

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: NSD827/2022
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
NUIX LIMITED ACN 117 140 235 & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 28/09/2022 4:33:47 PM AEST

Registrar

Important Information

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

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Concise Statement

No. NSD of 2022

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

Australian Securities and Investments Commission

Plaintiff

Nuix Limited ACN 117 140 235 and others

Defendants

A. THE IMPORTANT FACTS GIVING RISE TO THE CLAIM

Introduction

1. This case involves alleged failures by the First Defendant (**Nuix**) during the period from 18 January 2021 to 21 April 2021 to promptly disclose to the Australian Securities Exchange (**ASX**) material information in contravention of the *Corporations Act 2001* (Cth) (**the Corporations Act**) and the ASX Listing Rules, and making and failing to correct misleading statements about forecasts it had previously published to the market in contravention of the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth) (**the ASIC Act**). As a result of those contraventions, the market was misled. ASIC alleges that Nuix's board of directors breached their duties by causing or otherwise permitting the contraventions by Nuix.
2. Nuix is an Australian company in the business of providing investigative analytics and intelligence software to customers worldwide. Nuix's customers purchase software licences to access one or more of Nuix's applications. Nuix's standard contractual terms provide for upfront payment for annual contracts or either upfront or annual payment for multi-year contracts. In the financial year ending on 30 June 2020 (**FY20**), revenue from subscription licences represented 88.7% of Nuix's revenue, and 59% of its revenue was invoiced in U.S. dollars. Nuix reports in Australian dollars.
3. Nuix was listed on the ASX on 4 December 2020 following an initial public offering (**IPO**) of its shares (**Nuix Shares**) at an offer price of \$5.31 per share, giving it a market capitalisation at listing of \$1.685 billion.
4. Nuix's IPO garnered considerable market and media attention as it involved the ASX's largest-ever software IPO, and an Australian "tech" company with an international business and, as projected by the company, prospects as a high growth stock. On the first day of trading, Nuix's share price closed at \$8.01, up 50.85%, and by 22 January 2021, the share price reached an all-time peak of \$11.86.

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff		
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The Prospectus Forecasts

5. The prospectus issued by Nuix on 18 November 2020 (**Prospectus**) in connection with the IPO contained the following forecasts for the financial year ending on 30 June 2021 (**FY21**):
 - (a) statutory revenue (**Revenue**) of \$193.5 million (**the Prospectus Revenue Forecast**), an increase of 10.0% from FY20; and
 - (b) annualised contract value (**ACV**) at the end of FY21 of \$199.6 million (**the Prospectus ACV Forecast**), an increase of 18.6% from FY20.
6. ACV is the primary software revenue metric used by Nuix. ACV is a non-IFRS measure used by Nuix to assess the total contract value of its software contracts at a point in time on an annualised basis, and to mitigate the fluctuations in Revenue resulting from the upfront revenue recognition of multi-year contracts.
7. The Prospectus Revenue Forecast and the Prospectus ACV Forecast (**the Prospectus Forecasts**) were earnings guidance provided by Nuix which created market expectations and gave rise to the need for close attention from Nuix to the attainability of the Prospectus Forecasts.
8. At all relevant times, the Second Defendant (**Vawdrey**) was a director and the chief executive officer of Nuix, and the Third to Sixth Defendants (together, **NEDs**) were non-executive directors of Nuix.

The 26 February ASX Announcements

9. Nuix's results for the first half of FY21 (**1HFY21**) were Nuix's first published results following the IPO.
10. According to financial results Nuix published to the ASX on 26 February 2021, during 1HFY21 Nuix earned Revenue of \$85.3 million, and its ACV as at 31 December 2020 was \$162 million. Those results disappointed Nuix, and showed that:
 - (a) full year ACV would be, or would likely be, materially lower than the market guidance provided by Nuix, in the form of the projections of growth in ACV contained in the Prospectus; and
 - (b) ACV was materially lower than market expectations of ACV growth.
11. After the close of market on Friday 15 January 2021, and again on 12 February 2021, Vawdrey was provided with a paper which included the following information (**the 1HFY21 ACV Result**):
 - (a) Nuix's ACV at the end of 1HFY21 was \$161.9 million;
 - (b) Nuix's ACV at the end of 1HFY21 was \$17.1 million, or approximately 9.6%, less than the ACV Nuix expected in order to achieve the Prospectus ACV Forecast; and
 - (c) the primary reason Nuix missed the forecast for ACV at the end of 1HFY21 was subscription ACV underperformance.
12. On 12 February 2021, a meeting including Vawdrey and the NEDs (with the exception of the Fourth Defendant) was held to review the Prospectus Forecasts. On or about 11 February 2021, in preparation for that meeting, Vawdrey and the NEDs (**the Directors**) were informed, by the provision of a Board Pack containing financial information for the period ended 31 December 2020, among other things:
 - (a) of the 1HFY21 ACV Result; and
 - (b) that Nuix was forecasting Revenue of \$186.7 million for FY21 (**the February**

Revenue Forecast), which was \$6.8 million, or approximately 3.5%, less than the Prospectus Revenue Forecast.

13. On 25 February 2021, a Board meeting was held to approve the release of the results for 1HFY21, as well as ASX announcements that were released on 26 February 2021 (**the 26 February ASX Announcements**) which included an ASX Market Release, a 1HFY21 Financial Results presentation and an Interim Financial Report.
14. The 26 February ASX Announcements, which were authorised by the Board, stated Nuix's Revenue for, and ACV at the end of, 1HFY21, and reaffirmed the Prospectus Forecasts, without disclosing the February Revenue Forecast and all of the information referred to at paragraph 11 above.
15. Further, during the period from Monday 18 January 2021 until 25 February 2021, Nuix did not disclose the 1HFY21 ACV Result.
16. Following the release of the 26 February ASX Announcements, Nuix's share price fell from the previous day's closing price of \$8.97 to \$6.06, a decline of \$2.91 or 32.44%.

The 8 March ASX Announcement

17. On 1 March 2021, Daniel Silveri (**Silveri**), Nuix's head of financial planning and analysis, prepared a further forecast of Nuix's Revenue for FY21, and concluded that Nuix's Revenue forecast for FY21 was \$186.7 million (**the 1 March Revenue Forecast**), compared to the Prospectus Revenue Forecast.
18. During the week commencing on 1 March 2021, Nuix received feedback and questions from investors and a journalist from *The Australian Financial Review* expressing doubt that Nuix would achieve the Prospectus Forecasts despite their reaffirmation in the 26 February ASX Announcements. Nuix decided to make a further announcement to address market commentary, including an article in *The Australian Financial Review*. Despite this feedback, Nuix did not disclose the information referred to in paragraphs 11(b) and (c) above or give adequate consideration to the attainability of the Prospectus Forecasts prior to the April Forecast (defined below).
19. On 8 March 2021, Nuix released to the ASX an announcement (**the 8 March ASX Announcement**), which was authorised by the Board, in which it, without disclosing the February Revenue Forecast or the 1 March Revenue Forecast (which were the same) and without disclosing the information referred to at paragraphs 11(b) and (c) above:
 - (a) referred to and repeated the reaffirmation of the Prospectus Forecasts in the 26 February ASX Announcements;
 - (b) stated that its ACV at the end of 1HFY21 was "in line with management's expectations";
 - (c) represented that its forecast of Revenue for FY21 was \$193.5 million, comprising a forecast of \$164.1 million for renewal and upsell renewals, and \$29.4 million for new customer revenue.
20. A Board meeting was held on 18 March 2021. At or prior to that meeting, the Board was provided with a Board Pack stating that Nuix's Revenue for FY21 up to 28 February 2021 was \$8.7 million or 8% below the Prospectus forecast of Revenue for the corresponding period, and that Nuix's ACV had declined by 3% from the ACV as at 31 December 2021, to \$158 million on 28 February 2021. Nuix did not disclose to the ASX those facts or the effect of those facts prior to 21 April 2021.

The 21 April ASX Announcement

21. On 8 April 2021, Silveri prepared a further forecast of Nuix's Revenue for FY21 (**the April Forecast**), which he provided to Vawdrey, and which forecast that Nuix's Revenue for FY21 would be \$185.2 million compared to the Prospectus Revenue

Forecast, and proposed updated Revenue guidance to the ASX in the range of \$180 million to \$185 million for FY21.

22. A Board meeting was held on 9 April 2021. At the meeting, Vawdrey informed the other Directors that Nuix's "current best estimate" forecast of Revenue for FY21 was approximately \$185 million. The Board agreed that the Revenue forecast should be reviewed, a proposed ASX announcement circulated by Wednesday, 14 April 2021, and any announcement finalised by the morning of Friday, 16 April 2021.
23. The review of the April Forecast was completed by Silveri by the morning of Tuesday 13 April 2021 and on that day he provided a paper to Vawdrey with a Revenue forecast for FY21 of \$184.4 million.
24. A Board meeting was convened and held at or around 7.00am on Friday 16 April 2021. By that time, Nuix's forecast of ACV for FY21 was approximately 10% below the Prospectus ACV Forecast. However, that meeting did not result in the immediate disclosure of the downgrades of the Prospectus Forecasts.
25. On 21 April 2021, Nuix released an announcement to the ASX (**the 21 April ASX Announcement**), which updated the Prospectus Forecasts, stating that:
 - (a) the Revenue of Nuix for FY21 was forecast to be in the range of \$180 million to \$185 million; and
 - (b) the ACV of Nuix for FY21 was forecast to be in the range of \$168 million to \$177 million.
26. Following the release of the 21 April ASX Announcement, Nuix's share price fell from the previous day's closing price of \$5.07 to \$4.29, a decline of 15.38%.

B. THE RELIEF SOUGHT FROM THE COURT

27. ASIC seeks declarations, pecuniary penalties and costs against Nuix and the Directors, and disqualification orders against the Directors, as set out in its Originating Process.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

Misleading or deceptive conduct by Nuix

28. By releasing the 26 February ASX Announcements, Nuix represented that (**the 26 February Representations**):
 - (a) it was forecasting Revenue for FY21 of \$193.5 million and had reasonable grounds for the forecast as at 26 February 2021; and
 - (b) it was forecasting ACV for FY21 of \$199.6 million and had reasonable grounds for the forecast as at 26 February 2021.
29. By releasing the 8 March ASX Announcement, Nuix (**the 8 March Representations**):
 - (a) repeated the 26 February Representations as at 8 March 2021;
 - (b) represented that Nuix's ACV at the end of 1HFY21 was "in line with management's expectations"; and
 - (c) represented that underperformance in the results at the end of 1HFY21 was driven by the impact of currency headwinds and the timing of certain deals which completed in January 2021.
30. Each of the 26 February Representations and the 8 March Representations (**the Representations**) was misleading or deceptive in that:
 - (a) Nuix was not forecasting Revenue for FY21 of \$193.5 million as at 26 February 2021 or 8 March 2021, or did not have reasonable grounds for a representation

to that effect;

- (b) Nuix did not have reasonable grounds for representing that its ACV for FY21 was forecast to be \$199.6 million as at 26 February 2021 or 8 March 2021;
- (c) Nuix's ACV at the end of 1HFY21 was approximately \$17.1 million or 9.6% below the number Nuix expected in order to achieve the Prospectus ACV Forecast; and
- (d) Nuix's internal analysis indicated that the reason ACV at the end of 1HFY21 was below the forecast was primarily because of subscription ACV underperformance.

31. The 26 February Representations, which were repeated in the 8 March ASX Announcement, are taken to be misleading by s 769C of the Corporations Act and s 12BB of the ASIC Act.

32. Further, the Plaintiff (**ASIC**) alleges that Nuix contravened s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act by:

- (a) failing to disclose in the period from 18 January 2021 until 25 February 2021 the 1HFY21 ACV Result;
- (b) releasing the 26 February ASX Announcements and the 8 March ASX Announcement (**the Announcements**);
- (c) failing to disclose in the Announcements, or contemporaneously, the February Revenue Forecast and the information referred to at paragraphs 11(b) and (c) above; and
- (d) failing to correct the misleading or deceptive statements made in the Announcements at any time prior to 21 April 2021.

Continuous disclosure contraventions by Nuix

33. During the period from 18 January 2021 until 25 February 2021:

- (a) Nuix was aware of the 1HFY21 ACV Result;
- (b) ASX Listing Rule 3.1 required immediate disclosure of the 1HFY21 ACV Result;
- (c) the 1HFY21 ACV Result was not generally available; and
- (d) a reasonable person would expect the 1HFY21 ACV Result, if it were generally available, to have a material effect on the price or value of Nuix Shares, and Nuix was negligent with respect thereto.

34. During the period from 26 February 2021, or alternatively 8 March 2021 or a later date, until 21 April 2021:

- (a) each of the Representations required corrective disclosure;
- (b) there was a false market in Nuix Shares by reason of the misleading Announcements;
- (c) Nuix was aware of the following information:
 - (i) the February Revenue Forecast and the information referred to at paragraphs 11(b) and (c) above, and (from 1 March 2021), the 1 March Revenue Forecast;
 - (ii) Nuix's Revenue for FY21 was likely to be materially below the Prospectus Revenue Forecast (**the Revenue Information**);
 - (iii) Nuix's ACV for FY21 was likely to be materially below the Prospectus ACV

Forecast (**the ACV Information**);

- (d) ASX Listing Rule 3.1 required immediate disclosure of the information referred to in (c) above, and that information was not generally available;
 - (e) after the release of the 26 February ASX Announcements and the 8 March ASX Announcement which reaffirmed the Prospectus Forecasts, a reasonable person would expect the information referred to in (c) above, if it were generally available, to have a material effect on the price or value of Nuix Shares, and in the period prior to 23 March 2021 Nuix was negligent with respect thereto.
35. During the period from 13 April 2021 until 21 April 2021:
- (a) Nuix was aware that its Revenue for FY21 was forecast to be approximately \$185 million or, alternatively, in a range of \$180 million to \$185 million (**the April Information**);
 - (b) Nuix was aware of the Revenue Information and the ACV Information, and that information was not generally available;
 - (c) a reasonable person would expect the information referred to in (a) and (b), if it were generally available, to have a material effect on the price or value of Nuix Shares; and
 - (d) ASX Listing Rule 3.1 required immediate disclosure of the April Information, the Revenue Information and the ACV Information.
36. ASIC alleges that Nuix contravened s 674(2) of the Corporations Act by:
- (a) failing to inform the ASX of the 1HFY21 ACV Result in the period 18 January 2021 to 25 February 2021;
 - (b) failing to inform the ASX of the information referred to at paragraph 34(c) above in the period from 26 February or 8 March or such later date to 21 April 2021; and
 - (c) failing to inform the ASX of the April Information, the ACV Information and the Revenue Information during the period 13 April to 21 April 2021.

Contravention of s 180 of the Corporations Act by the Directors

37. During the period from 18 January 2021 to 25 February 2021, Vawdrey failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in failing to take adequate steps to prevent trading in Nuix Shares on an uninformed basis by causing Nuix to inform the ASX of the 1HFY21 ACV Result, and in failing to take adequate steps to prevent Nuix's conduct constituting the contraventions of s 674(2) of the Corporations Act referred to in paragraph 36(a) above, and of s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act referred to in paragraph 32(a) above.
38. Each of the Directors failed to exercise the degree of care and diligence that a reasonable person in their position would have exercised in light of the information they each had:
- (a) in authorising the 26 February ASX Announcements and the 8 March ASX Announcement, and in not taking adequate steps to prevent the conduct constituting Nuix's contraventions of s 1041H(1) of the Corporations Act and s 12DA(1) of the ASIC Act referred to in paragraphs 32(b), (c) and (d) above; and
 - (b) during the period from 26 February 2021 to 21 April 2021, in failing to take adequate steps to prevent trading in Nuix Shares on an uninformed basis by either causing Nuix to inform the ASX of the Revenue Information, the ACV

Information and (during the period from 13 April 2021, or alternatively, from 16 April 2021 to 21 April 2021) the April Information, or taking adequate steps to cause Nuix to request a trading halt for Nuix Shares, and in failing to take adequate steps to prevent Nuix's contraventions of s 674(2) of the Corporations Act referred to in paragraph 36(b) and (c) above.

D. THE HARM SUFFERED

39. Section 674 of the Corporations Act and ASX Listing Rule 3 impose on ASX-listed companies an obligation of continuous disclosure, intended to enhance confident and informed participation by investors in the secondary securities markets, an object effected by achieving a well-informed market. These provisions require companies to make timely disclosure of market sensitive information, with the consequence that the market price of securities reflects their underlying economic value. In its application to the present circumstances, the prohibition on misleading or deceptive conduct has similar objects of market integrity and investor protection.
40. The conduct of Nuix and its Directors prevented the attainment of those objects in relation to the listed shares in Nuix and affected market integrity and confidence in the market more broadly.
41. The Announcements and non-disclosures are also likely to have influenced investors in deciding whether to buy or sell Nuix Shares, inflicting losses or fortuitous gains on investors unknowingly buying or selling securities in an uninformed market. The release of the Announcements, and the failure of Nuix to inform the ASX of the 1H FY21 ACV Result, the ACV Information, the Revenue Information and the April Information, had the effect that trading in Nuix Shares took place on an uninformed basis in the period from 18 January 2021 to 21 April 2021. In the five-week period from 18 January 2021 to 25 February 2021, Nuix shares with a total value of \$336 million were traded. In the seven-week period from the 26 February ASX Announcements to the 21 April ASX Announcement, Nuix shares with a total value of \$888 million were traded.
42. The duty imposed on directors by s 180 of the Corporations Act is protective of the interests of the corporation. The actions of the Directors have exposed Nuix to harm, through the exposure of the company to penalty, litigation brought against the company by shareholders and reputational harm which in turn affects its business and any future capital raising.

This Concise Statement was prepared by Jeremy Giles SC, Justin Hewitt and Tim Chalke.

Certificate of lawyer

I, Caitlin Murray certify to the Court that, in relation to the concise statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 28 September 2022



Signed by Caitlin Murray
Solicitor for the Australian Securities and
Investments Commission