

## Defence to Second Further Amended Statement of Claim

Federal Court of Australia  
District Registry: Victoria  
Division: General

No. VID163 of 2017

**McKay Super Solutions Pty Limited (ACN 110 853 024) (as Trustee For The McKay Super Solutions Fund)**

Applicant

**Bellamy's Australia Limited (ACN 124 272 108)**

Respondent

No. VID213 of 2017

**Peter Anthony Basil**

Applicant

**Bellamy's Australia Limited (ACN 124 272 108)**

Respondent

By way of defence to the second further amended statement of claim dated 18 September 2018 in proceeding VID163 of 2017 (**McKay Proceeding**) and the second further amended statement of claim dated 18 September 2018 in proceeding VID213 of 2017 (**Basil Proceeding**) (together, unless otherwise specified, the **statement of claim**) the Respondent (**Bellamy's**) says:

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## A PARTIES

### A.1 The Applicant and Group Members

1. It admits paragraph 1.
2. As to the allegations in:
  - (a) Annexure A of the statement of claim in the McKay Proceeding:
    - (i) it admits paragraph A1;
    - (ii) it does not know and therefore cannot admit paragraph A2;
    - (iii) it does not know and therefore cannot admit paragraph A3;
    - (iv) it does not know and therefore cannot admit paragraph A4;
    - (v) as to paragraph A5, it refers to and repeats paragraph 149 below and otherwise denies the paragraph;
    - (vi) as to paragraph A6, it refers to and repeats paragraphs 150 and 151 below and otherwise denies the paragraph;
    - (vii) as to paragraph A7, it says that the allegation is embarrassing and is liable to be struck out by reason of it not being properly particularised, in circumstances where the Applicant must know (and accordingly should now particularise) any "*alternative investments or assets that it would have retained or acquired*" had it not acquired some or any of its interests in Bellamy's securities, and in further answer to that paragraph refers to and repeats paragraph 152 below and otherwise denies the paragraph;
    - (viii) as to paragraph A8, it refers to and repeats paragraphs 167 to 169 below and otherwise denies the paragraph;

- (ix) it denies paragraph A9, and refers to and repeats paragraphs 170 and 171 below;
- (b) Annexure A of the statement of claim in the Basil Proceeding:
- (i) it does not plead to paragraph A1 as no allegation is made therein;
  - (ii) it does not plead to paragraph A2 as no allegation is made therein;
  - (iii) it does not know and therefore cannot admit paragraph A3;
  - (iv) it does not know and therefore cannot admit paragraph A4;
  - (v) as to paragraph A5, it refers to and repeats paragraph 149 below and otherwise denies the paragraph;
  - (vi) as to paragraph A6, it refers to and repeats paragraphs 150 and 151 below and otherwise denies the paragraph;
  - (vii) as to paragraph A7, it says that the allegation is embarrassing and is liable to be struck out by reason of it not being properly particularised, in circumstances where the Applicant must know (and accordingly should now particularise) any "*alternative investments or assets that it would have retained or acquired*" had it not acquired some or any of its interests in Bellamy's securities, and in further answer to that paragraph it refers to and repeats paragraph 152 below and otherwise denies the paragraph;
  - (viii) as to paragraph A8, it refers to and repeats paragraphs 167 to 169 below and otherwise denies the paragraph;
  - (ix) it denies paragraph A9, and refers to and repeats paragraphs 170 and 171 below.

3. It does not plead to paragraph 3, as that paragraph contains no allegation of fact against it.
4. It does not know and therefore cannot admit paragraph 4.
5. It does not know and therefore cannot admit paragraph 5.

## **A.2 The Respondent**

6. Subject to referring at trial to the full terms and effect of the Australian Securities Exchange (**ASX**) Listing Rules and the statutory provisions referred to in paragraph 6, it admits that paragraph, and in further answer to it refers to and repeats paragraphs 8, 9 and 11 below.

## **B APPLICATION OF S 674(2) OF THE CORPORATIONS ACT**

### **B.1 The rules governing disclosure to the market for Bellamy's Securities**

7. It admits paragraph 7.
8. As to paragraph 8, it:
  - (a) admits that at all material times Rule 3.1 of the ASX Listing Rules provided that 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 the ASX that information;
  - (b) says further that the obligation in Rule 3.1 of the ASX Listing Rules does not apply to that information while:
    - (i) one or more of the following situations set out in Rule 3.1A of the ASX Listing Rules applies:
      - (A) it would be a breach of a law to disclose the information;

- (B) the information concerns an incomplete proposal or negotiation;
  - (C) the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
  - (D) the information is generated for the internal management purposes of the entity; or
  - (E) the information is a trade secret; and
- (ii) the information is confidential and the ASX has not formed the view that the information has ceased to be confidential; and
  - (iii) a reasonable person would not expect the information to be disclosed; and
- (c) otherwise denies that paragraph.

9. It admits paragraph 9, and in further answer to that paragraph says that:

- (a) section 676 of the *Corporations Act 2001* (Cth) (***Corporations Act***) provides that, for the purpose of section 674 of the *Corporations Act*, information is generally available if:
  - (i) it consists of readily observable matter; or
  - (ii) 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, since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed; or
  - (iii) it consists of deductions, conclusions or inferences made or drawn from either or both of the information referred to in subparagraph (i), or

information made known as mentioned in subparagraph (ii); and

- (b) section 677 of the *Corporations Act* provides that, for the purpose of section 674 of the *Corporations Act*, a reasonable person would be taken to expect information to have a material effect on the price or value of enhanced disclosure (**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.

10. It admits paragraph 10.

## **B.2 The rules governing attribution of awareness to Bellamy's**

11. It admits paragraph 11.

11A. It admits paragraph 11A.

11B. It admits paragraph 11B.

11BA. It admits paragraph 11BA.

11C. It admits paragraph 11C.

11D. It admits paragraph 11D.

11E. As to paragraph 11E, it:

- (a) admits that the NEDs (as defined in the statement of claim), Cohen (from 27 June 2016), Woolley and McBain were officers (together, the **Bellamy's Executives**);  
and
- (b) otherwise denies that paragraph.

## **C BELLAMY'S BUSINESS**

### **C.1 Bellamy's Markets**

12. It admits paragraph 12 and in further answer to that paragraph says that between April 2016 and December 2016, infant milk formula (**IMF**) represented the overwhelming majority of the revenue and profit generated by Bellamy's.
13. It denies paragraph 13, and specifically denies that at all material times (or at any material times) there was an 'Australian Market' or a 'Chinese Market' as defined in that paragraph, and in further answer to that paragraph says that:
- (a) the pleading in paragraph 13 is fundamentally misconceived and embarrassing;
  - (b) all subsequent allegations in the statement of claim which are made by reference to the 'Australian Market' and/or the 'Chinese Market' are embarrassing;
  - (c) between about April 2016 and December 2016 Bellamy's sold step 1 (for infants aged from 0 up to 12 months), step 2 (for infants aged 6 to 12 months) and step 3 (for infants older than 12 months) PRC IMF and step 1 (for infants aged from 0 up to 12 months), step 2 (for infants aged 6 to 12 months) and step 3 (for infants older than 12 months) domestic IMF, and that those products were sold for different prices, in different weights and carton sizes;

#### **Particulars**

Between about April 2016 and December 2016 Bellamy's operated and competed in different geographic, functional and product markets, including (relevantly): (i) Australian functional markets for premium IMF; and (ii) Chinese functional markets for ultra-premium IMF.

Bellamy's step 1, step 2 and step 3 domestic IMF and PRC IMF are, and were at all material times, high-quality organic products.

- (d) Bellamy's sold IMF:
  - (i) directly to consumers in Australia and China via its online stores;

- (ii) to Australian retail outlets; and
  - (iii) to exporters (**Exporters**) and distributors (**Distributors**) (together, Exporters and Distributors are referred to **Resellers**);
- (e) individuals, generally located in Australia (**daigous**), purchased Bellamy's domestic IMF:
- (i) from Bellamy's online stores;
  - (ii) from Australian retailers;
  - (iii) from Resellers; and/or
  - (iv) from persons who purchased Bellamy's domestic IMF from certain Resellers and/or from persons who purchased domestic IMF from such persons (together, **sub-distributors**),
- and then on-sold those products to consumers in China (**Daigou Transactions**);
- (f) Bellamy's IMF was purchased by consumers in China and Australia via various online and offline sales channels;
  - (g) the flow of products from Bellamy's to the ultimate consumers in China often involved various transactions over which Bellamy's had no visibility (those transactions are referred to as the **Grey Market**) including, but not limited to, Daigou Transactions; and
  - (h) it is not possible to ascertain with any precision what percentage or share of the products sold by Bellamy's ultimately became part of the Grey Market.

14. It denies paragraph 14 and in further answer to that paragraph refers to and repeats paragraph 13 above.



15. It denies paragraph 15 and in further answer to that paragraph refers to and repeats paragraph 13 above.
16. It denies paragraph 16 and in further answer to that paragraph refers to and repeats paragraph 13 above.
17. It denies paragraph 17 and in further answer to that paragraph:
  - (a) refers to and repeats paragraph 13 above; and
  - (b) says further that during the Relevant Period, it is possible that some daigous may have purchased IMF from Bellamy's via its online store.
18. As to paragraph 18, it:
  - (a) refers to and repeats sub-paragraph 13(d) above and says further that the price at which daigous could purchase Bellamy's IMF from Australian retailers, Bellamy's online stores, Resellers and sub-distributors differed;
  - (b) says the pleading in sub-paragraph 18(b) is circular and embarrassing but admits that for a seller to make a profit, a sale price must be higher than a purchase price;
  - (c) says that most, but not all, daigous sold Bellamy's IMF into China for the purpose of deriving a profit; and
  - (d) otherwise denies that paragraph.
- 18A. It denies paragraph 18A.

## **C.2 Bellamy's reputation in its markets**

19. As to paragraph 19, it:
  - (a) says that by mid-2015 Bellamy's had established a reputation among consumers in

China as a supplier of organic, safe, Australian made IMF products; and

(b) otherwise denies that paragraph.

20. As to paragraph 20, it:

(a) says that at all times between April 2016 and December 2016, consumers in China were prepared to pay a higher price for Bellamy's ultra-premium IMF than for non-premium IMF (**Non-Premium IMF Products**), which did not compete with the ultra-premium IMF produced by Bellamy's, by reason of Bellamy's reputation, the quality of the IMF produced by Bellamy's and the fact that its IMF was produced with organic ingredients and was an Australian brand;

(b) refers to and repeats paragraph 13 above; and

(c) otherwise denies that paragraph.

### **C.3 Bellamy's Systems and Processes for monitoring its business**

20A. As to paragraph 20A, it:

(a) admits that Bellamy's had systems for monitoring inventory levels, some but not all sales of Bellamy's IMF to end consumers, and Bellamy's cash receipts; and

#### **Particulars**

Throughout the 2016 calendar year Bellamy's was: (i) able to monitor its inventory levels; (ii) able to monitor the sales made by Bellamy's; (iii) able to monitor purchases by consumers of Bellamy's IMF from major Australian retailers via Aztec sales data; and (iv) able to monitor some but not all purchases by consumers of Bellamy's IMF via a minority of online platforms in China. The market was aware that there was limited visibility of sales to, and purchases by, ultimate consumers in China.

(b) otherwise denies that paragraph.

## **D RELEVANT EVENTS BEFORE APRIL 2016**

### **D.1 Bellamy's FY15 financial results announcements**

21. It admits paragraph 21 and in further answer to that paragraph says that:

- (a) on 21 August 2015, Bellamy's announced to the ASX that central to its future success would be to continue to develop long term relationships with suppliers and manufacturers; and
- (b) at trial, it will rely upon the entire terms of the three announcements released by Bellamy's to the ASX on 21 August 2015.

### **D.2 Alleged Australian Market Shortage Event October / November 2015**

22. It denies paragraph 22 and in further answer to that paragraph:

- (a) says that for a number of weeks during October and November 2015, there was a shortage of Bellamy's domestic IMF in Australian retail stores and outlets which was caused because demand for Bellamy's IMF exceeded supply;
- (b) refers to and repeats paragraphs 13(f) and 13(g) above and says further that the matters alleged in the chapeau to paragraph 22 occurred shortly before Singles Day, the largest online shopping day in the world;

#### **Particulars**

Singles Day is on 11 November. In 2013, total sales on Singles Day were approximately \$US 5.8 billion; in 2014, total sales on Singles Day were approximately \$US 9.3 billion; in 2015, total sales on Singles Day were approximately \$US 14.3 billion; in 2016, total sales on Singles Day were approximately \$US 17.8 billion.

- (c) says that in October and November 2015, daigous purchased Bellamy's IMF (in one or other of the manners described in paragraph 13(e) above), and that some of those daigous may have done so with knowledge of the price rise alleged in paragraph 25A of the statement of claim; and

- (d) further says that in October and November 2015, Bellamy's was allocating stock and there was a quota on the number of tins of Bellamy's IMF that could be purchased from Australian retailers and from Bellamy's Australian online store, including by daigous.

23. It denies paragraph 23.

24. It denies paragraph 24 and in further answer to that paragraph refers to and repeats paragraph 13 above.

**D.3 [Not used]**

25. [Not used]

**D.3 Alleged price increases and customer stockpiling**

25A. It denies paragraph 25A and in further answer to that paragraph refers to and repeats paragraph 13 above and says that in the second quarter of the 2016 financial year Bellamy's increased the price at which it sold its domestic IMF.

25B. As to paragraph 25B, it:

- (a) refers to and repeats paragraph 22 above;
- (b) says further that in November and December 2015, Bellamy's did not sell its domestic IMF to Resellers; and
- (c) otherwise denies that paragraph.

25C. It denies paragraph 25C.

25D. It denies paragraph 25D and in further answer to that paragraph refers to and repeats paragraph 13 above.

25E. It denies paragraph 25E.

#### **D.4 Bellamy's Supply Agreements**

26. It admits paragraph 26.

27. As to paragraph 27, it:

- (a) admits that from June 2015, Bellamy's Organic Pty Ltd (**BOPL**) was and is a party to a supply agreement (**TMI Contract**) with Tatura Milk Industries Ltd (**TMI**), a subsidiary of Bega Cheese Limited, for the supply of some IMF products sold by Bellamy's; and

##### **Particulars**

A copy of the TMI Contract is in the possession of the solicitors for Bellamy's.

- (b) otherwise denies that paragraph.

27A. As to paragraph 27A, it:

- (a) admits that in November 2015, BOPL and Fonterra Australia Pty Ltd (**Fonterra**) signed a letter of intent (**LOI**) which said that they would work expeditiously to enter into a formal supply agreement, which would be for a term of five years and contain a take or pay obligation; and

##### **Particulars**

A copy of the LOI is the possession of the solicitors for Bellamy's.

- (b) otherwise denies that paragraph.

28. As to paragraph 28, it:

- (a) admits that from July 2016, BOPL was a party to a supply agreement with Fonterra (**Fonterra Contract**) for the supply of some IMF products sold by Bellamy's; and
- (b) otherwise denies that paragraph.

**Particulars**

A copy of the Fonterra Contract is in the possession of the solicitors for Bellamy's.

29. As to paragraph 29, it:

- (a) admits that the TMI Contract and Fonterra Contract set minimum annual volumes in respect of relevant contract years and (subject to the terms of the contracts) obliged Bellamy's to make shortfall payments if those volumes were not ordered in the relevant contract year and says further that the existence of minimum annual supply volumes was known to the market;

**Particulars**

From late in the 2015 calendar year and during the 2016 calendar year brokers reported on the minimum annual supply commitments.

- (b) says that it will rely upon the full terms of the TMI Contract and Fonterra Contract at trial; and
- (c) otherwise denies that paragraph.

29A. As to paragraph 29A, it:

- (a) admits that by no later than 24 November 2015, TMI and Bellamy's agreed to increase the minimum annual volume under the TMI Contract to [REDACTED] [REDACTED] for the Contract Year (as defined in the TMI Contract); and
- (b) otherwise denies that paragraph.

29B. It denies paragraph 29B.

30. As to paragraph 30, it:

- (a) admits that by 30 November 2015, Bellamy's knew the terms of the TMI Contract and the matters set out in the LOI;
- (b) says that as at 30 November 2015, the Fonterra Contract had not yet been

concluded, and it was likely that in the 2016 calendar year Bellamy's would sell more than the minimum annual volume for that calendar year under the TMI Contract; and

**Particulars**

Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand.

- (c) otherwise denies that paragraph.

**D.5 Proposed regulatory changes in China**

31. It denies paragraph 31 and in further answer to that paragraph says that on about 9 December 2015, the China Food and Drug Administration (**CFDA**) released Draft Implementing Rules for the 2015 Food Safety Law which regulated various aspects of IMF in China.

**Particulars**

The draft implementing rules provided that: (i) IMF powder shall be registered as provided by law and, further, IMF powder subject to registration requirements shall obtain a registration certificate issued by the CFDA; (ii) in principle, each company (manufacturer) could register at the maximum nine formulas of three series; (iii) producers shall not sell in China infant formula powder that only have label/company name/address registered abroad and, further, imported pre-packaged foods shall have Chinese labels, which shall be directly printed on the product package before importation – it is not allowed to stick Chinese label over the foreign language label; and (iv) foods imported and exported via cross-border e-commerce shall comply with relevant provisions of the Food Safety Law and its Implementing Rules.

A copy of the draft implementing rules is in the possession of the solicitors for Bellamy's, and may be inspected by prior appointment.

32. It denies paragraph 32 and in further answer to that paragraph says that:
- (a) on 16 March 2016, the Customs Tariff Commission of the State Council issued *the Notice on Tariff Adjustment of Import Tax for Imported Articles (Shui Wei Hui [2016] No 2) (Shui Wei Hui)*;
- (b) on 24 March 2016, the Ministry of Finance, the General Administration of Customs

and the State Administration of Taxation jointly issued the Circular on *Tax Policy for Cross-Border E-Commerce Retail Imports (Cai Guan Shui [2016] No 18)* (**Cai Guan Shui**); and

- (c) Shui Wei Hui and Cai Guan Shui applied to different e-commerce sales channels in different ways.

#### Particulars

Shui Wei Hui applied to: (i) sales where foreign merchants maintained warehouses outside China and sent goods to Chinese customers by international transportation after they had made orders online via an e-commerce platform that was not linked to the network of the Chinese customs (**non-customs linked direct mail sales channel**); and (ii) sales by individuals who purchased foreign products outside China and sold those products to Chinese consumers online (**daigou e-commerce sales channel** which formed part of the Grey Market).

Shui Wei Hui provided that from 8 April 2016: (i) the tax brackets of the personal postal articles tax reduced from four categories to three; (ii) the tax rate on food would increase from 10% to 15%; (iii) the personal postal articles tax would continue to apply to inbound personal postal items with a maximum value of RMB 1,000 (RMB 800 for articles posted from Hong Kong, Macau and Taiwan) and that that tax would continue to be waived where the total tax payable did not exceed RMB 50.

Cai Guan Shui applied to: (i) online sales of product stored in bonded warehouses (**bonded e-commerce sales channel**); and (ii) sales where foreign merchants maintained warehouses outside China and sent goods to Chinese customers by international transportation after they had made orders online via e-commerce platforms that were linked to the network of the Chinese customs (**customs linked direct mail sales channel**).

Cai Guan Shui provided that from 8 April 2016: (i) a value added tax (**VAT**) of 11.9% would be imposed on imports where the transaction amount was less than RMB 2,000 and the total amount purchased by the purchaser was less than RMB 20,000 per annum; and (ii) for purchases outside those limits, the transaction would be taxed using the general trade tariffs, which included a 17% VAT.

A copy of Cai Guan Shui and Shui Wei Hui are in the possession of the solicitors for Bellamy's, and may be inspected by prior appointment.

33. As to paragraph 33, it:

- (a) admits that the article by Wang Han titled "China's new import tax regulations explained" referred to in the particulars under paragraph 33 was published in the *Global Times* on 21 April 2016;



- (b) admits that the article by Daniel Chan, Windson Li and Henry Ji titled “China increases taxes on cross-border e-commerce retail imports” referred to in the particulars under paragraph 33 was published in *DLA Piper Publications* on 7 April 2016;
- (b) says that at trial it will refer to the whole of those articles; and
- (c) otherwise denies that paragraph.

34. As to paragraph 34, it:

- (a) says that on 7 April 2016, a number of ministries and commissions of China co-released the *List of Imported Commodities for Retail in Cross-Border E-Commerce (Positive List)*, which included about 1,142 tariff lines (including IMF) that were able to be imported into China via the bonded e-commerce sales channel and the customs linked direct mail sales channels (being sales via the Central Board of Excise and Customs (**CBEC**)); and
- (b) otherwise denies that paragraph.

35. As to paragraph 35, it:

- (a) admits that on 13 April 2016, the Ministry of Finance in China provided guidance on IMF registration with the CFDA, which stated that as the registration framework was still in the process of being drafted, all IMF currently registered with the Certification and Accreditation Administration of China (**CNCA**) sold via the CBEC would not have to obtain CFDA formulation registration until 1 January 2018;
- (b) says that as at 7 April 2016, Bellamy's PRC IMF complied with Guobiao (GB) product testing standards in China and had a Chinese label;
- (c) says that as at 7 April 2016, TMI held registration with the CNCA for the

manufacture of Bellamy's PRC IMF; and

(d) otherwise denies that paragraph.

36. It admits paragraph 36.

37. As to paragraph 37, it:

(a) admits that the article by Angus Grigg titled "China Crackdown to hit Bellamy's, Blackmores" referred to in the particulars under paragraph 37 was published in *The Australian Financial Review* on 18 May 2016;

(b) says that at trial it will refer to the whole of that article;

(c) refers to and repeats to paragraphs 39 and 64A(d) below; and

(d) otherwise denies that paragraph.

38. It admits paragraph 38.

39. As to paragraph 39, it:

(a) admits that the matters alleged in paragraphs 31 and 32 above presented some uncertainties, and says further that those uncertainties were known to the market;

#### **Particulars**

The uncertainties were in the public domain and were reported on extensively by brokers throughout the 2016 calendar year. Those reports identified uncertainties and possible consequences including the impact on the sales of English labelled product, de-stocking by smaller brands which would not obtain registration, consolidation and a decrease in the number of IMF brands being sold in China, pricing pressures, and other disruption in the market. The reports also noted the likely benefits to Bellamy's arising from the proposed regulatory changes.

(b) refers to and repeats paragraph 64A(d) below; and

(c) otherwise denies that paragraph.

39A. It denies paragraph 39A and in further answer to that paragraph:

(a) says that the Operations and Financial Reports presented at the 10 March 2016 Board meeting:

(i) recorded that certain aspects of certain proposed regulations, none of which had been finalised and none of which had a commencement date, if introduced had a potentially highly adverse impact on some sales channels relied on by foreign IMF brands;

**Particulars**

The Operations and Financial Reports recorded that: (i) the proposed regulations requiring that IMF imported into China comply with Chinese inspection and quarantine criteria, and have a Chinese label, were still in consultation and if implemented (in the form proposed at that time) would not be applicable to offline sales; (ii) the proposed regulations regarding the need for foreign companies importing IMF into China to have a majority ownership interest in manufacturing facilities, would if implemented, not be applicable to online sales; and (iii) the regulations requiring that manufacturers have only three brands or less with nine products or less would if implemented have a potentially positive impact on both the offline and online sales channels in China.

(ii) outlined a series of actions to proactively manage the proposed regulatory changes; and

(b) refers to and repeats paragraphs 12 and 39(a) above and 51(b) below.

**D.6 The multi-channel approach to sales into China**

40. It denies paragraph 40 and in further answer to that paragraph it:

(a) refers to and repeats paragraph 13 above; and

(b) says that:

(i) during the 2016 calendar year, the overwhelming proportion of Bellamy's IMF purchased by consumers in China was not purchased directly from Bellamy's;

- (ii) at all times prior to and including February 2016, Bellamy's Tmall flagship store was not a major revenue generator but rather was primarily a marketing tool.

**D7. Alleged decline in Bellamy's sales performance in 3Q16**

40A. As to paragraph 40A, Bellamy's:

- (a) admits that Bellamy's monthly net revenue was \$25.8 million in December 2015;
- (b) admits that Bellamy's monthly net revenue was \$17.5 million in January 2016;
- (c) refers to and repeats paragraph 13 above; and
- (d) says further that:
  - (i) sales in January are traditionally lower than sales in December;
  - (ii) Bellamy's net revenue in January 2016 was \$9.29 million more than in January 2015;
  - (iii) Bellamy's year to date net revenue in January 2016 was \$56.3 million more than in January 2015;
- (e) otherwise denies that paragraph.

40B. As to paragraph 40B, it:

- (a) admits that Bellamy's monthly net revenue was \$14.9 million in February 2016 and that its budget was \$19.3 million;
- (b) says further that:
  - (i) for most of the period between about January and May 2016, [REDACTED]  
[REDACTED]

- (ii) in China, February traditionally has the lowest e-commerce sales due to the Chinese new year;
  - (iii) Bellamy's net revenue in February 2016 was \$3.7 million more than in February 2015;
  - (iv) Bellamy's year to date net revenue in February 2016 was \$60 million more than in February 2015;
  - (v) in February 2016, Bellamy's actual year to date net revenue was \$137.6 million as against a year to date budget of \$106.6 million;
- (c) refers to and repeats paragraphs 13 above and 84D(d) below; and
- (d) otherwise denies that paragraph.

40C. As to paragraph 40C, it:

- (a) admits paragraphs 40C(a) and (b) and in further answer to those paragraphs says that:
  - (i) Bellamy's EBIT for March 2016 was \$6 million as against its budget of \$5.2 million;
  - (ii) Bellamy's year to date net profit for March 2016 was \$24.1 million as against its budget of \$23.6 million;
- (b) says that in March 2016:
  - (i) sales of Step 1 and Step 2 IMF were below Bellamy's forecast volume, and says further that that was in part due to trade with Woolworths, which returned to normal ordering levels in April 2016;

- (ii) demand for Step 3 IMF (which was the primary revenue driver for Bellamy's) continued to be unwavering;
- (c) says further that:
  - (i) Bellamy's net revenue in March 2016 was \$13.5 million more than in March 2015;
  - (ii) Bellamy's year to date net revenue in March 2016 was \$73 million more than in March 2015; and
- (d) otherwise denies that paragraph.

## **E ANNOUNCEMENTS MADE BY BELLAMY'S BETWEEN FEBRUARY 2016 AND APRIL 2016**

41. As to paragraph 41, it:

- (a) admits paragraphs 41(a)(i), 41(a)(iv), 41(c) and 41(g);
- (b) says that on 19 February 2016, it announced to the ASX that:
  - (i) Bellamy's had recorded earnings before interest and tax (**EBIT**) of approximately \$19.2 million which constituted an increase of approximately 334% on the prior year period;
  - (ii) Bellamy's had recorded an increase of 325% in net profit after tax (**NPAT**) on the prior year period;
  - (iii) subject to normal trading conditions across all of Bellamy's markets, Bellamy's expected revenues in the second half of the financial year to be stronger than the first. While still early in the second half, based on current trading trends, and current known and planned supply arrangements,

Bellamy's forecasted revenue for the 2016 financial year would be in the range of \$240 million to \$260 million and it expected that the EBIT margin would be broadly in line with the half year results;

- (iv) Bellamy's continued to monitor market demand dynamics, in particular the purchase of Bellamy's products from Australian stores and customers then on-selling those products through independent e-commerce platforms overseas and that Bellamy's had put in place a strategy to address this through its online flagship stores;
- (v) Bellamy's had a strong brand reputation for organic infant foods and formula;
- (vi) Bellamy's expected the first deliveries from Fonterra to take place late in the 2016 financial year and therefore the benefit of those additional volumes to be realised in the 2017 financial year;
- (vii) Bellamy's was aware that there were potential changes to the regulatory environment in China for cross border transactions and that this may impact some brands and that the proposed changes in China regulations for cross border trade would strengthen Bellamy's position and provide greater control over the trade of its products through online channels;
- (viii) Bellamy's was monitoring daigou sales and was putting in place a strategy to address this through its online flagship stores;
- (ix) there continued to be a flow of Bellamy's product into China via Australian retailers, however retailers helped to limit that practice and Bellamy's was investing resources to optimise the opportunity presented by cross border e-commerce sales;
- (x) Bellamy's was continuing to monitor cross border traders;

- (xi) despite increasing its prices, Bellamy's had had unprecedented demand;
- (xii) a key priority for the second half of the 2016 financial year was for Bellamy's to carefully manage and grow its organic ingredient supply to meet demand;
- (xiii) Bellamy's had seen substantial growth in sales directly from Bellamy's to consumers in China;
- (xiv) Bellamy's had increased sales to retailers in China through its agency with SIIC and multiple distributors;
- (xv) in respect of the announcement titled "1H16 Results Presentation", that:
  - (A) the announcement was prepared based on information available at the time of its preparation;
  - (B) except as required by law, by releasing the announcement no representation or warranty, express or implied, was made as to the fairness, accuracy, completeness, reliability or correctness of the information, opinions or conclusions, or as to the reasonableness or any assumptions;
  - (C) certain statements contained in the announcement, particularly those regarding possible or assumed future performance, costs, returns, prices, potential business growth, industry growth or other trend projections, and any estimated company earnings or other performance measures, were, or may be, forward looking statements. Such statements related to future events and expectations and as such involved unknown risks and uncertainties, many of which were outside the control of or unknown to Bellamy's and its officers, employees, agents or associates. Actual results, performance or



achievement may vary materially from any forward-looking statements and the assumptions on which those were based, and such variations were normal and to be expected;

(D) the information contained in the announcement assumed the success of Bellamy's business strategies. The success of the strategies was subject to uncertainties and contingencies beyond Bellamy's control, and no assurance could be given that the anticipated benefits from the strategies would be realised in the periods for which forecasts had been prepared or otherwise. Given these uncertainties, Bellamy's cautioned investors and potential investors not to place undue reliance on these forward-looking statements;

(E) the reader was solely responsible for forming their own opinions and conclusions about what action to take on the basis of the information contained in the announcement;

(c) says further that at trial, it will rely upon the full terms of its announcements released on 19 February 2016 and titled:

(i) "Interim Report ASX (Appendix 4D) for the Half-Year Ended 31 December 2015";

(ii) "1H16 Results Presentation";

(iii) "Bellamy's generates strong growth in half year earnings"; and

(d) otherwise denies that paragraph.

42. As to paragraph 42, it:

(a) admits that on 22 March 2016, it released an announcement to the ASX titled "US

Roadshow";

- (b) admits that the announcement included the statements '*domestic market continues to represent majority of sales*' and '*channel mix, with online channels delivering higher gross margins*';
- (c) says further that the announcement repeated the matters set out in paragraph 41(b)(xiv) above;
- (d) says that it will rely upon the full terms of the announcement at trial; and
- (e) otherwise denies that paragraph.

43. As to paragraph 43, it:

- (a) admits that on 6 April 2016, it released an announcement to the ASX titled "Dairy Day 2016";
- (b) admits that the announcement said demand has never been a constraint to Bellamy's growth and that Bellamy's was well positioned to continue its strong growth trajectory;
- (c) says that the announcement repeated the matters set out in paragraph 41(b)(xiv) above;
- (d) says further that it will rely upon the full terms of the announcement at trial; and
- (e) otherwise denies that paragraph.

44. As to paragraph 44, it:

- (a) admits that on 14 April 2016, it released an announcement to the ASX titled "Bellamy's well placed to continue growing in China";

- (b) admits paragraphs 44(b), 44(e), and 44(i);
- (c) says that the announcement stated that:
  - (i) IMF was included in the Positive List;
  - (ii) as the registration framework was still in the process of being drafted, all infant formula currently registered with the CNCA that was sold via the CBEC channel would not have to obtain CFDA formulation registration until 1 January 2018;
  - (iii) Bellamy's was awaiting further details of the CFDA registration process;
  - (iv) Bellamy's infant formula already complied with Guobiao (GB) product testing standards and Bellamy's held registration with CNCA for its infant formula produced by Bellamy's approved manufacturing facilities;
  - (v) Bellamy's welcomed the guidance provided which confirmed that Bellamy's would continue to operate in China as it had been and that, from 1 January 2018, Bellamy's formula products would need to be registered with the CFDA;
  - (vi) the then chief executive officer (**CEO**) of Bellamy's said she believed the company was well placed to transition to the new requirements once they were known;
  - (vii) Bellamy's had grown strongly in China also due to the success of its e-commerce strategy;
  - (viii) the then CEO of Bellamy's said the company had not seen any change in demand for clean, pure, organic Australian made infant formula in China;
  - (ix) the then CEO of Bellamy's said it was business as usual for Bellamy's in the

e-commerce channel;

- (d) says that it will rely upon the full terms of the announcement at trial; and
- (e) otherwise denies that paragraph.

## **F. APRIL 2016**

### **F.1 Alleged April 2016 Representations**

45. It denies paragraph 45.

46. As to paragraph 46, it:

- (a) admits that the statements made by Bellamy's referred to in paragraphs 41 to 44 were made in trade and commerce in relation to a financial product within the meaning of sections 763A(1)(a) and 764A(1)(a) of the *Corporations Act*; and
- (b) otherwise denies that paragraph.

### **F.2 Alleged True Position as at April 2016**

46A. It denies paragraph 46A.

46B. As to paragraph 46B, it:

- (a) admits sub-paragraphs (a) and (b);
- (b) refers to and repeats paragraphs 13, 40A(d), 40B(b), 40C(a), 40C(b)(ii), and 40C(c) above; and
- (c) otherwise denies that paragraph.

46C. As to paragraph 46C, it:

- (a) admits sub-paragraphs (a), (c), (d) and (e);

- (b) refers to and repeats paragraph 46B(b) above; and
- (c) otherwise denies that paragraph.

47. As to paragraph 47, it:

- (a) admits that Bellamy's made the announcements referred to in the particulars to paragraph 47;
- (b) refers to and repeats paragraphs 27A and 28 above; and
- (c) otherwise denies that paragraph.

48. It denies paragraph 48 and in further answer to that paragraph:

- (a) says that by 14 April 2016, it held a reasonable amount of inventory and finished goods;

**Particulars**

As at 31 December 2015, Bellamy's held approximately \$20 million of inventory. As at 31 March 2016, Bellamy's held approximately \$24.2 million of inventory. Bellamy's IMF has a shelf life of approximately two to three years.

- (b) says further that by 14 April 2016, Bellamy's had decided to increase the amount of finished goods and ingredients it held and, at the time, that was a measured, deliberate and appropriate decision which was known to the market; and

**Particulars**

The increase in inventory levels was a necessary consequence of Bellamy's decision to source its own ingredients and to supply those ingredients to manufacturers of its IMF. Bellamy's had not previously owned the inventory used in the manufacture of its IMF. The decision necessarily meant that the amount of ingredients (and therefore inventory) held by Bellamy's would increase. The decision provided greater transparency and control over inventory management. The matters alleged were at all material times in the public domain and reported on by brokers.

The decision to increase finished goods was designed to: (i) provide Bellamy's with security to adapt and react quickly and flexibly; (ii) ensure that Bellamy's could meet demand and protect market share; (iii) ensure

that there was no shortage of stock for customers to purchase leading up to, on, and following Singles Day; and (iv) ensure that Bellamy's could maintain safety stock.

In 2015 (despite the fact that from 11:00 am, there was no Bellamy's IMF for consumers to purchase) and 2016, Bellamy's achieved strong sales on Singles Day.

Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand.

There is about a six to eight month lead time for Bellamy's to produce IMF. Further, Bellamy's had and has a high service level target.

The decision to work with Fonterra was a key element of Bellamy's strategy to de-risk its supply chain.




- (c) specifically denies that by no later than 14 April 2016, Bellamy's had commenced to experience reduced growth in demand for its infant milk formula products.

#### **Particulars**

Bellamy's refers to and repeats the particulars under paragraph 54(b) below.

49. It denies paragraph 49 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 13, 27 to 29B, 47 and 48 above; and
- (b) says that as at 14 April 2016, Bellamy's:

- (i)   
  
 in respect of that year under the TMI Contract; and
- (ii) had reasonable grounds to believe it would likely sell more than the minimum annual volume under the TMI Contract in the 2017 calendar year.

#### **Particulars**

Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand.

50. As to paragraph 50, it:

- (a) admits sub-paragraph (a);

(b) as to sub-paragraph (b):

(i) refers to and repeats paragraphs 13 and 35 above;

(ii) says that by 14 April 2016, it was likely that not all existing IMF sold in China would be registered by 1 January 2018, but it was likely that ultra-premium IMF, including Bellamy's, would be produced by manufacturers who obtained registration in respect of those products;

**Particulars**

As at 14 April 2016, there were approximately 2,000 IMF brands sold in China and approximately 100 Chinese manufacturers. In some cases, the same formula was sold under different brands. In the 2016 financial year, about 15% of formula sold in China was ultra-premium (or superior) product and the remaining products were Non-Premium IMF Products.

(c) says the matters alleged in sub-paragraph 50(a) of the statement of claim and the impact of the proposed regulatory changes referred to in sub-paragraph 50(b) of the statement of claim were known to the market and in the public domain; and

**Particulars**

The alleged effects arose by reason of public announcements made by various Chinese government bodies. At all material times, brokers reported on the matters set out in sub-paragraph 50(a) of the statement of claim and the impact of the proposed regulatory changes referred to in sub-paragraph 50(b) of the statement of claim. The particulars to paragraph 39(a) above are repeated.

(d) otherwise denies that paragraph.

51. As to paragraph 51, it:

(a) refers to and repeats paragraphs 31 to 39A above;

(b) says that Bellamy's was well placed to deal with the proposed regulatory changes; and

**Particulars**

Bellamy's took reasonable steps to monitor, consider the impact, and plan for, the proposed regulatory changes. Bellamy's had previously dealt effectively with regulatory changes in China. During the Relevant Period

(as defined in the statement of claim), Bellamy's worked with TMI to manage the regulatory changes and had long term relationships with TMI and Fonterra which could assist Bellamy's in satisfying some of the proposed regulatory requirements.

(c) otherwise denies that paragraph.

52. As to paragraph 52, it:

(a) says that by 14 April 2016, the events set out in paragraph 22(a) above were in the public domain; and

(b) otherwise denies that paragraph.

53. It denies paragraph 53 and in further answer to that paragraph refers to and repeats paragraphs 13 and 40 above.

53A. It denies paragraph 53A and in further answer to that paragraph refers to and repeats paragraph 13 above.

54. It denies paragraph 54 and in further answer to that paragraph:

(a) refers to and repeats paragraph 13 above;

(b) alternatively, refers to and repeats paragraph 20(a) above, and says further that if (which is denied) by 14 April 2016 there was a "material risk or likelihood" that (at some unspecified time in the future) there would be (an unspecified amount of) discounting by (an unspecified number of) suppliers in respect of (an unspecified number of brands of) IMF sold in (unspecified) markets in China, that "material risk or likelihood" was only in respect of Non-Premium IMF Products, and:

(i) was not due to the proposed regulatory changes;

#### **Particulars**

"Suppliers" of Non-Premium IMF Products had many months to sell the IMF they were then holding before the regulations came into effect.



- (ii) alternatively, if it was due to the proposed regulatory changes, was not as at 14 April 2016 impacting, or likely to impact, the performance or reputation of Bellamy's;

**Particulars**

Bellamy's refers to and repeats paragraphs 39, 50 and 51(b) above. In March 2016, revenue increased 116% compared with March 2015 and EBIT increased 216% compared with March 2015. In April 2016 revenue increased 200% compared with April 2015 and EBIT increased 5,500% compared with April 2015. Those results occurred notwithstanding the announcement of the proposed regulatory changes in China. The IMF produced by Bellamy's did not compete with Non-Premium IMF Products.

- (c) further or alternatively, says that as at 14 April 2016, the risks of the proposed regulatory changes, including de-stocking in the Non-Premium IMF Product market segment, were in the public domain; and

**Particulars**

Bellamy's refers to and repeats the particulars under paragraph 39(a) above.

- (d) further says that the announcement referred to in the particulars to paragraph 54 of the statement of claim stated "*the decrease was mainly attributable to the sales decline of the mid-tier infant formula products*" whereas "*the revenue from Biostime branded products [being an ultra-premium product like the IMF sold by Bellamy's] remained relatively stable*".

55. It denies paragraph 55 and in further answer to that paragraph refers to and repeats paragraphs 13, 53A and 54 above and 56(b) below.

56. It denies paragraph 56 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 13, 25A, 25D, and 53A to 55 above and paragraph 56(b) below;
- (b) says that if the matters alleged in paragraph 53A of the statement of claim and the "material risks or likelihoods" alleged in paragraph 54 of the statement of claim

existed as at 14 April 2016 (which is denied), these were not the only matters relevant to the questions whether, at that time:

- (i) there was a material risk or likelihood that demand for Bellamy's IMF in (unspecified) markets in China would be adversely affected;
- (ii) there was a material risk or likelihood that Bellamy's would be forced to discount the IMF it sold in (unspecified) markets in China, in order to maintain demand for Bellamy's IMF in those (unspecified) markets in China;

#### **Particulars**

Other factors relevant to those questions included: (a) the final terms of the Fonterra Contract (which had not yet been concluded); (b) the performance of competitors; (c) the fact that Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand; (d) Bellamy's financial performance to 14 April 2016, which continued to be strong after the announcement of the proposed regulatory changes; (e) the fact that the IMF produced by Bellamy's did not compete with Non-Premium IMF Products and the matters set out in paragraphs 19, 20 and 50(b)(ii) above; (f) the success of the sales leading up to, on, and following Singles Day and double 12 day; (g) the economics of the market opportunity in China; (h) the success of the pick and pack strategy of some Resellers and other persons in the supply chain; (i) the macro-economic trend of growth in sales of Australian products in China; (j) seasonality factors; (k) the impact of the abolishment of the one child policy in China; and (l) the matters alleged in paragraph 35 above.

- (c) further says that even if the matters alleged in paragraph 53A of the statement of claim and the "material risks or likelihoods" alleged in paragraph 54 existed as at 14 April 2016 (which is denied), they did not at that time give rise to the "material risks or likelihoods" alleged in paragraph 56 of the statement of claim when weighed with all of the other factors relevant to the questions whether, as at 14 April 2016, the "material risks or likelihoods" alleged in paragraph 56 of the statement of claim existed, the answers to which were matters of opinion.

56A. It denies paragraph 56A and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 13, 40, and 53A to 56 above;

- (b) says that paragraph 56A is illogical, internally inconsistent and embarrassing; and
- (c) says that at trial, Bellamy's intends to hold the Applicants to their pleading.

57. It denies paragraph 57 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 13 and 46A to 56A above;
- (b) says that if the matters alleged in paragraphs 46A to 56A of the statement of claim existed as at 14 April 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the questions whether, at that time:
  - (i) there was a material risk or likelihood that the proposed regulatory changes in China would materially adversely affect:
    - (A) earnings derived by Bellamy's from the sale of IMF in the 2017 financial year in (unspecified) markets in China and/or in (unspecified) markets in Australia; and
    - (B) the EBIT margin experienced by Bellamy's in the 2017 financial year;
  - (ii) there was a material risk or likelihood that Bellamy's would experience a reduction in demand for its IMF in (unspecified) markets in China and in (unspecified) markets in Australia in the 2017 financial year;
  - (iii) there was a material risk or likelihood that Bellamy's would experience a reduction in its market share in (unspecified) markets in Australia; and
  - (iv) there was a material risk or likelihood that Bellamy's would not achieve strong earnings growth in (unspecified) markets in China and (unspecified) markets in Australia in the 2017 financial year; and

### Particulars

Other factors relevant to those questions included: (a) the final terms of the Fonterra Contract (which had not yet been concluded); (b) the performance of competitors; (c) the fact that Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand; (d) Bellamy's financial performance to 14 April 2016, which continued to be strong after the announcement of the proposed regulatory changes; (e) the fact that the IMF produced by Bellamy's did not compete with Non-Premium IMF Products and the matters set out in paragraphs 19, 20 and 50(b)(ii) above; (f) the success of the sales leading up to, on, and following Singles Day and double 12 day; (g) the economics of the market opportunity in China; (h) the success of the pick and pack strategy of some Resellers and other persons in the supply chain; (i) the macro-economic trend of growth in sales of Australian products in China; (j) seasonality factors; (k) the impact of the abolishment of the one child policy in China; and (l) the matters alleged in paragraph 35 above.

- (c) further says that even if the matters alleged in paragraphs 46A to 56A of the statement of claim existed as at 14 April 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risks or likelihoods" alleged in paragraph 57 of the statement of claim when weighed with all of the other factors relevant to the questions whether, as at 14 April 2016, those alleged "material risks or likelihoods" existed, the answers to which were matters of opinion.

57A. It denies paragraph 57A and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 13, 25A to 30 and 46A to 56A above;
- (b) says that if the matters alleged in paragraphs 25A to 30 and 46A to 56A of the statement of claim existed as at 14 April 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the question whether, at that time, there was a material risk or likelihood that demand for Bellamy's IMF would fall, or alternatively, not grow at a rate sufficient to enable Bellamy's to sell the minimum volume for which its manufacturing contracts (including the TMI Contract and Fonterra Contract) provided, such that Bellamy's would have to either:

- (i) continue to take IMF, which had a limited shelf life, from the manufacturers (so adding to its inventory), even if it could not sell that IMF at all or before their shelf life expired; or
- (ii) pay shortfall payments,

with the consequential risk of reduced cash-flow and profits in the 2017 financial year and throughout the period of the TMI Contract and the Fonterra Contract; and

#### **Particulars**

Other factors relevant to those questions included: (a) the final terms of the Fonterra Contract (which had not yet been concluded) and the proper construction of the terms of that contract (once concluded) governing Bellamy's take or pay obligations in FY17 and later years; (b) the performance of competitors; (c) the fact that Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand; (d) Bellamy's financial performance to 14 April 2016, which continued to be strong after the announcement of the proposed regulatory changes; (e) the fact that the IMF produced by Bellamy's did not compete with Non-Premium IMF Products and the matters set out in paragraphs 19, 20 and 50(b)(ii) above; (f) the success of the sales leading up to, on, and following Singles Day and double 12 day; (g) the economics of the market opportunity in China; (h) the success of the pick and pack strategy of some Resellers and other persons in the supply chain; (i) the macro-economic trend of growth in sales of Australian products in China; (j) seasonality factors; (k) the impact of the abolishment of the one child policy in China; and (l) the matters alleged in paragraph 35 above. Bellamy's IMF has a shelf life of approximately two to three years. The Fonterra Contract was not concluded as at 14 April 2016.

- (c) further says that even if the matters alleged in paragraphs 25A to 30 and 46A to 56A of the statement of claim existed as at 14 April 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risk or likelihood" alleged in paragraph 57A of the statement of claim when weighed with all of the other factors relevant to the question whether, as at 14 April 2016, that alleged "material risk and likelihood" existed, the answer to which was a matter of opinion.

58. It denies paragraph 58.

**F.3 Alleged Bellamy's awareness as at 14 April 2016**

58A. It denies paragraph 58A and in further answer to that paragraph refers to and repeats paragraphs 12 to 17 and 19 to 20 above.

58B. It denies paragraph 58B and in further answer to that paragraph refers to and repeats paragraphs 18 and 18A above.

58C. It denies paragraph 58C and in further answer to that paragraph refers to and repeats paragraph 40 above.

58CA. It denies paragraph 58CA and in further answer to that paragraph refers to and repeats paragraphs 25A to 25E above.

58D. As to paragraph 58D, it:

- (a) admits that as at 14 April 2016, the Bellamy's Executives knew the terms of the TMI Contract and the LOI;
- (b) refers to and repeats paragraphs 26 to 30 above; and
- (c) otherwise denies that paragraph.

58E. It denies paragraph 58E and in further answer to that paragraph refers to and repeats paragraphs 31 to 39A above.

58F. It denies paragraph 58F and in further answer to that paragraph refers to and repeats paragraphs 40A to 40C above.

59. It denies paragraph 59 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 46A to 53 above; and
- (b) says that the Applicants' reliance upon the Fonterra Contract dated July 2016 (in

paragraph (i) to the particulars of paragraph 59 of the statement of claim) to establish knowledge as at April 2016 is embarrassing and liable to be struck out.

59AA. It denies paragraph 59AA and in further answer to that paragraph refers to and repeats paragraph 53A above.

59A. It denies paragraph 59A and in further answer to that paragraph refers to and repeats paragraphs 50, 54 to 56 and 58A to 58E above.

59B. It denies paragraph 59B and in further answer to that paragraph refers to and repeats paragraphs 56A to 57 and 58A to 58E above.

59C. It denies paragraph 59C and in further answer to that paragraph refers to and repeats paragraphs 57A to 58E above.

#### **F.4 Alleged April 2016 misleading or deceptive conduct**

60. It denies paragraph 60 and in further answer to that paragraph refers to and repeats paragraphs 45, 46A, 46B, 46C, 48, 49, 53, 53A, 57 and 57A above.

61. It denies paragraph 61 and in further answer to that paragraph refers to and repeats paragraph 45 above, and says alternatively to the extent that the alleged April 2016 Representations were made (which is denied), at the time they were made:

- (a) those representations were opinions which Bellamy's held; and
- (b) further or alternatively, Bellamy's had reasonable grounds for those representations.

#### **Particulars**

Bellamy's refers to and repeats paragraphs 46A to 57A above. The statements made by Bellamy's that are alleged to give rise to the representations were made following a detailed consideration of Bellamy's position.

62. In so far as paragraph 62 makes any allegation of fact against it, Bellamy's refers to and

repeats paragraphs 45 and 61(b) above, and otherwise denies that paragraph.

63. It denies paragraph 63.

64. It denies paragraph 64.

## **G MAY 2016**

### **G.0 Alleged further events in April and May 2016**

64A. As to paragraph 64A, it:

- (a) admits paragraph 64A(b);
- (b) admits that in April 2016 Bellamy's net revenue was \$21.1 million;
- (c) admits that Bellamy's budgeted net revenue for April 2016 was \$25.6 million;
- (d) admits that in April 2016, due to uncertainty regarding certain regulatory changes in China, there was a temporary slowdown in sales via some sales channels such that as compared to sales in the previous four-week period, sales of:
  - (i) Step 1 IMF was down 20%;
  - (ii) Step 2 IMF was down 33%; and
  - (iii) Step 3 IMF was down 50%;
- (e) says that Bellamy's does not sell IMF via Taobao;
- (f) says further that Taobao represented only one sales channel through which Bellamy's IMF was then sold;
- (g) says further that:
  - (i) Bellamy's net revenue in April 2016 was higher than its net revenue in



January 2016 and February 2016;

(ii) Bellamy's net revenue in April 2016 was more than three times higher than its net revenue in April 2015; and

(iii) Bellamy's year to date net revenue in April 2016 was \$87.1 million more than in April 2015;

(h) refers to and repeats paragraph 13 above; and

(i) otherwise denies that paragraph.

64B. As to paragraph 64B, it:

(a) says that if there was a risk presented by the proposed regulatory changes in China, that risk was short term, known to the market, and Bellamy's was at the time well placed to manage that risk;

(b) refers to and repeats paragraph 13 above; and

(c) says further that:

(i) Bellamy's net revenue in May 2016 was higher than its net revenue in January 2016, February 2016 and April 2016;

(ii) Bellamy's net revenue in May 2016 was more than \$8 million more than its net revenue in May 2015; and

(iii) Bellamy's year to date net revenue in May 2016 was \$95.2 million more than its net revenue in May 2015;

(d) otherwise denies that paragraph.

## G.1 Alleged May 2016 Representations

65. As to paragraph 65, it:

- (a) admits paragraphs 65(c), 65(f), 65(h) and 65(i);
- (b) says that on 17 May 2016, it:
  - (i) published a graph showing revenue growth by half year from the 2012 financial year through to the first half of the 2016 financial year;
  - (ii) published a graph showing EBIT growth by half year from the 2012 financial year through to the first half of the 2016 financial year;
  - (iii) announced to the ASX that China IMF was a unique market with growing e-commerce and that e-commerce growth was forecast to continue because of consumer channel preferences;
  - (iv) published a graph showing market growth in Australia between the 2012 and 2015 financial years;
  - (v) said the management of the regulatory environment in China and the changing purchasing habits in China were risks and key areas to ensure sustainable growth;
  - (vi) announced to the ASX that Bellamy's existing supply arrangements would support any changes in respect of the proposed regulation to ensure that:
    - (A) each manufacturer produces only three brands; and
    - (B) all formula be produced through an approved manufacturer;

(vii) announced to the ASX:

(A) the various sales channels for IMF to China, the importance of strong distribution partnerships in China, the need to operate flexibly across a variety of sales channels and the growing e-commerce sector;

(B) that the essence of Bellamy's strategy was to deliver long term sustainable growth;

(C) the matters set out in paragraph 41(b)(xiv) above, which were repeated;

(c) says further that at trial, it will rely upon the full terms of its announcement released on 17 May 2016 and titled "Strategy May 2016" (**17 May 2016 Announcement**); and

(d) otherwise denies that paragraph.

66. It denies paragraph 66.

67. As to paragraph 67, it:

(a) admits that the statements made by Bellamy's in the 17 May 2016 Announcement were made in trade and commerce in relation to a financial product within the meaning of s 763A(1)(a) and 764A(1)(a) of the *Corporations Act*; and

(b) otherwise denies that paragraph.

## **G.2 Alleged True Position as at May 2016**

67A. It denies paragraph 67A and in further answer to that paragraph refers to and repeats paragraphs 64A(g) and 64B(c) above.

68. Save for the admissions and positive averments made in this pleading in respect of

paragraphs 46A to 57A of the statement of claim, it denies paragraph 68 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 40A to 40C, 46A to 57A, and 64A to 64B above;
- (b) says that Bellamy's total inventory levels decreased between 31 March 2016 and 30 April 2016; and
- (c) specifically denies that by no later than 17 May 2016, Bellamy's commenced and/or continued to experience reduced growth in demand for Bellamy's products.

#### **Particulars**

Bellamy's refers to and repeats the particulars under paragraph 54(b) above. In May 2016 Bellamy's revenue increased 54% compared with May 2015 and EBIT increased 820% compared with May 2015. Those results occurred after the announcement of the proposed regulatory changes in China. Further, Bellamy's refers to and repeats paragraphs 64A(g) and 64B(c) above.

69. As to paragraph 69 it:

- (a) says Aztec sales data showed that the sales of Bellamy's IMF (in percentage terms, by revenue) in Coles, Woolworths and major Australian pharmacies went from approximately 25% of total sales of IMF in early April 2016 to approximately 21% on 17 May 2016;
- (b) further says that the matters alleged in paragraph 69(a) were expected;

#### **Particulars**

Aztec sales data only monitors sales made by major Australian retailers. The decrease in Aztec sales data was consistent with Bellamy's decision to shift some of its sales from sales to Australian retailers to sales to Resellers, in order to increase revenue and margins (**Channel Shift**) and the ability of daigous to access product from sources other than Australian retailers. The Channel Shift was known to the market. By 17 May 2016, a continuing shift by Chinese consumers existed towards online purchasing of IMF which was complemented by Bellamy's multi-channel distribution strategy.

- (c) further says that Aztec sales data is available for a fee, and was obtained by Bellamy's approximately monthly in arrears;

- (d) refers to paragraph 13 above; and
- (e) otherwise denies that paragraph.

70. It denies paragraph 70 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 67A, 68 and 69 above;
- (b) says that if the matters alleged in paragraphs 67A, 68 and 69 of the statement of claim remained in existence and were continuing as at 17 May 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the questions whether, at that time:
  - (i) there was a material risk or likelihood (or an increased material risk or likelihood) that the proposed regulatory changes in China would materially adversely affect:
    - (A) earnings derived by Bellamy's from the sale of IMF in the 2017 financial year in (unspecified) markets in China and/or in (unspecified) markets in Australia; and
    - (B) the EBIT margin experienced by Bellamy's in the 2017 financial year;
  - (ii) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would experience a reduction in demand for its IMF in (unspecified) markets in China and in (unspecified) markets in Australia in the 2017 financial year;
  - (iii) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would experience a reduction in its market share

in (unspecified) markets in Australia; and

- (iv) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would not achieve strong earnings growth in (unspecified) markets in China and (unspecified) markets in Australia in the 2017 financial year;

#### **Particulars**

Other factors relevant to those questions included: (a) the final terms of the Fonterra Contract (which had not yet been concluded); (b) the performance of competitors; (c) the fact that Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand; (d) Bellamy's financial performance to 17 May 2016, which continued to be strong after the announcement of the proposed regulatory changes; (e) the fact that the IMF produced by Bellamy's did not compete with Non-Premium IMF Products and the matters set out in paragraphs 19, 20 and 50(b)(ii) above; (f) the success of the sales leading up to, on, and following Singles Day and double 12 day; (g) the fact that the change in Aztec sales data was consistent with the Channel Shift and the ability of daigous to access product from sources other than Australian retailers; (h) the economics of the market opportunity in China; (i) the success of the pick and pack strategy of some Resellers and other persons in the supply chain; (j) the macro-economic trend of growth in sales of Australian products in China; (k) seasonality factors; (l) the impact of the abolishment of the one child policy in China; and (m) the matters alleged in paragraph 35 above.

- (c) further says that even if the matters alleged in paragraphs 67A, 68 and 69 remained in existence and were continuing as at 17 May 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risks or likelihoods (or increased material risks or likelihoods)" alleged in paragraph 70 of the statement of claim when weighed with all of the other factors relevant to the questions whether, as at 17 May 2016, those alleged "material risks or likelihood (or increased material risks or likelihoods)" existed, the answers to which were matters of opinion; and
- (d) further says by reason of sub-paragraphs (b) and (c) above, none of the information comprised by the matters alleged in paragraphs 67A, 68 and 69 of the statement

of claim (if those matters remained in existence and were continuing as at 17 May 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

70A. It denies paragraph 70A and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 13, 25A to 30, 46A to 56A and 67A to 70 above;
- (b) says that if the matters alleged in paragraphs 25A to 30, 46A to 56A and 67A to 70 of the statement of claim remained in existence and were continuing as at 17 May 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the question whether, at that time, there was a material risk or likelihood (or an increased material risk or likelihood) that demand for Bellamy's IMF would fall, or alternatively, not grow in (unspecified) markets in China and/or (unspecified) markets in Australia at a rate sufficient to enable Bellamy's to sell the minimum volume for which its manufacturing contracts (including the TMI Contract and Fonterra Contract) provided, such that Bellamy's would have to either:
  - (i) continue to take IMF, which had a limited shelf life, from the manufacturers (so adding to its inventory), even if it could not sell that IMF at all or before their shelf life expired;
  - (ii) or pay shortfall payments,

with the consequential risk of reduced cash-flow and profits in the 2017 financial year and throughout the period of the TMI Contract and the Fonterra Contract;

**Particulars**

Bellamy's refers to and repeats the particulars under paragraph 57A(b)

above. Bellamy's IMF has a shelf life of approximately two to three years. The final terms of the Fonterra Contract were not concluded as at 17 May 2016.

- (c) further says that even if the matters alleged in paragraphs 25A to 30, 46A to 56A and 67A to 70 of the statement of claim remained in existence and were continuing as at 17 May 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risk or likelihood (or increased material risk or likelihood)" alleged in paragraph 70A of the statement of claim, when weighed with all of the other factors relevant to the question whether, as at 17 May 2016, that alleged "material risk and likelihood (or increased material risk or likelihood)" existed, the answer to which was a matter of opinion; and
- (d) further says by reason of sub-paragraphs (b) and (c) above, none of the information comprised by the matters alleged in paragraphs 25A to 30, 46A to 56A and 67A to 70 of the statement of claim (if those matters remained in existence and were continuing as at 17 May 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

71. It denies paragraph 71.

72. It denies paragraph 72 and in further answer to that paragraph refers to and repeats paragraphs 46A to 57A, 59 to 59C, 64B, 65 and 67A to 69 above.

### **G.3 Alleged May 2016 Misleading or Deceptive Conduct**

73. It denies paragraph 73 and in further answer to that paragraph refers to and repeats paragraphs 46A, 46B, 46C, 48, 49, 53, 53A, 57, 57A, 60, 64A, 64B, 66, 67A, 69, 70 and 70A above.



74. It denies paragraph 74 and in further answer to that paragraph refers to and repeats paragraph 66 above, and says alternatively that to the extent that the alleged May 2016 Representations were made (which is denied), at the time they were made:

- (a) those representations were opinions which Bellamy's held; and
- (b) further or alternatively, Bellamy's had reasonable grounds for those representations.

**Particulars**

Bellamy's refers to and repeats paragraphs 46A to 57A, 64A to 64B and 67A to 70A above. The statements made by Bellamy's that are alleged to give rise to the representations were made following a detailed consideration of Bellamy's position.

75. In so far as paragraph 75 makes any allegation of fact against it, Bellamy's refers to and repeats paragraphs 66 and 74(b) above, and otherwise denies that paragraph.

76. It denies paragraph 76.

77. It denies paragraph 77.

**G.4 Alleged May 2016 Continuous Disclosure Contravention**

78. As to paragraph 78, it:

- (a) says that in May 2016, Bellamy's knew that the average analyst consensus of Bellamy's:
  - (i) revenue in the 2016 financial year was \$260.4 million;
  - (ii) EBIT in the 2016 financial year was \$51.3 million;
  - (iii) revenue in the 2017 financial year was \$427.4 million;
  - (iv) EBIT in the 2017 financial year was \$89.5 million;

and could, based on those figures, calculate the average analyst consensus of Bellamy's EBIT margins for the 2016 and 2017 financial years; and

(b) otherwise denies that paragraph.

79. It denies paragraph 79 and in further answer to that paragraph:

(a) refers to and repeats paragraphs 13 to 20, 26 to 40, 46A to 57A, 58A to 59C, 67A to 71 and 78 above and says further that the Applicants' reliance upon the Fonterra Contract dated July 2016 (in paragraphs (ii)c and (iii) to the particulars under paragraph 79 of the statement of claim) to establish knowledge as at May 2016 is embarrassing and liable to be struck out;

(b) if and in so far as paragraph 79 alleges that, as at 17 May 2016, there was a material risk that Bellamy's earnings for the 2017 financial year would be materially lower than the market's expectations as at that date by reason of the matters alleged in paragraphs 58A to 59C and 69A to 71 of the statement of claim – says that if those matters remained in existence and were continuing as at 17 May 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the question whether, as at 17 May 2016, there was a material risk that Bellamy's earnings for the 2017 financial year would be materially lower than the market's expectations as at that time;

#### **Particulars**

Bellamy's refers to and repeats the particulars under paragraph 70(b) above.

(c) further says that even if the matters alleged in paragraphs 58A to 59C and 69A to 71 of the statement of claim remained in existence and were continuing as at 17 May 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise

to the "material risk" alleged in paragraph 79 of the statement of claim when weighed with all of the other factors relevant to the question whether that alleged "material risk" remained in existence and was continuing as at 17 May 2016, the answer to which was a matter of opinion; and

- (d) further says by reason of sub-paragraphs (b) and (c) above, none of the information comprised by the matters alleged in paragraphs 58A to 59C and 69A to 71 of the statement of claim (if those matters remained in existence and were continuing as at 17 May 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

80. It denies paragraph 80 and in further answer to that paragraph:

- (a) says whether the "material risk" alleged in paragraph 80(d) of the statement of claim existed as at 17 May 2016 was a matter of opinion, and Bellamy's was not "aware" (within the meaning of Listing Rule 19.12) of an opinion it did not hold at that time;
- (b) says whether the "material risk or likelihood (or "increased material risk of likelihood") alleged in paragraphs 80(c) and 80(e) of the statement of claim existed as at 17 May 2016 was a matter of opinion, and Bellamy's was not "aware" (within the meaning of Listing Rule 19.12) of an opinion it did not hold at that time;
- (c) says further that as at May 2016, the Fonterra Contract was not on foot; and
- (d) refers to and repeats paragraphs 13, 40A to 40C, 50, 54 to 56A, 67A to 72 and 79 above.

81. It denies paragraph 81 and in further answer to that paragraph refers to and repeats paragraphs 70(b) to 70(d), 70A(b) to 70A(d), 79(b) to 79(d) and 80 above.

82. It denies paragraph 82 and in further answer to that paragraph refers to and repeats paragraphs 70(b) to 70(d), 70A(b) to 70A(d), 79(b) to 79(d) and 80 above.
83. It denies paragraph 83 and says further that at trial it will rely upon the full terms of its disclosures to the market and other matters in the public domain.
84. It denies paragraph 84 and in further answer to that paragraph says that if the alleged "May 2016 Information" existed prior to the disclosures made by Bellamy's on 2 December 2016 (which is denied), and if, but for the matters pleaded below, Bellamy's would have been required by ASX Listing Rule 3.1 to tell the ASX the alleged "May 2016 Information" at some time prior to 2 December 2016 (which is also denied), then that information was within the exception to Listing Rule 3.1 provided by Listing Rule 3.1A because:
- (a) a reasonable person would not have expected Bellamy's to disclose the information prior to 2 December 2016;

**Particulars**

A reasonable person would not have expected Bellamy's to disclose confidential information which was a matter of supposition or insufficiently definite to warrant disclosure and/or was generated for the internal management purposes of Bellamy's and/or concerned incomplete proposals or negotiations with Fonterra and TMI. A reasonable person would have appreciated that the premature disclosure of such confidential matters would or may have misinformed or misled the market, and/or created a false market in Bellamy's securities. Further, a reasonable person would not have expected Bellamy's to disclose confidential information generated for its internal management purposes and/or concerning incomplete commercial proposals or negotiations with Fonterra and TMI.

- (b) prior to 2 December 2016, the information was a matter of supposition or insufficiently definite to warrant disclosure and/or was generated for the internal management purposes of Bellamy's and/or concerned incomplete proposals or negotiations with Fonterra and TMI; and

**Particulars**

As at 17 May 2016, there were numerous factors relevant to the questions whether, at that time, the "material risks or likelihoods (or increased material risks or likelihoods)" alleged in paragraphs 70, 70A, 79(c) and 80

of the statement of claim existed. Bellamy's refers to and repeats the particulars under paragraphs 57A(b), 70(b), 70A(b) and 79(b) above. These factors, alone and/or in combination, involved matters of supposition and/or were insufficiently definite or certain at that time to enable Bellamy's to form a sufficiently definite view on the answers to the questions as to whether the "material risk" and "material risks or likelihoods (or increased material risks or likelihoods)" alleged in paragraphs 70, 70A, 79(c) and 80 of the statement of claim existed as at 17 May 2016, which were matters of opinion. Further or alternatively, the outcome of the balancing of these factors was insufficiently definite or certain at that time to enable Bellamy's to form a sufficiently definite view on the answers to these questions.

- (c) the information was confidential and the ASX had not formed the view that the information ceased to be confidential.

## **H AUGUST 2016**

### **H0. Alleged further relevant events from May to August 2016**

84A. As to paragraph 84A, it:

- (a) admits paragraph 84(a);
- (b) admits that \$23.1 million less \$9.8 million equals \$13.3 million;
- (c) says that in May 2016, Bellamy's Tmall flagship store was not a major revenue generator but rather was principally a marketing tool;
- (d) admits paragraph 84A(g) and refers to and repeats paragraph 48(b) above;
- (e) refers to and repeats paragraph 13 above and paragraph 93 below; and
- (f) otherwise denies that paragraph.

84B. As to paragraph 84B, it:

- (a) says that by 24 June 2016, Bellamy's correctly viewed the proposed regulatory changes in China as being positive for Bellamy's in the long term;

- (b) admits that the June 2016 Board Pack records that certain regulatory changes could potentially have a highly adverse impact on some sales channels and says further that the June 2016 Board Pack records that other regulatory changes could potentially have a positive impact on some sales channels, while others would have a slightly adverse impact or no impact on other sales channels;
- (c) says that:
  - (i) if by June 2016 there was a material risk or likelihood that competition would reduce the price of IMF sold in (unspecified) markets in China, then that risk related to markets in which Bellamy's did not compete and therefore would not impact Bellamy's; and
  - (ii) in June 2016, Bellamy's did not expect its average selling prices to fall below its targets;
- (d) refers to and repeats paragraphs 13, 22, 51(b) and 69(b) above; and
- (e) otherwise denies that paragraph.

84C. As to paragraph 84C, it:

- (a) admits paragraph 84C(a);
- (b) admits paragraph 84C(b);
- (c) admits that the sale of stock to SIIC was on [REDACTED] [REDACTED] paid for by Bellamy's, and says further that Bellamy's had always sold stock to SIIC on those terms;
- (d) admits that \$38.4 million less \$19.3 million equals \$19.1 million;
- (e) admits that as at 30 June 2016, Bellamy's held approximately \$55.8 million of

inventory (comprising \$21 million of finished goods, \$18.2 million of raw ingredients, \$12.7 million of bulk formula and \$3.9 million of other ingredients) and refers to and repeats paragraph 48(b) above;

(f) says further that:

- (i) Bellamy's net revenue in June 2016 was \$23.4 million more than in June 2015;
- (ii) Bellamy's year to date net revenue in June 2016 was \$119.4 million more than in June 2015;
- (iii) Bellamy's net revenue in June 2016 was more than its net revenue in any other month;
- (iv) Bellamy's sales in the last quarter of the 2016 financial year were its highest ever quarterly sales; and
- (v) Bellamy's sales in June 2016 were higher than its total sales in the last quarter of the 2015 financial year.

(g) refers to and repeats paragraphs 13 and 69(b) above; and

(h) otherwise denies that paragraph.

84D. As to paragraph 84D, it:

(a) admits paragraph 84D(b)(iii);

(b) admits that the April 2016 Board Pack records that a [REDACTED]

(c) says Bellamy's decided prior to the end of the 2016 financial year that [REDACTED]

- [REDACTED]
- (d) says that [REDACTED]  
[REDACTED]  
[REDACTED]
- (e) says that during the 2016 financial year Bellamy's sold IMF to more than 10 Resellers, and continued to sell IMF to some of those Resellers in the 2017 financial year;
- (f) refers to and repeats paragraph 13 above; and
- (g) otherwise denies that paragraph.

84E. As to paragraph 84E, it:

- (a) admits that in July 2016, Bellamy's net revenue was \$18 million and says further that:
- (i) Bellamy's budgeted net revenue for July 2016 was \$16 million;
  - (ii) Bellamy's net revenue for July 2016 was \$3.7 million more than July 2015;  
and
  - (iii) Bellamy's EBIT for July 2016 was more than three times greater than July 2015;
- (b) admits that as at 31 July 2016, Bellamy's held approximately \$66.2 million of inventory (comprising \$34.1 million of finished goods, \$20.2 million of raw ingredients and \$11.9 million of raw materials in transit) and refers to and repeats paragraph 48(b) above; and
- (c) otherwise denies that paragraph.



84F. As to paragraph 84F, it:

- (a) refers to and repeats paragraphs 13 and 84E above; and
- (b) otherwise denies that paragraph.

#### **H.1 Alleged August 2016 Representations**

85. As to paragraph 85, it:

- (a) admits paragraphs 85(a), 85(d), 85(i) and 85(k);
- (b) says that on 19 August 2016, it:
  - (i) published a graph that showed revenue and EBIT for each half year over the 2014, 2015 and 2016 financial years;
  - (ii) announced to the ASX that by reason of the additional IMF volumes to be delivered by Fonterra, to complement the growth in volumes from TMI, Bellamy's was well placed to continue its growth trajectory while optimising long-term returns;
  - (iii) announced to the ASX that China revenues grew by 331% in the 2016 financial year;
  - (iv) announced to the ASX that the then CEO of Bellamy's said that Bellamy's continued to experience strong growth in China across all of its distribution channels; that Bellamy's recognised the importance of having a multi-channel distribution strategy in China; and that Bellamy's online flagship stores via Tmall.com – where Bellamy's was in the top 10 brands of IMF – JD.com and VIP.com had led to substantial growth in sales direct from Bellamy's to consumers in China;

- (v) announced to the ASX that the then CEO of Bellamy's said that Bellamy's had a positive view of the regulatory changes announced and believed they would further strengthen Bellamy's growth opportunities in China where the Bellamy's brand and Bellamy's trusted, safe, organic products were highly valued by consumers;
- (vi) announced to the ASX a 67% increase in Australian revenues;
- (vii) announced to the ASX that the then CEO of Bellamy's said that Bellamy's continued to generate strong growth in the Australian domestic market and that brand awareness continued to grow;
- (viii) announced to the ASX that demand for Bellamy's brand continues to increase reflecting its recognition as a healthy, safe brand with product to match;
- (ix) announced to the ASX that the then CEO of Bellamy's said that the addition of the Fonterra manufacturing agreement would significantly lift volumes from the 2017 financial year and would underpin Bellamy's ability to service the growth in demand for Bellamy's range of organic IMF both domestically and internationally, and that Bellamy's had carefully matched available manufacturing capacity with its ingredients and were confident of its ability to continue to access global organic dairy ingredients;
- (x) announced to the ASX that increase in manufacturing volumes in the 2017 financial year would support inventory build for growth in existing and new markets;
- (xi) announced to the ASX that Bellamy's had planned for the anticipated regulatory changes over the last two years;

- (xii) announced to the ASX that Bellamy's was set to benefit from new Chinese regulations which would limit registered factories in China and offshore to producing three brands and each brand to three products, and Bellamy's volumes, scale and depth of penetration mean it is a priority top three customer with its manufacturers and canners;
  - (xiii) announced to the ASX that formula production deliveries from Fonterra started from the first quarter of the 2017 financial year;
  - (xiv) announced to the ASX that Bellamy's had substantial growth in sales direct from Bellamy's to consumers in China and was focused on further growing its multi-channel distribution;
  - (xv) announced to the ASX that there had been significant changes to the Australian retailer market for formula since changes to China regulations;
  - (xvi) in respect of the announcement titled "FY16 Results Presentation", repeated the matters set out in paragraph 41(b)(xiv) above; and
  - (xvii) announced to the ASX that changes in regulations were a risk to Bellamy's business;
- (c) says further that at trial, it will rely upon the full terms of its announcements released on 19 August 2016 and titled: "ASX (Appendix 4E) Preliminary Final Report for the year ended 30 June 2016"; "Annual report 2015-2016"; "FY16 Results Presentation"; and "Bellamy's agile business model delivers another record result" **(19 August 2016 Announcements)**; and
- (d) otherwise denies that paragraph.

86. As to paragraph 86, it:

- (a) admits sub-paragraph (a);
- (b) says that on 19 August 2016, the then CEO said that the 2017 financial year would be a transitional year for Bellamy's where the company would reinvest back into the business to put in place the platforms needed to grow the business in the 2018 financial year;
- (c) says further it will rely upon the full terms of the transcript of the conference call;  
and
- (d) otherwise denies that paragraph.

87. It denies paragraph 87.

88. As to paragraph 88, it:

- (a) admits that the statements made by Bellamy's in the 19 August 2016 Announcements and the statements made by its CEO on 19 August 2016 were made in trade and commerce in relation to a financial product within the meaning of s 763A(1)(a) and 764A(1)(a) of the *Corporations Act*; and
- (b) otherwise denies that paragraph.

## **H.2 Alleged True Position as at August 2016**

88A It denies paragraph 88A and in further answer to that paragraph refers to and repeats paragraphs 64B(c), 84C(f) and 84E(a) above.

88B It denies paragraph 88B and in further answer to that paragraph refers to and repeats paragraphs 84B, 84D and 84F above.

89. Save for the admissions and positive averments made in response to paragraphs 46A to

57A, and 67A to 70A of the statement of claim, it denies paragraph 89 and in further answer to that paragraph refers to and repeats paragraphs 46A to 57A and 67A to 70A above, and further says that:

- (a) by 19 August 2016, while the Fonterra Contract had been agreed, Bellamy's had not received any finished goods from Fonterra;
- (b) by 19 August 2016, Bellamy's had increased the amount of ingredients it held (as compared to the position at May 2016) and had increased the amount of finished goods it held (as compared to the position at May 2016) consistently with expectations; and

**Particulars**

Bellamy's refers to and repeats paragraphs 22(b), 48(b) and 68 above.

- (c) it specifically denies that by 19 August 2016, Bellamy's had commenced or continued to experience reduced growth in demand for Bellamy's products (in respect of markets that are unspecified in the statement of claim).

**Particulars**

Bellamy's net revenue for June 2016 increased \$23.4 million compared with June 2015 and \$1 million compared with forecast. EBIT for June 2016 increased 2,520% compared with June 2015 and 66% compared with forecast. For the 2016 financial year, Bellamy's EBIT of \$54.4 million increased 346% compared with the 2015 financial year, its revenue of about \$244 million increased 95% compared with the 2015 financial year and revenue in China increased 331%. Bellamy's net revenue for July 2016 increased \$3.7 million compared with July 2015 and \$2 million compared with forecast. EBIT for July 2016 increased 229% compared with July 2015 and 156% compared with forecast. Bellamy's refers to and repeats paragraph 88A above.

90. It denies paragraph 90.

91. As to paragraph 91, it:

- (a) admits Aztec sales data showed that the sales of Bellamy's IMF (in percentage terms, by revenue) in Coles, Woolworths and major Australian pharmacies went from approximately 25% of total sales of IMF in early April 2016 to approximately

15% by the end of July 2016;

- (b) says that the matters alleged in paragraph 91(a) were expected;

**Particulars**

Aztec sales data only monitors sales made by major Australian retailers. The decrease in Aztec sales data was consistent with the Channel Shift. The Channel Shift was known to the market. Daigous were able to access product from sources other than Australian retailers. By 19 August 2016, a continuing shift by Chinese consumers existed towards online purchasing of IMF which was complemented by Bellamy's multi-channel distribution strategy.

- (c) further says that Aztec sales data is available for a fee, and was obtained by Bellamy's approximately monthly in arrears;
- (d) refers to and repeats paragraphs 13 and 89(c) above; and
- (e) otherwise denies that paragraph.

92. As to paragraph 92, it:

- (a) refers to and repeats paragraphs 13, 25A, 25D, 53A, 54, 55, 64A, 64B, 84B and 84F above; and
- (b) otherwise denies that paragraph.

93. As to paragraph 93, it:

- (a) admits that in May 2016 Bellamy's sold some old label step 1, step 2 and step 3 IMF to Natway, with the step 1 and step 2 IMF being sold at a discount and the step 3 IMF being sold at a premium, with the result that the total sale price was at a marginal discount;
- (b) refers to and repeats paragraph 13 above;
- (c) otherwise denies that paragraph; and

- (d) says further that in Slater & Gordon's letter to MinterEllison dated 3 September 2018 written on behalf of both Applicants, the Applicants confirmed that the allegations made in paragraph 93 of the statement of claim are not intended to go beyond the particulars to that paragraph.

93A. As to paragraph 93A, it:

- (a) refers to and repeats the matters set out in paragraphs 40A to 40C, 64A to 64B, 84A to 84F, 89 and 92 above; and
- (b) otherwise denies that paragraph.

94. It admits paragraph 94 and in further answer to that paragraph says that the investment was:

- (a) known to the market; and
- (b) designed to position the Bellamy's business for sustainable earnings growth in the 2018 financial year.

95. It denies paragraph 95 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 20(a), and 88A to 93A above;
- (b) says further or alternatively that as at 19 August 2016, the risk of the proposed regulatory changes causing pricing pressures and impacting daigous was publicly available information;

**Particulars**

Bellamy's refers to and repeats the particulars under paragraph 39(a) above.

- (c) says further or alternatively that if the matters alleged in paragraphs 88A to 93A of the statement of claim existed as at 19 August 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is

denied), these were not the only matters relevant to the questions whether, at that time:

- (i) there was a material risk or likelihood (or an increased material risk or likelihood) that the discounting of the price of Bellamy's IMF in (unspecified) markets in China may have a negative effect on Bellamy's brand reputation held by consumers in (unspecified) markets in China at that time;
- (ii) there was a material risk or likelihood (or an increased material risk or likelihood) that as a result, demand for Bellamy's IMF would be further reduced in (unspecified) markets in China and other (unspecified) markets in which daigous operated; and
- (iii) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would experience a further reduction in its share of sales in (unspecified) markets in Australia and a reduction in purchases of Bellamy's IMF by daigous in (unspecified) markets in Australia;

#### **Particulars**

Other factors relevant to those questions included: (a) the impact of, and how Bellamy's managed, the proposed regulatory changes in China and the matters set out in paragraph 51(b) above; (b) the performance of competitors; (c) the fact that Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand; (d) Bellamy's financial performance to 19 August 2016, which continued to be strong after the announcement of the proposed regulatory changes; (e) the fact that the IMF produced by Bellamy's did not compete with Non-Premium IMF Products and the matters set out in paragraphs 19, 20 and 50(b)(ii) above; (f) the success of the sales leading up to, on, and following Singles Day and double 12 day; (g) the fact that the change in Aztec sales data was consistent with the Channel Shift and the ability of daigous to access product from sources other than Australian retailers; (h) the economics of the market opportunity in China; (i) the success of the pick and pack strategy of some Resellers and other persons in the supply chain; (j) the macro-economic trends of growth in sales of Australian products in China; (k) seasonality factors; (l) the Board had only seen one month of financial data; (m) the impact of the abolishment of the one child policy in China; and (o) the matters alleged in paragraph 35 above.

- (d) further says that even if the matters alleged in paragraphs 88A to 93A existed as at



19 August 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risks or likelihoods (or increased material risk or likelihood)" alleged in paragraph 95 of the statement of claim when weighed with all of the other factors relevant to the questions whether, as at 19 August 2016, those alleged "material risks or likelihoods (or increased material risks or likelihoods)" existed, the answers to which were matters of opinion; and

- (e) further says by reason of sub-paragraphs (c) and (d) above, none of the information comprised by the matters alleged in paragraphs 88A to 93A of the statement of claim (if those matters existed as at 19 August 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

96. It denies paragraph 96 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 88A to 95 above;
- (b) says that Bellamy's had not provided a forecast to the market for the 2017 financial year;
- (c) further or alternatively, says that if the matters alleged in paragraphs 88A to 95 existed as at 19 August 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the questions whether, at that time:
  - (i) there was a material risk or likelihood (or an increased material risk or likelihood) that the proposed regulatory changes in China would materially adversely affect:

- (A) earnings derived by Bellamy's from the sale of IMF in the 2017 financial year in (unspecified) markets in China and/or in (unspecified) markets in Australia; and
  - (B) the EBIT margin experienced by Bellamy's in the 2017 financial year;
- (ii) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would continue to experience reduced demand for its IMF in (unspecified) markets in China and in (unspecified) markets in Australia in the 2017 financial year;
  - (iii) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would continue to experience a reduction in its market share in (unspecified) markets in Australia; and
  - (iv) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would not achieve strong earnings growth in (unspecified) markets in China and (unspecified) markets in Australia in the 2017 financial year;

#### **Particulars**

Other factors relevant to those questions included: (a) the impact of, and how Bellamy's managed, the proposed regulatory changes in China and the matters set out in paragraph 51(b) above; (b) the performance of competitors; (c) the fact that Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand; (d) Bellamy's financial performance to 19 August 2016, which continued to be strong after the announcement of the proposed regulatory changes; (e) the fact that the IMF produced by Bellamy's did not compete with Non-Premium IMF Products and the matters set out in paragraphs 19, 20 and 50(b)(ii) above; (f) the success of the sales leading up to, on, and following Singles Day and double 12 day; (g) the fact that the change in Aztec sales data was consistent with the Channel Shift and the ability of daigous to access product from sources other than Australian retailers; (h) the economics of the market opportunity in China; (i) the success of the pick and pack strategy of some Resellers and other persons in the supply chain; (j) the macro-economic trends of growth in sales of Australian products in China; (k) seasonality factors; (l) the Board had only seen one

month of financial data; (m) the impact of the abolishment of the one child policy in China; and (o) the matters alleged in paragraph 35 above.

- (d) further says that even if the matters alleged in paragraphs 88A to 95 existed as at 19 August 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risks or likelihoods (or increased material risks or likelihoods)" alleged in paragraph 96 of the statement of claim when weighed with all of the other factors relevant to the questions whether, as at 19 August 2016, those alleged "material risks or likelihoods (or increased material risks or likelihoods)" existed, the answers to which were matters of opinion; and
- (e) further says by reason of sub-paragraphs (c) and (d) above, none of the information comprised by the matters alleged in paragraphs 88A to 93A and 95 of the statement of claim (if those matters existed as at 19 August 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

96A. It denies paragraph 96A and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 25A to 30, 46A to 56A, 67A to 70 and 88A to 96 above;
- (b) says that if the matters alleged in paragraphs 25A to 30, 46A to 56A, 67A to 70 and 88A to 96 of the statement of claim existed as at 19 August 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the question whether, at that time, there was a material risk or likelihood (or an increased material risk or likelihood) that demand for Bellamy's IMF would fall, or alternatively, not grow in (unspecified) markets in China and/or (unspecified)

markets in Australia at a rate sufficient to enable Bellamy's to sell the minimum volume for which its manufacturing contracts (including the TMI Contract and Fonterra Contract) provided, such that Bellamy's would have to either:

- (i) continue to take IMF, which had a limited shelf life, from the manufacturers (so adding to its inventory), even if it could not sell that IMF at all or before their shelf life expired; or
- (ii) pay shortfall payments,

with the consequential risk of reduced cash-flow and profits in the 2017 financial year and throughout the period of the TMI Contract and the Fonterra Contract;

#### **Particulars**

Bellamy's refers to and repeats paragraph 89 above and the particulars under paragraphs 57A(b), 70(b), 70A(b) and 79(b) above. Bellamy's IMF has a shelf life of approximately two to three years.

- (c) further says that even if the matters alleged in paragraphs 25A to 30, 46A to 56A, 67A to 70 and 88A to 96 of the statement of claim existed as at 19 August 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risk or likelihood (or increased material risk or likelihood)" alleged in paragraph 96A of the statement of claim when weighed with all of the other factors relevant to the question whether, as at 19 August 2016, that alleged "material risk and likelihood (or increased material risk or likelihood)" existed, the answer to which was a matter of opinion; and
- (d) further says by reason of sub-paragraphs (b) and (c) above, none of the information comprised by the matters alleged in paragraphs 25A to 30, 46A to 56A, 67A to 70 and 88A to 96 of the statement of claim (if those matters existed as at 19 August 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was

information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

97. It denies paragraph 97.

98. It denies paragraph 98 and in further answer to that paragraph refers to and repeats paragraphs 72, 85 to 86, and 88A to 94 above.

### **H.3 Alleged August 2016 Misleading or Deceptive Conduct**

99. It denies paragraph 99 and in further answer to that paragraph refers to and repeats paragraphs 73, 84A to 84F, 87, 88A, 88B, and 91 to 93 above.

100. It denies paragraph 100 and in further answer to that paragraph refers to and repeats paragraph 87 above, and alternatively says that to the extent that the alleged August 2016 Representations were made (which is denied), at the time they were made:

(a) those representations were opinions which Bellamy's held; and

(b) further or alternatively, Bellamy's had reasonable grounds for those representations.

#### **Particulars**

Bellamy's refers to and repeats paragraphs 46A to 57A, 64A to 64B, 67A to 70A and 88A to 96A above. The statements made by Bellamy's that are alleged to give rise to the representations were made following a detailed consideration of Bellamy's position.

101. In so far as paragraph 101 makes any allegation of fact against it, Bellamy's refers to and repeats paragraphs 87 and 100(b) above.

102. It denies paragraph 102.

103. It denies paragraph 103.

#### H.4 Alleged August 2016 Continuous Disclosure Contraventions

104. As to paragraph 104, it:

- (a) admits paragraph 104(b), and says further that, based on the figures alleged therein, Bellamy's could calculate the average analyst consensus of Bellamy's EBIT margin for the 2017 financial year; and
- (b) otherwise denies that paragraph.

105. It denies paragraph 105 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 13 to 20, 26 to 40, 46A to 53A, 55 to 57A, 58A to 59C, 67A to 71, 78 to 79, 84A to 84F, 88A to 97 and 104 above;
- (b) if and in so far as paragraph 105 alleges that, as at 19 August 2016, there was a material risk that Bellamy's earnings for the 2017 financial year would be materially lower than the market's expectations as at that date by reason of the matters alleged in paragraphs 58A to 59C, 79(b) and 88A to 97 of the statement of claim – says that if those matters remained in existence and were continuing as at 19 August 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the question whether, as at 19 August 2016, there was a material risk that Bellamy's earnings for the 2017 financial year would be materially lower than the market's expectations as at that time;

#### **Particulars**

Bellamy's refers to and repeats the particulars under paragraph 95(c) above.

- (c) further says that even if the matters alleged in paragraphs 58A to 59C, 79(b) and 88A to 97 of the statement of claim remained in existence and were continuing as at 19 August 2016 (which, save for the admissions and positive averments made

in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the alleged "material risk" when weighed with all of the other factors relevant to the question whether this alleged "material risk" remained in existence and was continuing as at 19 August 2016, the answer to which was a matter of opinion; and

- (d) further says by reason of sub-paragraphs (b) and (c) above, none of the information comprised by the matters alleged in paragraphs 58A to 59C, 79(b) and 88A to 97 of the statement of claim (if those matters remained in existence and were continuing as at 19 August 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

106. It denies paragraph 106 and in further answer to that paragraph:

- (a) says that whether the "material risk" alleged in paragraph 106(d) of the statement of claim existed as at 19 August 2016 was a matter of opinion, and Bellamy's was not "aware" (within the meaning of Listing Rule 19.12) of an opinion it did not hold at that time;
- (b) says that whether the "material risk or likelihood (or increased material risk of likelihood)" alleged in paragraphs 106(c) and 106(e) of the statement of claim existed as at 19 August 2016 was a matter of opinion, and Bellamy's was not "aware" (within the meaning of Listing Rule 19.12) of an opinion it did not hold at that time; and
- (c) refers to and repeats paragraphs 13, 68, 69, 80, 84A to 84F, and 88A to 98 above.

107. It denies paragraph 107 and in further answer to that paragraph refers to and repeats paragraphs 95(c) to 95(e), 96(c) to 96(e), 96A(b) to 96A(d), 105(b) to 105(d) and 106

above.

108. It denies paragraph 108 and in further answer to that paragraph refers to and repeats paragraphs 95(c) to 95(e), 96(c) to 96(e), 96A(b) to 96A(d), 105(b) to 105(d) and 106 above.
109. It denies paragraph 109 and says further that at trial it will rely upon the full terms of its disclosures to the market and other matters in the public domain.
110. It denies paragraph 110 and in further answer to that paragraph says that if the alleged "August 2016 Information" existed prior to the disclosures made by Bellamy's on 2 December 2016 (which is denied), and if, but for the matters pleaded below, Bellamy's would have been required by ASX Listing Rule 3.1 to tell the ASX the alleged "August 2016 Information" at some time prior to 2 December 2016 (which is also denied), then that information was within the exception to Listing Rule 3.1 provided by Listing Rule 3.1A because:
- (a) a reasonable person would not have expected Bellamy's to disclose the information prior to 2 December 2016;

#### **Particulars**

A reasonable person would not have expected Bellamy's to disclose confidential information which was a matter of supposition or insufficiently definite to warrant disclosure and/or was generated for the internal management purposes of Bellamy's and/or concerned incomplete proposals or negotiations with Fonterra and TMI. A reasonable person would have appreciated that the premature disclosure of such confidential matters would or may have misinformed or misled the market, and/or created a false market in Bellamy's securities. Further, a reasonable person would not have expected Bellamy's to disclose confidential information generated for its internal management purposes and/or concerning incomplete proposals or negotiations with Fonterra and TMI.

- (b) prior to 2 December 2016, the information was a matter of supposition or insufficiently definite to warrant disclosure and/or was generated for the internal management purposes of Bellamy's and/or concerned incomplete proposals or negotiations with Fonterra and TMI; and



### Particulars

As at 19 August 2016, there were numerous factors relevant to the questions whether, at that time, the "material risks or likelihoods (or increased material risks or likelihoods)" alleged in paragraphs 95, 96, 96A, 105 and 106 of the statement of claim existed. Bellamy's refers to and repeats the particulars to paragraphs 57A(b), 70(b), 70A(b), 79(b), 84(b) and 96A(b) above. These factors, alone and/or in combination, involved matters of supposition and/or were insufficiently definite or certain at that time to enable Bellamy's to form a sufficiently definite view on the answers to the questions as to whether the "material risk" and "material risks or likelihoods (or increased material risks or likelihoods)" alleged in paragraphs 95, 96, 96A, 105 and 106 of the statement of claim existed as at 19 August 2016, which were matters of opinion. Further or alternatively, the outcome of the balancing of these factors was insufficiently definite or certain at that time to enable Bellamy's to form a sufficiently definite view on the answers to these questions.

- (c) the information was confidential and the ASX had not formed the view that the information ceased to be confidential.

## I. October 2016

### I.1 Alleged October 2016 Representations

110A. As to paragraph 110A, it:

- (a) admits paragraphs 110A(a) and 110A(b);
- (b) admits that at 31 August 2016, Bellamy's held approximately \$75.1 million of inventory (comprising \$43 million of finished goods, \$29.5 million of raw ingredients and \$2.6 million of other ingredients) and in further answer to that paragraph refers to and repeats paragraph 48(b) above; and
- (c) otherwise denies that paragraph.

110B. As to paragraph 110B, it:

- (a) admits that by 22 September 2016 Bellamy's was aware that its year to date net revenue in August 2016 was \$7.4 million more than in August 2015;
- (b) says that by 22 September 2016, Bellamy's was aware that its sales in August 2016

continued to grow ahead of its sales in August 2015;

- (c) says that any risk to Bellamy's arising from the proposed regulatory changes in China was likely to be offset by various factors including the ability of Resellers and daigous to rely upon the direct mail channel, the fact that Bellamy's believed that Resellers were investing in pick and pay operations and the fact that many people in the industry believed that the compliance date for some or all of the proposed regulatory changes would be delayed until January 2018;
- (d) refers to and repeats paragraphs 13, 69(b) and 91(b) above; and
- (e) otherwise denies that paragraph.

110C. As to paragraph 110C, it:

- (a) admits paragraphs 110C(a) to (d);
- (b) admits that at 30 September 2016, Bellamy's held approximately \$78.4 million of inventory (comprising \$57 million of finished goods, \$18.8 million of raw ingredients and \$2.6 million of other ingredients) and refers to and repeats paragraph 48(b) above; and
- (c) otherwise denies that paragraph.

110D. As to paragraph 110D, it:

- (a) admits that by 19 October 2016, Bellamy's was aware that Bellamy's year to date net revenue had increased by \$9.9 million compared with September 2015;
- (b) admits paragraph 110D(b), and in further answer to that paragraph says that Bellamy's year to date EBIT by September 2016 was \$9.7 million (as compared with \$5.7 million in September 2015) and that that was due to several factors including the Channel Shift and the sale of stock produced at a lower ingredient

cost;

- (c) admits that the gross profit margin for the month of September 2016 was down on budget (40% as against a budget of 44%) as a result of promotional activity;
- (d) admits that by 19 October 2016, Bellamy's was aware that the decision by Bellamy's to discount IMF on its flagship store undercut some daigous and says further that Bellamy's recognised the need to increase its prices on its flagship store and did so;
- (e) admits paragraph 110D(h) and says further that the stranded and unprofitable stock had already been sold by Bellamy's;
- (f) admits sub-paragraphs 110D(i)(i) and (ii);
- (g) says further that Resellers began to hold less inventory after Bellamy's demonstrated an ability to deliver a constant supply of IMF;
- (h) refers to and repeats paragraph 13 above; and
- (i) otherwise denies that paragraph.

111. As to paragraph 111, it:

- (a) admits paragraph 111(b);
- (b) says that on 19 October 2016, it announced to the ASX that regulatory changes would strengthen long term growth opportunities;
- (c) says that on 19 October 2016, it announced to the ASX that:
  - (i) direct trading with China-based enterprises and customers continued to grow;

- (ii) there was growth in the e-commerce business in China;
  - (iii) due to the addition of a second manufacturing partner (Fonterra) and the ingredients required to support the initiative, inventory had increased in line with plans to \$67.8 million, comprised of \$35.1 million finished goods and \$32.7 million of ingredients;
  - (iv) "increased levels of finished goods to support the current sales rate of the business";
  - (v) agility and direct retailing in China was part of Bellamy's changing channel mix, which included a shift from daigou; and
  - (vi) the matters set out in paragraph 41(b)(xiv) above, which are repeated;
- (d) says further that at trial, it will rely upon the full terms of its announcement released on 19 October 2016 and titled "FY16 AGM" (**19 October 2016 Announcement**); and
- (e) otherwise denies that paragraph.

112. It denies paragraph 112.

113. As to paragraph 113, it:

- (a) admits that the statements made by Bellamy's in the 19 October 2016 Announcement were made in trade and commerce in relation to a financial product within the meaning of s 763A(1)(a) and 764A(1)(a) of the *Corporations Act*; and
- (b) otherwise denies that paragraph.

**I.2 Alleged True Position as at 19 October 2016**

113A. It denies paragraph 113A.

113B. It denies paragraph 113B and in further answer to that paragraph refers to and repeats paragraphs 110B and 110D above.

114. Save for the admissions and the positive averments made in this pleading in respect of paragraphs 46A to 57A, 67A to 70A and 88A to 96A of the statement of claim, it denies paragraph 114 and in further answer to that paragraph refers to and repeats paragraphs 40A to 40C, 46A to 57A, 64A to 64B, 67A to 70A, 84A to 84F, 88A to 96A, and 110A to 110D above, and says further that:

- (a) as at 19 October 2016, Bellamy's had not yet received any finished goods from Fonterra; and
- (b) between 19 August 2016 and 30 September 2016, Bellamy's increased the total inventory it held by approximately 18%.

**Particulars**

Bellamy's refers to and repeats the particulars under paragraph 89(b) above. Bellamy's engaged in a marketing plan in order to maximise sales prior to, on, and following Singles Day. As at 19 October 2016, Bellamy's had stock available to meet demand.

115. As to paragraph 115, it:

- (a) admits Aztec sales data showed that the sales of Bellamy's IMF (in percentage terms, by revenue) in Coles, Woolworths and major Australian pharmacies was approximately 12% of total Australian sales of infant formula product by the end of October 2016;
- (b) says that the matters alleged in paragraph 115(a) were expected;

**Particulars**

Aztec sales data only monitors sales made by major Australian retailers.

The decrease in Aztec sales data was consistent with the Channel Shift. The Channel Shift was known to the market. Daigous were able to access product from sources other than Australian retailers.

- (c) further says that Aztec sales data is available for a fee, and was obtained by Bellamy's approximately monthly in arrears; and
- (d) otherwise denies that paragraph.

116. It denies paragraph 116 and in further answer to the paragraph:

- (a) refers to and repeats paragraphs 113A and 115 above;
- (b) says that Bellamy's had not provided a forecast to the market for the 2017 financial year;
- (c) says further that if the matters alleged in paragraphs 113A and 115 of the statement of claim remained in existence and were continuing as at 19 October 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the questions whether, at that time:
  - (i) there was a material risk or likelihood (or an increased material risk or likelihood) that the proposed regulatory changes in China would materially adversely affect:
    - (A) earnings derived by Bellamy's from the sale of IMF in the 2017 financial year in (unspecified) markets in China and/or in (unspecified) markets in Australia; and
    - (B) the EBIT margin experienced by Bellamy's in the 2017 financial year;
  - (ii) there was a material risk or likelihood (or an increased material risk or

likelihood) that Bellamy's would continue to experience reduced demand for its IMF in (unspecified) markets in China and in (unspecified) markets in Australia in the 2017 financial year;

- (iii) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would continue to experience a reduction in Bellamy's market share in (unspecified) markets in Australia; and
- (iv) there was a material risk or likelihood (or an increased material risk or likelihood) that Bellamy's would not achieve strong earnings growth in (unspecified) markets in China and (unspecified) markets in Australia in the 2017 financial year;

#### **Particulars**

Other factors relevant to those questions included: (a) the impact of, and how Bellamy's managed, the proposed regulatory changes in China and the matters set out in paragraph 51(b) above; (b) the performance of competitors; (c) the fact that Bellamy's major constraint on growth had traditionally been production of sufficient IMF to meet demand; (d) the fact that the IMF produced by Bellamy's did not compete with Non-Premium IMF Products and the matters set out in paragraphs 19, 20 and 50(b)(ii) above; (e) the success of the sales leading up to, on, and following Singles Day and double 12 day; (f) the fact that the change in Aztec sales data was consistent with the Channel Shift and the ability of daigous to access product from sources other than Australian retailers; (g) the fact that there was more than eight months before the end of the 2017 financial year; (h) the economics of the market opportunity in China; (i) the success of the pick and pack strategy of some Resellers and other persons in the supply chain; (j) the macro-economic trend of growth in sales of Australian products in China; (k) seasonality factors; (l) the Board had only seen one quarter of financial data; (m) the impact of the abolishment of the one child policy in China; and (n) the matters alleged in paragraph 35 above.

- (d) further says that even if the matters alleged in paragraphs 113A and 115 of the statement of claim remained in existence and were continuing as at 19 October 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risks or likelihood (or an increased material risk or likelihood)" alleged in paragraph 116 of the statement of claim when weighed with all of the other

factors relevant to the questions whether, as at 19 October 2016, those alleged "material risks or likelihood (or an increased material risk or likelihood)" existed, the answers to which were matters of opinion; and

- (e) further says by reason of sub-paragraphs (c) and (d) above, none of the information comprised by the matters alleged in paragraphs 113A and 115 of the statement of claim (if those matters remained in existence and were continuing as at 19 October 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

116A It denies paragraph 116A and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 25A to 30, 46A to 56A, 67A to 70, 88A to 96 and 113A and 116 above;
- (b) says that if the matters alleged in paragraphs 25A to 30, 46A to 56A, 67A to 70, 88A to 96 and 113A and 116 of the statement of claim remained in existence and were continuing as at 19 October 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the question whether, at that time there was a material risk or likelihood (or an increased material risk or likelihood) that demand for Bellamy's IMF would fall, or alternatively, not grow in (unspecified) markets in China and/or (unspecified) markets in Australia at a rate sufficient to enable Bellamy's to sell the minimum volume for which its manufacturing contracts (including the TMI Contract and Fonterra Contract) provided, such that Bellamy's would have to either:



(i) continue to take IMF, which had a limited shelf life, from the manufacturers (so adding to its inventory), even if it could not sell that IMF at all or before their shelf life expired; or

(ii) pay shortfall payments,

with the consequential risk of reduced cash-flow and profits in the 2017 financial year and throughout the period of the TMI Contract and the Fonterra Contract;

**Particulars**

Bellamy's refers to and repeats paragraphs 89 and 114(a) above and the particulars under paragraphs 57A(b), 70(b), 70A(b) and 79(b) and 96A(b) above. Bellamy's IMF has a shelf life of approximately two to three years.

- (c) further says that even if the matters alleged in paragraphs 25A to 30, 46A to 56A, 67A to 70, 88A to 96 and 113A and 116 of the statement of claim existed as at 19 October 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risk or likelihood (or increased material risk or likelihood)" alleged in paragraph 116A of the statement of claim when weighed with all of the other factors relevant to the question whether, as at 19 October 2016, that alleged "material risk and likelihood (or increased material risk or likelihood)" existed, the answer to which was a matter of opinion; and
- (d) further says by reason of sub-paragraphs (b) and (c) above, none of the information comprised by the matters alleged in paragraphs 25A to 30, 46A to 56A, 67A to 70, 88A to 96 and 113A and 116 of the statement of claim (if those matters remained in existence and were continuing as at 19 October 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

117. It denies paragraph 117.

118. It denies paragraph 118 and in further answer to that paragraph refers to and repeats paragraphs 98, 111 and 113A to 115 above.

### **I.3 Alleged October 2016 Misleading or Deceptive Conduct**

119. It denies paragraph 119 and in further answer to that paragraph refers to and repeats paragraphs 99, 112, 110A to 110D, 113A, 113B and 115 above.

120. It denies paragraph 120 and in further answer to that paragraph refers to and repeats paragraph 112 above, and alternatively says that to the extent that the alleged October 2016 Representations were made (which is denied), at the time they were made:

- (a) those representations were opinions which Bellamy's held; and
- (b) further or alternatively, Bellamy's had reasonable grounds for those representations.

#### **Particulars**

Bellamy's refers to and repeats paragraphs 46A to 57A, 64A to 64B, 67A to 70A, 88A to 96A and 113A to 116A above. The statements made by Bellamy's that are alleged to give rise to the representations were made following a detailed consideration of Bellamy's position.

121. In so far as paragraph 121 makes any allegation of fact against it, Bellamy's refers to and repeats paragraphs 112 and 120(b) above.

122. It denies paragraph 122.

123. It denies paragraph 123.

### **I.4 Alleged October 2016 Continuous Disclosure Contravention**

124. As to paragraph 124, it:

- (a) admits paragraphs 124(b)(i) and (iii);
- (b) admits that the market expectation was for Bellamy's EBIT to be \$85.5 million for

the 2017 financial year;

- (c) says that based on the figures in sub-paragraphs (a) and (b), Bellamy's could calculate the average analyst consensus of Bellamy's EBIT margin for the 2017 financial year; and
- (d) otherwise denies that paragraph.

125. It denies paragraph 125 and in further answer to that paragraph:

- (a) refers to and repeats paragraphs 13 to 20, 26 to 40, 46A to 57, 58A to 59C, 67A to 70, 79, 88A to 96, 105(c), 110A to 110D, 113A to 117 and 124 above;
- (b) if and in so far as paragraph 125 alleges that, as at 19 October 2016, there was a material risk that Bellamy's earnings for the 2017 financial year would be materially lower than the market's expectations as at that date by reason of the matters alleged in paragraphs 58A to 59C, 79(b), 105(c) and 113A to 117 of the statement of claim – says that if those matters remained in existence and were continuing as at 19 October 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the question whether, as at 19 October 2016, there was a material risk that Bellamy's earnings for the 2017 financial year would be materially lower than the market's expectations as at that time;

#### **Particulars**

Bellamy's refers to and repeats the particulars under paragraph 116(c) above.

- (c) further says that even if the matters alleged in paragraphs 58A to 59C, 79(b), 105(c) and 113A to 117 of the statement of claim remained in existence and were continuing as at 19 October 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the "material risk" alleged in paragraph 125 of the

statement of claim when weighed with all of the other factors relevant to the question whether that alleged "material risk" remained in existence and was continuing as at 19 October 2016, the answer to which was a matter of opinion; and

- (d) further says by reason of sub-paragraphs (b) and (c) above, none of the information comprised by the matters alleged in paragraphs 58A to 59C, 79(b), 105(c) and 113A to 117 of the statement of claim (if those matters remained in existence and were continuing as at 19 October 2016, which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), whether alone or in combination, was information that Bellamy's was required to disclose to the ASX under ASX Listing Rule 3.1.

126. It denies paragraph 126 and in further answer to that paragraph:

- (a) says that whether the "material risk" alleged in paragraph 126(d) of the statement of claim remained in existence and was continuing as at 19 October 2016 was a matter of opinion, and Bellamy's was not "aware" (within the meaning of Listing Rule 19.12) of an opinion it did not hold at that time;
- (b) says that whether the "material risks or likelihood (or increased material risks or likelihood)" alleged in paragraphs 126(c) and 126(e) of the statement of claim remained in existence and were continuing as at 19 October 2016 was a matter of opinion, and Bellamy's was not "aware" (within the meaning of Listing Rule 19.12) of an opinion it did not hold at that time; and
- (c) refers to and repeats paragraphs 106 and 113A to 118 above.

127. It denies paragraph 127 and in further answer to that paragraph refers to and repeats paragraphs 116(c) to 116(e), 116A(b) to 116A(d) and 126 above.

128. It denies paragraph 128 and in further answer to that paragraph refers to and repeats paragraphs 116(c) to 116(e), 116A(b) to 116A(d) and 126 above.
129. It denies paragraph 129 and says further that at trial it will rely upon the full terms of its disclosures to the market and other matters in the public domain.
130. It denies paragraph 130 and in further answer to that paragraph says that if the alleged "October 2016 Information" existed prior to the disclosures made by Bellamy's on 2 December 2016 (which is denied), and if, but for the matters pleaded below, Bellamy's would have been required by ASX Listing Rule 3.1 to tell the ASX the alleged "October 2016 Information" at some time prior to 2 December 2016 (which is also denied), then that information was within the exception to Listing Rule 3.1 provided by Listing Rule 3.1A because:
- (a) a reasonable person would not have expected Bellamy's to disclose the information prior to 2 December 2016;

**Particulars**

A reasonable person would not have expected Bellamy's to disclose confidential information which was a matter of supposition or insufficiently definite to warrant disclosure and/or was generated for the internal management purposes of Bellamy's and/or concerned incomplete proposals or negotiations with Fonterra and TMI. A reasonable person would have appreciated that the premature disclosure of such confidential matters would or may have misinformed or misled the market, and/or created a false market in Bellamy's securities. Further, a reasonable person would not have expected Bellamy's to disclose confidential information generated for its internal management purposes and/or concerning incomplete proposals or negotiations with Fonterra and TMI.

- (b) prior to 2 December 2016, the information was a matter of supposition or insufficiently definite to warrant disclosure and/or was generated for the internal management purposes of Bellamy's and/or concerned incomplete proposals or negotiations with Fonterra and TMI; and

**Particulars**

As at 19 October 2016, there were numerous factors relevant to the questions whether, at that time, the "material risk" and "material risks or

likelihoods (or increased material risks or likelihoods)" alleged in paragraphs 116, 116A and 126 of the statement of claim existed. Bellamy's refers to and repeats the particulars to paragraphs 57A(b), 70(b), 70A(b), 79(b), 84(b) and 96A(b), 110(b) and 116A(b) above. These factors, alone and/or in combination, involved matters of supposition and/or were insufficiently definite or certain at that time to enable Bellamy's to form a sufficiently definite view on the answers to the questions as to whether the "material risk" and "material risks or likelihoods (or increased material risks or likelihoods)" alleged in paragraphs 116, 116A and 126 of the statement of claim existed as at 19 October 2016, which were matters of opinion. Further or alternatively, the outcome of the balancing of these factors was insufficiently definite or certain at that time to enable Bellamy's to form a sufficiently definite view on the answers to these questions.

- (c) the information was confidential and the ASX had not formed the view that the information ceased to be confidential.

## **J DECEMBER 2016**

### **J.1 Alleged 2 December 2016 Representations**

130A. It admits paragraph 130A and in further answer to that paragraph says that:

- (a) Bellamy's financial performance was in line with its expectations; and
- (b) Bellamy's year to date results were better than the previous year, with its year to date EBIT in October 2016 approximately double the year to date EBIT in October 2015.

130B. As to paragraph 130B, it:

- (a) admits that by 22 November 2016 Bellamy's was aware that Bellamy's year to date net revenue by October 2016 had grown by \$18 million compared with October 2015;
- (b) admits that by 22 November 2016 Bellamy's was aware that Bellamy's year to date EBIT by October 2016 had grown by \$6.9 million compared with October 2015;
- (c) admits paragraphs 130B(d) and 130B(e);

- (d) admits that by 22 November 2016 Bellamy's was aware that:
  - (i) by reducing its orders under the TMI Contract, Bellamy's became potentially exposed to shortfall payments under those contracts; and
  - (ii) there was a possibility of TMI calling on those shortfall payments but also a possibility that that would not occur; and
- (e) otherwise denies that paragraph.

130C. As to paragraph 130C, it:

- (a) admits that by 2 December 2016, the proposed regulatory changes in China were relevant to Bellamy's financial performance, and refers to and repeats paragraph 51(b) above;
- (b) admits that by 2 December 2016, the potential impositions of payments under the TMI Contract was relevant to Bellamy's financial performance;
- (c) refers to and repeats paragraph 13 above; and
- (d) otherwise denies that paragraph.

131. As to paragraph 131, it:

- (a) admits paragraph 131(b) (but not insofar as it uses the term 'Chinese Market' as defined in the statement of claim) and 131(h);
- (b) says that on 2 December 2016, it announced to the ASX that:
  - (i) Bellamy's unaudited revenue for the period 1 July 2016 to 20 November 2016 was up 24% to \$93 million (compared to the same period the previous year);

- (ii) Bellamy's momentum had been tempered by temporary volume dislocation in China due to regulatory changeover and the flow-on effects of restructuring the route-to-market in China impacting from late in the first quarter of the 2017 financial year, as well as by strategic investment in promotions;
  - (iii) the final document requirements for the CFDA product registration had been released, and Bellamy's was well progressed with the preparation of its documentation. With the period for registration extended to 31 December 2017, sales would continue under the current registration regime until the end of the year;
  - (iv) Bellamy's would continue to experience temporary volume dislocation until regulatory registrations were completed in China. Brands that are unlikely to gain registration were liquidating inventory at discounted prices, which impacted both imported brands such as Bellamy's and the market overall;
  - (v) based on its current view of its end markets, revenue for the first half of the 2017 financial year was anticipated to be approximately \$120 million;
  - (vi) if current trends continued in the second half of the 2017 financial year, revenue would be similar to the first half; and
  - (vii) as a result of the investment to underpin long term ambitions, Bellamy's expected its EBIT margin to be moderately below 20%, with the ultimate outcome dependent on final sales channel mix;
- (c) says further that at trial, it will rely upon the full terms of its announcement released on 2 December 2016 and titled "Business Update" (**2 December 2016 Announcement**); and



(d) otherwise denies that paragraph.

132. It denies paragraph 132.

133. As to paragraph 133, it:

(a) admits that the statements made by Bellamy's in the 2 December 2016 Announcement were made in trade and commerce in relation to a financial product within the meaning of s 763A(1)(a) and 764A(1)(a) of the *Corporations Act*; and

(b) otherwise denies that paragraph.

## **J.2 Alleged True Position in December 2016**

133A. It denies paragraph 133A.

133B. It denies paragraph 133B.

133C. It denies paragraph 133C.

134. Save for the admissions and the positive averments made in this pleading in respect of paragraphs 46A to 57A, 67A to 70A, 88A to 96A and 113A to 116A, it denies paragraph 134 and in further answer to that paragraph refers to and repeats paragraphs 46A to 57A, 67A to 70A, 88A to 96A and 113A to 116A above.

135. It denies paragraph 135.

136. As to paragraph 136, it:

(a) admits Aztec sales data showed that the sales of Bellamy's IMF (in percentage terms, by revenue) in Coles, Woolworths and major Australian pharmacies was approximately 14% of total sales of IMF by 2 December 2016, an increase of 2% from the corresponding sales share percentage as at the end of October 2016;

**Particulars**

Bellamy's refers to and repeats paragraph 115(b) above.

- (b) says that Aztec sales data is available for a fee, and was obtained by Bellamy's approximately monthly in arrears; and
  - (c) otherwise denies that paragraph.
137. As to paragraph 137, it says that this paragraph is embarrassing to plead to as the magnitude of the alleged "*risk of being obliged to make Shortfall Payments pursuant to the Take-or-Pay Obligations under the Supply Agreements*" is not specified, nor is the level of such "*Shortfall Payments*" specified. Under cover of that objection, Bellamy's admits that as at 2 December 2016, there was a risk of it being obliged to make some shortfall payments under the TMI Contract and/or the Fonterra Contract, but otherwise denies paragraph 137 and in further answer to that paragraph refers to and repeats paragraphs 30, 49, 57A, 70A, 93A, 96A, 110D, 116A, 130C and 131 above and paragraph 139 below.
138. As to paragraph 138, it:
- (a) admits that a \$36 million EBIT, on sales of \$240 million, is equivalent to a 15% EBIT margin;
  - (b) admits that a \$48 million EBIT, on sales of \$240 million, is equivalent to a 20% EBIT margin; and
  - (c) otherwise denies that paragraph.
139. It denies paragraph 139 and in further answer to that paragraph:
- (a) says that if the matters alleged in paragraphs 133A to 138 of the statement of claim remained in existence and were continuing as at 2 December 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), these were not the only matters relevant to the question

whether, at that time, there was a real and continuing risk that Bellamy's would not achieve an EBIT margin of or moderately below 20% for FY17; and

#### **Particulars**

Other factors relevant to that question included: (a) the ability to renegotiate the terms of the TMI Contract and the Fonterra Contract; (b) potential changes in channel mix, and the inconsistent nature of sales to Resellers when compared to the bricks and mortar sales channel; (c) the ability to deliver growth from products other than IMF; (d) the ability to build stronger trade marketing and marketing initiatives; (e) the ability to improve people resources to enable strength in the core business; (f) cash flow management and costs considerations; (g) the opportunity presented by O2O and Hipac; (h) the future impacts on the business from new customers and Resellers following Singles Day; (i) the success of the sales leading up to, on, and following double 12 day (j) the reported out of stock position of A2; (k) the impact of, and how Bellamy's managed, the proposed regulatory changes in China and the matters set out in paragraph 51(b) above; (l) the success of the pick and pack strategy of some Resellers and other persons in the supply chain; (m) the matters alleged in paragraph 35 above; (n) the fact that the IMF produced by Bellamy's did not compete with Non-Premium IMF Products and the matters set out in paragraphs 19, 20 and 50(b)(ii) above; (o) the economics of the market opportunity in China; (p) the fact that the change in Aztec sales data was consistent with the Channel Shift and the ability of daigous to access product from sources other than Australian retailers; (q) the performance of competitors; (r) the macro-economic trend of growth in sales of Australian products in China; (s) seasonality factors; and (t) the impact of the abolishment of the one child policy in China.

- (b) further says that even if the matters alleged in paragraphs 133A to 138 of the statement of claim remained in existence and were continuing as at 2 December 2016 (which, save for the admissions and positive averments made in respect of those paragraphs in this pleading, is denied), they did not at that time give rise to the alleged "real and continuing risk" that Bellamy's would not achieve an EBIT margin of or moderately below 20% for FY17 when weighed with all of the other factors relevant to the question whether, as at 2 December 2016, that alleged "real and continuing risk" existed, the answer to which was a matter of opinion.

140. It denies paragraph 140.

141. It denies paragraph 141 and in further answer that paragraph refers to and repeats paragraphs 47, 59 to 59C, 88A to 94, 113A to 115, 131, 132 and 133A to 139 above.

**J.3 Alleged 2 December Misleading or Deceptive Conduct**

142. It denies paragraph 142 and in further answer to that paragraph refers to and repeats paragraphs 132 and 133A to 139 above.
143. It denies paragraph 143 and in further answer to that paragraph refers to and repeats paragraph 132 above, and alternatively says that to the extent that the EBIT Margin Representation was made (which is denied), at the time the alleged representation was made:
- (a) the representation was an opinion which Bellamy's held; and
  - (b) further or alternatively, Bellamy's had reasonable grounds for that representation.

**Particulars**

Bellamy's refers to and repeats paragraphs 46A to 57A, 64A to 64B, 67A to 70A, 88A to 96A, 113A to 116A and 133A to 139 above. The statements made by Bellamy's that are alleged to give rise to the EBIT Margin Representation were made following a detailed consideration of the financial position of Bellamy's and in consultation with external advisors.

144. In so far as paragraph 144 makes any allegation of fact against it, Bellamy's refers to and repeats paragraphs 132 and 143(b) above, and otherwise denies that paragraph.
145. It denies paragraph 145.
146. It denies paragraph 146.

**K ALLEGED CAUSATION, LOSS AND DAMAGE****K.1 Alleged Market Effects**

147. As to paragraph 147, it:
- (a) admits sub-paragraph (a); and
  - (b) does not know and therefore cannot admit sub-paragraph (b).

148. It denies paragraph 148.

149. It denies paragraph 149.

149A In further answer to paragraphs 147 to 149, it:

- (a) denies that the doctrine of market-based causation is part of Australian law;
- (b) alternatively, says that if the doctrine of market-based causation is part of Australian law (which is denied), then:
  - (i) any group member in either proceeding who engaged in short selling of Bellamy's Securities at material times cannot invoke or rely on that doctrine in order to establish that any of the alleged contraventions (all of which are denied) caused that group member any loss or damage (which loss and damage is also denied); and
  - (ii) further or alternatively, the Applicants and the group members in both proceedings are not entitled to invoke or rely on the doctrine of market-based causation, and/or that doctrine can have no application, unless they plead and prove that, had Bellamy's not engaged in the alleged contravening conduct, with the consequence (as alleged by the Applicants) that the alleged "inflation" in the price of Bellamy's Securities would have been removed before they acquired their Bellamy's Securities, they nevertheless would have proceeded to acquire those Bellamy's Securities.

## **K.2 Alleged Reliance**

150. It does not know and therefore cannot admit paragraph 150.

151. It denies paragraph 151 and in further answer to that paragraph says that the allegation made in sub-paragraph 151(b) (that the Applicant and some group members relied

"directly on some or all" of the alleged representations) is embarrassing and liable to be struck out.

### **K.3 Alleged Change of Position**

152. It denies paragraph 152.

### **K.4 Alleged Corrective Disclosure: 2 December 2016 – Bellamy's First Business Update**

153. It admits paragraph 153.

154. It admits paragraph 154.

155. As to paragraph 155, it:

(a) admits sub-paragraph 155(a); and

(b) otherwise denies that paragraph.

156. It admits paragraph 156.

157. It admits that in the period after Bellamy's First Business Update, the price of Bellamy's securities declined as set out in sub-paragraphs (a) to (d) of paragraph 157, but otherwise denies paragraph 157.

158. It denies paragraph 158.

### **K.5 Trading Halt and Suspension from Quotation**

159. It admits paragraph 159.

160. It admits paragraph 160.

### **K.6 [Not used]**

161. [Not used]

## **K.7 Alleged Corrective Disclosure: 11 January 2017 – Bellamy's Second Business Update**

162. As to paragraph 162, it:

- (a) admits paragraphs 162(b), 162(c), 162(d) and 162(j);
- (b) says that on 11 January 2017, it announced to the ASX that:
  - (i) Bellamy's revenue and profitability had been impacted by lower than expected demand for its IMF, which had also led to increased inventory levels, excess ingredients and shortfall payments to suppliers, and that Bellamy's had responded by amending the Fonterra Contract and implementing measures to reduce production and better manage inventory levels;
  - (ii) the 2017 financial year revenue was expected to be in the range of \$220 million to \$240 million;
  - (iii) overall for the 2017 financial year, gross profit margin was expected to be in the range of 35% to 38%;
  - (iv) Bellamy's expected EBIT for the 2017 financial year to be \$22 million to \$26 million;
  - (v) as previously announced, in FY16 Bellamy's made a decision to restructure its China route-to-market by selling directly to Chinese resellers rather than indirectly via Australian retailers. The result of this shift was a reduction in Bellamy's share in IMF sales as measured by Australian retail scan data from April to June 2016. Since that time, Bellamy's share of IMF scan sales in Australia has stabilised in terms of volume and value as at November 2016;

- (vi) a part of Bellamy's strategy is to subcontract manufacturing of its products. Its key manufacturing contracts have minimum volume commitments to secure access to the necessary manufacturing facilities. Under its contractual arrangements with Fonterra and other suppliers/manufacturers, where Bellamy's is not able to fulfil minimum volume commitments, it is required to make shortfall payments; and
- (vii) shortfall payments were reflected in the revised reported EBIT forecasts for the 2017 financial year and would be expensed in the year incurred. Shortfall payments in respect of the 2017 financial year were not payable until the 2018 financial year. Under its contractual arrangements, Bellamy's projected over the next two years that shortfall payments would range [REDACTED] [REDACTED] each year depending on Bellamy's underlying sales growth and production requirements;
- (c) says further that at trial, it will rely upon the full terms of the announcement (**11 January 2017 Announcement**); and
- (d) otherwise denies that paragraph.

163. As to paragraph 163, it:

- (a) admits sub-paragraph 163(a); and
- (b) otherwise denies that paragraph.

#### **K.8 Reinstatement to quotation**

164. It admits paragraph 164.

165. It admits that after Bellamy's shares were reinstated to quotation on 11 January 2017, the price of Bellamy's securities declined as set out in sub-paragraphs (a) to (c) of paragraph



165, but otherwise denies paragraph 165.

166. It denies paragraph 166.

### **K.9 Alleged Loss and Damage**

167. It does not know and therefore cannot admit paragraph 167.

168. It does not know and therefore cannot admit paragraph 168.

169. It denies paragraph 169 and in further answer to that paragraph:

- (a) says that McKay Applicant cannot discharge its burden of establishing that it and the group members in the McKay Proceeding have suffered any loss or damage in circumstances where the “real value” or “true value” or “actual value” or “intrinsic value” (as those terms are explained in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 657-658) of the Bellamy’s securities they acquired during the Relevant Period is equal to or greater than the price(s) paid by each of them for the Bellamy’s securities they acquired during the Relevant Period;
- (b) says that the Basil Applicant cannot discharge his burden of establishing that he and the group members in the Basil Proceeding have suffered any loss or damage in circumstances where the “real value” or “true value” or “actual value” or “intrinsic value” (as those terms are explained in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 657-658) of the Bellamy’s securities they acquired during the Relevant Period is equal to or greater than the price(s) paid by each of them for the Bellamy’s securities they acquired during the Relevant Period;
- (c) further and alternatively to sub-paragraphs (a) and (b) above, says that the McKay Applicant cannot discharge its burden of establishing that the following group members in the McKay Proceeding have suffered any loss or damage by reason of the alleged contraventions (which are denied): those group members who either:

- (i) held the Bellamy's securities they acquired during the Relevant Period up to and/or after the point in time when the market value of those securities was greater than the price(s) they paid for those securities; or
- (ii) have sold the Bellamy's securities they acquired during the Relevant Period for a price greater than the price(s) they paid for those securities,

and who have thereby profited (or could have profited) from their acquisitions of Bellamy's securities which are the subject of their claims against Bellamy's in the McKay Proceeding;

- (d) further and alternatively to sub-paragraphs (a) and (b) above, says that the Basil Applicant cannot discharge his burden of establishing that he and the following group members in the Basil Proceeding have suffered any loss or damage by reason of the alleged contraventions (which are denied): those group members who either:

- (i) held the Bellamy's securities they acquired during the Relevant Period up to and/or after the point in time when the market value of those securities was greater than the price(s) they paid for those securities; or
- (ii) have sold the Bellamy's securities they acquired during the Relevant Period for a price greater than the price(s) they paid for those securities,

and who have thereby profited (or could have profited) from their acquisitions of Bellamy's securities which are the subject of their claims against Bellamy's in the Basil Proceeding;

- (e) further or alternatively, says that if the McKay Applicant and the Basil Applicant and the group members in their respective proceedings have suffered any loss or damage by reason of Bellamy's alleged contraventions (which is denied), then that

loss or damage cannot be any greater (for each claimant) than the difference between:

- (i) the price paid by that claimant for the Bellamy's securities that claimant acquired during the Relevant Period; and
  - (ii) the sum of:
    - (A) the market value of such of those securities which are still retained by that claimant; and
    - (B) the sale proceeds from any sale of those securities by that claimant after the end of the Relevant Period.
- (f) further or alternatively, says that if the McKay Applicant and the Basil Applicant and the group members in their respective proceedings have suffered any loss or damage by reason of Bellamy's alleged contraventions (which is denied), then the Basil Applicant and any group member in either the McKay Proceeding or the Basil Proceeding who continued to hold, and did not sell, the Bellamy's securities they acquired during the Relevant Period (or some of those securities) after the market price of Bellamy's securities recovered following 11 January 2017 to a price which was greater than the price(s) they paid for their Bellamy's securities, have by their conduct failed to mitigate their loss, and accordingly:
- (i) are not entitled to recover from Bellamy's any of their alleged loss or damage; or
  - (ii) alternatively, are not entitled to recover from Bellamy's any of their alleged loss or damage that resulted from their failure to mitigate.

**L ALLEGED ENTITLEMENT TO RELIEF**

170. It denies paragraph 170 and in further answer to that paragraph refers to and repeats paragraph 169 above.

171. It denies paragraph 171 and in further answer to that paragraph refers to and repeats paragraph 169 above.

**M THE STATEMENT OF CLAIM IS EMBARRASSING**

172. In response to the entire statement of claim, Bellamy's says that:

- (a) the pleading is embarrassing because it:
  - (i) alleges numerous irrelevant background facts and circumstances;
  - (ii) does not allege in summary form material facts;
  - (iii) does not allege all the material facts necessary to make good the causes of action pleaded by the Applicants;
  - (iv) is so prolix, and contains such extensive cross referencing, that the pleading is rendered unintelligible;
- (b) it will hold the Applicants to their pleaded case at trial and oppose any further attempt by the Applicants to amend their case prior to or during trial.

Date: 12 November 2018



Signed by Beverley Newbold  
MinterEllison  
Lawyer for the respondent

**M GARNER**  
**G KOZMINSKY**

This pleading was prepared by MinterEllison and G Kozminsky and settled by M Garner.

Federal Court of Australia  
District Registry: Victoria  
Division: General

**McKay Super Solutions Pty Limited (ACN 110 853 024) (as Trustee For The McKay Super Solutions Fund)**

Applicant

**Bellamy's Australia Limited (ACN 124 272 108)**

Respondent

**Peter Anthony Basil**

Applicant

**Bellamy's Australia Limited (ACN 124 272 108)**

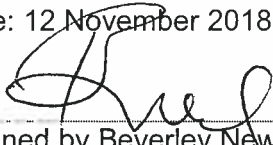
Respondent

**Certificate of lawyer**

I **BEVERLEY NEWBOLD** certify to the Court that, in relation to the defence filed on behalf of the respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 12 November 2018



Signed by Beverley Newbold  
Lawyer for the respondent

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Filed on behalf of (name & role of party) Bellamy's Australia Limited, Respondent  
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