of his contraventions of s 180(1) and ss 1309(2) and (12). It is appropriate that the disqualification order be considered first, and before any pecuniary penalty is assessed: *Cruickshank v Australian Securities and Investments Commission* [2022] FCAFC 128; 292 FCR 627 at [143]-[145]. As Allsop CJ said, at [144]:

This long-standing practice makes sense in that the primary purpose of disqualification orders is the protection of the public, while the purpose of a pecuniary penalty is to act as a specific and general deterrent to the general public against repetition of like conduct: *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 per Santow J at [60] and [125].

1. In considering the appropriateness of the disqualification period proposed jointly by ASIC and Dr Marnickavasagar, I have taken into account the following factors:
2. the seniority of Dr Marnickavasagar, being both CEO and Board Member since 2009;
3. the admitted contraventions which I have characterised as one course of conduct, albeit serious, and the need to protect the public from similar contraventions;
4. the conduct involved providing false and misleading information to the market operator;
5. the information which was the basis of the contraventions represented such a significant proportion of the company’s revenue;
6. the effect on Holista’s share price before and after the 9 April 2020 Announcement, and subsequent to the corrective disclosure;
7. the conduct extended over 3 months;
8. Dr Marnickavasagar’s conduct was reckless but not deliberately wrongful or dishonest; and
9. admissions having been made, albeit relatively late in the proceedings.
10. I have also had regard to the cases referred to in the joint submissions as being comparable: *Australian Securities and Investments Commission v Blue Star Helium Ltd (No 4)* [2021] FCA 1578; 158 ACSR 196; *Australian Securities and Investments Commission v Vocation Ltd (in Liq) (No 2)* [2019] FCA 1783; 140 ACSR 382; *Australian Securities and Investments Commission v Padbury Mining Limited* [2016] FCA 990; 116 ACSR 208; *Australian Securities and Investments Commission v MacDonald* [2009] NSWSC 714; 73 ACSR 638.
11. In all the circumstances, I am satisfied that the appropriate disqualification period is 4 years.

## The appropriate pecuniary penalty

1. As to the proposed pecuniary penalty, the task for the Court is to satisfy itself that the submitted penalty is appropriate: *Fair Work* at [48]. In so doing, the Court assumes that the regulator – in this case, ASIC – “will fashion penalty submissions with an overall view to achieving” its statutory functions, which include, relevantly: to “promote the confident and informed participation of investors and consumers in the financial system” and to “take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it” (*ASIC Act* ss 1(2)(b), 1(2)(g)).
2. ASIC and Dr Marnickavasagar jointly submit that the appropriate penalty is $150,000. At the time of the contraventions, s 1317G(1) provided that the Court may order a person to pay the Commonwealth a pecuniary penalty of the relevant maximum amount where the statutory conditions, set out in subparagraphs (a) – (d), were satisfied. In the present case, subparagraph (a) is satisfied as a declaration of contravention by the person will have been made under s 1317E. Subparagraph (b) is satisfied because it is a serious contravention of a financial services civil penalty provision. The maximum pecuniary penalty of 5000 penalty units prescribed by s 1317G(3)(a) applies to each contravention. Applying the value of a penalty unit under s 4AA of the *Crimes Act 1958* (Cth) at the relevant times of the contraventions, the maximum penalty for each contravention by Dr Marnickavasagar is $1.05 million.
3. In considering the appropriate penalty for Dr Marnickavasagar, the Court is again required to take account of the mandatory considerations in s 1317G(6) of the *Corporations Act*,in addition to undertaking its general evaluative task guided by the French factors. Additional factors relevant to an individual were identified by Santow J in *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; 42 ACSR 80 at [126]. To the extent that these factors are not already expressly contemplated by the French factors, they include: hardship to the individual; the consequences of an associated disqualification order; any prejudice to the individual’s rehabilitation; any remorse or contrition; whether the individual acted on the advice of professionals; and previous unblemished character.

#### Nature and extent of the contravention

1. As I have already explained above, contraventions of the continuous disclosure obligation are serious: *Helou (No 2)* at [149] and [147]. Dr Marnickavasagar has admitted that his contravention of s 180 of the *Corporations Act* in authorising the announcement which led Holista to breach its obligations, was serious. As I have found, Holista’s contravention persisted for three months, from 9 April 2020 until 9 July 2020, because of Dr Marnickavasagar’ admitted failure to qualify, withdraw or correct the announcement: SAFA [97].
2. Dr Marnickavasagar also **admits** to providing false and misleading information to the ASX, and to members of Holista, on three occasions, contrary to ss 1309(2) and (12) of the *Corporations Act*: SAFA [102]-[108].
3. There is, however, no evidence to suggest that Dr Marnickavasagar acted deliberately or dishonestly, nor that he benefitted in any way from the contraventions: cf *GetSwift*.

#### Nature and extent of any loss or damage

1. There is no evidence that “acquirers or disposers” of the company’s shares were materially prejudiced by the non-disclosure, nor that the contravening conduct was the result of any “plan” to mislead the market: *Chemeq* at [99]; *ASIC v Westpac* at [122].

#### Circumstances in which the contravention took place

1. I have already rejected Dr Marnickavasagar plea in mitigation based on the COVID-19 pandemic. I have accepted that the difficulties faced by companies during the pandemic are, prima facie, mitigating factors. Nevertheless, despite the uncertainties and the vagueness with respect to Health Therapies’ position, I have found that Dr Marnickavasagar chose, perhaps optimistically, to take a risk – one that I have found to have been reckless. Further, there was no evidence of Dr Marnickavasagar’s subjective state of mind at the relevant time which explained the conduct in which he chose to engage.

#### No prior contraventions

1. It is accepted that Dr Marnickavasagar has no prior convictions involving contraventions of the *Corporations Act*: SAFA [111].
2. In addition to these mandatory considerations, I take into account that the disqualification period of four years is a significant penalty, particularly for a person in the position of Dr Marnickavasagar, who has been a director of several Australian companies for over a decade. I take into account his cooperation, albeit belated, with ASIC, and the significant admissions he has made. That demonstrates a degree of contrition. I also take into account that Dr Marnickavasagar has agreed to pay ASIC’s legal costs fixed in the sum of $200,000.
3. Although I consider the amount of the proposed penalty to be low, I take into account the regulator’s apparent confidence that, coupled with the disqualification period, the total penalty is appropriate in all the circumstances.

# DISPOSITION

1. There will be declarations and orders accordingly.
2. As agreed, Dr Marnickavasagar must pay ASIC’s investigative and legal costs, fixed in the amount of $200,000. Holista must pay ASIC’s investigate and legal costs of the proceedings in so far as they exceed $200,000 to be taxed, if not agreed.

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| I certify that the preceding one hundred and ninety-one (191) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Sarah C Derrington. |

Associate:

Dated:  19 March 2024