



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

Case: S ECI 2020 03281

Filed on: 31/03/2021 10:48 PM

**No. S-ECI 2020 03281**

**BETWEEN**

**ANTHONY BOGAN**

First Plaintiff

**MICHAEL THOMAS WALTON**

Second Plaintiff

-and-

**THE ESTATE OF PETER JOHN SMEDLEY DECEASED**

First Defendant

**ANDREW GERARD ROBERTS**

Second Defendant

**PETER GRAEME NANKERVIS**

Third Defendant

**JEREMY CHARLES ROY MAYCOCK**

Fourth Defendant

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

Fifth Defendant

**DEFENCE**

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Date of Document: 31 March 2021

Solicitors Code: 53

Filed on behalf of: The Fifth Defendant

DX: 388

**Prepared by:**

Telephone: 02 9258 6062

Ashurst Australia

Ref: 1000 088 194

5 Martin Place,

Attention: John Pavlakis

SYDNEY NSW 2000

Email: john.pavlakis@ashurst.com

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As to the allegations in the statement of claim indorsed on the writ (**Statement of Claim**), the Fifth Defendant says as follows, noting the following qualifications to what is said below in this Defence:

- a. the headings employed below are taken from the Statement of Claim, are adopted for convenience only, and do not constitute any admission; and
- b. the Fifth Defendant has no authority to and does not make any admissions on behalf of the individual partners or employees who provided services pursuant to the 2013 Retainer and/or the 2014 Retainer which would constitute any admission to an allegation of conduct or a state of mind contained in the

Statement of Claim going to potential liability under s 1041E (noting the nature of potential liability arising under that provision), and such admissions as are made below with respect to such matters are made on behalf of the other partners of the Fifth Defendant as at the relevant time, and those matters should be taken to be not admitted by the individual partners or employees who provided services pursuant to the 2013 Retainer and/or the 2014 Retainer.

**A. THE PARTIES**

**A.1. The Plaintiffs and the Group Members**

1. As to paragraph 1, the Fifth Defendant:
  - a. denies that it caused any loss or damage to the Group Members; and
  - b. otherwise, does not admit paragraph 1.
2. The Fifth Defendant does not admit paragraph 2.
3. The Fifth Defendant does not admit paragraph 3.
4. The Fifth Defendant does not admit paragraph 4.

**A.2. The Defendants**

5. As to paragraph 5, the Fifth Defendant:
  - a. admits sub-paragraphs 5(a) to 5(e); and
  - b. does not admit sub-paragraphs 5(f) to 5(h).
6. The Fifth Defendant admits paragraph 6.
7. As to paragraph 7, the Fifth Defendant:
  - a. admits sub-paragraphs 7(a) to 7(d); and
  - b. does not admit sub-paragraph 7(e).
8. The Fifth Defendant admits paragraph 8.
9. As to paragraph 9, the Fifth Defendant:
  - a. in respect of sub-paragraph 9(a):
    - i. says that KPMG offered, at all material times, audit services and accounting services;
    - ii. says that KPMG (ABN 51 194 660 183) is a partnership under the *Partnership Act 1982* (NSW) (**NSW Partnership Act**); and

- iii. otherwise, denies sub-paragraph 9(a);
- b. in respect of sub-paragraph 9(b):
  - i. says that, in respect of the conduct alleged in the Statement of Claim, the only proper persons who these proceedings may be brought against are those persons who were partners during the Relevant Period (as defined in the Statement of Claim); and
  - ii. otherwise, admits sub-paragraph 9(b);
- c. in respect of sub-paragraph 9(c):
  - i. says that the partnership does not include employees; and
  - ii. otherwise, admits sub-paragraph 9(c).
- d. in respect of sub-paragraph 9(d):
  - i. refers to and relies on the provisions of s 761F of the *Corporations Act 2001* (Cth) (**Corporations Act**) for their full force and effect; and
  - ii. otherwise, denies sub-paragraph 9(d);
- e. in respect of sub-paragraph 9(e):
  - i. refers to and relies on the provisions of the *Partnership Act 1958* (Vic) (**Victorian Partnership Act**) for their full force and effect;
  - ii. says that each partner of the Fifth Defendant during the Relevant Period and at all material times was an agent of the Fifth Defendant to the extent provided for in s 9 of the Victorian Partnership Act and s 5 of the NSW Partnership Act for the purpose of the business of the partnership;
  - iii. says that, in respect of the conduct alleged in the Statement of Claim:
    - a. pursuant to s 9(1) of the NSW Partnership Act and/or s 13 of the Victorian Partnership Act, every partner of the Fifth Defendant is liable jointly with the other partners for any debts and obligations of the firm incurred while the partner was a partner; and
    - b. pursuant to s 10(1) of the NSW Partnership Act and/or s 13(1) of the Victorian Partnership Act, in the event (which is denied) that any wrongful act or omission of Mr Young or Mr Julian McPherson acting in the ordinary course of the business of the firm, or with the authority of their co-partners, caused loss or injury (which is denied) to any person not being a partner of the firm, the Fifth Defendant would be liable therefore to the same extent as the partner so acting or omitting to act (which is denied); and

- iv. otherwise, denies sub-paragraph 9(e).

**B. ARRIUM**

10. As to paragraph 10, the First Defendant:

- a. admits sub-paragraphs 10(a) to 10(d);
- b. in respect of sub-paragraph 10(e):
  - i. says that Arrium is subject to and bound by ss 292(1), 295, 296(1), 297, 301, 302, 303, 305, 314, 315(1) and 320 of the Corporations Act;
  - ii. admits sub-paragraphs 10(e)(i) to 10(e)(iv) and 10(e)(vi);
  - iii. in respect of sub-paragraph 10(e)(v):
    - a. says that the Australian Accounting Standards referenced in sub-paragraph 10(e)(v)(A) apply to annual reporting periods and were not applicable to the preparation of the 1H15 Financial Report (as defined in the Statement of Claim);
    - b. says that in respect of the 1H15 Financial Report, s 305 of the Corporations Act required Arrium to give a true and fair view of the financial position and performance of either Arrium, or the consolidated entity comprising Arrium and its subsidiaries;
    - c. refers to and relies on the provisions of ss 302 to 305 of the Corporations Act for their full force and effect; and
    - d. otherwise, denies sub-paragraph 10(e)(v);
  - iv. refers to and relies on the provisions of Part 2M.3 of the Corporations Act for their full force and effect; and
  - v. otherwise, denies sub-paragraph 10(e);
- c. in respect of sub-paragraph 10(f):
  - i. admits sub-paragraph 10(f)(ii);
  - ii. refers to and relies on the provisions of ASX Listing Rules 4.3A, 4.3B, 4.3D, 4.5 and Appendix 4E for their full force and effect; and
  - iii. otherwise, denies sub-paragraph 10(f);
- d. in respect of sub-paragraph 10(g):
  - i. says that Arrium is subject to and bound by ss 111AP(1) and 674(1) of the Corporations Act and ASX Listing Rule 3.1;

- ii. refers to and relies on the provisions of ss 111AP(1) and 674(1) of the Corporations Act and ASX Listing Rule 3.1 for their full force and effect; and
  - iii. otherwise, denies sub-paragraph 10(g).
11. As to paragraph 11, the Fifth Defendant:
- a. admits sub-paragraph 11(a) and says further that Arrium also carried on business as a recycling company;
  - b. admits sub-paragraph 11(b) and says further that the FY14 Financial Report, 1H15 Financial Report and FY14 Financial Report (each term as defined in the Statement of Claim) each included recycling as a key segment for Arrium's earnings and profit;
  - c. in respect of sub-paragraph 11(c):
    - i. says that the FY14 Financial Results Announcement (as defined in the Statement of Claim) stated that as part of Arrium's mining segment, Arrium had mining operations in the Middleback Ranges and Southern Iron region in South Australia;
    - ii. says that the FY14 Financial Results Announcement stated that volumes from the SI Mining Operation increased to just over 3.8Mt (wet) for FY14;
    - iii. says that the FY14 Financial Results Announcement stated that the net decrease of reserves at Southern Iron from exports and other depletions was 4.8Mt in FY14;
    - iv. says that the Reserves and Resources Statement (as defined in the Statement of Claim) stated that the SI Hematite ore reserves were depleted by 3.8Mt in FY14;
    - v. says that the FY14 Financial Results Announcement stated that newly declared ore reserves derived from beneficiation of stockpiles at Middleback Ranges added 8.6Mt in FY14;
    - vi. says that the FY14 Financial Results Announcement stated that 5.7Mt of reserves at Middleback Ranges were either depleted (exported) or removed from the reserve statement in FY14; and
    - vii. otherwise, does not admit sub-paragraph 11(c); and

#### **Particulars**

- i. FY14 Financial Results Announcement, Arrium Limited Operating and Financial Review 2014, page 10; and

- ii. Reserves and Resources Statement, 2014 Annual Report, page 132.
- d. denies sub-paragraph 11(d) and says further:
- i. that the Reserves and Resources Statement stated that as at FY14, exploration was actively continuing in the Hawks Nest Area;
  - ii. that the Reserves and Resources Statement stated that, as at 30 June 2014, Arrium's Middleback Ranges hematite ore reserves comprised the Iron Chieftain, Iron Duchess South, Iron Knight, Iron Baron, Iron Cavalair, Iron Queen, Iron Princess and Iron Monarch deposits;
  - iii. that the Reserves and Resources Statement stated that as at 30 June 2014, Arrium's South Iron hematite ore reserves comprised of the Peculiar Knob and the Hawks Nest Deposits of Buzzard and Tui; and
  - iv. that the Reserves and Resources Statement stated that Southern Iron was the licensee of exploration licences in Mt Brady and Windy Valley, up to at least January 2015.

#### **Particulars**

- i. Reserves and Resources Statement, 2014 Annual Report, pages 131 to 132; and
- ii. Reserves and Resources Statement, Southern Iron Hematite Introduction.

### **C. DIRECTORS' ROLES**

12. As to paragraph 12, the Fifth Defendant:
- a. says that Smedley ceased acting as director on 17 November 2014;
  - b. admits that Smedley, Roberts, Nankervis and Maycock had legal duties in the capacities identified in paragraphs 5 to 8 of the Defence;
  - c. otherwise, denies paragraph 12.
13. As to paragraph 13, the Fifth Defendant:
- a. notes the definition of the term "Financial Report" used in sub-paragraph 10(e)(i) of the Statement of Claim to include FY14 and FY15;
  - b. says that as directors of Arrium for the year ended 30 June 2014, Smedley, Roberts and Nankervis were obligated pursuant to s 295 of the Corporations Act to include a declaration within the FY14 Financial Report; and
  - c. otherwise, admits paragraph 13.
14. As to paragraph 14, the Fifth Defendant:

- a. notes the definition of the term "Financial Report" used in sub-paragraph 10(e)(i) of the Statement of Claim to include FY14 and FY15;
  - b. says that Maycock was appointed as director of Arrium on 19 August 2014;
  - c. says that as directors of Arrium for the half year ended 31 December 2015, Roberts, Nankervis and Maycock were obligated pursuant to s 303 of the Corporations Act to include a declaration within the 1H15 Financial Report; and
  - d. otherwise, denies paragraph 14.
15. As to paragraph 15, the Fifth Defendant:
- a. notes the definition of the term "Financial Report" used in sub-paragraph 10(e)(i) of the Statement of Claim to include FY14 and FY15;
  - b. says that Maycock was appointed as director of Arrium on 19 August 2014;
  - c. says that as directors of Arrium for the year ended 30 June 2015, Roberts, Nankervis and Maycock were obligated pursuant to s 295 of the Corporations Act to include a declaration within the FY15 Financial Report; and
  - d. otherwise, admits paragraph 15.
16. As to paragraph 16, the Fifth Defendant:
- a. says that the Chief Financial Officer of Arrium could have provided a declaration to the directors of Arrium pursuant to s 295A(1)(b) of the Corporations Act, instead of the Chief Executive Officer;
  - b. otherwise, admits paragraph 16.

## **D. KPMG'S ROLE**

### **D.1. KPMG's Audit Obligations**

17. As to paragraph 17, the Fifth Defendant:
- a. says that on or about 4 December 2013, the Fifth Defendant sent a letter of engagement to Arrium to confirm their engagement as auditors of Arrium and its controlled entities under the Corporations Act (**2013 Retainer**) which was effective for services performed for FY14 and the half-year financial reporting period ending 31 December 2013;
  - b. says that on or about 3 December 2014, the Fifth Defendant sent a letter of engagement to Arrium to confirm their engagement as auditors of Arrium and its controlled entities under the Corporations Act (**2014 Retainer**) which was effective for services performed for FY15 and 1H15;

- c. relies on the terms of the 2013 Retainer and 2014 Retainer for their full force and effect; and
  - d. otherwise, denies paragraph 17.
18. As to paragraph 18, the Fifth Defendant:
- a. in respect of sub-paragraph 18(a)(i), refers to and relies on the provisions of ss 297 and 305 of the Corporations Act for their full force and effect;
  - b. in respect of sub-paragraph 18(a)(ii), relies on the provisions of s 307(b) of the Corporations Act for their full force and effect;
  - c. in respect of sub-paragraph 18(b):
    - i. admits sub-paragraph 18(b) in respect of the audit of the FY14 Financial Report and the FY15 Financial Report;
    - ii. otherwise, denies sub-paragraph 18(b); and
    - iii. says further that the Australian Auditing Standards referenced in sub-paragraph 18(b) apply to an audit of a financial report and were not applicable to the review of the 1H15 Financial Report;
  - d. admits sub-paragraphs 18(c)(i) and 18(c)(ii);
  - e. in respect of sub-paragraph 18(c)(iii), relies on the provisions of ss 308(3B) and 297 of the Corporations Act for their full force and effect;
  - f. in respect of sub-paragraph 18(d)(i) and 18(d)(ii):
    - i. notes the definition of the term "Auditor's Report" used in sub-paragraph 10(e)(ii) of the Statement of Claim;
    - ii. refers to and relies on the provisions of ss 205 and 309 of the Corporations Act for their full force and effect; and
    - iii. says that, as the auditor of Arrium, KPMG performed a review of the 1H15 Financial Report pursuant s 309 of the Corporations Act;
  - g. in respect of sub-paragraph 18(d)(iii), relies on the provisions of ss 308(5B) and 305 of the Corporations Act for their full force and effect; and
  - h. otherwise, denies paragraph 18.
19. The Fifth Defendant denies paragraph 19 and further:
- a. notes the definition of the term "Auditor's Report" used in paragraph 10(e)(ii) of the Statement of Claim;



- b. refers to and relies on the terms of the 2013 Retainer and 2014 Retainer for their full force and effect; and
- c. refers to and relies on the provisions of ss 314, 319 and 320 of the Corporations Act and the provisions of ASX Listing Rules 4.5.1 and 4.2A.1 for their full force and effect.

20. As to paragraph 20, the Fifth Defendant:

- a. says that the 2013 Retainer and 2014 Retainer each state that, in providing the services to Arrium, the Fifth Defendant will at all times use reasonable endeavours to meet the service level criteria agreed with Arrium and as set out in Appendix 3 to the 2013 Retainer and Appendix 3 to the 2014 Retainer;
- b. refers to and relies on the terms of the 2013 Retainer and 2014 Retainer for their full force and effect; and
- c. otherwise, denies paragraph 20.

#### **D.2. KPMG Audit Team**

21. As to paragraph 21, the Fifth Defendant:

- a. notes the definition of the term "Statutory Auditing Definition" used in sub-paragraph 18(d) of the Statement of Claim;
- b. repeats paragraphs 17 and 18 of the Defence; and
- c. otherwise, admits paragraph 21.

22. The Fifth Defendant admits paragraph 22.

23. As to paragraph 23, the Fifth Defendant:

- a. repeats paragraphs 21 and 22 of the Defence; and
- b. otherwise, denies paragraph 23.

#### **D.3. KPMG's Audit Work**

24. As to paragraph 24, the Fifth Defendant:

- a. refers to and relies on the terms of the 2013 Retainer and 2014 Retainer for their full force and effect;
- b. admits that the Fifth Defendant:
  - i. had access to and made reference to the books of Arrium to the extent necessary to perform its audit of the FY14 Financial Report and FY15 Financial Report and its review of the 1H15 Financial Report pursuant to the 2013 Retainer and 2014 Retainer; and

- ii. could request information, explanations and other assistance from Arrium's directors and officers to the extent necessary to perform its audit of the FY14 Financial Report and FY15 Financial Report and its review of the 1H15 Financial Report pursuant to the 2013 Retainer and 2014 Retainer;
  - c. as part of the 2013 Retainer and 2014 Retainer, the Fifth Defendant expected management of Arrium to provide it with access to all information which they considered relevant to the preparation of the financial report, including records, documentation and other matters, additional information that the Fifth Defendant may request from management for the purpose of the audit of the FY14 Financial Report and FY15 Financial Report and review of 1H15 Financial Report and unrestricted access to persons within the entity from whom the Fifth Defendant determined necessary to obtain audit evidence;
  - d. says that it performed auditing services of the FY14 Financial Report according to the terms of the 2013 Retainer;
  - e. says that it performed a review of the 1H15 Financial Report according to the terms of the 2014 Retainer;
  - f. says that it performed auditing services of the FY15 Financial Report according to the terms of the 2014 Retainer;
  - g. says that it attended the premises at which business records of Arrium were held; and
  - h. otherwise, denies paragraph 24.
25. As to paragraph 25, the Fifth Defendant:
- a. repeats paragraph 24 of the Defence; and
  - b. otherwise, denies paragraph 25.

**E. ARRIUM'S FY14 FINANCIAL STATEMENTS**

26. The Fifth Defendant admits paragraph 26.
27. The Fifth Defendant admits paragraph 27.
28. As to paragraph 28, the Fifth Defendant:
- a. says that on 19 August 2014, Smedley and Roberts signed the FY14 Directors' Declaration (as defined in the Statement of Claim) in respect of the FY14 Financial Report in accordance with a resolution of the directors of Arrium; and
  - b. otherwise, does not admit paragraph 28.

29. As to paragraph 29, the Fifth Defendant:
- a. says that on 19 August 2014, Young signed the FY14 Audit Report (as defined in the Statement of Claim) in respect of the FY14 Financial Report;
  - b. refers to and relies on the provisions of ss 314 and 319 of the Corporations Act and ASX Listing Rule 4.5.1 for their full force and effect; and
  - c. otherwise, denies paragraph 29.
30. The Fifth Defendant admits paragraph 30.

## **F. IMPAIRMENT OF ARRIUM'S ASSETS IN FY14**

### **F.1. FY14 Impairment indicators**

#### ***F.1.1. Market Capitalisation Impairment Indicator***

31. The Fifth Defendant admits paragraph 31.

#### ***F.1.2. Market Decline Impairment Indicator***

32. As to paragraph 32, the Fifth Defendant:
- a. says that the purported facts pleaded involve evaluative matters of conclusion;
  - b. says that the FY14 Financial Results Announcement stated that, as at 30 June 2014, the average Platts 62% CFR index price for the year was down 3% on the prior year average;
  - c. says that the Arrium Limited 1H15 Results (as defined in the Statement of Claim) stated that, as at 31 December 2014, the Platts average market index price (62% Fe) was down 39% from the half year ended 30 December 2013;
  - d. says that the FY15 Financial Results Announcement (as defined in the Statement of Claim) stated that, as at 30 June 2015, the Platts average market index price (62% Fe) was down 41% from 30 June 2014; and
  - e. otherwise, denies paragraph 32.

#### **Particulars**

- i. FY14 Financial Results Announcement, page 4;
- ii. Arrium Limited 1H15 Results, page 1; and
- iii. FY15 Financial Results Announcement, page 6.

#### ***F.1.3. SI Mine Low Net Cash Proceeds Impairment Indicator***

33. As to paragraph 33, the Fifth Defendant:

- a. says that the Arrium Mining Quarterly Production Report for the quarter ended 30 June 2014 stated that Arrium's average price for iron ore was US\$85/t CFR (dmt) in the quarter to 30 June 2014;
- b. says that the Arrium Mining Quarterly Production Report for the quarter ended 30 June 2014 stated that Arrium's average price for iron ore was A\$92/t CFR (dmt) in the quarter to 30 June 2014;
- c. says that the FY14 Financial Results Announcement stated that Arrium's average price for iron ore for FY14 was A\$123/dmt;
- d. says that the FY14 Financial Results Announcement stated that Arrium's total cash cost for its mining segment for FY14 was A\$73/dmt, including loaded cash cost, royalties, sales and marketing and corporate costs, adjustment for moisture content and freight, and excluding capitalised costs (infrastructure, pre-stripping and mining licences), depreciation and amortisation charges in respect of those costs; and
- e. otherwise, denies paragraph 33.

#### **Particulars**

- i. Arrium Mining Quarterly Production Report for the quarter ended 30 June 2014;
- ii. FY14 Financial Results Announcement, "Strong FY14 Results through Successful Strategy Execution", page 4; and
- iii. FY14 Financial Results Announcement, "FY14 Results Presentation", pages 10 and 55.

34. The Fifth Defendant does not admit paragraph 34.

35. As to paragraph 35, the Fifth Defendant:

- a. says that the Reserves and Resources Statement stated that, as at 30 June 2014, the total hematite ore reserves at Southern Iron was 19.7Mt, represented by the Peculiar Knob and the Hawks Nest Deposits of Buzzard and Tui; and

#### **Particulars**

- i. Reserves and Resources Statement, 2014 Annual Report, page 132.

- b. otherwise, denies paragraph 35.

36. As to paragraph 36, the Fifth Defendant:

- a. repeats paragraphs 11, 33, 34 and 35 of the Defence; and
- b. otherwise, denies paragraph 36.

37. The Fifth Defendant denies paragraph 37.

38. The Fifth Defendant denies paragraph 38.

**F.1.4. Falling Demand Impairment Indicator**

39. As to paragraph 39, the Fifth Defendant:

- a. says that the FY14 Financial Results Announcement stated that the total revenue for Arrium's mining consumables segment was \$1,538 million in FY14, down 2% on the prior year largely due to lower sales in Australasia;
- b. says that the FY14 Financial Results Announcement stated that there was also weaker demand for rail wheels and grinding media sold by Arrium's mining consumables segment in Australasia; and
- c. otherwise, denies paragraph 39.

**Particulars**

- i. FY14 Financial Results Announcement, "Strong FY14 Results through Successful Strategy Execution", pages 1 to 2; and
- ii. FY14 Financial Results Announcement, "Arrium Limited Operating and Financial Review 2014", page 3.

**F.2. Impairment testing for FY2014**

40. The Fifth Defendant admits paragraph 40.

41. As to paragraph 41, the Fifth Defendant:

- a. repeats paragraphs 31 to 38 of the Defence;
- b. notes the definition of the terms "Market Capitalisation Information" used in paragraph 31, "Market Decline Information" used in paragraph 32 and "SI Mine Low Net Cash Proceeds Information" used in paragraph 38 of the Statement of Claim;
- c. says that the carrying amount of Arrium's net assets being more than its market capitalisation was an indicator of impairment with respect to the FY14 Mining Assets, FY14 Mining Consumables Assets, FY14 Steel Assets and FY14 Recycling Assets as at 30 June 2014 (**FY14 Market Capitalisation Indicator**); and
- d. otherwise, denies paragraph 41.

42. As to paragraph 42, the Fifth Defendant:

- a. refers to and relies on the terms of paragraph 9 of AASB 136 for their full force and effect;

b. says that the existence of the FY14 Market Capitalisation Indicator required Arrium to estimate the recoverable amount of FY14 Mining Assets, FY14 Mining Consumables Assets, FY14 Steel Assets and FY14 Recycling Assets as at 30 June 2014; and

c. otherwise, denies paragraph 42.

43. The Fifth Defendant denies paragraph 43.

**F.3. Required impairments charges in FY14**

44. The Fifth Defendant denies paragraph 44.

45. The Fifth Defendant denies paragraph 45.

46. The Fifth Defendant denies paragraph 46.

47. The Fifth Defendant denies paragraph 47.

48. The Fifth Defendant denies paragraph 48.

**F.4. Arrium's contravention of its Continuous Disclosure Obligations**

49. The Fifth Defendant denies paragraph 49.

50. The Fifth Defendant denies paragraph 50.

51. The Fifth Defendant denies paragraph 51.

52. As to paragraph 52, the Fifth Defendant:

a. notes the definition of the term "FY14 Impairment Information" used in paragraph 49 of the Statement of Claim;

b. admits that Arrium did not inform the ASX of that (supposed) FY14 Impairment Information in those terms; and

c. otherwise, denies paragraph 52.

53. The Fifth Defendant denies paragraph 53.

**G. SEPTEMBER 2014 CAPITAL RAISING**

54. As to paragraph 54, the Fifth Defendant:

a. says that on 15 September 2014, Arrium published and lodged with the ASX:

i. a presentation entitled "Equity Capital Raising"; and

ii. a notice entitled "Arrium Limited Notice under s 708AA(2)(f) of the Corporations Act 2001 (Cth)"; and

- b. otherwise, admits paragraph 54.
55. As to paragraph 55, the Fifth Defendant:
- a. in respect of sub-paragraph 55(b), says that the Capital Raising Announcement (as defined in the Statement of Claim) stated that:
    - i. the net proceeds of the capital raising would be used to repay debt, in line with the company's stated priority of debt reduction; and
    - ii. the raising would strengthen the company's balance sheet and provide it with a more appropriate capital structure for the current environment; and
  - b. otherwise, admits paragraph 55.
56. As to paragraph 56, the Fifth Defendant:
- a. says that Arrium's earnings before tax for the year ended 30 June 2014 were stated in the Capital Raising Presentation (as defined in the Statement of Claim) to be \$412.7 million;
  - b. says that Arrium's assets were stated in the Capital Raising Presentation to be \$8,002 million; and

#### **Particulars**

- i. Capital Raising Presentation, pages 28, 36 and 37.
  - c. otherwise, admits paragraph 56.
57. As to paragraph 57, the Fifth Defendant:
- a. in respect of sub-paragraph 57(c), says that Arrium stated that it had complied with the provisions of Chapter 2M of the Corporations Act as they applied to Arrium; and
  - b. otherwise, admits paragraph 57.
58. As to paragraph 58, the Fifth Defendant:
- a. says that Arrium published an announcement on 18 September 2014 entitled "Arrium Limited Retail Entitlement Offer" which reproduced the Capital Raising Presentation;
  - b. repeats paragraph 56 of the Defence; and
  - c. otherwise, admits paragraph 58.
59. As to paragraph 59, the Fifth Defendant:

- a. says that on 18 September 2014, Arrium announced completion of the institutional component of its fully underwritten equity raising, with the result that:
    - i. approximately \$367 million was raised through the institutional entitlement offer; and
    - ii. approximately \$98 million was raised through the institutional placement; and
  - b. otherwise, admits paragraph 59.
60. The Fifth Defendant admits paragraph 60.
61. As to paragraph 61, the Fifth Defendant:
- a. in respect of sub-paragraph 61(c), says that Arrium stated that it had complied with the provisions of Chapter 2M of the Corporations Act as they applied to Arrium; and
  - b. otherwise, admits paragraph 61.
62. As to paragraph 62, the Fifth Defendant:
- a. in respect of sub-paragraph 62(b), says that Arrium's ASX announcement entitled "Retail Entitlement Offer" dated 13 October 2014 stated that Arrium will offer for sale under the Retail Shortfall Bookbuild (as defined in that announcement) entitlements to take up approximately 590.8 million new shares, which represents those entitlements attributable to renouncing and ineligible retail shareholders; and
  - b. otherwise, admits paragraph 62.
63. The Fifth Defendant admits paragraph 63.
64. The Fifth Defendant admits paragraph 64.
- H. ARRIUM'S 1H15 FINANCIAL STATEMENTS**
65. The Fifth Defendant admits paragraph 65.
66. As to paragraph 66, the Fifth Defendant:
- a. in respect of sub-paragraph 66(a), says that the January 2015 Announcement (as defined in the Statement of Claim) stated that export iron ore sales had a history of being a significant contributor to Arrium's earnings and cash generation;
  - b. in respect of sub-paragraph 66(b), says that the January 2015 Announcement stated that Arrium was re-designing its South Australian based mining



operation to provide a sustainable, cash flow positive business in a low iron ore price environment;

- c. in respect of sub-paragraph 66(e), says that the January 2015 Presentation (as defined in the Statement of Claim) stated that Arrium would target an approximately 27% reduction in average loaded cash cost and an approximately 20% reduction in total cash cost post re-design;
- d. in respect of sub-paragraph 66(g), says that the January 2015 Announcement stated that Arrium expected restructuring cash costs from the mothballing of the SI Mining Operation (as defined in that announcement) would be approximately \$70 million during FY15; and
- e. otherwise, admits paragraph 66.

67. The Fifth Defendant admits paragraph 67.

68. As to paragraph 68, the Fifth Defendant:

- a. in respect of sub-paragraph 68(c)(ii), says that the 1H15 Financial Report included a report entitled "Independent Auditor's Review Report" (**1H15 Review Report**); and
- b. otherwise, admits paragraph 68.

69. As to paragraph 69, the Fifth Defendant:

- a. says that on 18 February 2015, Roberts signed the 1H15 Directors' Declaration (as defined in the Statement of Claim) in respect of the 1H15 Financial Report in accordance with a resolution of the directors of Arrium; and
- b. otherwise, does not admit paragraph 69.

70. As to paragraph 70, the Fifth Defendant:

- a. says that on 18 February 2015, Young signed the 1H15 Review Report in respect of the 1H15 Financial Report;
- b. refers to and relies on the provisions of s 320 of the Corporations Act and ASX Listing Rule 4.21.1 for their full force and effect; and
- c. otherwise, denies paragraph 70.

71. The Fifth Defendant admits paragraph 71.

## **I. IMPAIRMENT OF ARRIUM'S ASSETS IN 1H15**

### **I.1. Impairment testing for 1H15**

72. The Fifth Defendant admits paragraph 72.

73. As to paragraph 73, the Fifth Defendant:
- a. repeats paragraphs 31, 32 and 39 of the Defence;
  - b. notes the definition of the terms "Market Capitalisation Information" used in paragraph 31, "Market Decline Information" used in paragraph 32 and "Falling Demand Information" used in paragraph 39 of the Statement of Claim;
  - c. says that the carrying amount of Arrium's net assets being more than its market capitalisation was an indicator of impairment with respect to the 1H15 Mining Assets, 1H15 Mining Consumables Assets, 1H15 Steel Assets and 1H15 Recycling Assets as at 31 December 2014 (**1H15 Market Capitalisation Indicator**); and
  - d. otherwise, denies paragraph 73.

74. As to paragraph 74, the Fifth Defendant:
- a. refers to and relies on the terms of paragraph 9 of AASB 136 for their full force and effect;
  - b. says that the existence of the 1H15 Market Capitalisation Indicator required Arrium to estimate the recoverable amount of 1H15 Mining Assets, 1H15 Mining Consumables Assets, 1H15 Steel Assets and 1H15 Recycling Assets as at 31 December 2014; and
  - c. otherwise, denies paragraph 74.

75. The Fifth Defendant denies paragraph 75.

## **I.2. Required impairments charges in 1H15**

76. The Fifth Defendant denies paragraph 76.

77. The Fifth Defendant denies paragraph 77.

78. The Fifth Defendant denies paragraph 78.

79. The Fifth Defendant denies paragraph 79.

80. The Fifth Defendant denies paragraph 80.

## **J. ARRIUM'S FY15 FINANCIAL STATEMENTS**

81. The Fifth Defendant admits paragraph 81.

82. The Fifth Defendant admits paragraph 82.

83. As to paragraph 83, the Fifth Defendant:

- a. says that on 19 August 2015, Maycock and Roberts signed the FY15 Directors' Declaration (as defined in the Statement of Claim) in respect of the

FY15 Financial Report in accordance with a resolution of the directors of Arrium; and

b. otherwise, denies paragraph 83.

84. As to paragraph 84, the Fifth Defendant:

a. says that on 19 August 2015, Young signed the FY15 Audit Report (as defined in the Statement of Claim) in respect of the FY15 Financial Report;

b. refers to and relies on the provisions of ss 314 and 319 of the Corporations Act and ASX Listing Rule 4.2A.1 for their full force and effect; and

c. otherwise, denies paragraph 84.

85. As to paragraph 85, the Fifth Defendant:

a. in respect of sub-paragraph 85(j), says that the FY15 Financial Report recorded that as at 30 June 2015, Arrium had total segment assets of \$318.1 million within its recycling segment; and

b. otherwise, admits paragraph 85.

## **K. IMPAIRMENT OF ARRIUM'S ASSETS IN FY15**

### **K.1. Impairment testing for FY15**

86. The Fifth Defendant admits paragraph 86.

87. As to paragraph 87, the Fifth Defendant:

a. repeats paragraphs 31 and 32 of the Defence;

b. notes the definition of the terms "Market Capitalisation Information" used in paragraph 31 and "Market Decline Information" used in paragraph 32 of the Statement of Claim;

c. says that the carrying amount of Arrium's net assets being more than its market capitalisation was an indicator of impairment with respect to the FY15 Mining Assets, FY15 Mining Consumables Assets, FY15 Steel Assets and FY15 Recycling Assets as at 30 June 2015 (**FY15 Market Capitalisation Indicator**); and

d. otherwise, denies paragraph 87.

88. As to paragraph 88, the Fifth Defendant:

a. refers to and relies on the terms of paragraph 9 of AASB 136 for their full force and effect;

- b. says that the existence of the FY15 Market Capitalisation Indicator required Arrium to estimate the recoverable amount of FY15 Mining Assets, FY15 Mining Consumables Assets, FY15 Steel Assets and FY15 Recycling Assets as at 30 June 2015; and
- c. otherwise, denies paragraph 88.

89. The Fifth Defendant denies paragraph 89.

**K.2. Required impairments charges in FY15**

90. The Fifth Defendant denies paragraph 90.

91. The Fifth Defendant denies paragraph 91

92. The Fifth Defendant denies paragraph 92.

93. The Fifth Defendant denies paragraph 93.

94. The Fifth Defendant denies paragraph 94.

**L. DIRECTORS' CONTRAVENING CONDUCT**

**L.1. Directors' Misleading or Deceptive Representations in FY14**

***L.1.1. Directors' Representations***

95. The Fifth Defendant does not admit paragraph 95.

96. As to paragraph 96, the Fifth Defendant:

- a. repeats sub-paragraph 28(a) of the Defence;
- b. refers to and relies on the terms of the FY14 Financial Report and FY14 Directors' Declaration for their full force and effect; and
- c. otherwise, does not admit paragraph 96.

***L.1.2. Misleading or deceptive conduct***

97. The Fifth Defendant denies paragraph 97.

98. The Fifth Defendant denies paragraph 98.

99. The Fifth Defendant denies paragraph 99.

100. The Fifth Defendant denies paragraph 100.

101. The Fifth Defendant does not admit paragraph 101.

102. The Fifth Defendant denies paragraph 102.

103. The Fifth Defendant denies paragraph 103.

**L.1.3. S 1041E liability in respect of the FY14 Directors' Opinion to ASX**

104. As to paragraph 104, the Fifth Defendant:

- a. repeats sub-paragraph 28(a) and paragraph 96 of the Defence; and
- b. otherwise, does not admit paragraph 104.

105. The Fifth Defendant denies paragraph 105.

106. The Fifth Defendant does not admit paragraph 106.

107. The Fifth Defendant does not admit paragraph 107.

108. The Fifth Defendant denies paragraph 108.

109. The Fifth Defendant denies paragraph 109.

**L.1.4. S 1041E liability in respect of the FY14 Directors' Representation to ASX**

110. As to paragraph 110, the Fifth Defendant:

- a. repeats sub-paragraph 28(a) and paragraph 96 of the Defence; and
- b. otherwise, does not admit paragraph 110.

111. The Fifth Defendant denies paragraph 111.

112. The Fifth Defendant does not admit paragraph 112.

113. The Fifth Defendant does not admit paragraph 113.

114. The Fifth Defendant denies paragraph 114.

115. The Fifth Defendant denies paragraph 115.

**L.1.5. Continuing nature of the Directors' FY14 Accounts Misleading Conduct Contraventions**

116. The Fifth Defendant denies paragraph 116.

**L.2. Directors' liability in respect of the Capital Raising**

**L.2.1. Directors' liability in respect of the Capital Raising Representations**

117. The Fifth Defendant denies paragraph 117.

118. The Fifth Defendant does not admit paragraph 118.

119. The Fifth Defendant does not admit paragraph 119.

120. The Fifth Defendant does not admit paragraph 120.

121. The Fifth Defendant does not admit paragraph 121.

122. The Fifth Defendant does not admit paragraph 122.

123. The Fifth Defendant does not admit paragraph 123.

***L.2.2. Continuing nature of the Directors' Capital Raising Contraventions***

124. The Fifth Defendant does not admit paragraph 124.

**L.3. Directors' Misleading or Deceptive Representations in 1H15**

***L.3.1. Directors' Representations***

125. The Fifth Defendant does not admit paragraph 125.

126. As to paragraph 126, the Fifth Defendant:

- a. repeats sub-paragraph 69(a) of the Defence;
- b. refers to and relies on the terms of the 1H15 Financial Report and 1H15 Directors' Declaration for their full force and effect; and
- c. otherwise, does not admit paragraph 126.

***L.3.2. Misleading or deceptive conduct***

127. The Fifth Defendant denies paragraph 127.

128. The Fifth Defendant denies paragraph 128.

129. The Fifth Defendant denies paragraph 129.

130. The Fifth Defendant denies paragraph 130.

131. The Fifth Defendant does not admit paragraph 131.

132. The Fifth Defendant denies paragraph 132.

133. The Fifth Defendant denies paragraph 133.

***L.3.3. S 1041E liability in respect of the 1H15 Directors' Opinion to ASX***

134. As to paragraph 134, the Fifth Defendant:

- a. repeats sub-paragraph 69(a) and paragraph 126 of the Defence; and
- b. otherwise, does not admit paragraph 134.

135. The Fifth Defendant denies paragraph 135.

136. The Fifth Defendant does not admit paragraph 136.

137. The Fifth Defendant does not admit paragraph 137.

138. The Fifth Defendant denies paragraph 138.

139. The Fifth Defendant denies paragraph 139.

**L.3.4. S 104E liability in respect of the 1H15 Directors' Representation to ASX**

140. As to paragraph 140, the Fifth Defendant:

- a. repeats sub-paragraph 69(a) and paragraph 126 of the Defence; and
- b. otherwise, does not admit paragraph 140.

141. The Fifth Defendant denies paragraph 141.

142. The Fifth Defendant does not admit paragraph 142.

143. The Fifth Defendant does not admit paragraph 143.

144. The Fifth Defendant denies paragraph 144.

145. The Fifth Defendant denies paragraph 145.

**L.3.5. Continuing nature of the Directors' 1H15 Accounts Misleading Conduct Contraventions**

146. The Fifth Defendant denies paragraph 146.

**L.4. Directors' Misleading or Deceptive Representations in FY15**

**L.4.1. Directors' Representations**

147. The Fifth Defendant does not admit paragraph 147.

148. As to paragraph 148, the Fifth Defendant:

- a. repeats sub-paragraph 83(a) of the Defence;
- b. refers to and relies on the terms of the FY15 Financial Report and FY15 Directors' Declaration for their full force and effect; and
- c. otherwise, does not admit paragraph 148.

**L.4.2. Misleading or deceptive conduct**

149. The Fifth Defendant denies paragraph 149.

150. The Fifth Defendant denies paragraph 150.

- 151. The Fifth Defendant denies paragraph 151.
- 152. The Fifth Defendant denies paragraph 152.
- 153. The Fifth Defendant does not admit paragraph 153.
- 154. The Fifth Defendant denies paragraph 154.
- 155. The Fifth Defendant denies paragraph 155.

***L.4.3. S 1041E liability in respect of the FY15 Directors' Opinion to ASX***

- 156. As to paragraph 156, the Fifth Defendant:
  - a. repeats sub-paragraph 83(a) and paragraph 148 of the Defence; and
  - b. otherwise, does not admit paragraph 156.
- 157. The Fifth Defendant denies paragraph 157.
- 158. The Fifth Defendant does not admit paragraph 158.
- 159. The Fifth Defendant does not admit paragraph 159.
- 160. The Fifth Defendant denies paragraph 160.
- 161. The Fifth Defendant denies paragraph 161.

***L.4.4. S 1041E liability in respect of the FY15 Directors' Representation to ASX***

- 162. As to paragraph 162, the Fifth Defendant:
  - a. repeats paragraphs 83(a) and 148 of the Defence; and
  - b. otherwise, does not admit paragraph 162.
- 163. The Fifth Defendant denies paragraph 163.
- 164. The Fifth Defendant does not admit paragraph 164.
- 165. The Fifth Defendant does not admit paragraph 165.
- 166. The Fifth Defendant denies paragraph 166.
- 167. The Fifth Defendant denies paragraph 167.

***L.4.5. Continuing nature of the Directors' FY15 Accounts Misleading Conduct Contraventions***

- 168. The Fifth Defendant denies paragraph 168.



## **M. KPMG'S CONTRAVENING CONDUCT**

### **M.1. KPMG's Representations in FY14**

169. As to paragraph 169, the Fifth Defendant:

- a. says that the FY14 Audit Report stated that KPMG performed the procedures to assess whether in all material respects the financial report presents fairly, in accordance with the Corporations Act and Australian Accounting Standards, a true and fair view which is consistent with KPMG's understanding of the financial position of the group comprising Arrium and the entities it controlled at the year's end or from time to time during FY14 and of the group's performance;
- b. refers to and relies on the terms of the FY14 Audit Report for their full force and effect; and
- c. otherwise, denies paragraph 169.

### **M.2. Misleading or deceptive conduct in FY14**

#### ***M.2.1. Misleading or deceptive conduct in respect of the FY14 KPMG Opinion to ASX***

170. The Fifth Defendant denies paragraph 170.

171. The Fifth Defendant denies paragraph 171.

172. The Fifth Defendant denies paragraph 172.

173. As to paragraph 173, the Fifth Defendant:

- a. notes the definition of the terms "FY14 KPMG Opinion to ASX" and "FY14 KPMG Representation to ASX" used in paragraph 169 of the Statement of Claim;
- b. repeats paragraph 169 of the Defence;
- c. says that if the Fifth Defendant engaged in conduct which was a financial service within the meaning of s 1041H of the Corporations Act or s 12DA of the ASIC Act, that service was an "exempt service" within the meaning of the Corporations Regulations; and
- d. otherwise, admits paragraph 173.

#### **Particulars**

- i. Corporations Act s 766A(2);
- ii. Corporations Regulations 2001 r 7.1.29; and
- iii. ASIC Act s 5(3).

174. The Fifth Defendant denies paragraph 174.

175. The Fifth Defendant denies paragraph 175.

**M.2.2. *Misleading or deceptive conduct in respect of the FY14 KPMG Representation to ASX***

176. The Fifth Defendant denies paragraph 176.

177. The Fifth Defendant denies paragraph 177.

**M.2.3. *S 1041E liability in respect of the FY14 KPMG Opinion to ASX***

178. The Fifth Defendant:

- a. repeats paragraphs 29 and 169 of the Defence;
- b. denies paragraph 178; and
- c. notes the definition of the term "FY14 KPMG Opinion to ASX" used in paragraph 169 of the Statement of Claim.

179. The Fifth Defendant denies paragraph 179.

180. The Fifth Defendant denies paragraph 180.

181. The Fifth Defendant denies paragraph 181.

182. The Fifth Defendant denies paragraph 182.

183. The Fifth Defendant denies paragraph 183.

184. The Fifth Defendant denies paragraph 184.

**M.2.4. *S 1041E liability in respect of the FY14 KPMG Representation to ASX***

185. The Fifth Defendant denies paragraph 185.

186. The Fifth Defendant denies paragraph 186.

187. The Fifth Defendant denies paragraph 187.

188. The Fifth Defendant denies paragraph 188.

189. The Fifth Defendant denies paragraph 189.

190. The Fifth Defendant denies paragraph 190.

191. The Fifth Defendant denies paragraph 191.

**M.3. Continuing nature of the KPMG FY14 Accounts Contravention**

192. The Fifth Defendant denies paragraph 192.

**M.4. KPMG's Representations in 1H15**

193. As to paragraph 193, the Fifth Defendant:

- a. repeats sub-paragraph 68(a) of the Defence;
- b. says that the 1H15 Review Report stated that based on KPMG's review, which was not an audit, KPMG had not become aware of any matter that made it believe that the condensed half-year financial report of Arrium Limited was not in accordance with the Corporations Act;
- c. says that the 1H15 Review Report stated that a review of a half-year financial report consists of making enquiries, primarily of persons responsible for financial and accounting matters, and applying analytical and other review procedures;
- d. says that the 1H15 Review Report stated that a review is substantially less in scope than an audit conducted in accordance with Australian Auditing Standards and consequently did not enable KPMG to obtain assurance that KPMG would become aware of all significant matters that might be identified in an audit and accordingly, KPMG did not express an audit opinion;
- e. refers to and relies on the terms of the 1H15 Review Report for their full force and effect; and
- f. otherwise, denies paragraph 193.

**M.5. Misleading or deceptive conduct in 1H15**

***M.5.1. Misleading or deceptive conduct in respect of the 1H15 KPMG Opinion to ASX***

194. The Fifth Defendant denies paragraph 194.

195. The Fifth Defendant:

- a. denies paragraph 195; and
- b. says further that the Australian Auditing Standards referenced apply to audits of annual and interim financial reports and were not applicable to the 1H15 Review Report.

196. The Fifth Defendant denies paragraph 196.

197. As to paragraph 197, the Fifth Defendant:

- a. notes the definitions of the terms "1H15 KPMG Opinion to ASX" and "1H15 KPMG Representation to ASX" used in paragraph 193 of the Statement of Claim;
- b. repeats paragraph 193 of the Defence;
- c. says that if the Fifth Defendant engaged in conduct which was a financial service within the meaning of s 1041H of the Corporations Act or s 12DA of the ASIC Act, that service was an "exempt service" within the meaning of the Corporations Regulations; and
- d. otherwise, admits paragraph 197.

#### **Particulars**

- i. Corporations Act s 766A(2);
- ii. Corporations Regulations 2001 r 7.1.29; and
- iii. ASIC Act s 5(3).

198. The Fifth Defendant denies paragraph 198.

199. The Fifth Defendant denies paragraph 199.

#### ***M.5.2. Misleading or deceptive conduct in respect of the 1H15 KPMG Representation to ASX***

200. The Fifth Defendant denies paragraph 200.

201. The Fifth Defendant denies paragraph 201.

#### ***M.5.3. S 1041E liability in respect of the 1H15 KPMG Opinion to ASX***

202. The Fifth Defendant:

- a. denies paragraph 202; and
- b. further repeats paragraphs 70 and 193 of the Defence.

203. The Fifth Defendant denies paragraph 203.

204. The Fifth Defendant denies paragraph 204.

205. The Fifth Defendant denies paragraph 205.

206. The Fifth Defendant denies paragraph 206.

207. The Fifth Defendant denies paragraph 207.

208. The Fifth Defendant denies paragraph 208.

**M.5.4. S 1041E liability in respect of the 1H15 KPMG Representation to ASX**

209. The Fifth Defendant denies paragraph 209.

210. The Fifth Defendant denies paragraph 210.

211. The Fifth Defendant denies paragraph 211.

212. The Fifth Defendant denies paragraph 212.

213. The Fifth Defendant denies paragraph 213.

214. The Fifth Defendant denies paragraph 214.

215. The Fifth Defendant denies paragraph 215.

**M.6. Continuing nature of the KPMG 1H15 Accounts Contraventions**

216. The Fifth Defendant denies paragraph 216.

**M.7. KPMG's Representations in FY15**

217. As to paragraph 217, the Fifth Defendant:

- a. says that the FY15 Audit Report stated that KPMG performed the procedures to assess whether in all material respects the financial report presents fairly, in accordance with the Corporations Act and the Australian Accounting Standards, a true and fair view which is consistent with KPMG's understanding of the financial position of the group comprising Arrium and the entities it controlled at the year's end or from time to time during FY15, and of the group's performance;
- b. relies on the terms of the FY15 Audit Report for their full force and effect; and
- c. otherwise, denies paragraph 217.

**M.8. Misleading or deceptive conduct in FY15**

**M.8.1. Misleading or deceptive conduct in respect of the FY15 KPMG Opinion to ASX**

218. The Fifth Defendant denies paragraph 218.

219. The Fifth Defendant denies paragraph 219.

220. The Fifth Defendant denies paragraph 220.

221. As to paragraph 221, the Fifth Defendant:

- a. notes the definitions of the terms "FY15 KPMG Opinion to ASX" and "FY15 KPMG Representation to ASX" used in paragraph 217 of the Statement of Claim;

- b. repeats paragraph 217 of the Defence;
- c. says that if the Fifth Defendant engaged in conduct which was a financial service within the meaning of s 1041H of the Corporations Act or s 12DA of the ASIC Act, that service was an "exempt service" within the meaning of the Corporations Regulations; and
- d. otherwise, admits paragraph 173.

#### **Particulars**

- i. Corporations Act s 766A(2);
- ii. Corporations Regulations 2001 r 7.1.29; and
- iii. ASIC Act s 5(3).

222. The Fifth Defendant denies paragraph 222.

223. The Fifth Defendant denies paragraph 223.

#### ***M.8.2. Misleading or deceptive conduct in respect of the FY15 KPMG Representation to ASX***

224. The Fifth Defendant denies paragraph 224.

225. The Fifth Defendant denies paragraph 225.

#### ***M.8.3. S 1041E liability in respect of the FY15 KPMG Opinion to ASX***

226. The Fifth Defendant:

- a. denies paragraph 226;
- b. repeats paragraphs 84 and 217 of the Defence; and
- c. notes the definition of the term "FY15 KPMG Opinion to ASX" used in paragraph 217 of the Statement of Claim.

227. The Fifth Defendant denies paragraph 227.

228. The Fifth Defendant denies paragraph 228.

229. The Fifth Defendant denies paragraph 229.

230. The Fifth Defendant denies paragraph 230.

231. The Fifth Defendant denies paragraph 231.

232. The Fifth Defendant denies paragraph 232.

**M.8.4. S 1041E liability in respect of the FY15 KPMG Representation to ASX**

233. The Fifth Defendant denies paragraph 233.

234. The Fifth Defendant denies paragraph 234.

235. The Fifth Defendant denies paragraph 235.

236. The Fifth Defendant denies paragraph 236.

237. The Fifth Defendant denies paragraph 237.

238. The Fifth Defendant denies paragraph 238.

239. The Fifth Defendant denies paragraph 239.

**M.9. Continuing nature of the KPMG FY15 Accounts Contraventions**

240. The Fifth Defendant denies paragraph 240.

**N. CONTRAVENING CONDUCT CAUSED LOSS**

**N.1. What happened after the contraventions**

241. As to paragraph 241, the Fifth Defendant:

- a. says that the purported facts pleaded involve evaluative matters for consideration; and
- b. otherwise, does not admit paragraph 241.

242. The Fifth Defendant admits paragraph 242.

243. The Fifth Defendant admits paragraph 243.

244. The Fifth Defendant admits paragraph 244.

245. The Fifth Defendant does not admit paragraph 245.

**N.2. What would have happened but for the contraventions**

246. The Fifth Defendant denies paragraph 246.

247. The Fifth Defendant denies paragraph 247.

248. The Fifth Defendant:

- a. denies paragraph 248;
- b. says further that ss 302 and 303 of the Corporations Act relate to an obligation to prepare a half-year financial report; and

- c. further relies on the provisions of ss 304 and 305 of the Corporations Act for their full force and effect.

249. The Fifth Defendant denies paragraph 249.

### **N.3. Causation: acquisitions in the Capital Raising**

250. As to paragraph 250, the Fifth Defendant:

- a. admits sub-paragraph 250(a) to the extent that it is established that the Second Plaintiff or Group Members acquired relevant interests in Arrium Shares in the Capital Raising during the Relevant Period;
- b. in respect of sub-paragraphs 250(b) and 250(c), says that the offer price of Arrium Shares would reasonably be expected to have been informed or affected by material information disclosed to the ASX and by other publicly available information amongst other factors affecting the price at which those shares were traded; and
- c. otherwise, denies paragraph 250.

251. The Fifth Defendant denies paragraph 251.

252. The Fifth Defendant does not admit paragraph 252.

### **N.4. Market-based causation (on-market acquisitions)**

253. As to paragraph 253, the Fifth Defendant:

- a. admits sub-paragraphs 253(a) and 253(b) to the extent that it is established that the First Plaintiff or Group Members acquired relevant interests in Arrium Shares on the financial market operated by ASX during the Relevant Period;
- b. in respect of sub-paragraph 253(c), says that the price or value of Arrium Shares would reasonably be expected to have been informed or affected by material information disclosed to the ASX and by other publicly available information amongst other factors affecting the price at which those shares were traded; and
- c. otherwise, denies paragraph 253.

254. The Fifth Defendant:

- a. denies paragraph 254; and
- b. says further that insofar as it is alleged that loss or damage can be claimed by the Plaintiffs or Group Members who are not proved individually to have relied in fact on the impugned conduct of the Fifth Defendant, that allegation is contrary to law, and no such loss or damage can be awarded.

255. The Fifth Defendant denies paragraph 255.



256. The Fifth Defendant does not admit paragraph 256.

**N.5. Loss or damage suffered by the Plaintiffs and Group Members**

257. The Fifth Defendant denies paragraph 257.

**O. COMMON QUESTIONS OF LAW OR FACT**

258. The Fifth Defendant does not plead to paragraph 258 as that paragraph contains no allegation against it.

259. The Fifth Defendant does not plead to paragraph 259 as that paragraph contains no allegation against it.

260. The Fifth Defendant does not plead to paragraph 260 as that paragraph contains no allegation against it.

261. The Fifth Defendant does not plead to paragraph 261 as that paragraph contains no allegation against it.

262. The Fifth Defendant does not plead to paragraph 262 as that paragraph contains no allegation against it.

263. The Fifth Defendant does not plead to paragraph 263 as that paragraph contains no allegation against it.

264. The Fifth Defendant does not plead to paragraph 264 as that paragraph contains no allegation against it.

265. The Fifth Defendant does not plead to paragraph 265 as that paragraph contains no allegation against it.

266. The Fifth Defendant denies that the plaintiff and group members are entitled to the relief claimed, or any relief at all.

**P. RELIEF FROM LIABILITY**

267. The proceedings against the Fifth Defendant are civil proceedings against the Fifth Defendant for alleged negligence, default or breach of duty in the Fifth Defendant's capacity as auditor of Arrium during the Relevant Period.

268. At all material times, the Fifth Defendant acted honestly.

269. In all the circumstances of the case, if (which is denied) the Fifth Defendant is liable to any applicant or Group Member, the Fifth Defendant ought fairly be excused for any negligence, default or breach of duty.

270. In the premises of paragraphs 267 to 269 above, pursuant to s 1318 of the Corporations Act, the Court should wholly, or alternatively partly, relieve the Fifth Defendant from any liability.

**Q. PROFESSIONAL STANDARDS SCHEME**

**Q.1. FY14 Audit Report**

271. It was an express term of the 2013 Retainer that the services performed in relation to the FY14 Audit Report would be limited by the application of the Institute of Chartered Accountants in Australia (NSW) Scheme (the **2013 Scheme**) approved under the *Professional Standards Act 1994* (NSW) (the **PSA**), or such other applicable scheme approved under the PSA.

**Particulars**

i. 2013 Retainer, Appendix 1, clause 8.1.

272. At all material times, the 2013 Scheme was a scheme operating under the PSA.

273. At all material times, the Fifth Defendant was a Schedule A Participating Member of the 2013 Scheme.

**Particulars**

i. 2013 Scheme, Schedule A (c).

274. It was a term of the 2013 Scheme that a Schedule A Participant against whom a proceeding is brought relating to occupational liability (as defined in the PSA) in connection with auditing services (as defined in the 2013 Scheme) is not liable in damages in relation to that claim above \$75,000,000.

**Particulars**

i. 2013 Scheme, clauses 3.2, 3.3 and 4.1.

275. By reason of ss 28 and 29(2) of the PSA, s 137 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), and paragraphs 268 to 271 of the Defence, any liability of the Fifth Defendant arising from the performance of the 2013 Retainer as claimed in the Statement of Claim is limited to \$75,000,000.

**Q.2. 1H15 Review Report and FY15 Audit Report**

276. It was an express term of the 2014 Retainer that the services performed in relation to the 1H15 Review Report and FY15 Financial Report would be limited by the application of the Institute of Chartered Accountants in Australia (NSW) Scheme (now the Chartered Accountants Australia and New Zealand Professional Standards Scheme (NSW)) (the **2014 Scheme**) approved under the PSA, or such other applicable scheme approved under the PSA.

**Particulars**

i. 2014 Retainer, Appendix 1, clause 8.1.

277. At all material times, the 2014 Scheme was a scheme operating under the PSA.

278. At all material times, the Fifth Defendant was a participating member of the 2014 Scheme.
279. It was a term of the Scheme that a participating member against whom a proceeding is brought relating to occupational liability (as defined in the PSA) in connection with auditing services or reviews performed (as defined in the 2014 Scheme) in excess of \$2,000,000, is not liable in damages in relation to that claim above \$50,000,000.

### **Particulars**

- i. 2014 Retainer, clause 8.1; and
- ii. 2014 Scheme, clauses 3.2, 3.3 and 4.1.
280. For performance of the services performed pursuant to the 2014 Retainer, KPMG charged Arrium the sum of \$1,553,633.
281. By reason of ss 28 and 29(2) of the PSA, s 137 of the CCA, and paragraphs 273-276 of the Defence, any liability of the Fifth Defendant arising from the performance of the 2013 Retainer as claimed in the Statement of Claim is limited to \$50,000,000.

### **R. PROPORTIONATE LIABILITY**

282. In respect of alleged contraventions of s 1041H of the Corporations Act, s 12DA of the ASIC Act and s 18 of the ACL by the Fifth Defendant (the **Claims**), if (which are denied) the Fifth Defendant is liable to any Plaintiff or Group Member for any loss or damage that is the subject of the Claims (**Claimed Loss**), it says as follows at paragraphs 283 to 289.
283. The Claims are apportionable claims within the meaning of:
- a. in respect of any alleged contravention of s 1041H of the Corporations Act, s 1041L of the Corporations Act;
  - b. in respect of any alleged contravention of s 12DA of the ASIC Act, s 12GP of the ASIC Act; and
  - c. in respect of any alleged contravention of s 18 of the ACL, s 87CB of the CCA.

#### **R.1. FY14 Financial Report**

284. In respect of the FY14 Financial Report, Smedley, Roberts and Nankervis are each to be considered a "concurrent wrongdoer" within the meaning of s 1041L(3) of the Corporations Act, s 12GP(3) of the ASIC Act and s 87CB(3) of the CCA by reason of:
- a. the matters pleaded in paragraphs 95 to 116 of the Statement of Claim; and
  - b. Smedley, Roberts and Nankervis each being a person whose acts or omissions caused the Claimed Loss.

285. In the premises, the Fifth Defendant's liability (if any) to the Plaintiffs and each Group Member in respect of the FY14 Financial Report is limited by s 1041N of the Corporations Act, s 12GR of the ASIC Act, and s 87CD of the CCA, to an amount reflecting that proportion of Claimed Loss that the Court considers is just having regard to the extent of the Fifth Defendant's responsibility for that Claimed Loss.

### **R.2. 1H15 Financial Report and FY15 Financial Report**

286. In respect of the 1H15 Financial Report and FY15 Financial Report, Roberts, Nankervis, and Maycock are each to be considered a "concurrent wrongdoer" within the meaning of s 1041L(3) of the Corporations Act, s 12GP(3) of the ASIC Act and s 87CB(3) of the CCA by reason of:

- a. the matters pleaded in paragraphs 125 to 168 of the Statement of Claim; and
- b. Roberts, Nankervis and Maycock each being a person whose acts or omissions caused the Claimed Loss.

287. In the premises, the Fifth Defendant's liability (if any) to the Plaintiffs and each Group Member in respect of the 1H15 Financial Report and FY15 Financial Report is limited by s 1041N of the Corporations Act, s 12GR of the ASIC Act, and 87CD of the CCA, to an amount reflecting that proportion of Claimed Loss that the Court considers is just having regard to the extent of the Fifth Defendant's responsibility for that Claimed Loss.

### **R.3. Advisers**

288. If (which is not presently known to the Fifth Defendant):

- a. any Plaintiff or Group Member was advised by an adviser in relation to purchases of Arrium Shares in respect of which that Plaintiff or Group Member now makes Claims;
- b. that advice was negligent; and
- c. that advice caused or contributed to the making of those purchases,

that adviser is a person whose acts or omissions caused the Claimed Loss in respect of that Plaintiff or Group Member.

#### **Particulars**

- i. Further particulars may be provided following discovery in respect of the Claims by the Plaintiffs and, prior to the trial of each Group Member's Claims, by that Group Member.

289. In the premises, each of the Fifth Defendant and any adviser referred to in the preceding paragraph is, in relation to the Claims by any Plaintiff or Group Member referred to in that paragraph, a concurrent wrongdoer within the meaning of s 1041L(3) of the Corporations Act, s 12GP(3) of the ASIC Act and s 87CB(3) of the CCA.

## S. CONTRIBUTORY NEGLIGENCE

290. If (which is not presently known to the Fifth Defendant) the decision of any Plaintiff or Group Member to purchase Arrium Shares, in respect of which that Plaintiff or Group Member now makes claims based on alleged contraventions of ss 1041H of the Corporations Act, s 12DA of the ASIC Act or s 18 of the ACL, involved a failure by that Plaintiff or Group Member to take reasonable care, then, by reason of:
- a. in respect of the contravention of s 1041H of the Corporations Act alleged against the Fifth Defendant, s 1041I of the Corporations Act;
  - b. in respect of the contravention of s 12DA of the ASIC Act alleged against the Fifth Defendant, s 12GF of the ASIC Act; and
  - c. in respect of the contravention of s 18 of the ACL alleged against the Fifth Defendant, s 137B of the ACL,

any liability of the Fifth Defendant in relation to those claims is limited to an amount which the Court thinks just and equitable having regard to the responsibility of that Plaintiff or Group Member.

### Particulars

- i. Further particulars may be provided following discovery in respect of the claims by the Plaintiffs and, prior to the trial of each Group Member's claims, by that Group Member.

## T. CIVIL LIABILITY ACT (NSW) / WRONGS ACT (VIC)

291. The claims in respect of the contravention of s 18 of the ACL alleged against the Fifth Defendant in the Statement of Claim are for harm resulting from negligence, within the meaning of s 5A of the *Civil Liability Act 2002* (NSW) (**CLA**) and/or s 44 of the *Wrongs Act 1958* (VIC) (**Wrongs Act**).
292. In respect of those claims:
- a. having regard to the subject matter, scope and purpose of ss 18 and 236 of the ACL, it is not appropriate for the scope of the Fifth Defendant's liability to extend to any loss or damage claimed, within the meaning of s 5D(1) of the CLA and/or s 51 of the Wrongs Act;
  - b. accordingly, the Fifth Defendant is not liable under s 236 of the ACL for any such loss or damage.
293. Further or alternatively:
- a. the risk that:
    - i. the FY14 Financial Report, FY15 Financial Report or 1H15 Financial Report might contain a material misstatement prior to audit or review, as applicable;

- ii. further, or alternatively, a material misstatement might not be detected by the auditor,

was an obvious risk, within the meaning of s 5F of the CLA and/or s 53 of the Wrongs Act;

- b. the risk that, at any given time, the price of Arrium Shares on ASX might be:
  - i. affected by an error in the FY14 Financial Report, FY15 Financial Report or 1H15 Financial Report;
  - ii. further or alternatively, different from the true value of Arrium Shares,was an obvious risk, within the meaning of s 5F of the CLA and/or s 53 of the Wrongs Act;
- c. the risk that the price of Arrium Shares on ASX might fluctuate to a significant degree was an obvious risk, within the meaning of s 5F of the CLA and/or s 53 of the Wrongs Act;
- d. accordingly, pursuant to s 5G of the CLA and/or s 54 of the Wrongs Act, for the purposes of any claim in respect of the contravention of s 18 of the ACL alleged against the Fifth Defendant in the Statement of Claim, it is to be presumed that the Plaintiffs and Group Members were aware of the risks referred to in sub-paragraphs (a) to (c) above; and
- e. for that reason, no loss or damage can be recovered pursuant to s 236 of the ACL.

294. Further or alternatively:

- a. the risk that:
  - i. the FY14 Financial Report, FY15 Financial Report or 1H15 Financial Report might contain a material misstatement prior to audit or review, as applicable;
  - ii. further, or alternatively, a material misstatement might not be detected by the auditor,was an inherent risk, within the meaning of s 5I of the CLA and/or s 55 of the Wrongs Act;
- b. the risk that, at any given time, the price of Arrium Shares on ASX might be:
  - i. affected by an error in the FY14 Financial Report, FY15 Financial Report or 1H15 Financial Report;
  - ii. further or alternatively, different from the true value of Arrium Shares,

was an inherent risk, within the meaning of s 51 of the CLA and/or s 55 of the Wrongs Act;

- c. the risk that the price of Arrium Shares on ASX might fluctuate to a significant degree was an inherent risk, within the meaning of s 51 of the CLA and/or s 55 of the Wrongs Act;
- d. accordingly, pursuant to s 51 of the CLA and/or s 55 of the Wrongs Act, the Fifth Defendant is not liable under s 236 of the ACL for any loss alleged in the Statement of Claim to have been suffered as a result of the materialisation of a risk referred to in sub-paragraphs (a) to (c) above.

295. Further or alternatively:

- a. in performing the 2013 Retainer in relation to the FY14 Financial Report and the 2014 Retainer in relation to the 1H15 Financial Report and FY15 Financial Report, the Fifth Defendant acted in a manner that (at the time) was widely accepted in Australia by peer professional opinion as competent professional practice, within the meaning of s 50(1) of the CLA and/or s 59(1) of the Wrongs Act; and
- b. accordingly, pursuant to s 50(1) of the CLA and/or s 59(1) of the Wrongs Act, the Fifth Defendant is not liable under s 236 of the ACL for any loss alleged in the statement of claim.

#### **U. NORMATIVE CAUSATION**

296. Further and in answer to each of the claims made:

- a. having regard to the subject matter, scope and purpose of ss 1041H and 1041I of the Corporations Act, it is not appropriate for the scope of the Fifth Defendant's liability to extend to any loss or damage claimed;
- b. having regard to the subject matter, scope and purpose of ss 1041E and 1041I of the Corporations Act, it is not appropriate for the scope of the Fifth Defendant's liability to extend to any loss or damage claimed;
- c. having regard to the subject matter, scope and purpose of ss 12DA(1) and 12GF of the ASIC Act, it is not appropriate for the scope of the Fifth Defendant's liability to extend to any loss or damage claimed; and
- d. having regard to the subject matter, scope and purpose of ss 18 and 236 of the ACL, it is not appropriate for the scope of the Fifth Defendant's liability to extend to any loss or damage claimed.



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Jeremy Kirk SC  
Eleven Wentworth, Sydney

*Julia L. Roy.*

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Julia Roy  
Sixth Floor, Selbourne Wentworth, Sydney

31 March 2021