



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

Case: S ECI 2023 01835
Filed on: 27/09/2024 10:54 AM

No. S ECI 2023 01835

BETWEEN

JUSTINE LIDGETT

First Plaintiff

CAMERON LIDGETT

Second Plaintiff

AND

DOWNER EDI LIMITED (ACN 003 872 848)

Defendant

AND

KPMG (A FIRM) (ABN 51 194 660 183)

Third Party

DEFENCE TO THIRD PARTY NOTICE

Date of Document: 27 September 2024

Filed on behalf of: Third Party

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Unless otherwise specified, this Defence adopts defined terms used in the Amended Statement of Claim filed by the Defendant on 5 August 2024 (**DSOC**). As to the allegations in the DSOC, KPMG says as follows:

A. PARTIES

1 KPMG admits paragraph 1.

2 KPMG admits paragraph 2.

AA. DOWNER UTILITIES

2A In response to paragraph 2A, KPMG:

(a) in relation to subparagraph (b), says that:

(i) Downer Utilities has been a wholly owned subsidiary of Downer Utilities Holdings since 7 August 2019; and

(ii) at all relevant times before 7 August 2019, Downer Utilities was a wholly owned subsidiary of Olbia Pty Limited (ACN 000 305 304); and

(b) otherwise admits the paragraph.

2B In response to paragraph 2B, KPMG:

(a) in relation to subparagraph (b), says that:

(i) Downer Utilities Holdings has been a wholly owned subsidiary of Downer Engineering Power since 17 July 2019; and

(ii) at all relevant times before 17 July 2019, the shareholders of Downer Utilities Holdings were Paul Salteri, Mary Victoria Shaw, Adriana Bianca Gardos and Robert Salteri; and

(b) otherwise admits the paragraph.

2C In response to paragraph 2C, KPMG:

(a) in relation to subparagraph (b), says that:

(i) Downer Engineering Power has been a wholly owned subsidiary of Downer Engineering Holdings since 17 July 2019; and

(ii) at all relevant times before 17 July 2019, Downer Engineering Power was a wholly owned subsidiary of Downer EDI Engineering Group Pty Limited (ACN 006 016 495); and

(b) otherwise admits the paragraph.

2D In response to paragraph 2D, KPMG:

(a) in relation to subparagraph (b), says that:

(i) Downer Engineering Holdings has been a wholly owned subsidiary of Downer Group Finance since 17 July 2019; and

(ii) at all relevant times before 17 July 2019, Downer Engineering Holdings was a wholly owned subsidiary of Downer EDI Engineering Group Pty Limited (ACN 006 016 495); and

(b) otherwise admits the paragraph.

2E KPMG admits paragraph 2E.

2F KPMG admits paragraph 2F.

2G In response to paragraph 2G, KPMG:

(a) admits that Downer Utilities has been a wholly owned subsidiary of Downer since at least 7 August 2019; and

(b) otherwise does not admit the paragraph.

B. SHARES IN DOWNER & DOWNER UTILITIES

3 KPMG admits paragraph 3.

C. RETAINERS & DUTIES OF CARE FOR AUDITS OF FY20-22

C.1 Retainer and duties of care for audits of FY20

Retainer

4 KPMG admits paragraph 4.

5 In response to paragraph 5, KPMG:

(a) admits it was an express term of the FY20 Retainer that KPMG would conduct its audit in accordance with Australian Auditing Standards (FY18 Engagement Letter, clause 1.1);

(b) admits the FY20 Retainer contained the words quoted in subparagraph (b) but says they were expressed to be subject to “the extent that Section 1317AE would prevent [KPMG] from doing so”;

(c) admits subparagraph (c);

(d) in response to subparagraph (d), says there were express terms of the FY20 Retainer that:

- (i) KPMG was engaged as auditor of Downer and its controlled entities under the Corporations Act (FY18 Engagement Letter, page 1);
 - (ii) Downer Utilities was a controlled entity which the Directors and Management of Downer had determined required a statutory audit (FY20 Arrangements Letter, [2] and Appendix One); and
 - (iii) KPMG's obligation in respect of controlled entities preparing special purpose financial reports was to:
 - (A) conduct an audit in accordance with the Australian Auditing Standards; and
 - (B) report to the Company's members whether in KPMG's opinion the annual special purpose financial report complied with the Corporations Act, including:
 - (1) giving a true and fair view of the Company's financial position as at 30 June 2020 and of its performance for the year ended 30 June 2020 in accordance with the accounting policies determined by the directors; and
 - (2) complying with AASB 101 *Presentation of Financial Statements*, AASB 107 *Cash Flow Statements*, AASB 108 *Accounting Policies, Changes in Accounting Estimates and Errors*, AASB 1048 *Interpretation and Application of Standard*, AASB 1054 *Australian Additional Disclosure*, AASB 1031 *Materiality* and other accounting standards determined by the directors and the *Corporations Regulations 2001* (Cth) as determined by the directors (FY18 Engagement Letter, [1.8] and Appendix Two and FY20 Arrangements Letter);
 - (e) relies on the terms of the FY18 Engagement Letter, including its Appendices, being the Terms and Conditions of Business appended to the FY18 Engagement Letter (**FY16 Terms and Conditions**) and Appendix Two, and the FY20 Arrangements Letter for their full force and effect; and
 - (f) otherwise denies the paragraph.
- 6 In response to paragraph 6, KPMG:
- (a) admits subparagraphs (a)-(c);

- (b) says it was an implied term of the FY20 Retainer that KPMG would exercise reasonable care and skill in forming the opinions described in subparagraph 5(d)(iii)(B) above; and
- (c) otherwise denies the paragraph.

Duties of care

7 In response to paragraph 7, KPMG:

- (a) admits it owed a duty to Downer to exercise reasonable care and skill in respect of the matters in subparagraphs (a) and (b);
- (b) says the scope of that duty is defined by the express terms of the FY20 Retainer; and
- (c) otherwise denies the paragraph.

7A In response to paragraph 7A, KPMG:

- (a) says that the Special Purpose Financial Report of Downer Utilities for FY20 was prepared for the purpose of fulfilling the financial reporting responsibilities of the Directors of Downer Utilities under the Corporations Act (Special Purpose Financial Report of Downer Utilities for FY20 [DOW.3000.0071.9583], page 6);
- (b) says that the Special Purpose Financial Report of Downer Utilities for FY20 and the accompanying Independent Auditor's Report to the Shareholder of Downer Utilities were expressly stated to be potentially unsuitable for any other purpose (Special Purpose Financial Report of Downer Utilities for FY20 [DOW.3000.0071.9583], page 6);
- (c) says that the Special Purpose Financial Report of Downer Utilities for FY20 was expressly intended solely for the shareholder of Downer Utilities (Special Purpose Financial Report of Downer Utilities for FY20 [DOW.3000.0071.9583], page 6);
- (d) says that KPMG expressly disclaimed any assumption of responsibility for any reliance on the Independent Auditor's Report to the Shareholder of Downer Utilities or the Financial Report by any other person or for any other purpose than that for which it was prepared (Special Purpose Financial Report of Downer Utilities for FY20 [DOW.3000.0071.9583], page 6);
- (e) says that Downer Utilities prepared a Special Purpose Financial Report in FY20 because in the opinion of the Directors of Downer Utilities there were unlikely to exist users of the financial report who were unable to command the preparation of reports tailored so as to satisfy specifically all of their information needs (Special

Purpose Financial Report of Downer Utilities for FY20 [DOW.3000.0071.9583], page 12);

- (f) says that the shareholder of Downer Utilities was Downer Utilities Holdings; and
- (g) otherwise denies the paragraph.

7B In response to paragraph 7B, KPMG:

- (a) repeats the pleadings at paragraph 7A above; and
- (b) otherwise denies the paragraph.

7C In response to paragraph 7C, KPMG:

- (a) admits that it owed Downer a duty to exercise reasonable care and skill:
 - (i) in auditing the financial report of Downer Utilities for FY20; and
 - (ii) in forming the opinions described in subparagraph 5(d)(iii)(B) above; and
- (b) says the scope of that duty is defined by the express terms of the FY20 Retainer; and
- (c) otherwise denies the paragraph.

C.2 Retainer and duties of care for audits of FY21

Retainer

8 KPMG admits paragraph 8, and says further that the FY21 Retainer was modified on 30 September 2021.

Particulars

The FY21 Retainer was modified by an addendum letter dated 23 September 2021, countersigned on 30 September 2021 (**FY21 Addendum Letter**).

9 In response to paragraph 9, KPMG:

- (a) admits it was an express term of the FY21 Retainer that KPMG would conduct its audit in accordance with Australian Auditing Standards (FY21 Engagement Letter, clause 1.1);
- (b) admits the FY21 Retainer contained the words quoted in subparagraph (b) but says they were expressed to be subject to “the extent that Section 1317AE would prevent [KPMG] from doing so”;
- (c) admits subparagraph (c); and
- (d) in response to subparagraph (d), says that there were express terms of the FY21 Retainer that:

- (i) KPMG was engaged as auditor of Downer and its controlled entities under the Corporations Act (FY21 Engagement Letter, page 1);
- (ii) Downer Utilities was a controlled entity which the Directors and Management of Downer had determined required a statutory audit (FY21 Arrangements Letter, [2] and Appendix One);
- (iii) KPMG's responsibility was to:
 - (A) conduct an audit of Downer Utilities in accordance with Australian Auditing Standards – Simplified Disclosures Framework; and
 - (B) report to Downer Utilities' shareholder whether in KPMG's opinion the annual financial report of Downer Utilities complied with the Corporations Act, including:
 - (1) giving a true and fair view of Downer Utilities' financial position as at 30 June 2021 and of its performance for the year ended 30 June 2021; and
 - (2) complying with the Australian Accounting Standards – Simplified Disclosures Framework and the *Corporations Regulations 2001* (Cth) (FY21 Addendum Letter, [1.1]);
- (e) relies on the terms of the FY21 Engagement Letter, including its Appendices, being the Terms and Conditions of Business appended to the FY21 Engagement Letter (**FY21 Terms and Conditions**) and Appendix Two, the FY21 Arrangements Letter, and the FY21 Addendum Letter for their full force and effect; and
- (f) otherwise denies the paragraph.

10 In response to paragraph 10, KPMG:

- (a) admits subparagraphs (a)-(c);
- (b) says it was an implied term of the FY21 Retainer that KPMG would exercise reasonable care and skill in forming the opinions described in subparagraph 9(d)(iii)(B) above; and
- (c) otherwise denies the paragraph.

Duties of care

11 In response to paragraph 11, KPMG:

- (a) admits it owed a duty to Downer to exercise reasonable care and skill in respect of the matters in subparagraphs (a) and (b);

(b) says the scope of that duty is defined by the express terms of the FY21 Retainer; and

(c) otherwise denies the paragraph.

11A In response to paragraph 11A, KPMG:

(a) says that the financial report of Downer Utilities for FY21 was prepared for the purpose of fulfilling the financial reporting responsibilities of the Directors of Downer Utilities; and

(b) otherwise denies the paragraph.

11B In response to paragraph 11B, KPMG:

(a) repeats the pleadings at paragraph 11A above; and

(b) otherwise denies the paragraph.

11C In response to paragraph 11C, KPMG:

(a) admits that it owed Downer a duty to exercise reasonable care and skill:

(i) in auditing the financial report of Downer Utilities for FY21; and

(ii) in forming the opinions described in subparagraph 9(d)(iii)(B) above;

(b) says the scope of that duty is defined by the express terms of the FY21 Retainer; and

(c) otherwise denies the paragraph.

C.3 Retainer and duties of care for audits of FY22

Retainer

12 KPMG admits paragraph 12.

Particulars

The FY22 Retainer included the FY21 Addendum Letter.

13 In response to paragraph 13, KPMG:

(a) admits it was an express term of the FY22 Retainer that KPMG would conduct its audit in accordance with Australian Auditing Standards (FY21 Engagement Letter, clause 1.1; FY22 Arrangements Letter);

(b) admits the FY22 Retainer contained the words quoted in subparagraph (b) but says they were expressed to be subject to “the extent that Section 1317AE would prevent [KPMG] from doing so”;

(c) admits subparagraph (c);

- (d) in response to subparagraph (d), says that there were express terms of the FY22 Retainer that:
- (i) KPMG was engaged as auditor of Downer and its controlled entities under the Corporations Act (FY21 Engagement Letter, page 1);
 - (ii) Downer Utilities was a controlled entity which the Directors and Management of Downer had determined required a statutory audit (FY22 Arrangements Letter, [2] and Appendix One); and
 - (iii) KPMG's responsibility was to:
 - (A) conduct an audit of Downer Utilities in accordance with Australian Auditing Standards – Simplified Disclosures Framework; and
 - (B) report to Downer Utilities' shareholder whether in KPMG's opinion the annual financial report of Downer Utilities complied with the Corporations Act, including:
 - (1) giving a true and fair view of Downer Utilities' financial position as at 30 June 2022 and of its performance for the year ended 30 June 2022; and
 - (2) complying with the Australian Accounting Standards – Simplified Disclosures Framework and the *Corporations Regulations 2001* (Cth) (FY21 Addendum Letter, [1.1]);
- (e) relies on the terms of the FY21 Engagement Letter, including its Appendices, being the FY21 Terms and Conditions and Appendix Two, the FY21 Addendum Letter and the FY22 Arrangements Letter for their full force and effect; and
- (f) otherwise denies paragraph 9.

14 In response to paragraph 14, KPMG:

- (a) admits subparagraphs (a)-(c);
- (b) says it was an implied term of the FY22 Retainer that KPMG would exercise reasonable care and skill in forming the opinion described in subparagraph 13(d)(iii)(B) above; and
- (c) otherwise denies the paragraph.

Duties of care

- 15 In response to paragraph 15, KPMG:
- (a) admits it owed a duty to Downer to exercise reasonable care and skill in respect of the matters in subparagraphs (a) and (b);
 - (b) says the scope of that duty is defined by the express terms of the FY22 Retainer; and
 - (c) otherwise denies the paragraph.
- 15A In response to paragraph 15A, KPMG:
- (a) says that the FY22 Downer Utilities Financial Report was prepared for the purpose of fulfilling the financial reporting responsibilities of the Directors of Downer Utilities; and
 - (b) otherwise denies the paragraph.
- 15B In response to paragraph 15B, KPMG:
- (a) repeats the pleadings at paragraph 15A above; and
 - (b) otherwise denies the paragraph.
- 15C In response to paragraph 15C, KPMG:
- (a) admits that it owed Downer a duty to exercise reasonable care and skill:
 - (i) in auditing the financial report of Downer Utilities for FY22; and
 - (ii) in forming the opinions described in subparagraph 13(d)(iii)(B) above;
 - (b) says the scope of that duty is defined by the express terms of the FY22 Retainer; and
 - (c) otherwise denies the paragraph.

D. AUDITING & ACCOUNTING STANDARDS**D.1 ASA 450 (Evaluation of Misstatements Identified during the Audit)**

- 16 In response to paragraph 16, KPMG:
- (a) relies on Australian Auditing Standard ASA 450 (*Evaluation of Misstatements Identified during the Audit*) (**ASA 450**) for its full terms and effect;
 - (b) in relation to subparagraph (d), says that the quoted statement is contained at paragraph 12 of ASA 450; and
 - (c) otherwise admits the paragraph.

D.2 ASA 700 (Forming an Opinion and Reporting on a Financial Report)

17 In response to paragraph 17, KPMG:

- (a) relies on Australian Auditing Standard ASA 700 (*Forming an Opinion and Reporting on a Financial Report*) (**ASA 700**) as in force from time to time during FY20-22 for its full terms and effect; and
- (b) otherwise admits the paragraph.

D.3 Definitions in ASA 450 & 700*“Materiality”*

18 In response to paragraph 18, KPMG:

- (a) admits that paragraph A2 of Australian Auditing Standard ASA 320 (*Materiality in Planning and Performing an Audit*) (**ASA 320**) as in force from time to time during FY20-22 contains the quoted statement;
- (b) relies on ASA 320, ASA 450, ASA 700 and Australian Auditing Standard ASA 800 (*Special Considerations – Audits of Financial Reports Prepared in Accordance with Special Purpose Frameworks*) (**ASA 800**) as in force from time to time for their full terms and effect; and
- (c) otherwise denies the paragraph.

“Those charged with governance”

19 In response to paragraph 19, KPMG:

- (a) admits that paragraph 10(a) of Australian Auditing Standard ASA 260 (*Communication With Those Charged With Governance*) (**ASA 260**) contains the quoted statement;
- (b) relies on ASA 260, ASA 450, ASA 700 and ASA 800 as in force from time to time for their full terms and effect; and
- (c) otherwise denies the paragraph.

20 In response to paragraph 20, KPMG:

- (a) admits that the Audit & Risk Committee of Downer and the Board of Downer were persons with responsibility for overseeing the strategic direction of Downer and obligations related to the accountability of the Group;
- (b) admits that the board of Downer Utilities was responsible for overseeing the strategic direction of Downer Utilities and obligations related to the accountability of Downer Utilities; and

(c) otherwise does not admit paragraph 20.

21 In response to paragraph 21, KPMG:

(a) repeats the pleading at subparagraphs (a) and (b) above; and

(b) otherwise does not admit paragraph 21.

D.4 AASB 15 (Revenue from Contracts with Customers)

22 In response to paragraph 22, KPMG:

(a) in relation to subparagraph (c), says that the criteria identified in subparagraphs (i) and (ii) comprise two of three alternative criteria, and are not cumulative;

(b) in relation to subparagraph (d), says that the quoted statement cross-refers to paragraphs 35, 36 and 37 of Australian Accounting Standard AASB 15 (Revenue from Contracts with Customers) (AASB 15);

(c) relies on AASB 15 as in force from time to time for its full terms and effect; and

(d) otherwise admits the paragraph.

E. CONTRACT WITH AUSNET

23 KPMG admits paragraph 23.

24 In response to paragraph 24, KPMG:

(a) says that the AusNet Contract was renewable at the option of AusNet Services (not Downer) subject to the terms of the AusNet Contract;

(b) relies on the AusNet Contract [DOW.3000.0022.9999; DOW.3000.0021.9999] for its full terms and effect; and

(c) otherwise admits the paragraph.

25 In response to paragraph 25, KPMG:

(a) admits that on 23 July 2019, Downer made an announcement to the ASX which contains the words alleged save for the words in the square bracket in subparagraph (c); and

(b) otherwise does not admit the paragraph.

26 KPMG admits paragraph 26.

27 In response to paragraph 27, KPMG:

(a) says that the AusNet Contract commenced in respect of "Mobilisation" only on the "Contract Date", being 22 July 2019;

Particulars

AusNet Contract, clause 2(a) and clause 1.1, definition of "Contract Date".

- (b) says that all other Services commenced on the Commencement Date, being the date on which AusNet Services notified Downer Utilities that all Conditions Precedent had been satisfied or waived; and

Particulars

AusNet Contract, clause 2(b) and clause 1.1, definition of "Commencement Date".

- (c) otherwise does not admit the paragraph.

28 KPMG does not admit paragraph 28.

F. ALLEGED OVERSTATEMENTS OF REVENUE FROM AUSNET CONTRACT

F.1 Alleged overstatements of revenue for FY20

Revenue allegedly wrongly recognised

29 KPMG does not admit paragraph 29.

30 KPMG does not admit paragraph 30.

Alleged consequent overstatement by Downer Utilities

30A KPMG does not admit paragraph 30A.

30B KPMG does not admit paragraph 30B.

30C In response to paragraph 30C, KPMG:

- (a) repeats its pleadings at paragraphs 7A, 25, 28 and 30-30B above;
- (b) denies that the FY20 Subsidiary Overstatement, if made, could have reasonably been expected to influence the economic decisions of users taken on the basis of the financial report as a whole; and
- (c) otherwise does not admit the paragraph.

30D In response to paragraph 30D, KPMG:

- (a) repeats its pleadings at paragraphs 16, 17, 18 and 30C above; and
- (b) otherwise denies the paragraph.

30E In response to paragraph 30E, KPMG:

- (a) repeats its pleadings at paragraph 30D above;

- (b) says that the application of ASA 700 to a special purpose financial report is modified by ASA 800; and
- (c) otherwise denies the paragraph.

30F In response to paragraph 30F, KPMG:

- (a) repeats its pleadings at paragraphs 30A, 30B and 30D above; and
- (b) otherwise denies the paragraph.

Alleged consequent overstatement by Downer Group

31 KPMG does not admit paragraph 31.

32 KPMG does not admit paragraph 32.

33 KPMG admits that the plaintiffs have made the allegations against Downer as set out at paragraph 33 of the DSOC and otherwise denies the paragraph.

34 In response to paragraph 34, KPMG:

- (a) admits that Downer repeats the plaintiffs' allegations pleaded at paragraph 33 of the DSOC;
- (b) does not admit the plaintiffs' allegations repeated in subparagraphs 33(a) and (b) of the DSOC; and
- (c) otherwise does not admit paragraph 34.

35 In response to paragraph 35, KPMG:

- (a) repeats its pleadings at paragraphs 25, 28, 30 and 31-34 above;
- (b) denies that the FY20 Group Overstatement, if made, could have reasonably been expected to influence the economic decisions of users taken on the basis of the Consolidated Financial Report as a whole; and
- (c) otherwise does not admit the paragraph.

36 In response to paragraph 36, KPMG:

- (a) repeats its pleading at paragraphs 16, 17, 18, 31, 34 and 35 above; and
- (b) otherwise denies the paragraph.

37 In response to paragraph 37, KPMG:

- (a) repeats its pleadings at paragraphs 34 and 36 above; and
- (b) otherwise denies the paragraph.

38 In response to paragraph 38, KPMG:

- (a) repeats its pleadings at paragraphs 31, 32, 34 and 36 above; and
- (b) otherwise does not admit the paragraph.

F.2 Alleged overstatements of revenue for FY21

Revenue allegedly wrongly recognised

39 KPMG does not admit paragraph 39.

40 KPMG does not admit paragraph 40.

Alleged consequent overstatement by Downer Utilities

40A KPMG does not admit paragraph 40A.

40B KPMG does not admit paragraph 40B.

40C In response to paragraph 40C, KPMG:

- (a) repeats its pleadings at paragraphs 11A, 25, 28, 30A, 30D and 40-40B above;
- (b) denies that the FY21 Subsidiary Overstatement, if made, could have reasonably been expected to influence the economic decisions of users taken on the basis of the financial report as a whole; and
- (c) otherwise does not admit the paragraph.

40D In response to paragraph 40D, KPMG:

- (a) repeats its pleadings at paragraphs 16, 17, 18 and 40C above; and
- (b) otherwise denies the paragraph.

40E In response to paragraph 40E, KPMG:

- (a) repeats its pleadings at paragraph 40D above; and
- (b) otherwise denies the paragraph.

40F In response to paragraph 40F, KPMG:

- (a) repeats its pleadings at paragraphs 40A, 40B and 40D above; and
- (b) otherwise does not admit the paragraph.

Alleged consequent overstatement by Downer Group

41 KPMG does not admit paragraph 41.

42 KPMG does not admit paragraph 42.

- 43 In response to paragraph 43, KPMG:
- (a) says that in its report to the Audit & Risk Committee on 29 July 2021, KPMG identified that the aggregate impact of unadjusted audit differences would decrease post tax profit by \$5.9 million;
 - (b) says that these audit differences did not have a material impact on the Consolidated Financial Report for FY21;
 - (c) says that none of these audit differences related to revenue to which AASB 15 would have applied; and
 - (d) otherwise does not admit the paragraph.
- 44 In response to paragraph 44, KPMG:
- (a) repeats its pleadings at paragraphs 42 and 43 above; and
 - (b) otherwise does not admit paragraph 44.
- 45 In response to paragraph 45, KPMG:
- (a) repeats its pleadings at paragraphs 25, 28, 31, 36, 40, 41-42 and 44 above;
 - (b) denies that the FY21 Group Overstatement, if made, could have reasonably been expected to influence the economic decisions of users taken on the basis of the Consolidated Financial Report as a whole; and
 - (c) otherwise does not admit the paragraph.
- 46 In response to paragraph 46, KPMG:
- (a) repeats its pleading at paragraphs 16, 17, 18, 41 and 45 above; and
 - (b) otherwise denies the paragraph.
- 47 In response to paragraph 47, KPMG:
- (a) repeats its pleading at paragraph 46 above; and
 - (b) otherwise does not admit the paragraph.
- 48 In response to paragraph 48, KPMG:
- (a) repeats its pleadings at paragraphs 41, 42, 44 and 46 above; and
 - (b) otherwise does not admit the paragraph.

F.3 Alleged overstatements of revenue for FY22

Revenue allegedly wrongly recognised

- 49 KPMG does not admit paragraph 49.

50 KPMG does not admit paragraph 50.

Alleged consequent overstatement by Downer Utilities

50A KPMG does not admit paragraph 50A.

50B KPMG does not admit paragraph 50B.

50C In response to paragraph 50C, KPMG:

- (a) repeats its pleadings at paragraphs 25, 28, 30A, 30D, 40A, 40D and 50-50B above;
- (b) denies that the FY22 Subsidiary Overstatement, if made, could have reasonably been expected to influence the economic decisions of users taken on the basis of the financial report as a whole; and
- (c) otherwise does not admit the paragraph.

50D In response to paragraph 50D, KPMG:

- (a) repeats its pleadings at paragraphs 16, 17, 18 and 50C above; and
- (b) otherwise denies the paragraph.

50E In response to paragraph 50E, KPMG:

- (a) repeats its pleadings at 50D above; and
- (b) otherwise denies the paragraph.

50F In response to paragraph 50F, KPMG:

- (a) repeats its pleadings at paragraphs 50A, 50B and 50D; and
- (b) otherwise does not admit the paragraph.

Alleged consequent overstatement by Downer Group

51 KPMG does not admit paragraph 51.

52 KPMG does not admit paragraph 52.

53 In response to paragraph 53, KPMG:

- (a) repeats its pleadings at paragraphs 25, 28, 31, 36, 41, 46, 50, 51 and 52 above; and
- (b) otherwise does not admit the paragraph.

54 In response to paragraph 54, KPMG:

- (a) repeats its pleading at paragraphs 16, 17, 18, 51 and 53 above; and
- (b) otherwise does not admit the paragraph.

55 In response to paragraph 55, KPMG:

- (a) repeats its pleading at paragraph 54 above; and
- (b) otherwise does not admit the paragraph.

56 In response to paragraph 56, KPMG:

- (a) repeats its pleadings at paragraphs 51, 52 and 54 above; and
- (b) otherwise does not admit the paragraph.

G. AUDITS FOR FY20-22

G.1 Audits for FY20

Audit of financial report of Downer Utilities

56A KPMG admits paragraph 56A.

56B KPMG denies paragraph 56B, and says further that:

- (a) the scope of KPMG's duty to exercise reasonable care and skill was defined by the express terms of the FY20 Retainer;
- (b) there were express terms of the FY20 Retainer that:
 - (i) "For those controlled entities preparing special purpose financial reports, we will report as set out in Appendix Two" (FY18 Engagement Letter, clause 1.8; FY20 Arrangements Letter);
 - (ii) "Directors and other officers of Downer and of each of the entities in the Group are responsible for the preparation of the financial report. This includes responsibility for such control as they consider necessary to prepare a financial report that is free of material misstatement whether due to fraud or error" (FY18 Engagement Letter, clause 2; FY20 Arrangements Letter);
 - (iii) "Such internal controls reduce but do not eliminate the risk of misstatements in the financial report from fraud or error. Directors and other officers assume responsibility for such risk. Whilst the conduct of an audit or review may act as a deterrent against fraud or error, we cannot be held responsible for not preventing fraud and error" (FY18 Engagement Letter, clause 2; FY20 Arrangements Letter);
 - (iv) "Directors and other officers of Downer and of each of the components, including those which are not controlled entities, are responsible for disclosing their knowledge of known or suspected: fraud or non-compliance with laws or regulations that could materially affect the financial report..." (FY18 Engagement Letter, clause 2; FY20 Arrangements Letter);

- (v) “We expect directors and management to advise us of any known material and/or contentious issues relating to preparation of the financial reports” (FY18 Engagement Letter, clause 2; FY20 Arrangements Letter);
- (vi) “We expect management of Downer and each of the entities in the Group to provide us with access to all information of which they are aware that is relevant to the preparation of the financial report, including records, documentation and other matters, additional information that we may request from management for the purpose of the audit and unrestricted access to persons within the entity from whom we determine it necessary to obtain audit evidence” (FY18 Engagement Letter, clause 2; FY20 Arrangements Letter);
- (vii) “Because of the test nature and other inherent limitations of an audit, together with the inherent limitations of any accounting and internal control system, there is an unavoidable risk that some material misstatements may remain undiscovered” (FY18 Engagement Letter, clause 3.1; FY20 Arrangements Letter);
- (viii) “An audit is planned and performed to obtain reasonable assurance that financial reports are free of material misstatement, whether caused by fraud or error. Absolute assurance is not attainable because of the nature of audit evidence and the characteristics of fraud. There is a risk that material errors and fraud ... may exist and not be detected by an audit performed in accordance with Australian Auditing Standards” (FY18 Engagement Letter, clause 3.1; FY20 Arrangements Letter);
- (ix) “[Downer] shall promptly provide [KPMG] or any Assisting Party with:
 - a. all relevant information; and
 - b. access to appropriate members of your staff... records, facilities, equipment, technology, systems and premises,as are reasonably required for the proper and timely provision of the Services. [Downer] shall notify us in writing of any changes to the information originally provided to [KPMG]” (FY16 Terms and Conditions, [2.1]; FY20 Arrangements Letter);
- (x) “[Downer] is responsible for:
 - a. the management, conduct and operation of [Downer’s] business, interests and affairs;

- b. compliance with [Downer's] regulatory obligations;
 - c. deciding how you use, choosing to what extent you wish to rely upon, and/or the implementation of advice or recommendations in the Deliverable;..." (FY16 Terms and Conditions, [2.2]; FY20 Arrangements Letter);
- (xi) "[Downer] warrant[s] and represent[s] to [KPMG] that: ...
 - c. "[Downer] ha[s] the knowledge, ability and experience to carry out the obligations assumed by [Downer] under the Agreement..." (FY16 Terms and Conditions, [2.3(c)]; FY20 Arrangements Letter);
- (xii) "Appendix Two: Controlled entities preparing special purpose financial reports

Our responsibility is to conduct our audit in accordance with Australian Auditing Standards and we report under Section 308 to the Company's members whether in our opinion the annual special purpose financial report complies with the *Corporations Act 2001*, including:

giving a true and fair view of the Company's financial position as at 30 June 2018 and of its performance for the year ended 30 June 2018 in accordance with the accounting policies determined by the directors; and complying with AASB 101 *Presentation of Financial Statements*, AASB 107 *Cash Flow Statements*, AASB 108 *Accounting Policies, Changes in Accounting Estimates and Errors*, AASB 1048 *Interpretation and Application of Standard*, AASB 1054 *Australian Additional Disclosure*, AASB 1031 *Materiality* and other accounting standards determined by the directors and the Corporations Regulations 2001 as determined by the directors.

As the directors have determined that [name company] is not a reporting entity as defined in AASB 101 *Presentation of Financial Statements*, Australian Accounting Standards, other than those listed above, will only be applied to the extent determined by the directors" (FY18 Engagement Letter, Appendix Two; FY20 Arrangements Letter); and
- (xiii) KPMG "assume[s] that the financial reports are prepared in accordance with the Group's accounting policies which are in accordance with Australian Accounting Standards (principles and disclosure requirements). Any changes to the business or regulatory environment, operations and/or accounting

issues should be brought to our attention well in advance of the end of the reporting period” (FY20 Arrangements Letter, [5.1]);

- (c) KPMG otherwise relies on the terms of the FY20 Retainer for their full force and effect;
- (d) KPMG’s duty to exercise reasonable care and skill did not extend to identifying all misstatements, including material misstatements, in the Special Purpose Financial Report of Downer Utilities for FY20; and
- (e) further or in the alternative:
 - (i) KPMG acted in a manner that, at all relevant times, was widely accepted in Australia by peer professional opinion as competent professional practice; and
 - (ii) accordingly, pursuant to section 50(1) of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**), KPMG is not liable in negligence.

56C In response to paragraph 56C, KPMG:

- (a) relies on the FY20 Independent Auditor’s Report to the Shareholder of Downer Utilities (Special Purpose Financial Report of Downer Utilities for FY20 [DOW.3000.0071.9583] at pages 5-7) in its entirety;
- (b) says that in the FY20 Independent Auditor’s Report to the Shareholder of Downer Utilities, KPMG:
 - (i) gave an opinion that the accompanying Financial Report of Downer Utilities was in accordance with the Corporations Act, including:
 - (A) giving a true and fair view of the Downer Utilities’ Group’s financial position as at 30 June 2020 and of its financial performance for the year ended on that date; and
 - (B) complying with Australian Accounting Standards to the extent described in Note A1 and the *Corporations Regulations 2001* (Cth);
 - (ii) included an emphasis of matter with respect to the basis of preparation and restriction on use of the Special Purpose Financial Report as pleaded at paragraph 7A above; and
 - (iii) noted that its objective was to obtain reasonable assurance about whether the Financial Report as a whole was free from material misstatement, whether due to fraud or error; and
- (c) otherwise denies the paragraph.

56D KPMG admits paragraph 56D.

56E KPMG admits paragraph 56E.

56F In response to paragraph 56F, KPMG:

- (a) repeats paragraphs 6, 7C and 56B above; and
- (b) otherwise denies the paragraph.

56G In response to paragraph 56G, KPMG:

- (a) says the opinion it gave was in the terms set out at subparagraph 56C(b) above;
- (b) says that opinion must be read as part of the FY20 Independent Auditor's Report to the Shareholder of Downer Utilities in its entirety, including particularly the emphasis of matter;
- (c) admits that in expressing that opinion, KPMG represented that it:
 - (i) had exercised reasonable care and skill in forming that opinion; and
 - (ii) "believe[s] that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion"; and
- (d) otherwise denies the paragraph.

56H In response to paragraph 56H, KPMG:

- (a) says the FY20 Independent Auditor's Report to the Shareholder of Downer Utilities was made to the shareholder of Downer Utilities;

Particulars

Special Purpose Financial Report of Downer Utilities for FY20
[DOW.3000.0071.9583] at page 5.

- (b) says that the FY20 Independent Auditor's Report to the Shareholder of Downer Utilities was made pursuant to obligations arising from the FY20 Retainer, Corporations Act and Australian Auditing Standards;
- (c) repeats subparagraphs 7A(a)-(e) above; and
- (d) otherwise denies the paragraph.

56I In response to paragraph 56I, KPMG:

- (a) repeats paragraphs 2, 56G and 56H above;
- (b) admits that it conducted an audit of the Special Purpose Financial Report of Downer Utilities for FY20 in the course of trade or commerce;

- (c) says that the representations pleaded at subparagraph 56G(c) above were made pursuant to the statutory duty found in the Corporations Act at section 307; and
- (d) otherwise denies the paragraph.

56J In response to paragraph 56J, KPMG:

- (a) repeats paragraphs 56G and 56H above;
- (b) says that the representations pleaded at subparagraph 56G(c) above were made in relation to shares in Downer Utilities; and
- (c) otherwise denies the paragraph.

56K In response to paragraph 56K, KPMG:

- (a) repeats paragraphs 3, 56G and 56J above;
- (b) says that the representations pleaded at subparagraph 56G(c) above were made in relation to financial products within the meaning of section 1041H(1) of the Corporations Act; and
- (c) otherwise denies the paragraph.

56L In response to paragraph 56L, KPMG:

- (a) repeats paragraphs 3, 56G and 56J above;
- (b) says that the representations pleaded at subparagraph 56G(c) above were made in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and
- (c) otherwise denies the paragraph.

56M KPMG denies paragraph 56M.

56N KPMG denies paragraph 56N.

56O KPMG denies paragraph 56O.

56P KPMG denies paragraph 56P.

Audit of Consolidated Financial Report of Downer Group

57 KPMG admits paragraph 57.

58 KPMG denies paragraph 58, and says further that:

- (a) the scope of KPMG's duty to exercise reasonable care and skill was defined by the express terms of the FY20 Retainer;
- (b) there were express terms of the FY20 Retainer as pleaded above at subparagraph 56B(b) above;

- (c) KPMG's duty to exercise reasonable care and skill did not extend to identifying all misstatements, including material misstatements, in the Consolidated Financial Report of the Downer Group for FY20; and
- (d) further or in the alternative:
 - (i) KPMG acted in a manner that, at all relevant times, was widely accepted in Australia by peer professional opinion as competent professional practice; and
 - (ii) accordingly, pursuant to section 5O(1) of the Civil Liability Act, KPMG is not liable in negligence.

59 In response to paragraph 59, KPMG:

- (a) relies on the FY20 Independent Auditor's Report to the Shareholders of Downer (Consolidated Financial Report of the Downer Group for FY20 [DOW.3000.0070.9995] at pages 52-58) in its entirety;
- (b) says that in the FY20 Independent Auditor's Report to the Shareholders of Downer, KPMG:
 - (i) gave an opinion that the Consolidated Financial Report of the Downer Group for FY20 complied with the Corporations Act, including:
 - (A) giving a true and fair view of the Group's financial position as at 30 June 2020 and of its financial performance for the year ended on that date; and
 - (B) complying with Australian Accounting Standards and the *Corporations Regulations 2001* (Cth); and
 - (ii) noted that its objective was to obtain reasonable assurance about whether the Consolidated Financial Report of the Downer Group for FY20 as a whole was free from material misstatement, whether due to fraud or error; and
- (c) otherwise denies the paragraph.

59A KPMG admits paragraph 59A.

59B KPMG admits paragraph 59B.

60 In response to paragraph 60, KPMG:

- (a) repeats paragraphs 6, 7 and 58 above; and
- (b) otherwise denies the paragraph.

- 61 In response to paragraph 61, KPMG:
- (a) says the opinion it gave was in the terms set out at subparagraph 59(b) above;
 - (b) says that opinion must be read as part of the FY20 Independent Auditor's Report to the Shareholders of Downer in its entirety;
 - (c) admits that in expressing that opinion, KPMG represented that it:
 - (i) had exercised reasonable care and skill in forming that opinion; and
 - (ii) "believe[s] that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion"; and
 - (d) otherwise denies the paragraph.

- 62 In response to paragraph 62, KPMG:

- (a) says that the FY20 Independent Auditor's Report to the Shareholders of Downer was made to shareholders of Downer;

Particulars

Consolidated Financial Report of the Downer Group for FY20
[DOW.3000.0070.9995] at page 52.

- (b) says that the FY20 Independent Auditor's Report to the Shareholders of Downer was made pursuant to obligations arising from the FY20 Retainer, Corporations Act and Australian Auditing Standards; and
- (c) otherwise denies the paragraph.

- 63 In response to paragraph 63, KPMG:

- (a) repeats paragraphs 2, 61 and 62 above;
- (b) admits that it conducted an audit of the Consolidated Financial Report of the Downer Group for FY20 in the course of trade or commerce;
- (c) says that the representations pleaded at subparagraph 61(c) above were made pursuant to the statutory duty found in the Corporations Act at section 307; and
- (d) otherwise denies the paragraph.

- 64 In response to paragraph 64, KPMG:

- (a) repeats paragraphs 61 and 62 above;
- (b) says that the representations pleaded at subparagraph 61(c) above were made in relation to shares in Downer; and
- (c) otherwise denies the paragraph.

65 In response to paragraph 65, KPMG:

- (a) repeats paragraphs 3, 61 and 64 above;
- (b) says that the representations pleaded at subparagraph 61(c) above were made in relation to financial products within the meaning of section 1041H(1) of the Corporations Act; and
- (c) otherwise denies the paragraph.

66 In response to paragraph 66, KPMG:

- (a) repeats paragraphs 3, 61 and 64 above;
- (b) says that the representations pleaded at subparagraph 61(c) above were made in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and
- (c) otherwise denies the paragraph.

67 KPMG denies paragraph 67.

68 KPMG denies paragraph 68.

69 KPMG denies paragraph 69.

70 KPMG denies paragraph 70.

G.2 Audits for FY21

Audit of financial report of Downer Utilities

70A KPMG admits paragraph 70A.

70B KPMG denies paragraph 70B and says further that:

- (a) the scope of KPMG's duty to exercise reasonable care and skill was defined by the express terms of the FY21 Retainer (including the FY21 Addendum Letter);
- (b) there were express terms of the FY21 Retainer that:
 - (i) "Directors and other officers of Downer and of each of the entities in the Group are responsible for the preparation of the financial report. This includes responsibility for such control as they consider necessary to prepare a financial report that is free of material misstatement whether due to fraud or error" (FY21 Engagement Letter, clause 2);
 - (ii) "Such internal controls reduce but do not eliminate the risk of misstatements in the financial report from fraud or error. Directors and other officers assume responsibility for such risk. Whilst the conduct of an audit or review may act

- as a deterrent against fraud or error, we cannot be held responsible for not preventing fraud and error” (FY21 Engagement Letter, clause 2);
- (iii) “Directors and other officers of Downer and of each of the components, including those which are not controlled entities, are responsible for disclosing their knowledge of known or suspected: fraud or non-compliance with laws or regulations that could materially affect the financial report...” (FY21 Engagement Letter, clause 2);
 - (iv) “We expect directors and management to advise us of any known material and/or contentious issues relating to preparation of the financial reports” (FY21 Engagement Letter, clause 2);
 - (v) “We expect management of Downer and each of the entities in the Group to provide us with access to all information of which they are aware that is relevant to the preparation of the financial report, including records, documentation and other matters, additional information that we may request from management for the purpose of the audit and unrestricted access to persons within the entity from whom we determine it necessary to obtain audit evidence” (FY21 Engagement Letter, clause 2);
 - (vi) “Because of the test nature and other inherent limitations of an audit, together with the inherent limitations of any accounting and internal control system, there is an unavoidable risk that some material misstatements may remain undiscovered” (FY21 Engagement Letter, clause 3.1);
 - (vii) “An audit is planned and performed to obtain reasonable assurance that financial reports are free of material misstatement, whether caused by fraud or error. Absolute assurance is not attainable because of the nature of audit evidence and the characteristics of fraud. There is a risk that material errors and fraud... may exist and not be detected by an audit performed in accordance with Australian Auditing Standards” (FY21 Engagement Letter, clause 3.1);
 - (viii) “[Downer] agree[s] to promptly provide [KPMG] and any Assisting Parties with all relevant assistance, information, access to personnel, systems, technology, equipment and other materials, as well as safe access to premises, reasonably required by us to provide the Services” (FY21 Terms and Conditions, [3.1]);
 - (ix) “[KPMG] will rely on the accuracy and completeness of Your Materials and [KPMG] will not verify it. [Downer] must notify [KPMG] in writing of any

changes to Your Materials that may affect [KPMG's] Services" (FY21 Terms and Conditions, [3.2]);

- (x) "In providing the Services, [KPMG] will only be regarded as having or knowing information provided to or known by the Personnel providing the Services. This is the case even if other Personnel have separately been provided with or know additional information" (FY21 Terms and Conditions, [3.3]);
 - (xi) "[Downer] [is] responsible and accountable for managing [Downer's] business and affairs and deciding what to do after receiving the Services, including whether to implement [KPMG's] advice or recommendations and complying with laws and regulations that affect [Downer]" (FY21 Terms and Conditions, [4.3]);
 - (xii) KPMG "assume[s] that the financial reports are prepared in accordance with the entity's accounting policies which are in accordance with Australian Accounting Standards (principles and disclosure requirements). Any changes to the business or regulatory environment, operations and/or accounting issues should be brought to our attention well in advance of the end of the reporting period" (FY21 Arrangements Letter, [5.1]); and
 - (xiii) "Directors are also responsible for determining that [Downer Utilities] is not publicly accountable based on AASB 1053 *Application of Tiers of Accounting Standards* and for preparing [Downer Utilities'] financial report using the Australian Accounting Standards – Simplified Disclosures (SD) Framework. In complying with 1060 General Purpose Financial Statements – *Simplified Disclosures for For-Profit and Not-for-Profit Entities Tier 2 Entities* (1060), directors and management must also form a view whether the financial report is in compliance with the Australian Accounting Standards – Simplified Disclosures (SD) Framework. In doing so, they shall make an explicit and unreserved statement in the financial report of compliance with the recognition and measurement requirements in Australian Accounting Standards, the presentation requirements in those standards as modified by 1060, and the disclosure requirements of 1060" (FY21 Addendum Letter, clause 2);
- (c) KPMG otherwise relies on the terms of the FY21 Retainer for their full force and effect;

- (d) KPMG's duty to exercise reasonable care and skill did not extend to identifying all misstatements, including material misstatements, in the FY21 Downer Utilities General Purpose Financial Report; and
- (e) further or in the alternative:
 - (i) KPMG acted in a manner that, at all relevant times, was widely accepted in Australia by peer professional opinion as competent professional practice; and
 - (ii) accordingly, pursuant to section 5O(1) of the Civil Liability Act, KPMG is not liable in negligence.

70C In response to paragraph 70C, KPMG:

- (a) relies on the FY21 Independent Auditor's Report to the Shareholders of Downer Utilities (General Purpose Financial Report of Downer Utilities for FY21 [DOW.3000.0071.9584] at pages 5-6) in its entirety;
- (b) says that in the FY21 Independent Auditor's Report to the Shareholders of Downer Utilities, KPMG:
 - (i) gave an opinion that the accompanying Financial Report of Downer Utilities was in accordance with the Corporations Act, including:
 - (A) giving a true and fair view of the Downer Utilities' Group's financial position as at 30 June 2021 and of its financial performance for the year ended on that date; and
 - (B) complying with Australian Accounting Standards – Simplified Disclosures and the *Corporations Regulations 2001* (Cth); and
 - (ii) noted that its objective was to obtain reasonable assurance about whether the Financial Report as a whole was free from material misstatement, whether due to fraud or error; and
- (c) otherwise denies the paragraph.

70D KPMG admits paragraph 70D.

70E KPMG admits paragraph 70E.

70F In response to paragraph 70F, KPMG:

- (a) repeats paragraphs 10, 11C and 70A above; and
- (b) otherwise denies the paragraph.

70G In response to paragraph 70G, KPMG:

- (a) says the opinion it gave was in the terms set out at subparagraph 70C(b) above;
- (b) says that opinion must be read as part of the FY21 Independent Auditor's Report to the Shareholders of Downer Utilities in its entirety, including particularly the emphasis of matter;
- (c) admits that in expressing that opinion, KPMG represented that it:
 - (i) had exercised reasonable care and skill in forming that opinion; and
 - (ii) "believe[s] that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion"; and
- (d) otherwise denies the paragraph.

70H In response to paragraph 70H, KPMG:

- (a) says the FY21 Independent Auditor's Report to the Shareholders of Downer Utilities was made to the shareholder of Downer Utilities;

Particulars

General Purpose Financial Report of Downer Utilities for FY21
[DOW.3000.0071.9584] at page 5.

- (b) says that the FY21 Independent Auditor's Report to the Shareholders of Downer Utilities was made pursuant to obligations arising from the FY21 Retainer (including the FY21 Addendum Letter), Corporations Act and Australian Auditing Standards;
- (c) repeats subparagraph 11A(a) above; and
- (d) otherwise denies the paragraph.

70I In response to paragraph 70I, KPMG:

- (a) repeats paragraphs 2, 70G and 70H above;
- (b) admits that it conducted an audit of the General Purpose Financial Report of Downer Utilities for FY21 in the course of trade or commerce;
- (c) says that the representations pleaded at subparagraph 70G(c) above were made pursuant to the statutory duty found in the Corporations Act at section 307; and
- (d) otherwise denies the paragraph.

70J In response to paragraph 70J, KPMG:

- (a) repeats paragraphs 70G and 70H above;

- (b) says that the representations pleaded at subparagraph 70G(c) above were made in relation to shares in Downer Utilities; and
- (c) otherwise denies the paragraph.

70K In response to paragraph 70K, KPMG:

- (a) repeats paragraphs 3, 70G and 70H above;
- (b) says that the representations pleaded at subparagraph 70G(c) above were made in relation to financial products within the meaning of section 1041H(1) of the Corporations Act; and
- (c) otherwise denies the paragraph.

70L In response to paragraph 70L, KPMG:

- (a) repeats paragraphs 3, 70G and 70J above;
- (b) says that the representations pleaded at subparagraph 70G(c) above were made in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and
- (c) otherwise denies the paragraph.

70M KPMG denies paragraph 70M.

70N KPMG denies paragraph 70N.

70O KPMG denies paragraph 70O.

70P KPMG denies paragraph 70P.

Audit of Consolidated Financial Report of Downer Group

71 KPMG admits paragraph 71.

72 KPMG denies paragraph 72, and says further that:

- (a) the scope of KPMG's duty to exercise reasonable care and skill was defined by the express terms of the FY21 Retainer;
- (b) there were express terms of the FY21 Retainer as pleaded above at subparagraph 70B(b);
- (c) KPMG otherwise relies on the terms of the FY21 Retainer for their full force and effect;
- (d) KPMG's duty to exercise reasonable care and skill did not extend to identifying all misstatements, including material misstatements, in the Consolidated Financial Report of the Downer Group for FY21; and

- (e) further or in the alternative:
 - (i) KPMG acted in a manner that, at all relevant times, was widely accepted in Australia by peer professional opinion as competent professional practice; and
 - (ii) accordingly, pursuant to section 5O(1) of the Civil Liability Act, KPMG is not liable in negligence.

73 In response to paragraph 73, KPMG:

- (a) relies on the FY21 Independent Auditor's Report to the Shareholders of Downer (Consolidated Financial Report of the Downer Group for FY21 [DOW.3000.0070.9997] at pages 53-59) in its entirety;
- (b) says that in the FY21 Independent Auditor's Report to the Shareholders of Downer, KPMG:
 - (i) gave an opinion that the Consolidated Financial Report of the Downer Group for FY21 complied with the Corporations Act, including:
 - (A) giving a true and fair view of the Group's financial position as at 30 June 2021 and of its financial performance for the year ended on that date; and
 - (B) complying with Australian Accounting Standards and the *Corporations Regulations 2001* (Cth);
 - (ii) noted that its objective was to obtain reasonable assurance about whether the Consolidated Financial Report of the Downer Group for FY21 as a whole was free from material misstatement, whether due to fraud or error; and
- (c) otherwise denies the paragraph.

73A KPMG admits paragraph 73A.

73B KPMG admits paragraph 73B.

74 In response to paragraph 74, KPMG:

- (a) repeats paragraphs 10, 11 and 72 above; and
- (b) otherwise denies the paragraph.

75 In response to paragraph 75, KPMG:

- (a) says the opinion it gave was in the terms set out at subparagraph 73(b) above;
- (b) says that opinion must be read as part of the FY21 Independent Auditor's Report to the Shareholders of Downer in its entirety;

- (c) admits that in expressing that opinion, KPMG represented that it:
 - (i) had exercised reasonable care and skill in forming that opinion; and
 - (ii) “believe[s] that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion”; and
- (d) otherwise denies the paragraph.

76 In response to paragraph 76, KPMG:

- (a) says that the FY21 Independent Auditor’s Report to the Shareholders of Downer was made to shareholders of Downer;

Particulars

Consolidated Financial Report of the Downer Group for FY21
[DOW.3000.0070.9997] at page 53.

- (b) says that the FY21 Independent Auditor’s Report to the Shareholders of Downer was made pursuant to obligations arising from the FY21 Retainer, Corporations Act and Australian Auditing Standards; and
- (c) otherwise denies the paragraph.

77 In response to paragraph 77, KPMG:

- (a) repeats paragraphs 2, 75 and 76 above;
- (b) admits that it conducted an audit of the Consolidated Financial Report of the Downer Group for FY21 in the course of trade or commerce;
- (c) says that the representations pleaded at subparagraph 75(c) above were made pursuant to the statutory duty found in the Corporations Act at section 307; and
- (d) otherwise denies the paragraph.

78 In response to paragraph 78, KPMG:

- (a) repeats paragraphs 75 and 76 above;
- (b) says that the representations pleaded at subparagraph 75(c) above were made in relation to shares in Downer; and
- (c) otherwise denies the paragraph.

79 In response to paragraph 79, KPMG:

- (a) repeats paragraphs 3, 75 and 78 above;

(b) says that the representations pleaded at subparagraph 75(c) above were made in relation to financial products within the meaning of section 1041H(1) of the Corporations Act; and

(c) otherwise denies the paragraph.

80 In response to paragraph 80, KPMG:

(a) repeats paragraphs 3, 75 and 78 above;

(b) says that the representations pleaded at subparagraph 75(c) above were made in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and

(c) otherwise denies the paragraph.

81 KPMG denies paragraph 81.

82 KPMG denies paragraph 82.

83 KPMG denies paragraph 83.

84 KPMG denies paragraph 84.

G.3 Audits for FY22

84A KPMG admits paragraph 84A.

84B KPMG denies paragraph 84B and says further that:

(a) the scope of KPMG's duty to exercise reasonable care and skill was defined by the express terms of the FY22 Retainer;

(b) there were express terms of the FY22 Retainer that:

(i) "Directors and other officers of Downer and of each of the entities in the Group are responsible for the preparation of the financial report. This includes responsibility for such control as they consider necessary to prepare a financial report that is free of material misstatement whether due to fraud or error" (FY21 Engagement Letter, clause 2; FY22 Arrangements Letter);

(ii) "Such internal controls reduce but do not eliminate the risk of misstatements in the financial report from fraud or error. Directors and other officers assume responsibility for such risk. Whilst the conduct of an audit or review may act as a deterrent against fraud or error, we cannot be held responsible for not preventing fraud and error" (FY21 Engagement Letter, clause 2; FY22 Arrangements Letter);

- (iii) “Directors and other officers of Downer and of each of the components, including those which are not controlled entities, are responsible for disclosing their knowledge of known or suspected: fraud or non-compliance with laws or regulations that could materially affect the financial report...” (FY21 Engagement Letter, clause 2; FY22 Arrangements Letter);
- (iv) “We expect directors and management to advise us of any known material and/or contentious issues relating to preparation of the financial reports” (FY21 Engagement Letter, clause 2; FY22 Arrangements Letter);
- (v) “We expect management of Downer and each of the entities in the Group to provide us with access to all information of which they are aware that is relevant to the preparation of the financial report, including records, documentation and other matters, additional information that we may request from management for the purpose of the audit and unrestricted access to persons within the entity from whom we determine it necessary to obtain audit evidence” (FY21 Engagement Letter, clause 2; FY22 Arrangements Letter);
- (vi) “Because of the test nature and other inherent limitations of an audit, together with the inherent limitations of any accounting and internal control system, there is an unavoidable risk that some material misstatements may remain undiscovered” (FY21 Engagement Letter, clause 3.1; FY22 Arrangements Letter);
- (vii) “An audit is planned and performed to obtain reasonable assurance that financial reports are free of material misstatement, whether caused by fraud or error. Absolute assurance is not attainable because of the nature of audit evidence and the characteristics of fraud. There is a risk that material errors and fraud ... may exist and not be detected by an audit performed in accordance with Australian Auditing Standards” (FY21 Engagement Letter, clause 3.1; FY22 Arrangements Letter);
- (viii) “[Downer] agree[s] to promptly provide [KPMG] and any Assisting Parties with all relevant assistance, information, access to personnel, systems, technology, equipment and other materials, as well as safe access to premises, reasonably required by us to provide the Services” (FY21 Terms and Conditions, [3.1]; FY22 Arrangements Letter);
- (ix) “[KPMG] will rely on the accuracy and completeness of Your Materials and [KPMG] will not verify it. [Downer] must notify [KPMG] in writing of any

changes to Your Materials that may affect [KPMG's] Services" (FY21 Terms and Conditions, [3.2]; FY22 Arrangements Letter);

- (x) "In providing the Services, [KPMG] will only be regarded as having or knowing information provided to or known by the Personnel providing the Services. This is the case even if other Personnel have separately been provided with or know additional information" (FY21 Terms and Conditions, [3.3]; FY22 Arrangements Letter);
 - (xi) "[Downer] [is] responsible and accountable for managing [Downer's] business and affairs and deciding what to do after receiving the Services, including whether to implement [KPMG's] advice or recommendations and complying with laws and regulations that affect [Downer]" (FY21 Terms and Conditions, [4.3]; FY22 Arrangements Letter);
 - (xii) KPMG "assume[s] that the financial reports are prepared in accordance with the entity's accounting policies which are in accordance with Australian Accounting Standards (principles and disclosure requirements). Any changes to the business or regulatory environment, operations and/or accounting issues should be brought to [KPMG's] attention well in advance of the end of the reporting period" (FY22 Arrangements Letter, [6.1]); and
 - (xiii) "Directors are also responsible for determining that [Downer Utilities] is not publicly accountable based on AASB 1053 *Application of Tiers of Accounting Standards* and for preparing [Downer Utilities'] financial report using the Australian Accounting Standards – Simplified Disclosures (SD) Framework. In complying with 1060 General Purpose Financial Statements – *Simplified Disclosures for For-Profit and Not-for-Profit Entities Tier 2 Entities* (1060), directors and management must also form a view whether the financial report is in compliance with the Australian Accounting Standards – Simplified Disclosures (SD) Framework. In doing so, they shall make an explicit and unreserved statement in the financial report of compliance with the recognition and measurement requirements in Australian Accounting Standards, the presentation requirements in those standards as modified by 1060, and the disclosure requirements of 1060" (FY21 Addendum Letter, clause 2);
- (c) KPMG otherwise relies on the terms of the FY22 Retainer for their full force and effect;

- (d) KPMG's duty to exercise reasonable care and skill did not extend to identifying all misstatements, including material misstatements, in the FY22 Downer Utilities General Purpose Financial Report; and
- (e) further or in the alternative:
 - (i) KPMG acted in a manner that, at all relevant times, was widely accepted in Australia by peer professional opinion as competent professional practice; and
 - (ii) accordingly, pursuant to section 5O(1) of the Civil Liability Act, KPMG is not liable in negligence.

84C In response to paragraph 84C, KPMG:

- (a) relies on the FY22 Independent Auditor's Report to the Shareholder of Downer Utilities (General Purpose Financial Report of Downer Utilities for FY22 [DOW.3000.0071.9582] at pages 5-6) in its entirety;
- (b) says that in the FY22 Independent Auditor's Report to the Shareholder of Downer Utilities, KPMG:
 - (i) gave an opinion that the accompanying Financial Report of Downer Utilities was in accordance with the Corporations Act, including:
 - (A) giving a true and fair view of the Downer Utilities' Group's financial position as at 30 June 2022 and of its financial performance for the year ended on that date; and
 - (B) complying with Australian Accounting Standards – Simplified Disclosures and the *Corporations Regulations 2001* (Cth); and
 - (ii) noted that its objective was to obtain reasonable assurance about whether the Financial Report as a whole was free from material misstatement, whether due to fraud or error; and
- (c) otherwise denies the paragraph.

84D KPMG admits paragraph 84D.

84E KPMG admits paragraph 84E.

84F In response to paragraph 84F, KPMG:

- (a) repeats paragraphs 14, 15C and 84A above; and
- (b) otherwise denies the paragraph.

84G In response to paragraph 84G, KPMG:

- (a) says the opinion it gave was in the terms set out at subparagraph 84C(b) above;
- (b) says that opinion must be read as part of the FY22 Independent Auditor's Report to the Shareholder of Downer Utilities in its entirety, including particularly the emphasis of matter;
- (c) admits that in expressing that opinion, KPMG represented that it:
 - (i) had exercised reasonable care and skill in forming that opinion; and
 - (ii) "believe[s] that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion"; and
- (d) otherwise denies the paragraph.

84H In response to paragraph 84H, KPMG:

- (a) says the FY22 Independent Auditor's Report to the Shareholder of Downer Utilities was made to the shareholder of Downer Utilities;

Particulars

General Purpose Financial Report of Downer Utilities for FY22
[DOW.3000.0071.9582] at page 5.

- (b) says that the FY22 Independent Auditor's Report to the Shareholder of Downer Utilities was made pursuant to obligations arising from the FY22 Retainer, FY21 Addendum, Corporations Act and Australian Auditing Standards;
- (c) repeats subparagraph 15A(a) above; and
- (d) otherwise denies the paragraph.

84I In response to paragraph 84I, KPMG:

- (a) repeats paragraphs 2, 84G and 84H above;
- (b) admits that it conducted an audit of the Financial Report of Downer Utilities for FY22 in the course of trade or commerce;
- (c) says that the representations pleaded at subparagraph 84G(c) above were made pursuant to the statutory duty found in the Corporations Act at section 307; and
- (d) otherwise denies the paragraph.

- 84J In response to paragraph 84J, KPMG:
- (a) repeats paragraphs 84G and 84H above;
 - (b) says that the representations pleaded at subparagraph 84G(c) above were made in relation to shares in Downer Utilities; and
 - (c) otherwise denies the paragraph.
- 84K In response to paragraph 84K, KPMG:
- (a) repeats paragraphs 3, 84G and 84J above;
 - (b) says that the representations pleaded at subparagraph 84G(c) above were made in relation to financial products within the meaning of section 1041H(1) of the Corporations Act; and
 - (c) otherwise denies the paragraph.
- 84L In response to paragraph 84L, KPMG:
- (a) repeats paragraphs 3, 84G and 84J above;
 - (b) says that the representations pleaded at subparagraph 84G(c) above were made in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and
 - (c) otherwise denies the paragraph.
- 84M KPMG denies paragraph 84M.
- 84N KPMG denies paragraph 84N.
- 84O KPMG denies paragraph 84O.
- 84P KPMG denies paragraph 84P.

Audit of Consolidated Financial Report of Downer Group

- 85 KPMG admits paragraph 85.
- 86 KPMG denies paragraph 86 and says further that:
- (a) the scope of KPMG's duty to exercise reasonable care and skill was defined by the express terms of the FY22 Retainer;
 - (b) there were express terms of the FY22 Retainer as pleaded above at 84B(b);
 - (c) KPMG's duty to exercise reasonable care and skill did not extend to identifying all misstatements, including material misstatements, in the Consolidated Financial Report of the Downer Group for FY22; and
 - (d) further or in the alternative:

- (i) KPMG acted in a manner that, at all relevant times, was widely accepted in Australia by peer professional opinion as competent professional practice; and
- (ii) accordingly, pursuant to section 5O(1) of the Civil Liability Act, KPMG is not liable in negligence.

87 In response to paragraph 87, KPMG:

- (a) relies on the FY22 Independent Auditor's Report to the Shareholders of Downer (Consolidated Financial Report of the Downer Group for FY22 [DOW.3000.0023.9999] at pages 53-59) in its entirety;
- (b) says that in the FY22 Independent Auditor's Report to the Shareholders of Downer, KPMG:
 - (i) gave an opinion that the Consolidated Financial Report of the Downer Group for FY22 complied with the Corporations Act, including:
 - (A) giving a true and fair view of the Group's financial position as at 30 June 2022 and of its financial performance for the year ended on that date; and
 - (B) complying with Australian Accounting Standards and the *Corporations Regulations 2001* (Cth);
 - (ii) noted that its objective was to obtain reasonable assurance about whether the Consolidated Financial Report of the Downer Group for FY22 as a whole was free from material misstatement, whether due to fraud or error; and
- (c) otherwise denies the paragraph.

87A KPMG admits paragraph 87A.

87B KPMG admits paragraph 87B.

88 In response to paragraph 88, KPMG:

- (a) repeats paragraph 14, 15 and 86 above; and
- (b) otherwise denies the paragraph.

89 In response to paragraph 89, KPMG:

- (a) says that the opinion it gave was in the terms set out at subparagraph 87(b) above;
- (b) says that opinion must be read as part of the FY22 Independent Auditor's Report in its entirety;
- (c) admits that in expressing that opinion, KPMG represented that it:

- (i) had exercised reasonable care and skill in forming that opinion; and
- (ii) “believe[s] that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our opinion”; and
- (d) otherwise denies the paragraph.

90 In response to paragraph 90, KPMG:

- (a) says that the FY22 Independent Auditor’s Report to the Shareholders of Downer was made to shareholders of Downer;

Particulars

Consolidated Financial Report of the Downer Group for FY22
[DOW.3000.0023.9999] at page 53.

- (b) says that the FY22 Independent Auditor's Report to the Shareholders of Downer was made pursuant to obligations arising from the FY22 Retainer, Corporations Act and Australian Auditing Standards; and
- (c) otherwise denies paragraph 90.

91 In response to paragraph 91, KPMG:

- (a) repeats paragraphs 2, 89 and 90 above;
- (b) admits that it conducted an audit of the Consolidated Financial Report of the Downer Group for FY22 in the course of trade or commerce;
- (c) says that the representations pleaded at subparagraph 89(c) above were made pursuant to the statutory duty found in the Corporations Act at section 307; and
- (d) otherwise denies the paragraph.

92 In response to paragraph 92, KPMG:

- (a) repeats paragraphs 89 and 90 above;
- (b) says that the representations pleaded at subparagraph 89(c) above were made in relation to shares in Downer; and
- (c) otherwise denies the paragraph.

93 In response to paragraph 93, KPMG:

- (a) repeats paragraphs 3, 89 and 92 above;
- (b) says that the representations pleaded at subparagraph 89(c) above were made in relation to financial products within the meaning of section 1041H(1) of the Corporations Act; and

(c) otherwise denies the paragraph.

94 In response to paragraph 94, KPMG:

(a) repeats paragraphs 3, 89 and 92 above;

(b) says that the representations pleaded at subparagraph 89(c) above were made in relation to financial services within the meaning of section 12DA(1) of the ASIC Act; and

(c) otherwise denies the paragraph.

95 KPMG denies paragraph 95.

96 KPMG denies paragraph 96.

97 KPMG denies paragraph 97.

98 KPMG denies paragraph 98.

H. ALLEGED LOSS

H.1 Alleged false, misleading, or deceptive conduct

“Capital Raise Cleansing Notice Representations”

99 KPMG denies paragraph 99.

100 KPMG denies paragraph 100.

“30 June 2020 Financial Representations”

101 KPMG denies paragraph 101.

102 KPMG denies paragraph 102.

“31 December 2020 Financial Representations”

103 KPMG denies paragraph 103.

104 KPMG denies paragraph 104.

“30 June 2021 Financial Representations”

105 KPMG denies paragraph 105.

106 KPMG denies paragraph 106.

“31 December 2021 Financial Representations”

107 KPMG denies paragraph 107.

108 KPMG denies paragraph 108.

“30 June 2022 Financial Representations”

109 KPMG denies paragraph 109.

110 KPMG denies paragraph 110.

“First FY23 Guidance Representations”

111 KPMG denies paragraph 111.

112 KPMG denies paragraph 112.

“Second FY23 Guidance Representations”

113 KPMG denies paragraph 113.

114 KPMG denies paragraph 114.

H.2 Alleged failures of continuous disclosure*“Contract Management Information”*

115 KPMG denies paragraph 115.

116 KPMG denies paragraph 116.

“AusNet Loss Information”

117 KPMG denies paragraph 117.

118 KPMG denies paragraph 118.

“30 June 2020 True Financial Information”

119 KPMG denies paragraph 119.

120 KPMG denies paragraph 120.

“31 December 2020 True Financial Information”

121 KPMG denies paragraph 121.

122 KPMG denies paragraph 122.

“30 June 2021 True Financial Information”

123 KPMG denies paragraph 123.

124 KPMG denies paragraph 124.

“31 December 2021 True Financial Information”

125 KPMG denies paragraph 125.

126 KPMG denies paragraph 126.

“30 June 2022 True Financial Information”

127 KPMG denies paragraph 127.

128 KPMG denies paragraph 128.

“FY23 Guidance Information”

129 KPMG denies paragraph 129.

130 KPMG denies paragraph 130.

I. RELIEF FROM LIABILITY

131 The proceedings against KPMG are civil proceedings against KPMG for alleged negligence, default or breach of duty in KPMG's capacity as auditor of Downer and Downer Utilities for FY20-FY22.

132 At all material times, KPMG acted honestly.

133 In all the circumstances of the case, if (which is denied), KPMG is or may be liable in respect of the alleged negligence, default or breach of duty, KPMG ought fairly be excused for any negligence, default or breach of duty.

134 In the premises of paragraphs 131 to 133 above, pursuant to section 1318 of the Corporations Act, the Court should wholly, or alternatively partly, relieve KPMG from liability on such terms as the Court thinks fit.

J. INDIRECT LOSS

135 It was an express term of the FY20 Retainer that:

“To the extent permitted by law, [KPMG] exclude[s] all liability to [Downer] for any indirect loss, loss of business, goodwill or reputation or consequential loss including without limitation loss of profits or revenue, business interruption, unauthorised access to, or loss of data. For the avoidance of doubt, this clause does not exclude liability for direct losses arising from any negligent act or omission by us which may include loss of profits or revenue, business interruption, unauthorised access or loss of data. Such losses are governed by the operation of clause 8.2” (FY16 Terms and Conditions [8.3], as updated by the FY20 Arrangements Letter).

136 Downer's claims in the DSOC are, wholly or in part, for indirect loss.

137 In the premises of paragraph 135 and 136 above, KPMG denies that it is liable to Downer for any claims in the DSOC arising in connection with the FY20 Retainer.

- 138 There were express terms of the FY21 Retainer that:
- (a) “To the extent permitted by law, we are not liable for any: (a) indirect or consequential loss or damage; or (b) loss of or damage to business, goodwill, or reputation; loss of revenue or profits; loss of, damage to, or unauthorised access to data; or business interruption” (FY21 Terms and Conditions, [8.3]); and
 - (b) “This clause 8 applies to any claim or liability in connection with the Services or this Agreement, regardless of the basis on which it arises, whether in contract, tort (including negligence), under statute or otherwise” (FY21 Terms and Conditions, [8.5]).
- 139 Downer’s claims in the DSOC are, wholly or in part, for indirect loss.
- 140 In the premises of paragraph 138 and 139 above, KPMG denies that it is liable to Downer for any claims in the DSOC arising in connection with the FY21 Retainer.
- 141 There were express terms of the FY22 Retainer that:
- (a) “To the extent permitted by law, we are not liable for any: (a) indirect or consequential loss or damage; or (b) loss of or damage to business, goodwill, or reputation; loss of revenue or profits; loss of, damage to, or unauthorised access to data; or business interruption” (FY21 Terms and Conditions, [8.3], as updated by the FY22 Arrangements Letter); and
 - (b) “This clause 8 applies to any claim or liability in connection with the Services or this Agreement, regardless of the basis on which it arises, whether in contract, tort (including negligence), under statute or otherwise” (FY21 Terms and Conditions, [8.5], as updated by the FY22 Arrangements Letter).
- 142 Downer’s claims in the DSOC are, wholly or in part, for indirect loss.
- 143 In the premises of paragraph 141 and 142 above, KPMG denies that it is liable to Downer for any claims in the DSOC arising in connection with the FY22 Retainer.

K. PROFESSIONAL STANDARDS SCHEME

K.1 The Scheme

- 144 At all material times, the Chartered Accountants Australia and New Zealand Professional Standards Scheme was a scheme operating under the *Professional Standards Act 1994* (NSW) (**the PSA**).
- 145 At all material times, KPMG was a Participant of the Scheme.

Particulars

Each partner at KPMG is a member of Chartered Accountants Australia New Zealand (**CA ANZ**) who holds a Certificate of Public Practice, or is an Affiliate Member of CA ANZ in accordance with the CA ANZ By-Laws.

- 146 It was a term of the Scheme that a Participant against whom a proceeding is brought relating to occupational liability (as defined in the PSA) resulting in Damages (as defined in the Scheme) exceeding \$2,000,000 in connection with auditing services and in respect of which the Fee is \$2,500,000 or more is not liable in damages in relation to that claim above \$75,000,000.

Particulars

Scheme, clauses 3.1, 3.2, 3.3 and 4.1.

K.2 FY20

- 147 It was an express term of the FY20 Retainer that the services performed in relation to the audit of the Consolidated Financial Report of the Downer Group for FY20 and the audit of the financial report of Downer Utilities for FY20 would be limited by the application of the Scheme or such other applicable scheme approved under the PSA.

Particulars

FY16 Terms and Conditions, [8.1], as updated by the FY20 Arrangements Letter.

- 148 The Fee (as defined in the Scheme) for the services performed in relation to the audit of the Consolidated Financial Report of the Downer Group for FY20 and the audit of the financial report of Downer Utilities for FY20 exceeded \$2,500,000.

Particulars

FY20 Arrangements Letter, clause 5.

- 149 By reason of sections 28 and 29(2) of the PSA, section 137 of the Competition and Consumer Act 2010 (Cth) (**CCA**), and paragraphs 144 to 148 above, any liability of KPMG arising in connection with the performance of the FY20 Retainer as claimed in the DSOC is limited to \$75,000,000.

K.2 FY21

- 150 It was an express term of the FY21 Retainer that the services performed in relation to the audit of the Consolidated Financial Report of the Downer Group for FY21 and the audit of

the financial report of Downer Utilities for FY21 would be limited by the application of the Scheme or such other applicable scheme approved under the PSA.

Particulars

FY21 Terms and Conditions, [8.1], FY21 Arrangements Letter.

- 151 The Fee (as defined in the Scheme) for the services performed in relation to the audit of the Consolidated Financial Report of the Downer Group for FY21 and the audit of the financial report of Downer Utilities for FY21 exceeded \$2,500,000.

Particulars

FY21 Arrangements Letter, clause 5.

- 152 By reason of sections 28 and 29(2) of the PSA, section 137 of the CCA, and paragraphs 144-146 and 150-151 above, any liability of KPMG arising in connection with the performance of the FY21 Retainer as claimed in the DSOC is limited to \$75,000,000.

K.3 FY22

- 153 It was an express term of the FY22 Retainer that the services performed in relation to the audit of the Consolidated Financial Report of the Downer Group for FY22 and the audit of the financial report of Downer Utilities for FY22 would be limited by the application of the Scheme or such other applicable scheme approved under the PSA.

Particulars

FY21 Terms and Conditions, [8.1], as updated by the FY22 Arrangements Letter.

- 154 The Fee (as defined in the Scheme) for the services performed in relation to the audit of the Consolidated Financial Report of the Downer Group for FY22 and the audit of the financial report of Downer Utilities for FY22 exceeded \$2,500,000.

Particulars

FY22 Arrangements Letter, clause 6.

155 By reason of sections 28 and 29(2) of the PSA, section 137 of the CCA, and paragraphs 144-146 and 153-154 above, any liability of KPMG arising in connection with the performance of the FY22 Retainer as claimed in the DSOC is limited to \$75,000,000.

L. CONTRACTUAL LIABILITY LIMIT

L.1 FY20

156 There were express terms of the FY20 Retainer that if KPMG's liability was not limited by the application of the Scheme approved under the PSA or such other applicable scheme approved under the PSA,

- (a) "...subject to clause 8.4, [Downer] agree[d] that, to the extent permitted by law, [KPMG's] liability for any Loss, including without limitation liability for any negligent act or omission by [KPMG], shall be limited to an amount equal to:... d. \$20 million where the reasonable charge for the Services is \$500,000 or more"; and

Particulars

FY16 Terms and Conditions, [8.2], as updated by the FY20 Arrangements Letter.

- (b) "**Loss** means any loss including any liability, cost, expense (including legal costs on a full indemnity basis), Claim, proceeding, action, demand or damage suffered by you in connection with the Services."

Particulars

FY16 Terms and Conditions, [14], as updated by the FY20 Arrangements Letter.

157 Downer's claims in the DSOC are for, or include, Loss in connection with the FY20 Retainer.

158 In the premises of paragraphs 156-157 above, if KPMG's liability is not limited by the application of the Scheme, any liability of KPMG arising in connection with the FY20 Retainer as claimed in the DSOC is limited to \$20,000,000.

L.2 FY21

159 It was an express term of the FY21 Retainer that if KPMG's liability was not limited by the application of the Scheme approved under the PSA or such other applicable scheme

approved under the PSA "... to the extent permitted by law our maximum aggregate liability is limited to the lesser of 10 times the fees paid by you for the Services or \$20 million."

Particulars

FY21 Terms and Conditions, [8.2], FY21 Arrangements Letter.

160 Downer's claims in the DSOC are for, or include, Loss in connection with the FY21 Retainer.

161 In the premises of paragraphs 159-160 above, if KPMG's liability is not limited by the application of the Scheme, any liability of KPMG arising in connection with the FY21 Retainer as claimed in the DSOC is limited to \$20,000,000.

L.3 FY22

162 It was an express term of the FY22 Retainer that if KPMG's liability was not limited by the application of the Scheme approved under the PSA or such other applicable scheme approved under the PSA "... to the extent permitted by law our maximum aggregate liability is limited to the lesser of 10 times the fees paid by you for the Services or \$20 million."

Particulars

FY21 Terms and Conditions, [8.2] as updated by the FY22 Arrangements Letter.

163 Downer's claims in the DSOC are for, or include, Loss in connection with the FY22 Retainer.

164 In the premises of paragraphs 162-163 above, if KPMG's liability is not limited by the application of the Scheme, any liability of KPMG arising in connection with the FY22 Retainer as claimed in the DSOC is limited to \$20,000,000.

M. DOWNER'S FAILURE TO TAKE REASONABLE CARE

165 In the alternative, and without admission, in the event KPMG is found liable with respect to any of Downer's loss or damage pleaded in the DSOC, the loss or damage was a result, in whole or in part, of Downer's failure to take reasonable care.

Particulars

- (i) Downer allegedly adopted the methods of accounting for WIP on the AusNet Contract pleaded in subparagraph 72(b) of Downer's Amended Defence.
- (ii) Downer did not notify KPMG during any of the FY20-FY22 audits that it was not applying appropriate accounting methodology, applying appropriate

methodology incorrectly, or incapable of applying the chosen methodology correctly, for WIP on the AusNet contract.

- (iii) In the course of each audit, Downer gave incorrect or incomplete reasons for the quantum of the WIP balance to KPMG.
- (iv) Downer failed to exercise reasonable care in adequately investigating an anonymous complaint it received on or before 9 August 2022 to the effect that:
 - (A) WIP may have been overstated on the AusNet contract by \$20-25 million; and
 - (B) losses on the contract were not being recognised as they were incurred (**Whistle-blower complaint**).
- (v) On 8 December 2022, Downer:
 - (A) made an announcement to the ASX entitled “Accounting Irregularities in Utilities and Trading Update”; and
 - (B) convened a conference call for investors during which Downer’s CEO & Managing Director made representations about the alleged errors in revenue recognition on the AusNet Contract.
- (vi) The pleadings at paragraphs 170-172 of this Defence are repeated as particulars of contributory negligence.

Further particulars may be provided following completion of interlocutory steps and exchange of evidence.

166 KPMG did not intend to cause, nor did it fraudulently cause, any loss or damage to Downer.

167 In the premises of paragraphs 165-166 above, and by reason of:

- (a) in respect of breaches of duties of care in tort and contract alleged against KPMG, section 9 of the Law Reform (Miscellaneous Provisions) Act 1965 (NSW);
- (b) in respect of the contravention of section 1041H of the Corporations Act alleged against KPMG, section 1041I of the Corporations Act;
- (c) in respect of the contravention of section 12DA of the ASIC Act alleged against KPMG, section 12GF of the ASIC Act; and
- (d) in respect of the contravention of section 18 of the ACL alleged against KPMG, section 137B of the CCA,

any liability of KPMG in relation to those claims is limited to an amount which the Court thinks just and equitable having regard to Downer's share in the responsibility for that loss or damage.

N. FAILURE TO MITIGATE

168 Downer failed to take reasonable steps to mitigate its loss.

Particulars

- (i) On or before 9 August 2022, Downer received the Whistle-blower complaint.
- (ii) Had Downer adequately investigated the Whistle-blower complaint, it would have identified the alleged WIP Overstatements prior to release of the Consolidated Financial Report of the Downer Group for FY22 [DOW.3000.0023.9999] and the General Purpose Financial Report of Downer Utilities for FY22 [DOW.3000.0071.9582].
- (iii) Downer made the 8 December 2022 Disclosures.

Further particulars may be provided following completion of interlocutory steps and the exchange of evidence.

O. SET OFF

169 In the alternative, and without admission, in the event KPMG is found liable with respect to any of Downer's loss pleaded in the DSOC, KPMG sets off any sum due from KPMG to Downer against the amount due from Downer to KPMG in respect of claims set out below at paragraphs 170 to 182.

O.1 Breach of Contract

170 KPMG refers to and repeats subparagraphs 56B(b), 70B(b) and 84B(b) above.

- 171 In the premises of paragraph 170 above, it was an implied term of the FY20 Retainer, the FY21 Retainer and the FY22 Retainer that Downer, through its directors, officers, and employees, would exercise reasonable care and skill in completing each of the responsibilities set out in subparagraphs 56B(b), 70B(b) and 84B(b) above.
- 172 In breach of the FY20 Retainer, FY21 Retainer and FY22 Retainer, Downer, directly or through its directors, managers or employees:
- (a) failed to disclose their knowledge of known or suspected fraud or non-compliance with laws or regulations that could materially affect the Consolidated Financial Reports for the Downer Group and/or the financial reports for Downer Utilities for FY20-FY22;
 - (b) failed to advise KPMG of known material and/or contentious issues in relation to the preparation of the Consolidated Financial Reports for the Downer Group and/or the financial reports for Downer Utilities for FY20-FY22;
 - (c) failed to provide KPMG with access to all information of which they were aware that was relevant to the preparation of the Consolidated Financial Reports for the Downer Group and/or the financial reports for Downer Utilities for FY20-FY22;
 - (d) failed to provide KPMG with all relevant information and access to appropriate records and systems as were reasonably required for the provision of audit services by KPMG to Downer and Downer Utilities in FY20-FY22;
 - (e) failed to bring any changes to accounting issues to KPMG's attention well in advance of the end of the reporting period;

Particulars

- (A) Downer asserts that prior to April 2022, the calculation of WIP on the AusNet Contract by Downer depended on whether the costs incurred on a Work Order were in excess of the unbilled amount of the Work Order:
 - (1) where total costs incurred were less than the unbilled amount, the unbilled amount of the Work Order was recognised as WIP; and
 - (2) where total costs incurred exceeded the billable amount at the end of the reporting period, WIP was recognised as the total costs incurred plus a margin percentage (Downer's Amended Defence, subparagraph 72(b)(iii)).
- (B) This fact was not disclosed to KPMG.

Further particulars may be provided following completion of interlocutory steps and exchange of evidence.

- (f) lacked the knowledge, ability and experience to carry out the obligations assumed by Downer under the FY20 Retainer, FY21 Retainer and FY22 Retainer; and
 - (g) failed to prepare the Consolidated Financial Report for the Downer Group and/or the financial report for Downer Utilities for FY20-FY22:
 - (i) in accordance with the Group's and/or Downer Utilities' accounting policies; and
 - (ii) in accordance with Australian Accounting Standards,
- (each, a **Downer Breach**).

O.2 Misleading or Deceptive Conduct

173 For each of FY20, FY21 and FY22, the Directors of Downer made declarations including that:

- (a) the financial statements and notes set out in the Consolidated Financial Reports of the Downer Group for FY20-FY22 were in accordance with the Corporations Act, including:
 - (i) complying with Australian Accounting Standards, the *Corporations Regulations 2001* (Cth) and other mandatory professional reporting requirements; and
 - (ii) the financial statements and notes to the financial statements give a true and fair view of the financial position and performance of Downer and the consolidated entity;
- (b) the Directors had been given the declarations required by section 295A of the Corporations Act; and
- (c) the financial statements were in compliance with International Financial Reporting Standards, as noted in Note A to the financial statements.

(together and separately, the **Director Group Representations**)

Particulars

Consolidated Financial Report of the Downer Group for FY20 [DOW.3000.0070.9995] at page 125; Consolidated Financial Report of the Downer Group for FY21 [DOW.3000.0070.9997] at page 131; Consolidated

Financial Report of the Downer Group for FY22 [DOW.3000.0023.9999] at page 125.

- 174 In the alternative, and without admission, contrary to the Director Group Representations, the financial statements and notes set out in the Consolidated Financial Reports of the Downer Group for FY20-FY22:
- (a) were not in accordance with the Corporations Act;
 - (b) did not comply with Australian Accounting Standards; and
 - (c) did not give a true and fair view of the financial position and performance of Downer.
- 175 For each of FY20, FY21 and FY22, the CEO and CFO of Downer made declarations under section 295A that:
- (a) the financial records of Downer for the financial year were properly maintained in accordance with section 286;
 - (b) the financial statements, and the notes referred to in section 295(3)(b), for the financial year complied with Australian Accounting Standards; and
 - (c) the financial statements and notes for the financial year gave a true and fair view;
 - (d) the consolidated entity disclosure statement required by subsection 295(3A) was true and correct; and
 - (e) any other matters that were prescribed by the regulations for the purposes of this paragraph in relation to the financial statements and the notes for the financial year were satisfied,
- (together and separately, the **CEO and CFO Group Representations**).
- 176 In the alternative, and without admission, contrary to the CEO and CFO Group Representations, in each of FY20, FY21 and FY22:
- (a) the financial records of Downer had not been properly maintained in accordance with section 286 of the Corporations Act;
 - (b) the financial statements did not comply with Australian Accounting Standards; and
 - (c) the financial statements for the financial year did not give a true and fair view.
- 177 For each of FY20, FY21 and FY22, the CEO and CFO of Downer issued a letter to KPMG (each, a **Management Representation Letter**) where they represented that:
- (a) they had fulfilled their responsibilities, as set out in the terms of the respective audit engagement letters, for the preparation of the financial report that gives a true and fair view in accordance with applicable AASBs and the Corporations Act;

- (b) they had provided KPMG with:
 - (i) access to all information of which they were aware that was relevant to the preparation of the financial report such as records, documentation and other matters;
 - (ii) additional information that KPMG had requested from them for the purpose of the audit; and
 - (iii) unrestricted access to persons within the entity from whom KPMG determined it necessary to obtain audit evidence;
 - (c) they acknowledged their responsibility for such internal control as they determined necessary for the preparation of the financial report that is free from material misstatement whether due to fraud or error. In particular, they acknowledged their responsibility for the design, implementation and maintenance of internal control to prevent and detect fraud and error;
 - (d) the effects of uncorrected misstatements as set out at Appendix 2 of the FY20 Management Representation Letter were immaterial, both individually and in the aggregate, to the financial report as a whole; and
 - (e) in respect of FY20 and FY21, except as disclosed in the financial statements there were no significant matters that had arisen that would require a restatement of the comparative figures,
- (together and separately, the **Downer Letter Representations**).

Particulars

Management Representation Letter for FY20 dated 12 August 2020 at 1, 3, 5, 9, 53; Management Representation Letter for FY21 dated 12 August 2021 at 1, 3, 5, 9, 54; Management representation Letter for FY22 dated 17 August 2022 at 1, 3, 5, 9.

- 178 In the alternative, and without admission, contrary to the Management Representation Letters, for each of FY20, FY21 and FY22:
- (a) management had not fulfilled its responsibilities as set out in the terms of the audit engagement letters, for the preparation of the financial report that gives a true and fair view in accordance with applicable AASBs and the Corporations Act; and
 - (b) management had not provided KPMG with access to all information of which they were aware that was relevant to the preparation of the financial report.

- 179 The Director Group Representations, CEO and CFO Group Representations and Downer Letter Representations were made in trade or commerce.
- 180 By reason of the matters pleaded at paragraphs 3, 65-66, 79-80, 93-94, 172, 174, 176, 178, and 179 above, the Director Group Representations, CEO and CFO Group Representations and Downer Letter Representations were misleading or deceptive contrary to:
- (a) section 1041H(1) of the Corporations Act;
 - (b) section 12DA(1) of the ASIC Act; and
 - (c) section 18 of the Australian Consumer Law, Sch 2 of the CCA,
- (each matter being a **Downer Contravention**).

O.3 Loss

- 181 If KPMG engaged in any of the FY20 KPMG Breaches, FY20 KPMG Contraventions, FY21 KPMG Breaches, FY21 KPMG Contraventions, FY22 KPMG Breaches and/or FY22 KPMG Contraventions as alleged in the DSOC (which is denied) it was because Downer had committed each of the Downer Breaches and Downer Contraventions.
- 182 If KPMG is liable for any of the FY20 KPMG Breaches, FY20 KPMG Contraventions, FY21 KPMG Breaches, FY21 KPMG Contraventions, FY22 KPMG Breaches and/or FY22 KPMG Contraventions as alleged in the DSOC (which is denied) the amount of that liability is a loss suffered as a result of each of the Downer Breaches and Downer Contraventions.

P Herzfeld

J Roy

M Mellos

Dated: 27 September 2024

ALLENS