

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



Case: S ECI 2023 01835

Filed on: 04/03/2024 02:16 PM

No. S ECI 2023 01835

BETWEEN

JUSTINE LIDGETT

First Plaintiff

CAMERON LIDGETT

Second Plaintiff

AND

DOWNER EDI LIMITED (ACN 003 872 848)

Defendant

DEFENCE

| | | | |
|---------------------|--------------------|------------------|---------------------|
| Date of Document: | 1 March 2024 | Solicitors Code: | 103351 |
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PRELIMINARY

The terms defined by the Plaintiffs in the Consolidated Statement of Claim dated 3 November 2023 (**CSOC**) have the same meaning in this Defence, unless otherwise defined. The Defendant does not admit any factual assertions contained in or implied by the use of those defined terms. Headings are used for convenience only and do not form part of this Defence.

A. INTRODUCTION

A.1 The Plaintiff and Group Members

1. In answer to the allegations in paragraph 1 of the CSOC, the Defendant:
 - (a) admits this proceeding is commenced as a group proceeding pursuant to Part 4A of the *Supreme Court of Victoria Act 1986 (Vic)* by the plaintiffs in their individual and representative capacity; and
 - (b) otherwise does not know and therefore cannot admit the allegations in paragraph 1 of the CSOC.
2. The Defendant does not know and therefore cannot admit the allegations in paragraph 2 of the CSOC.
3. The Defendant does not know and therefore cannot admit the allegations in paragraph 3 of the CSOC.

A.2 Legal obligations to which Downer was subject

4. In answer to the allegations in paragraph 4 of the CSOC, the Defendant:
 - (a) admits that during the Relevant Period, it was a “person” for the purposes of the legislative provisions pleaded at sub-paragraphs 4(a)-(c); and
 - (b) otherwise denies the allegations in paragraph 4 of the CSOC.
5. In answer to the allegations in paragraph 5 of the CSOC, the Defendant:
 - (a) admits that it was included in the official list of the financial market operated by the ASX on 20 December 1990;
 - (b) as to the allegations in sub-paragraph 5(a):
 - (i) admits that during the Relevant Period, Downer Shares:

- (A) were ED securities for the purposes of s 111AE of the *Corporations Act 2001* (Cth) (**Corporations Act**);
 - (B) were quoted ED securities for the purposes of s 111AM of the *Corporations Act*; and
 - (C) were able to be acquired and disposed of by investors and potential investors on the Affected Market; and
 - (ii) otherwise denies the allegations in sub-paragraph 5(a) of the CSOC;
 - (c) as to the allegations in sub-paragraphs 5(b)(i) to (ii):
 - (i) admits that during the Relevant Period:
 - (A) it was a listed entity within the meaning of s 111AL(1) of the *Corporations Act*; and
 - (B) it was subject to and bound by the ASX Listing Rules; and
 - (ii) otherwise denies the allegations in sub-paragraphs 5(b)(i) to (ii) of the CSOC; and
 - (d) as to the allegations in sub-paragraphs 5(b)(iii) to (vi):
 - (i) relies on the terms of the provisions for their full force and effect as in force from time to time during the Relevant Period;
 - (ii) admits that it was bound by the provisions as in force from time to time during the Relevant Period; and
 - (iii) otherwise denies the allegations in sub-paragraphs 5(b)(iii) to (vi).
6. In answer to the allegations in paragraph 6, the Defendant:
- (a) says that on and from 14 August 2021:
 - (i) pursuant to s 1041H(4) of the *Corporations Act*, if it engaged in conduct that did not contravene s 674A(2) of the *Corporations Act*, but would contravene that subsection if sub-paragraph 674A(2)(d) contained the same text as sub-paragraph 674(2)(d), its engaging in conduct did not contravene s 1041H(1) of the *Corporations Act*; and
 - (ii) pursuant to s 12DA(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), if it engaged in conduct that did not contravene s 674A(2) of the *Corporations Act*, but would contravene that

subsection if sub-paragraph 674A(2)(d) contained the same text as sub-paragraph 674(2)(d), its engaging in that conduct did not contravene s 12DA(1) of the ASIC Act;

- (b) says further that on and from 14 August 2021:
 - (i) section 674 of the Corporations Act has not been a civil penalty provision or a financial services civil penalty provision within the meaning of ss 1317E(3) and 1317HA of the Corporations Act;
 - (ii) section 674 of the Corporations Act has not been a s 1325 order provision within the meaning of s 1325(7) of the Corporations Act; and
 - (iii) in the premises, the Plaintiffs are not entitled to an order for compensation under sections 1317HA or 1325 of the Corporations Act for damage caused by any conduct of the Defendant in contravention of s 674 of the Corporations Act; and
 - (c) otherwise admits the allegations in paragraph 6 of the CSOC.
7. The Defendant admits the allegations in paragraph 7 of the CSOC.
 8. The Defendant admits the allegations in paragraph 8 of the CSOC.
 9. In answer to the allegations in paragraph 9 of the CSOC, the Defendant:
 - (a) admits that it was required to comply with AASB 15 as in force from time to time during the Relevant Period;
 - (b) says further that there were three versions of AASB 15 applicable during the Relevant Period;

Particulars

- i. AASB 15, no. 3 (applicable to annual periods from 1 January 2019 to 1 January 2021, prepared on 3 January 2019).
- ii. AASB 15, no. 4 (applicable to annual periods from 1 January 2019 to 1 January 2021, prepared on 2 March 2020).
- iii. AASB 15, no. 5 (applicable to annual periods from 1 July 2012 to 1 January 2023, prepared on 30 June 2021).

- (c) admits that there were other accounting standards with which it was required to comply during the Relevant Period;
- (d) does not know, and therefore cannot admit, which “other accounting standards” the Plaintiffs allege it was required to comply with; and
- (e) otherwise admits the allegations in paragraph 9 of the CSOC.

10. In answer to the allegations in paragraph 10 of the CSOC, the Defendant:

- (a) says that the part of AASB 15 which paragraph 10 purports to summarise relates only to circumstances where contract revenue relates to variable consideration;

Particulars

- i. AASB 15 (versions 3-5), paragraphs 50 to 54, 56-59.
- (b) says further that part of AASB 15 which paragraph 10 purports to summarise does not describe all the circumstances in which the Defendant was permitted to recognise revenue consistently with AASB 15;
- (c) refers to and relies on the terms of AASB 15 as in force during the Relevant Period for its full terms and effect; and
- (d) otherwise denies the allegations in paragraph 10 of the CSOC.

11. The Defendant admits the allegations in paragraph 11 of the CSOC.

12. In answer to the allegations in paragraph 12 of the CSOC, the Defendant:

- (a) says that the part of IFRS 15 which paragraph 12 purports to summarise relates only to circumstances where contract revenue relates to variable consideration;

Particulars

- i. IFRS 15, paragraphs 50-54, 56-59.
- (b) says further that part of IFRS 15 which paragraph 12 purports to summarise does not describe all the circumstances in which an entity is permitted to recognise revenue consistently with IFRS 15;
- (c) refers to and relies on the terms of IFRS 15 as in force during the Relevant Period for its full terms and effect; and
- (d) otherwise denies the allegations in paragraph 12 of the CSOC.

A.3 Downer's business

13. The Defendant admits the allegations in paragraph 13 of the CSOC.
14. In response to the allegation in paragraph 14 of the CSOC, the Defendant:
 - (a) says that for the HY20 to FY22 period, the Defendant's business conducted the following operations:
 - (i) Transport – comprising the Defendant's Road Services, Projects, and Rollingstock Services (later known as Rail and Transit Systems) businesses, with services including management and maintenance of road networks across Australia and New Zealand, design and construction of light rail, heavy rail, signalling, track and station works, rail safety technology, bridges and roads; and rollingstock asset management;
 - (ii) Utilities – including services across the power and gas, water, renewable energy and telecommunications sectors, including planning, designing, constructing, operating, maintaining, managing and decommissioning power and gas network assets, delivering complete water lifestyle solutions for municipal and industrial water users, services and solutions for renewable energy assets including procurement, assembly, design, construction, commissioning and maintenance, and providing end-to-end technology and communications solutions with integrated civil construction, electrical, fibre, copper and radio network deployment capability throughout Australia and New Zealand;
 - (iii) Facilities – operating in Australia and New Zealand, delivering facilities services to customers across a diverse range of industry sectors including: defence, education, government, healthcare, senior living, sports and venues, resources, leisure and hospitality, airports, industrial, commercial, property, mineral technologies, utilities and public private partnerships;
 - (iv) Engineering, Construction and Maintenance – comprising its Asset Services and Engineering & Construction businesses, with services including design, engineering, construction, maintenance and ongoing management of critical assets; and
 - (i) Mining – operating in more than 60 sites in Australia, Papua New Guinea, South America and Southern Africa, providing services at all stages of the mining lifecycle, including exploration drilling, open cut mining services in

Australia, underground mining services in Australia and Papua New Guinea, drilling, explosives manufacture and supply, blasting and crushing, Tyre management and mine closure and rehabilitation;

Particulars

- i. HY20 Half Year Financial Report, 12 February 2020, 3 to 8 [DOW.3000.0070.9991].
- ii. FY20 Annual Report, 12 August 2020, 7 to 10 [DOW.3000.0070.9995].
- iii. HY21 Half-year Report, 11 February 2021, 3 to 8 [DOW.3000.0070.9996].
- iv. FY21 Annual Report, 12 August 2021, 6, 7 to 9 [DOW.3000.0070.9997].
- v. HY22 Half-year Report, 10 February 2022, 9 to 12 [DOW.3000.0023.9998].
- vi. FY22 Annual Report, 17 August 2022, 10, 15 to 17 [DOW.3000.0023.9999].

(b) says that:

- (i) in February 2020, the Defendant announced its decision to shift its focus from major construction efforts to other areas, including transport, voltage transmission and substations, telecommunications, water, wind transport (being within the Defendant's other divisional segments); and
- (ii) in FY22, the Defendant divested its mining business;

Particulars

- i. FY22 Annual Report, 17 August 2022, 17 [DOW.3000.0023.9999].
- ii. FY20 Half Year Results, Investor Webcast transcript, 12 February 2020, 2 [DOW.2002.0001.0017].

(c) says that, following the events described at (b) above, in FY23, the Defendant's business conducted the following operations:

- (i) Transport (as described in paragraph 14(a)(i) above);

- (ii) Utilities (as described in paragraph 14(a)(ii) above); and
- (iii) Facilities (as described in paragraph 14(a)(iii) above); and

Particulars

- i. HY23 Half-year Report, 27 February 2023, 8 to 10 [DOW.3000.0049.9999].
 - ii. FY23 Annual Report, 10 August 2023, 8 to 11, 79 [DOW.2000.0001.2299].
- (d) otherwise denies the allegations in paragraph 14 of the CSOC.

A.4 Directors and officers of Downer

15. In answer to the allegations in paragraph 15 of the CSOC, the Defendant:

- (a) as to the allegations in sub-paragraph 15(a) of the CSOC:
 - (i) says that Fenn was a director of Downer from 1 July 2010 to 1 August 2010;
 - (ii) admits that Fenn was the Managing Director and Chief Executive Officer of Downer from 2 August 2010 to 27 February 2023; and
 - (iii) otherwise denies the allegations in sub-paragraph 15(a); and
- (b) admits the allegations in sub-paragraph 15(b) of the CSOC.

16. The Defendant admits the allegations in paragraph 16 of the CSOC.

17. In answer to the allegations in paragraph 17 of the CSOC, the Defendant:

- (a) says that Cinerari:
 - (i) was the Chief Executive Officer – Downer Works Australia from in or around October 2008 to February 2011;
 - (ii) was the Chief Operating Officer – Infrastructure East, Australian Operations from in or around March 2011 to January 2015;
 - (iii) was the Chief Executive Officer – Transport and Infrastructure division from in or around January 2015 to 25 August 2019; and
 - (iv) was the Chief Operating Officer – Australian Operations of Downer from in or around 26 August 2019 to February 2022; and
- (b) otherwise denies the allegations in paragraph 17 of the CSOC.

18. In answer to the allegations in paragraph 18 of the CSOC, the Defendant:
- (a) says that Ferguson was Acting Chief Financial Officer of Downer from in or around April 2016 to 5 October 2016;
 - (b) admits that Ferguson was:
 - (i) the Chief Financial Officer of Downer from 6 October 2016 to 31 August 2023; and
 - (ii) an officer of Downer within the meaning of s 9 of the Corporations Act and ASX Listing Rule 19.2 at all times from October 2016 to 31 August 2023; and
 - (c) otherwise denies the allegations in paragraph 18 of the CSOC.
19. The Defendant admits the allegations in paragraph 19 of the CSOC.
20. In answer to the allegations in paragraph 20 of the CSOC, the Defendant:
- (a) says that Cohen:
 - (i) was the Executive General Manager – Infrastructure of Tenix Holdings Australia from 26 January 2013 to in or around October 2014;
 - (ii) was the Executive General Manager – Infrastructure of Downer from in or around October 2014 to 31 March 2015; and
 - (iii) was the Executive Director – Utilities division of Downer from in or around 1 April 2015 to 31 May 2022; and
 - (b) otherwise admits the allegations in paragraph 18 of the CSOC.
21. The Defendant admits the allegations in paragraph 21 of the CSOC.
22. The Defendant denies the allegations in paragraph 22 of the CSOC.
23. In answer to the allegations in paragraph 23 of the CSOC, the Defendant:
- (a) admits the paragraph insofar as it relates to the individuals and periods pleaded in paragraphs 15 to 21 of this Defence; and
 - (b) otherwise denies paragraph 23 of the CSOC.

B. DOWNER'S STATEMENTS TO THE MARKET

B.1 23 July 2019 announcement of the AusNet Contract

24. The Defendant admits the allegations in paragraph 24 of the CSOC.

25. In answer to the allegations in paragraph 25 of the CSOC, the Defendant:
- (a) refers to and relies on the terms of the 23 July 2019 Announcement for its full terms and effect [DOW.3000.0070.9990];
 - (b) says that on 22 July 2019, an Operations and Maintenance Agreement was entered into between AusNet Electricity Services Pty Ltd, AusNet Transmission Group Pty Ltd and Downer Utilities Australia Pty Ltd (**AusNet Contract** or **OMSA**) [DOW.3000.0022.9999; DOW.3000.0021.9999]; and
 - (c) otherwise denies the allegations in paragraph 25 of the CSOC.
26. The Defendant admits the allegations in paragraph 26 of the CSOC.
27. In answer to the allegations in paragraph 27 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 25 of this Defence;
 - (b) says that the AusNet Contract has generated in revenue approximately:
 - (i) \$36 million for the period April 2020 to June 2020;
 - (ii) between \$152 million to \$176 million per annum in FY21, FY22 and FY23; and
 - (c) otherwise admits the allegations in paragraph 27 of the CSOC.

B.2 Capital Raise

28. In answer to the allegations in paragraph 28 of the CSOC, the Defendant:
- (a) admits the allegations in sub-paragraph 28(a) of the CSOC; and
 - (b) admits the allegations in sub-paragraph 28(b) of the CSOC save that Cleansing Notice title referred to “708AA(2)(f)” not “7088AA(2)(f)”.
29. In answer to the allegations in paragraph 29 of the CSOC, the Defendant:
- (a) refers to and relies on the terms of the Capital Raise Announcement for its full terms and effect; and
 - (b) otherwise admits the allegations in paragraph 29 of the CSOC.
30. In answer to the allegations in paragraph 30 of the CSOC, the Defendant refers to and repeats paragraph 29 of this Defence.
31. In answer to the allegations in paragraph 31 of the CSOC, the Defendant:

- (a) refers to and relies on the terms of the Cleansing Notice for its full terms and effect; and
- (b) otherwise admits the allegations in paragraph 31 of the CSOC.

B.3 12 August 2020 announcements

- 32. The Defendant admits the allegations in paragraph 32 of the CSOC.
- 33. The Defendant admits the allegations in paragraph 33 of the CSOC.
- 34. In answer to the allegations in paragraph 34 of the CSOC, the Defendant:
 - (a) refers to and relies on the terms of the FY20 Annual Report for its full terms and effect;
 - (b) says further that the FY20 Annual Report included the Independent Auditor's Report for FY20 by which KPMG reported that, in KPMG's opinion, the Consolidated Financial Report of Downer EDI Limited for FY20 complied with the Corporations Act, including:
 - (i) giving a true and fair view of the Downer Group's financial position as at 30 June 2020 and of its financial performance for FY20; and
 - (ii) complying with Australian Accounting Standards
(FY20 Audit Opinions);
 - (c) says further that KPMG identified in its Independent Auditor's Report for FY20 that a "Key Audit Matter", being a matter which in KPMG's professional judgment was a matter of most significance in its audit, was "Recognition of Revenue"; and
 - (d) otherwise admits the allegations in paragraph 34 of the CSOC.
- 35. The Defendant admits the allegations in paragraph 35 of the CSOC.
- 36. The Defendant admits the allegations in paragraph 36 of the CSOC.

B.4 11 February 2021 announcements

- 37. The Defendant admits the allegations in paragraph 37 of the CSOC.
- 38. In answer to the allegations in paragraph 38 of the CSOC, the Defendant:
 - (a) says that the table extracted in paragraph 38 of the CSOC inaccurately refers to 31 Dec 2021 instead of 31 Dec 2019;

- (b) refers to and relies on the terms of the HY21 Appendix 4D for its full terms and effect; and
 - (c) otherwise admits paragraph 38 of the CSOC.
39. In answer to the allegations in paragraph 39 of the CSOC, the Defendant:
- (a) refers to and relies on the terms of the HY21 Half-year Report for its full terms and effect;
 - (b) says further that the HY21 Half-year Report included the Independent Auditor's Review Report by which KPMG reported that it had reviewed the Condensed Consolidated Half-year Financial Report and had not become aware of any matter that made KPMG believe the Consolidated Half-year Financial Report did not comply with the Corporations Act, including:
 - (i) giving a true and fair view of the Downer Group's financial position as at 31 December 2020 and of its performance for the half-year ended on 31 December 2020; and
 - (ii) complying with Australian Accounting Standards
(HY21 Half-year Review Opinion); and
 - (c) otherwise admits the allegations in paragraph 39 of the CSOC.
40. The Defendant admits the allegations in paragraph 40 of the CSOC.
41. The Defendant admits the allegations in paragraph 41 of the CSOC.

B.5 12 August 2021 announcements

42. The Defendant admits the allegations in paragraph 42 of the CSOC.
43. The Defendant admits the allegations in paragraph 43 of the CSOC.
44. In answer to the allegations in paragraph 44 of the CSOC, the Defendant:
- (a) refers to and relies on the terms of the FY21 Annual Report for its full terms and effect;
 - (b) says further that the FY21 Annual Report included the Independent Auditor's Report for FY21 by which KPMG reported that, in KPMG's opinion, the Consolidated Financial Report of Downer EDI Limited for FY21 complied with the Corporations Act, including:

- (i) giving a true and fair view of the Downer Group's financial position as at 30 June 2021 and of its financial performance for FY21; and
- (ii) complying with Australian Accounting Standards

(FY21 Audit Opinions);

- (c) says further that KPMG identified in its Independent Auditor's Report for FY21 that a "Key Audit Matter", being a matter which in KPMG's professional judgment was a matter of most significance in its audit, was "Recognition of Revenue"; and
 - (d) otherwise admits the allegations in paragraph 44 of the CSOC.
45. The Defendant admits the allegations in paragraph 45 of the CSOC.

46. The Defendant admits the allegations in paragraph 46 of the CSOC.

B.6 10 February 2022 announcements

47. The Defendant admits the allegations in paragraph 47 of the CSOC.

48. The Defendant admits the allegations in paragraph 48 of the CSOC.

49. In answer to the allegations in paragraph 49 of the CSOC, the Defendant:

- (a) refers to and relies on the terms of the HY22 Half-year Report for its full terms and effect;
- (b) says further that the HY22 Half-year Report included the Independent Auditor's Review Report by which KPMG reported that it had reviewed the Condensed Consolidated Half-year Financial Report and had not become aware of any matter that made KPMG believe the Consolidated Half-year Financial Report did not comply with the Corporations Act, including:
 - (i) giving a true and fair view of the Downer Group's financial position as at 31 December 2021 and of its performance for the half-year ended on 31 December 2021; and
 - (ii) complying with Australian Accounting Standards

(HY22 Half-year Review Opinion); and

- (c) otherwise admits the allegations in paragraph 49 of the CSOC.
50. The Defendant admits the allegations in paragraph 50 of the CSOC.
51. The Defendant admits the allegations in paragraph 51 of the CSOC.

B.7 17 August 2022 announcements

52. The Defendant admits the allegations in paragraph 52 of the CSOC.
53. The Defendant admits the allegations in paragraph 53 of the CSOC.
54. In answer to the allegations in paragraph 54 of the CSOC, the Defendant:
- (a) refers to and relies on the terms of the FY22 Annual Report for its full terms and effect;
 - (b) says further that the FY22 Annual Report included the Independent Auditor's Report for FY22 by which KPMG reported that, in KPMG's opinion, the Consolidated Financial Report of Downer EDI Limited for FY22 complied with the Corporations Act, including:
 - (i) giving a true and fair view of the Downer Group's financial position as at 30 June 2022 and of its financial performance for FY22; and
 - (ii) complying with Australian Accounting Standards
(FY22 Audit Opinions);
 - (c) says further that KPMG identified in its Independent Auditor's Report for FY22 that a "Key Audit Matter", being a matter in which KPMG's professional judgment was a matter of most significance in its audit, was "Recognition of Revenue"; and
 - (d) otherwise admits the allegations in paragraph 54 of the CSOC.
55. The Defendant admits the allegations in paragraph 55 of the CSOC.
56. The Defendant admits the allegations in paragraph 56 of the CSOC.

B.8 3 November 2022 announcements

57. The Defendant admits the allegations in paragraph 57 of the CSOC.
58. The Defendant admits the allegations in paragraph 58 of the CSOC.
59. The Defendant admits the allegations in paragraph 59 of the CSOC.

B.9 8 December 2022 announcements

60. The Defendant admits the allegations in paragraph 60 of the CSOC.
61. The Defendant admits the allegations in paragraph 61 of the CSOC.
62. In answer to the allegations in paragraph 62 of the CSOC, the Defendant:

- (a) refers to and relies on the Transcript of 8 December 2022 Call for its full terms and effect; and
- (b) otherwise admits the allegations in paragraph 62 of the CSOC.

B.10 Price impact of the 8 December 2022 Announcement and/or the 8 December 2022 Call

63. In answer to the allegations in paragraph 63 of the CSOC, the Defendant:

- (a) says that the closing price of Downer Shares:
 - (i) on 7 December 2022 was \$4.80;
 - (ii) on 8 December 2022 was \$3.82; and
 - (iii) on 9 December 2022 was \$3.70;
- (b) says that the traded volume of Downer Shares:
 - (i) on 8 December 2022 was 30,165,218; and
 - (ii) on 9 December 2022 was 18,713,932; and
- (c) otherwise denies paragraph 63 of the CSOC.

B.11 Price impact of the 8 December 2022 Announcement and/or the 8 December 2022 Call

64. The Defendant admits the allegations in paragraph 64 of the CSOC.

65. The Defendant admits the allegations in paragraph 65 of the CSOC.

66. The Defendant admits the allegations in paragraph 66 of the CSOC.

67. In answer to the allegations in paragraph 67 of the CSOC, the Defendant:

- (a) refers to and relies on the terms of the HY23 Half-year Report for its full terms and effect;
- (b) says further that the HY23 Half-year Report included the Independent Auditor's Review Report by which KPMG reported that it had reviewed the Condensed Consolidated Half-year Financial Report and had not become aware of any matter that made KPMG believe the Consolidated Half-year Financial Report did not comply with the Corporations Act, including:

- (i) giving a true and fair view of the Downer Group's financial position as at 31 December 2022 and of its performance for the half-year ended on 31 December 2022; and
- (ii) complying with Australian Accounting Standards **(HY23 Half-year Review Opinion)**; and
- (c) otherwise admits the allegations in paragraph 67 of the CSOC.

68. The Defendant admits the allegations in paragraph 68 of the CSOC, save that "remain" in the sentence commencing "The market outlook" should be "remains".

69. The Defendant admits the allegations in paragraph 69 of the CSOC.

B.12 Price impact of the 27 February 2023 Disclosures

70. In answer to the allegations in paragraph 70 of the CSOC, the Defendant:

- (a) says that the closing price of Downer Shares:
 - (i) on 24 February 2023 was \$3.96;
 - (ii) on 27 February 2023 was \$3.02; and
 - (iii) on 28 February 2023 was \$3.16;
- (b) says that the traded volume of Downer Shares on 27 February 2023 was 25,570,150; and
- (c) otherwise denies paragraph 70 of the CSOC.

C. THE TRUE POSITION

C.1 Features of the AusNet Contract, and its administration

71. In answer to the allegations in paragraph 71 of the CSOC, the Defendant refers to and repeats sub-paragraph 25(b) of this Defence and says further that:

- (a) as to sub-paragraph 71(a) of the CSOC:
 - (i) the AusNet Contract was executed on 22 July 2019 between Downer Utilities Australia Pty Ltd (**Downer Utilities**) (a subsidiary of Downer), AusNet Electricity Services Pty Ltd and AusNet Transmission Group Pty Ltd (together, **AusNet Services**); and
 - (ii) the Commencement Date of the AusNet Contract as defined in clause 1.1 of the OMSA was 1 April 2020;

- (b) as to sub-paragraph 71(b) of the CSOC, clause 2(i) of the AusNet Contract provided that the Electrical Services Contract dated 25 September 2012 between SPI Electricity Pty Ltd and Tenix Australia Pty Ltd (**ESC**) will be deemed to have expired on the day immediately preceding the Commencement Date of the AusNet Contract;
 - (c) as to sub-paragraph 71(c) of the CSOC, the Defendant relies on the terms of the AusNet Contract and ESC respectively for their full force and effect;
 - (d) as to sub-paragraphs 71(d)-(g) of the CSOC, under the AusNet Contract:
 - (i) AusNet Services could issue Works Orders to Downer Utilities (cl 7.2(b)(i)); and
 - (ii) if Downer Utilities accepted and performed any such Works Order, it would be paid according to an agreed schedule of rates, or otherwise as quoted by Downer Utilities and agreed by AusNet Services (cll 7.1(a), 7.3(a), (b), (d), (f), 7.4(a)-(c), 48.1);
 - (e) as to sub-paragraph (h), the AusNet Contract provided in cl 7.9 that the parties agreed to comply with “Schedule 19 – Volume Commitment”;
 - (f) as to sub-paragraph (i):
 - (i) says that Work Orders issued under the AusNet Contract could include operations and maintenance works, asset replacement, capital works and minor work (schs 6, 17); and
 - (ii) otherwise admits sub-paragraph (i); and
 - (g) otherwise denies paragraph 71.
72. In answer to the allegations in paragraph 72 of the CSOC, the Defendant:
- (a) denies sub-paragraph 72(a) and says that the recognition of revenue in relation to the AusNet Contract was managed:
 - (i) prior to August 2022, by finance staff within Downer’s Utilities management structure; and
 - (ii) from August 2022, within Downer’s Finance (Utilities) management structure;
 - (b) as to sub-paragraph (b), says that:

- (i) revenue recognised on Work Orders issued under the AusNet Contract at any point in time comprised the aggregate of:
 - (A) the amount billed by Downer to AusNet Services for completed operations; and
 - (B) an estimate of the WIP, being the value of work completed but not yet invoiced;
 - (ii) where a Work Order was not completed and billed at the end of a reporting period, it was necessary to estimate the WIP that should be recognised in respect of that Work Order;
 - (iii) prior to April 2022, the calculation of WIP on the AusNet Contract depended on whether the costs incurred on a Work Order were in excess of the unbilled amount of the Work Order:
 - (A) where total costs incurred were less than the unbilled amount, the unbilled amount of the Work Order was recognised as WIP; and
 - (B) 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;
 - (iv) after April 2022 until January 2023, the calculation of WIP on the AusNet Contract utilised a “stage of completion” approach, by which the unbilled amount of each Work Order was multiplied by a completion percentage which represented an estimate of the stage of completion of each Work Order;
 - (v) says further that changes made to the calculation of WIP in accordance with sub-paragraph 72(b)(iv) of this Defence was reviewed and approved by the Defendant’s contract manager of the AusNet Contract;
 - (vi) admits that in some circumstances the calculation of WIP in accordance with the methods described in sub-paragraphs 72(b)(iii) and (iv) of this Defence did not accurately estimate the value of work completed but not yet billed; and
 - (vii) otherwise denies sub-paragraph 72(b) of the CSOC;
- (c) denies sub-paragraph 72(c) of the CSOC;
 - (d) as to sub-paragraph 72(d) of the CSOC:

- (i) admits that Downer reviewed the WIP on the AusNet Contract on numerous occasions at a detailed level;
 - (ii) admits that those reviews did not focus on the point of revenue recognition for Work Orders; and
 - (iii) otherwise denies sub-paragraph 72(d); and
- (e) as to sub-paragraph 72(e)-(f) of the CSOC:
- (i) says that at all material times, Downer had in place policies relating to the recognition of revenue on contracts (**Downer's Revenue Recognition Policies**);

Particulars

- i. DG-FN-ST015 Revenue Recognition Standard [DOW.1001.0003.7789].
 - ii. DG-DM-ST003 Profit Recognition Standard [DOW.1070.0002.9572].
 - iii. DG-DM-GU00 Project Commercial Management Guide – Implications of AASB 15/ IFRS 15 [DOW.1070.0002.9573].
- (ii) says that the WIP on the AusNet Contract was the subject of reviews by Downer's Project Management Office during the Relevant Period;
 - (iii) says that in August 2022, as part of the audit process for FY22, KPMG conducted a review of the WIP balance on the AusNet Contract, and reported to Downer that it had found no evidence to substantiate a material misstatement in the AusNet Contract WIP;
 - (iv) says that during the Relevant Period it did not require the revenue recognition methodology for the AusNet Contract to be approved by the Tenders and Contracts Committee; and
 - (v) otherwise denies sub-paragraphs 72(e)-(f) of the CSOC.
73. In answer to the allegations in paragraph 73 of the CSOC, the Defendant:
- (a) as to sub-paragraph 73(a) of the CSOC:
 - (i) refers to and repeats sub-paragraph 72(b) of this Defence; and

- (ii) says that the calculation of WIP on the AusNet Contract between 1 April 2020 and January 2023 resulted in the overstatement of revenue in that period;
- (b) as to sub-paragraph 73(b) of the CSOC, says that:
 - (i) as at 1 April 2020 (and at all material times afterwards), the Defendant had in place systems and processes for the recognition of revenue consistently with AASB 15;

Particulars

Those systems and processes included:

- i. Downer's Revenue Recognition Policies.
- ii. Downer's Financial and Corporate Governance Self-Assessment process.
- iii. Downer's recognition of revenue was the subject of audit by KPMG throughout the Relevant Period.
- iv. Downer's Internal Audit function undertook periodic reviews of projects including in relation to WIP balances.
- v. In mid-2020, Internal Audit undertook a project valuation review for the Utilities business including obtaining the June 2020 WIP calculations for the AusNet Contract.

Further particulars may be provided with the service of evidence.

- (ii) at all material times from April 2020, the Defendant had robust systems for reporting on the AusNet contract (including in relation to WIP);

Particulars

- i. The AusNet Contract was allocated a dedicated contract management team including a contract manager, finance manager and senior management accountant.
- ii. Monthly Operations Summary Reports were prepared for the AusNet Contract for the period April 2020 onwards which reported on matters including a review of actual and forecast revenue, costs and gross margin and analysis of WIP.

- iii. From at least June 2021, the time spent on any given Work Order under the AusNet Contract was reviewed by an accounting team.

Further particulars may be provided with the service of evidence.

- (iii) Downer's systems and processes did not prevent the calculation of WIP on the AusNet Contract being calculated in accordance with the process described in sub-paragraph 72(b) of this Defence; and
- (iv) otherwise denies paragraph 73(b) of the CSOC.

74. In answer to the allegations in paragraph 74 of the CSOC, the Defendant:

- (a) says that an "onerous contract" is a contract in which the "unavoidable costs of meeting the obligations under the contract exceed the economic benefits expected to be received under it";

Particulars

- i. AASB 37 "Provisions, Contingent Liabilities and Contingent Assets", p 7.
- (b) says that a contract is assessed as onerous over the course of the life of the contract;
- (c) says that it is therefore meaningless and impossible to assess, as the Plaintiffs purport to do in paragraph 74 of the CSOC, whether the AusNet Contract was "onerous" during "the Relevant Period" or "during the period from 23 July 2019 to 8 December 2022";
- (d) says that during the Relevant Period and during the period from 23 July 2019 to 8 December 2022, the AusNet Contract had an initial term of five years from 1 April 2020 with the option to enter into two three-year extensions (clause 3.1-3.2);
- (e) says that at no point during the Relevant Period or during the period from 23 July 2019 to 8 December 2022 was the AusNet Contract onerous over the course of its life; and

Particulars

- i. AASB 137 defines an onerous contract as a contract in which the unavoidable costs of meeting the obligations under the contract exceed the economic benefits expected to be received under it.

- ii. The economic benefit expected to be received under the AusNet Contract is determined based on both the terms of the AusNet Contract and its commercial operation, including features such as:
 - a. the nature of the counterparty (AusNet Services), the services to be provided under the AusNet Contract, and the importance of those services to AusNet Services' operations;
 - b. the long-term relationship between AusNet Services and the Defendant; and
 - c. in the premises, the likelihood of commercial renegotiation of terms of the AusNet Contract.
 - iii. The Defendant further relies on:
 - a. Agreement between AusNet Services and the Defendant entered into on 24 February 2023; and
 - b. Agreement between AusNet Services and the Defendant entered into on 14 November 2023.
- (f) otherwise denies paragraph 74 of the CSOC.
75. In answer to the allegations in paragraph 75 of the CSOC, the Defendant:
- (a) admits that during the period from 1 April 2020 to 27 February 2023, the AusNet Contract was loss making;
 - (b) says that the AusNet Contract is, over the course of its life, a profitable contract; and

Particulars

- i. AusNet Contract.
- ii. Agreement between AusNet Services and the Defendant entered into on 24 February 2023.
- iii. Agreement between AusNet Services and the Defendant entered into on 14 November 2023.

- (c) says further that the Transcript referred to in the particulars to paragraph 75 is of a call on 27 February 2023.

Twelve months ended 30 June 2020

- 76. In answer to the allegations in paragraph 76 of the CSOC, the Defendant:
 - (a) denies sub-paragraph 76(a) and says that it had Total Revenue for the twelve months ending 30 June 2020 of \$12,740.26 million;
 - (b) denies sub-paragraph 76(b) and says that it had EBIT for the twelve months ending 30 June 2020 of (\$43.77) million;
 - (c) denies sub-paragraph 76(c) and says that it had EBITA for the twelve months ending 30 June 2020 of \$27.6 million;
 - (d) admits sub-paragraph 76(d); and
 - (e) admits sub-paragraph 76(e).
- 77. In answer to the allegations in paragraph 77 of the CSOC, the Defendant:
 - (a) refers to and repeats sub-paragraph 34(b) of this Defence;
 - (b) admits that the accounts upon which the FY20 Appendix 4E were based and contained in the FY20 Annual Report were not prepared in accordance with AASB 15;
 - (c) denies that the accounts upon which the FY20 Appendix 4E were based and contained in the FY20 Annual Report did not give a true and fair view of the financial performance and financial position of Downer; and

Particulars

- i. The matters pleaded at paragraph 76 of this Defence were not “material” to the FY20 accounts on which the FY20 Appendix 4E contained in the FY20 Annual Report were based, within the meaning of AASB 108.
 - (d) otherwise denies the paragraph 77 of the CSOC.

Six months ended 31 December 2020

- 78. In answer to the allegations in paragraph 78 of the CSOC, the Defendant:
 - (a) denies sub-paragraph 78(a) and says that it had Total Revenue for the six months ending 31 December 2020 of \$5,817.4 million; and

(b) otherwise admits the paragraph 78 of the CSOC.

79. In answer to the allegations in paragraph 79 of the CSOC, the Defendant:

- (a) refers to and repeats sub-paragraph 39(b) of this Defence;
- (b) admits that the accounts upon which the HY21 Appendix 4D were based, and contained in the HY21 Half-year Report:
 - (i) were not prepared in accordance with AASB 15; and
 - (ii) did not give a true and fair view of the financial performance and financial position of Downer; and
- (c) refers to and repeats paragraphs 76 and 78 of this Defence and otherwise denies paragraph 79 of the CSOC.

Twelve months ended 30 June 2021

80. In answer to the allegations in paragraph 80 of the CSOC, the Defendant:

- (a) denies sub-paragraph 80(a) and says that it had Total Revenue for the twelve months ending 30 June 2021 of \$11,571.4 million;
- (b) denies sub-paragraph 80(b) and says that it had EBIT for the twelve months ending 30 June 2021 of \$322.1 million;
- (c) denies sub-paragraph 80(c) and says that it had EBITA for the twelve months ending 30 June 2021 of \$338.3 million;
- (d) denies sub-paragraph 80(d) and says that it had NPATA for the twelve months ending 30 June 2021 of \$221.1 million; and
- (e) denies sub-paragraph 80(e) and says that it had NPAT for the twelve months ending 30 June 2021 of \$174.8 million.

81. In answer to the allegations in paragraph 81 of the CSOC, the Defendant:

- (a) refers to and repeats sub-paragraph 44(b) of this Defence;
- (b) admits that the accounts upon which the FY21 Appendix 4E were based, and contained in the FY21 Annual report:
 - (i) were not prepared in accordance with AASB 15; and
 - (ii) did not give a true and fair view of the financial performance and financial position of Downer; and

- (c) refers to and repeats paragraphs 76, 78 and 80 of this Defence and otherwise denies paragraph 81 of the CSOC.

Six months ended 31 December 2021

82. The Defendant admits the allegations in paragraph 82 of the CSOC.
83. In answer to the allegations in paragraph 83 of the CSOC, the Defendant:
- (a) refers to and repeats sub-paragraph 49(b) of this Defence;
 - (b) admits that the accounts upon which the HY22 Appendix 4D were based, and contained in the HY22 Half Year Report:
 - (i) were not prepared in accordance with AASB 15; and
 - (ii) did not give a true and fair view of the financial performance and financial position of Downer; and
 - (c) refers to and repeats paragraphs 76, 78 and 80 of this Defence and otherwise denies paragraph 83 of the CSOC.

Twelve months ended 30 June 2022

84. In answer to the allegations in paragraph 84 of the CSOC, the Defendant:
- (a) denies sub-paragraph 84(a) and says that it had Total Revenue for the twelve months ending 30 June 2022 of \$11,137.76 million;
 - (b) admits sub-paragraph 84(b);
 - (c) denies sub-paragraph 84(c) and says that it had EBITA for the twelve months ending 30 June 2022 of \$341.31 million;
 - (d) denies sub-paragraph 84(d) and says that it had NPATA for the twelve months ending 30 June 2022 of \$164.76 million; and
 - (e) denies sub-paragraph 84(e) and says that it had NPAT for the twelve months ending 30 June 2022 of \$140.37 million.
85. In answer to the allegations in paragraph 85 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 54(b) of this Defence;
 - (b) admits that the accounts upon which the FY22 Appendix 4E were based, and contained in the FY22 Annual report:
 - (i) were not prepared in accordance with AASB 15; and

- (ii) did not give a true and fair view of the financial performance and financial position of Downer; and
- (c) refers to and repeats paragraphs 76, 78, 80 and 84 of this Defence and otherwise denies paragraph 85 of the CSOC.

C.2 Misstated Guidance for FY23

86. In answer to the allegations in paragraph 86 of the CSOC, the Defendant:

- (a) admits that its reported results for NPATA in FY23 was not, in fact, between \$210 million and \$230 million or \$247.8 million and \$270.3 million; and
- (b) otherwise denies paragraph 86 of the CSOC.

D. MISLEADING OR DECEPTIVE CONDUCT

D.1 AusNet Contract

87. In answer to the allegations in paragraph 87 of the CSOC, the Defendant:

- (a) denies that the implied representations pleaded in sub-paragraphs 87(a)-(b) were made;
- (b) says that the matters stated in the 23 July 2019 Announcement were stated subject to the full terms and effect of that document;
- (c) says further that the express terms of the 23 July 2019 Announcement referred to the worth of the AusNet Contract (that is, its value), not the expected profits to be received; and
- (d) further and alternatively, says that if (which is denied) the Defendant made the implied representations pleaded at sub-paragraphs 87(a)-(b) of the CSOC, those implied representations reflected the Defendant's expectations, were statements of opinion and/or were forward looking representations for which the Defendant had reasonable grounds.

Particulars

- i. The 23 July 2019 Announcement was made by reference to the whole of the initial five-year term of the AusNet contract.
- ii. The 23 July 2019 Announcement was made following detailed analysis and review of the AusNet Contract by:
 - a. The Defendant's Utilities team;

- b. The Defendant's Tenders and Contracts Committee; and
 - c. The Defendant's Tender Risk Evaluation Committee.
- iii. The Defendant relies on particulars (ii) and (iii) to paragraph 74(e) of this Defence and says the 23 July 2019 Announcement was made having regard to the commercial nature of the AusNet contract in the context of the long-term commercial relationship which had existed between the Defendant and AusNet Services.
88. In answer to the allegations in paragraph 88 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 87 of this Defence and denies that the implied representation pleaded in paragraph 88 was made; and
 - (b) further and alternatively says that if (which is denied) the Defendant made the implied representation pleaded at paragraph 87 of the CSOC, it refers to and repeats sub-paragraph 87(d) of this Defence.
89. In answer to the allegations in paragraph 89 of the CSOC, the Defendant:
- (a) denies that the representation pleaded in paragraph 89 was made;
 - (b) says that the matters stated in the documents pleaded and particularised in paragraphs 32 to 36 of the CSOC were made subject to the full terms and effect of those documents; and
 - (c) further and alternatively says that if (which is denied) the Defendant made the partly implied and partly express representations pleaded at paragraph 89 of the CSOC, then:
 - (i) that representation was reflected the Defendant's expectations, was a statement of opinion and/or was a forward looking representation for which it had reasonable grounds; and
 - (ii) it refers to and repeats sub-paragraph 87(d) of this Defence.
90. The Defendant denies the allegations in paragraph 90 of the CSOC.
91. The Defendant denies the allegations in paragraph 91 of the CSOC.
92. The Defendant denies the allegations in paragraph 92 of the CSOC and repeats sub-paragraph 87(d) of this Defence.

93. The Defendant denies the allegations in paragraph 93 of the CSOC and repeats subparagraph 87(d) of this Defence.
94. In answer to the allegations in paragraph 94 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 87 to 93 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 94 of the CSOC.

D.2 Capital Raise Representations

95. In answer to the allegations in paragraph 95 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 28 and 30 of this Defence;
 - (b) says that to the extent the alleged representation in paragraph 95 of the CSOC is said to be express, it denies that the representation as pleaded was expressly made;
 - (c) says that to the extent the alleged representation in paragraph 95 of the CSOC is said to be implied, it denies that the representation as pleaded was impliedly made;
 - (d) further and alternatively it says that if (which is denied) the Defendant made the representation which is alleged at paragraph 95 of the CSOC, then that representation reflected the Defendant's expectations, was a statement of opinion, and/or was a forward looking representation, for which the Defendant had reasonable grounds; and

Particulars

- i. The Defendant says the statements pleaded at paragraphs 28 and 30 of this Defence were made after the preparation of the FY20 budget conducted in accordance with the Defendant's systems for the preparation and review of a robust and detailed annual budget.
- ii. The systems and processes for the FY20 budget included:
 - a. in around early 2019, business units conducting a "bottom up" budgeting process at the level of each individual project within the business unit;
 - b. in around early 2019, the finance team of the Defendant evaluating all business units;

- c. in March 2019, presentation of financial information including preliminary targets by the heads of business units to the CEO and CFO and appropriate finance personnel;
 - d. in April 2019, presentation by the heads of business units to the CEO and CFO and appropriate finance personnel in relation to strategy and revenue outlooks;
 - e. between March and June 2019, the analysis by the finance team of issues that may affect the preliminary targets in order to consider whether those targets should be recalibrated;
 - f. between February and June 2019, engagement between the finance team and each business unit to finalise the draft budgets for FY20 for submission to the Board;
 - g. in April 2019, the issuing of final targets to business units;
 - h. in June 2019, presentation of the proposed budget to the Defendant's Board at the annual "Strategic Planning Session"; and
 - i. following preparation of the draft budget, the review and consideration between June and November 2019, by the Audit and Risk Committee of the Defendant's Board and the Defendant's Board.
- iii. The statements pleaded at paragraphs 28 and 30 of this Defence were made following a robust due diligence process, including:
 - a. the formation of a due diligence committee to oversee and conduct the capital raise;
 - b. a verification process of the statements pleaded at paragraphs 28 and 30 of this Defence;
 - c. the Financial and Corporate Governance Self-Assessment process;
 - d. review and reporting by the Defendant's auditors, KPMG;
 - e. review and reporting by the due diligence committee; and

- f. the consideration by the due diligence committee and management of Downer of the reports particularised in d. and e. above.

Further particulars may be provided with the service of evidence.

- (e) otherwise denies the allegations in paragraph 95 of the CSOC.
96. In answer to the allegations in paragraph 96 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 95 of this Defence and denies that the representation (whether express or implied) was made; and
 - (b) further and alternatively says that if (which is denied) the Defendant made the representation pleaded at paragraph 96 of the CSOC, it refers to and repeats sub-paragraph 95(d) of this Defence.
97. In answer to the allegations pleaded in paragraph 97 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 28 and 31 of this Defence;
 - (b) admits that by the Cleansing Notice, the Defendant stated that as at 21 July 2020:
 - (i) it had complied with the provisions of Chapter 2M of the Corporations Act as they applied to it; and
 - (ii) it had complied with s 674 of the Corporations Act; and
 - (c) otherwise denies paragraph 97 of the CSOC.
98. The Defendant denies the allegations in paragraph 98 of the CSOC.
99. The Defendant denies the allegations in paragraph 99 of the CSOC.
100. The Defendant denies the allegations in paragraph 100 of the CSOC and refers to and repeats sub-paragraph 95(d) of this Defence.
101. The Defendant denies the allegations in paragraph 101 of the CSOC and refers to and repeats sub-paragraph 95(d) of this Defence.
102. The Defendant denies the allegations in paragraph 102 of the CSOC.
103. In answer to the allegations in paragraph 103 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 95 to 102 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 103 of the CSOC.

D.3 30 June 2020 Financial Representations

104. In answer to the allegations in paragraph 104 of the CSOC, the Defendant refers to and repeats paragraphs 32 to 36 of this Defence, and says further that:

- (a) as to sub-paragraph 104(a) of the CSOC:
 - (i) it admits it made the express representation pleaded at sub-paragraph 104(a); and
 - (ii) it says that that representation was a statement of opinion for which it had reasonable grounds;

Particulars

- i. The Defendant refers to and repeats sub-paragraphs 34(b) and 34(c) of this Defence.
- ii. The Defendant refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence.

Further particulars may be provided with the service of evidence.

- (b) as to sub-paragraph 104(b) of the CSOC:
 - (i) it admits it made the representations pleaded in sub-paragraphs 104(b)(ii), (iii) and (v) and says those representations were statements of opinion for which it had reasonable grounds;

Particulars

- i. The Defendant refers to and repeats sub-paragraphs 34(b) and 34(c) of this Defence.
- ii. The Defendant refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence.

Further particulars may be provided with the service of evidence.

- (ii) it denies that it made the representations pleaded in sub-paragraphs 104(b)(i) and (iv); and
- (iii) further or alternatively, says that if (which is denied) it made the representations pleaded in sub-paragraphs 104(b)(i) and (iv), those representations were statements of opinion for which it had reasonable grounds; and

Particulars

- i. The Defendant refers to and repeats sub-paragraphs 34(b) and 34(c) of this Defence.
- ii. The Defendant refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence.

Further particulars may be provided with the service of evidence.

- (c) it otherwise denies the allegations in paragraph 104 of the CSOC.
105. In answer to the allegations in paragraph 104 of the CSOC, the Defendant refers to and repeats paragraph 104 of this Defence and otherwise denies the allegations.
106. The Defendant denies the allegations in paragraph 106 of the CSOC.
107. The Defendant denies the allegations in paragraph 107 of the CSOC.
108. In answer to the allegations in paragraph 108 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 76, 77 and 104 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 108 of the CSOC.
109. In answer to the allegations in paragraph 109 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 104 to 108 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 109 of the CSOC.

D.4 31 December 2020 Financial Representations

110. In answer to the allegations in paragraph 110 of the CSOC, the Defendant refers to and repeats paragraphs 37 to 41 of this Defence and says further that:
- (a) as to sub-paragraphs 110(a)-(b), it admits it made the express representations pleaded at sub-paragraph 110(a)-(b);
 - (b) it says that those representations were statements of opinion for which it had reasonable grounds; and

Particulars

- i. The Defendant refers to and repeats sub-paragraph 39(b) of this Defence.
- ii. The Defendant refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence.

Further particulars may be provided with the service of evidence.

- (c) it otherwise denies the allegations in paragraph 110 of the CSOC.
111. In answer to the allegations in paragraph 111 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 110 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 111 of the CSOC.
112. The Defendant denies the allegations in paragraph 112 of the CSOC.
113. The Defendant denies the allegations in paragraph 113 of the CSOC.
114. In answer to the allegations in paragraph 114 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 78, 79, 110 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 114 of the CSOC.
115. In answer to the allegations in paragraph 115 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 110 to 114 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 115 of the CSOC.

D.5 30 June 2021 Financial Representations

116. In answer to the allegations in paragraph 116 of the CSOC, the Defendant:
- (a) as to sub-paragraphs 116(a)-(b), admits it made the express representations pleaded at sub-paragraph 116(a)-(b);
 - (b) says that those representations were statements of opinion for which it had reasonable grounds; and

Particulars

- i. The Defendant refers to and repeats sub-paragraphs 44(b) and (c) of this Defence.
- ii. The Defendant refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence.

Further particulars may be provided with the service of evidence.

- (c) otherwise denies the allegations in paragraph 116 of the CSOC.
117. In answer to the allegations in paragraph 117 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 116 of this Defence; and

- (b) otherwise denies the allegations in paragraph 117 of the CSOC.
118. The Defendant denies the allegations in paragraph 118 of the CSOC.
119. The Defendant denies the allegations in paragraph 119 of the CSOC.
120. In answer to the allegations in paragraph 120 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 80, 81 and 116 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 120 of the CSOC.
121. In answer to the allegations in paragraph 121 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 116 to 120 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 121 of the CSOC.

D.6 31 December 2021 Financial Representations

122. In answer to the allegations in paragraph 122 of the CSOC, the Defendant refers to and repeats paragraphs 47 to 51 of this Defence and says further that:
- (a) as to sub-paragraphs 122(a)-(b), it admits it made the express representations pleaded at sub-paragraphs 122(a)-(b);
 - (b) it says that those representations were statements of opinion for which it had reasonable grounds; and

Particulars

- i. The Defendant refers to and repeats sub-paragraph 49(b) of this Defence.
- ii. The Defendant refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence.

Further particulars may be provided with the service of evidence.

- (c) it otherwise denies the allegations in paragraph 122 of the CSOC.
123. In answer to the allegations in paragraph 123 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 47, 51 and 122 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 123 of the CSOC.
124. The Defendant denies the allegations in paragraph 124 of the CSOC.
125. The Defendant denies the allegations in paragraph 125 of the CSOC.

126. In answer to the allegations in paragraph 126 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 82, 83 and 122 of this Defence; and
- (b) otherwise denies the allegations in paragraph 126 of the CSOC.

127. In answer to the allegations in paragraph 127 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 122 to 126 of this Defence; and
- (b) otherwise denies the allegations in paragraph 127 of the CSOC.

D.7 30 June 2022 Financial Representations

128. In answer to the allegations in paragraph 128 of the CSOC, the Defendant refers to and repeats paragraphs 52 to 56 of this Defence and says further that:

- (a) as to sub-paragraphs 128(a)-(b), it admits it made the express representation pleaded at sub-paragraphs 128(a)-(b);
- (b) it says that those representations were statements of opinion for which it had reasonable grounds; and

Particulars

- i. The Defendant refers to and repeats sub-paragraphs 54(b)-(c) of this Defence.
- ii. The Defendant refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence.

Further particulars may be provided with the service of evidence.

- (c) otherwise denies the allegations in paragraph 128 of the CSOC.

129. In answer to the allegations in paragraph 129 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 52, 56 and 128 of this Defence; and
- (b) otherwise denies the allegations in paragraph 129 of the CSOC.

130. The Defendant denies the allegations in paragraph 130 of the CSOC.

131. The Defendant denies the allegations in paragraph 131 of the CSOC.

132. In answer to the allegations in paragraph 132 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 84, 85 and 128 of this Defence; and
- (b) otherwise denies the allegations in paragraph 132 of the CSOC.

133. In answer to the allegations in paragraph 133 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 128 to 132 of this Defence; and
- (b) otherwise denies the allegations in paragraph 133 of the CSOC.

D.8 First FY23 Guidance Representation

134. In answer to the allegations in paragraph 134 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 54 of this Defence;
- (b) says that from time to time the Defendant issued guidance in relation to its then current expectation of its likely earnings for the current year (**Guidance Statements**);
- (c) says that Guidance Statements issued by the Defendant to participants in the market:
 - (i) were statements that were made by the Defendant, and received by participants in the market, in the context of the whole of the documents in which they were contained;
 - (ii) were point-in-time assessments made and expressed in light of then prevailing conditions, expected annual revenue and fact and matters known to the Defendant; and
 - (iii) were consequently, as was apparent:
 - (A) difficult matters of judgment on which reasonable minds might differ; and
 - (B) inherently susceptible to revision as circumstances changed and new or different information emerged which had the potential to affect the Defendant's expected revenue and costs for the current year; and
 - (iv) says that it issued revised guidance as and when it determined that it was sufficiently definite that the guidance previously issued would not be achieved;
- (d) says that the Defendant had systems and processes in place, where were followed for the preparation and review of a robust and detailed annual budget for FY23;

Particulars

- i. The systems and processes included:

- a. from around November 2021, business units conducting a “bottom up” budgeting process at the level of each individual project within the business unit;
- b. from November 2021, the finance team of the Defendant evaluating all business units;
- c. in December 2021, presentation by the heads of business units to the CEO, CFO and appropriate finance personnel in relation to strategy and revenue outlooks;
- d. from November 2021 to January 2022, the aggregation of evaluated data;
- e. in February 2022, the issuing of preliminary targets for consideration by the heads of business of each business unit;
- f. the review and analysis of preliminary targets by the heads of business of each business unit;
- g. in March 2022, presentation by business units to the CEO and CFO, on the achievability and risks and opportunities of the targets which were issued;
- h. between February and June 2022, analysis by the finance team of issues that may affect preliminary targets in order to consider whether those targets should be recalibrated;
- i. between March and April 2022, updates to the Board in relation to the budget process;
- j. between February and June 2022, engagement between the finance team and each business unit to finalise the draft budgets for FY23 for submission to the Board;
- k. in April 2022, the issuing of final targets to business units;
- l. in June 2022, presentation of the proposed budget to the Defendant’s Board at the annual “Strategic Planning Session”; and.

- m. in June 2022, presentation of the proposed budget to the Defendant's Board at the annual "Strategic Planning Session"; and
- n. following preparation of the draft budget, the review and consideration between June and August 2022, by the Audit and Risk Committee of the Defendant's Board and the Defendant's Board.

Further particulars may be provided with the service of evidence.

- (e) denies that it made a representation in terms of what underlying NPATA for FY23 was "likely to be";
- (f) says that on 17 August 2022, the Defendant made a Guidance Statement in terms that "For FY23, Downer expects 10-20% underlying NPATA growth, assuming no material COVID-19, weather, labour or other disruptions" (**FY23 Guidance Statement**) [DOW.3000.0023.9999];
- (g) says further that:
 - (i) the FY23 Guidance Statement; or
 - (ii) alternatively, the partly express and partly implied representation pleaded at paragraph 134 of the CSOC (which is denied),

reflected the Defendant's expectations, were statements of opinion, and/or were forward looking representations which the Defendant had reasonable grounds;

Particulars

- i. The Defendant relies on the matters pleaded in sub-paragraph 134(a)-(e) of this Defence.

Further particulars may be provided with the service of evidence.

- (h) says further that the FY23 Guidance Statement and/or the partly express and partly implied representation pleaded at paragraph 134 of the CSOC (which is denied) were subject to the express assumption that the expectation "assum[ed] no material COVID-19, weather, labour or other disruptions"; and
- (i) otherwise denies the allegations in paragraph 134 of the CSOC.

135. In answer to the allegations in paragraph 135 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 54 and 134 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 135 of the CSOC.
136. The Defendant denies the allegations in paragraph 136 of the CSOC.
137. The Defendant denies the allegations in paragraph 137 of the CSOC.
138. In answer to the allegations in paragraph 138 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 71, 74, 86 and 134 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 138 of the CSOC.
139. In answer to the allegations in paragraph 139 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 138 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 139 of the CSOC.
140. In answer to the allegations in paragraph 140 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 134 to 139 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 140 of the CSOC.

D.9 Second FY23 Guidance Representation

141. In answer to the allegations in paragraph 141 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 60 to 62 and sub-paragraphs 134(b) to 134(c) of this Defence;
 - (b) says that at all material times, it had systems and processes in place to monitor its financial performance from time to time during the current financial year;

Particulars

- i. The Defendant's monthly reporting cycle involves at least the following steps:
 - a. on Work Day 4, business units run "flash reports";
 - b. from Work Days 6 to 10, more detailed versions of flash reports are loaded into Downer's systems;

- c. on Work Day 12, business units prepare submissions which incorporate forecasts for the month, flash reports from Day 4, and actual performance for the month;
 - d. each business unit prepares and submits reports to Downer's internal systems;
 - e. each business unit provides a monthly detailed report to the CFO summarising the full month results;
 - f. on Work Days 12 to 13, the CEO, CFO and Deputy CFO hold one hour meetings with the heads and general managers of finance of each of the Defendant's Business Units to discuss the month's performance, how that performance is tracking to forecast and risk observations; and
 - g. the information obtained is aggregated into a CFO report prepared by a team reporting to the CFO, which deals with the month's financial performance including financial reporting.
- ii. The Defendant's systems and processes also involved regular reviews of financial performance including:
- a. at six-weekly review meetings between the general managers of finance of each business unit and the CFO;
 - b. at quarterly and/or half-year reviews conducted with the heads of business, general manager of finance and other personnel for each business unit assessing the performance of each business unit across a range of areas; and
 - c. regular internal audits and risk assessments conducted across the Downer Group.

Further particulars may be provided with the service of evidence.

- (c) denies that it made a representation in terms of what underlying NPATA for FY23 was "likely to be";

- (d) says that on 8 December 2022, the Defendant made a Guidance Statement in terms that “Downer now expects underlying FY23 NAPTA to be between \$210 million – \$23- million assuming no further material COVID-19, weather, labour shortages or other disruptions” (**Second FY23 Guidance Statement**) [DOW.3000.0048.9997];
- (e) says further that:
- (i) the Second FY23 Guidance Statement; or
 - (ii) alternatively, the partly express and partly implied representation pleaded at paragraph 141 of the CSOC (which is denied),
- reflected the Defendant’s expectations, was a statement of opinion, and/or was a forward looking representations, for which the Defendant had reasonable grounds;

Particulars

- i. The Defendant relies on the matters pleaded in sub-paragraph 141(b) of this Defence.

Further particulars may be provided with service of evidence.

- (f) says further that the Second FY23 Guidance Statement and/or the partly express and partly implied representation pleaded at paragraph 141 of the CSOC (which is denied) were subject to the express assumption that the expectation “assum[ed] no further material COVID-19, weather, labour shortages or other disruptions”; and
- (g) otherwise denies the allegations in paragraph 141 of the CSOC.
142. In answer to the allegations in paragraph 142 of the CSOC, the Defendant:
- (a) refers to and repeats paragraphs 62 and 141 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 142 of the CSOC.
143. The Defendant denies the allegations in paragraph 143 of the CSOC.
144. The Defendant denies the allegations in paragraph 144 of the CSOC.
145. In answer to the allegations in paragraph 145 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 141 and 142 of this Defence; and
 - (b) otherwise denies the allegations in paragraph 145 of the CSOC.

146. In answer to the allegations in paragraph 146 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 86, 141 and 145 of this Defence; and
- (b) otherwise denies the allegations in paragraph 146 of the CSOC.

147. In answer to the allegations in paragraph 147 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 141 to 146 of this Defence; and
- (b) otherwise denies the allegations in paragraph 147 of the CSOC.

E. FALSE OR MISLEADING STATEMENTS

148. In answer to the allegations in paragraph 148 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 95 to 97, 104 to 105, 110 to 111, 116 to 117, 122 to 123, 128 to 129, 134 to 135 and 141 to 142 of this Defence;
- (b) says that if any of the representations were made as alleged by the Plaintiffs, they were made by Downer; and
- (c) otherwise denies the allegations in paragraph 148 of the CSOC.

149. In answer to the allegations in paragraph 149 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 100, 102 to 103, 108 to 109, 114 to 115, 120 to 121, 126 to 127, 132 to 133, 139 to 140 and 146 to 147 of this Defence; and
- (b) otherwise denies the allegations in paragraph 149 of the CSOC.

150. The Defendant does not know and therefore cannot admit the allegations in paragraph 150 of the CSOC.

151. The Defendant denies the allegations in paragraph 151 of the CSOC.

152. In answer to the allegations in paragraph 152 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 148 to 151 of this Defence; and
- (b) otherwise denies the allegations in paragraph 152 of the CSOC.

F. CONTINUOUS DISCLOSURE CONTRAVENTIONS

F.1 AusNet Onerous Contract Information

153. In answer to the allegations in paragraph 153 of the CSOC, the Defendant:

- (a) says that:

- (i) the Defendant cannot have known the alleged “AusNet Onerous Contract Information” as at 1 April 2020, which was the commencement of the AusNet Contract; and
 - (ii) the Plaintiffs have otherwise failed to articulate when during the Relevant Period it is alleged the Defendant was aware of that alleged information;
- (b) refers to and repeats paragraphs 15 to 18, 20, 27, 71 and 74 to 75 of this Defence; and
- (c) otherwise denies the allegations in paragraph 153 of the CSOC.

154. In answer to the allegations in paragraph 154 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 74 of this Defence;
- (b) denies that the “AusNet Onerous Contract Information” as pleaded (which the Defendant denies exists at all) was information that a reasonable person would expect to have a material effect on the price or value of Downer Shares within the meaning of s 674(2) of the Corporations Act; and
- (c) otherwise denies paragraph 154 of the CSOC.

155. In answer to the allegations in paragraph 155 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 74 and 154 of this Defence; and
- (b) otherwise denies paragraph 155 of the CSOC.

156. The Defendant denies the allegations in paragraph 156 of the CSOC.

157. The Defendant denies the allegations in paragraph 157 of the CSOC.

158. The Defendant denies the allegations in paragraph 158 of the CSOC.

F.2 Contract Management Information

159. In answer to the allegations in paragraph 159 of the CSOC, the Defendant:

- (a) refers to and repeats sub-paragraphs 72(e), 73(b) and the particulars to paragraph 141(b) of this Defence;
- (b) says that if the “Contract Management Information” as pleaded (which the Defendant denies exists at all) is established, Downer was not aware of that information at any time before 27 February 2023, alternatively 8 December 2022;
- (c) says that:

- (i) the Defendant cannot have known the alleged “Contract Management Information” as at 1 April 2020, which was the commencement of the AusNet Contract; and
 - (ii) the Plaintiffs have otherwise failed to articulate when during the Relevant Period it is alleged the Defendant was aware of that alleged information; and
- (d) otherwise denies paragraph 159 of the CSOC.

160. In answer to the allegations in paragraph 160 of the CSOC:

- (a) refers to and repeats paragraph 73 of this Defence;
- (b) denies that the “Contract Management Information” as pleaded (which the Defendant denies exists at all) was information that a reasonable person would expect to have a material effect on the price or value of Downer Shares within the meaning of s 674(2) of the Corporations Act; and
- (c) otherwise denies paragraph 160 of the CSOC.

161. In answer to the allegations in paragraph 161 of the CSOC, the Defendant:

- (a) refers to and repeats paragraphs 73 and 160 of this Defence; and
- (b) otherwise denies the allegations in paragraph 161 of the CSOC.

162. The Defendant denies the allegations in paragraph 162 of the CSOC.

163. The Defendant denies the allegations in paragraph 163 of the CSOC.

164. The Defendant denies the allegations in paragraph 164 of the CSOC.

F.3 AusNet Loss Information

165. In answer to the allegations in paragraph 165 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 75 of this Defence;
- (b) says that the pleaded allegation in paragraph 75 of the CSOC is that the AusNet Contract was loss-making in the period 1 April 2020 to 27 February 2023, and in those circumstances, the Defendant cannot have been aware of the AusNet Loss Information at any point prior to 27 February 2023, being the end of the pleaded loss-making period; and
- (c) otherwise denies paragraph 165 of the CSOC.

166. In answer to the allegations in paragraph 166 of the CSOC, the Defendant:

- (a) admits sub-paragraph 166(a) of the CSOC;
- (b) refers to and repeats paragraph 75 of this Defence; and
- (c) denies sub-paragraph 166(b) of the CSOC.

167. The Defendant denies the allegations in paragraph 167 of the CSOC.

168. In answer to the allegations in paragraph 168 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 165 of this Defence;
- (b) says that it could not have logically told the ASX the AusNet Loss Information at any point prior to 27 February 2023, being the end of the pleaded loss-making period; and
- (c) otherwise denies the allegations in paragraph 168 of the CSOC.

169. The Defendant denies paragraph 169 of the CSOC.

170. The Defendant denies paragraph 170 of the CSOC.

F.4 30 June 2020 True Financial Information

171. In answer to the allegations in paragraph 171 of the CSOC, the Defendant:

- (a) refers to and repeats sub-paragraphs 72(e), 73(b) and 76 of this Defence; and
- (b) denies paragraph 171 of the CSOC.

172. In answer to the allegations in paragraph 172 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 76 above and denies the existence of the “30 June 2020 Financial Information” as pleaded in paragraph 76 of the CSOC;
- (b) admits that the information pleaded at paragraph 76 of this Defence was not generally available until 27 February 2023;
- (c) denies that the information pleaded at paragraph 76 of this Defence was information that a reasonable person would expect to have a material effect on the price or value of Downer Shares within the meaning of s 674(2) of the Corporations Act; and
- (d) otherwise denies paragraph 172 of the CSOC.

173. The Defendant denies paragraph 173 of the CSOC.

174. In answer to the allegations in paragraph 174 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 172 of this Defence; and
- (b) otherwise denies paragraph 174 of the CSOC.

175. The Defendant denies paragraph 175 of the CSOC.

176. The Defendant denies paragraph 176 of the CSOC.

F.5 31 December 2020 True Financial Information

177. In answer to the allegations in paragraph 177 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 78 of this Defence and denies the existence of the “31 December 2020 True Financial Information” as pleaded in paragraph 78 of the CSOC; and
- (b) if the Plaintiffs establish the existence of the “31 December 2020 True Financial Information”:
 - (i) refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence; and
 - (ii) otherwise denies paragraph 177 of the CSOC.

178. In answer to the allegations in paragraph 178 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 78 of this Defence; and
- (b) otherwise denies paragraph 178 of the CSOC.

179. In answer to the allegations in paragraph 179 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 78 of this Defence; and
- (b) otherwise denies paragraph 179 of the CSOC.

180. In answer to the allegations in paragraph 180 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 177 of this Defence;
- (b) if the Plaintiffs establish the existence of the “31 December 2020 True Financial Information”, admits it did not communicate that information to the ASX until 27 February 2023; and
- (c) otherwise denies paragraph 180 of the CSOC.

181. The Defendant denies the allegations in paragraph 181 of the CSOC.

182. The Defendant denies the allegations in paragraph 182 of the CSOC.

F.6 30 June 2021 True Financial Information

183. In answer to the allegations in paragraph 183 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 80 of this Defence; and
 - (b) if the Plaintiffs establish the existence of the “30 June 2021 True Financial Information”:
 - (i) refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence; and
 - (ii) otherwise denies paragraph 183 of the CSOC.
184. In answer to the allegations in paragraph 184 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 80 of this Defence; and
 - (b) otherwise denies paragraph 184 of the CSOC.
185. In answer to the allegations in paragraph 185 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 80 of this Defence; and
 - (b) otherwise denies paragraph 185 of the CSOC.
186. In answer to the allegations in paragraph 186 of the CSOC, the Defendant:
- (a) refers to and repeats paragraph 80 of this Defence;
 - (b) if the Plaintiffs establish the existence of the “30 June 2021 True Financial Information”, admits that it did not communicate that information to the ASX until 27 February 2023; and
 - (c) otherwise denies paragraph 186 of the Defence.
187. The Defendant denies the allegations in paragraph 187 of the CSOC.
188. The Defendant denies the allegations in paragraph 188 of the CSOC.

F.7 31 December 2021 True Financial Information

189. In answer to the allegations in paragraph 189 of the CSOC, the Defendant:
- (a) refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence; and
 - (b) otherwise denies paragraph 189 of the CSOC.
190. In answer to the allegations in paragraph 190 of the CSOC, the Defendant:
- (a) admits that the 31 December 2021 True Financial Information was not generally available until 27 February 2023;

- (b) admits a reasonable person would expect, if the 31 December 2021 True Financial Information were generally available, it would have had a material effect on the price or value of Downer Shares within the meaning of s674(2) of the Corporations Act at some points in time during the Relevant Period;
- (c) denies it would have had that effect at all points in time during the Relevant Period; and
- (d) otherwise denies paragraph 190 of the CSOC.

191. In answer to the allegations in paragraph 191 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 189 of this Defence; and
- (b) otherwise admits paragraph 191 of the CSOC.

192. In answer to the allegations in paragraph 192 of the CSOC, the Defendant:

- (a) denies that the Defendant had or obtained the 31 December 2021 True Financial Information prior to 27 February 2023; and
- (b) admits that it did not communicate the 31 December 2021 True Financial Information to the ASX until 27 February 2023.

193. The Defendant denies the allegations in paragraph 193 of the CSOC.

194. The Defendant denies the allegations in paragraph 194 of the CSOC.

F.8 30 June 2022 True Financial Information

195. In answer to the allegations in paragraph 195 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 84 of this Defence; and
- (b) if the Plaintiffs establish the existence of the “30 June 2022 True Financial Information”:
 - (i) refers to and repeats sub-paragraphs 72(e) and 73(b) of this Defence; and
 - (ii) otherwise denies paragraph 195 of the CSOC.

196. In answer to the allegations in paragraph 196 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 84 of this Defence; and
- (b) denies paragraph 196 of the CSOC.

197. In answer to the allegations in paragraph 197 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 84 of this Defence; and
- (b) denies paragraph 197 of the CSOC.

198. In answer to the allegations in paragraph 198 of the CSOC, the Defendant:

- (a) refers to and repeats paragraph 84 of this Defence;
- (b) if the Plaintiffs establish the existence of the 30 June 2022 True Financial Information, admits it did not communicate the information to the ASX until 27 February 2023; and
- (c) otherwise denies paragraph 198 of the CSOC.

199. The Defendant denies the allegations in paragraph 199 of the CSOC.

200. The Defendant denies the allegations in paragraph 200 of the CSOC.

F.9 FY23 Guidance Information

201. In answer to the allegations in paragraph 201 of the CSOC:

- (a) admits that it was aware of the matters pleaded in paragraph 86 of this Defence by 3 November 2023; and
- (b) otherwise denies paragraph 201 of the CSOC.

202. In answer to the allegations in paragraph 202 of the CSOC, the Defendant:

- (a) says that if the Plaintiffs establish the existence of the “FY23 Guidance Information” as pleaded in paragraph 86 of the CSOC (the existence of which at any relevant time is denied), then:
 - (i) it admits it was information that was not generally available within the meaning of s 674(2) of the Corporations Act until 8 December 2022; and
 - (ii) it admits it was information a reasonable person would expect, if it were generally available, to have a material effect on the price or value of Downer Shares within the meaning of s 674(2) of the Corporations Act; and
- (b) otherwise denies paragraph 202 of the CSOC.

203. In answer to the allegations in paragraph 203 of the CSOC, the Defendant:

- (a) says that if the Plaintiffs establish the existence of the “FY23 Guidance Information” as pleaded in paragraph 86 of the CSOC (the existence of which at any relevant

time is denied), then it admits it was obliged to tell the ASX that information immediately from the date it had or obtained that information; and

(b) otherwise denies paragraph 197 of the CSOC.

204. In answer to the allegations in paragraph 204 of the CSOC, the Defendant:

(a) says that if the Plaintiffs establish the existence of the “FY23 Guidance Information” as pleaded in paragraph 86 of the CSOC (the existence of which at any relevant time is denied), then it admits that it did not communicate that information until 8 December 2022; and

(b) otherwise denies paragraph 204 of the CSOC.

205. The Defendant denies the allegations in paragraph 205 of the CSOC.

206. The Defendant denies the allegations in paragraph 206 of the CSOC.

G. CONTRAVENING CONDUCT CAUSED GROUP MEMBERS’ LOSS

G.1 Acquisition of Downer Shares

207. The Defendant does not know and therefore cannot admit the allegations in paragraph 207 of the CSOC.

G.2 Market-based causation

208. In answer to the allegations in paragraph 208 of the CSOC, the Defendant:

(a) refers to and repeats paragraph 5 of this Defence;

(b) does not know and therefore cannot admit the matters in sub-paragraphs 208(a)-(d) of the CSOC; and

(c) denies the allegations in sub-paragraph 208(e) of the CSOC.

209. In answer to the allegations in paragraph 209 of the CSOC, the Defendant:

(a) insofar as the allegations relate to the alleged Continuous Disclosure Contraventions, refers to and repeats paragraphs 153 to 206 of this Defence;

(b) insofar as the allegations relate to the alleged Misleading Conduct Contraventions, refers to and repeats paragraphs 87 to 147 of this Defence;

(c) insofar as the allegations relate to the alleged False Statement Contraventions, refers to and repeats paragraphs 148 to 151 of this Defence; and

- (d) otherwise does not know and therefore cannot admit the allegations in paragraph 209 of the CSOC.

210. In answer to the allegations in paragraph 210 of the CSOC, the Defendant:

- (a) insofar as the allegations relate to the alleged Market Contraventions, refers to and repeats paragraphs 87 to 151 and 153 to 206 of this Defence; and
- (b) otherwise does not know and therefore cannot admit the allegations in paragraph 210 of the CSOC.

211. In answer to the allegations in paragraph 211 of the CSOC, the Defendant:

- (a) insofar as the allegations relate to the alleged Material Information, refers to and repeats paragraphs 87 to 147 and 153 to 206 of this Defence;
- (b) insofar as the allegations relate to the alleged Misleading Conduct Contraventions, refers to and repeats 87 to 147 of this Defence; and
- (c) otherwise does not know and therefore cannot admit the allegations in paragraph 211 of the CSOC.

G.3 Capital Raise

212. In answer to the allegations in paragraph 212 of the CSOC;

- (a) says that the Plaintiffs have particularised the alleged Market Contraventions as being those which occurred by 21 July 2020;

Particulars

- i. Letter from Maurice Blackburn to Gilbert + Tobin dated 29 January 2024 [DOW.2005.0001.0001].
- (b) says that to the extent the allegations in paragraph 212 may otherwise appear to incorporate Market Contraventions which are alleged to have occurred after 21 July 2020, the Defendant understands those allegations not to be pressed in light of sub-paragraph 212(a) above;
- (c) as to sub-paragraph 212(a) of the CSOC, admits the Capital Raise was undertaken at an offer price of \$3.75 per new Downer Share and otherwise denies sub-paragraph 212(a);
- (d) denies sub-paragraph 212(b) of the CSOC; and
- (e) admits sub-paragraph 212(c) of the CSOC.

213. In answer to the allegations in paragraph 213 of the CSOC, the Defendant

- (a) refers to and repeats paragraph 212 of this Defence; and
- (b) otherwise denies paragraph 213 of the CSOC.

214. In answer to the allegations in paragraph 214 of the CSOC, the Defendant

- (a) refers to and repeats paragraph 213 of this Defence; and
- (b) otherwise denies paragraph 214 of the CSOC.

G.4 Reliance

215. In answer to the allegations in paragraph 215 of the CSOC, the Defendant:

- (a) insofar as the allegations relate to the Material Information and/or Representations, refers to and repeats paragraphs 87 to 147 and 153 to 206 of this Defence; and
- (b) otherwise does not know and therefore cannot admit the allegations in paragraph 215 of the CSOC.

G.5 Loss and damage

216. In answer to the allegations in paragraph 216 of the CSOC, the Defendant:

- (a) insofar as the allegations relate to the alleged Market Contraventions, refers to and repeats paragraphs 87 to 151 and 153 to 206 of this Defence; and
- (b) otherwise does not know and therefore cannot admit the allegations in paragraph 216 of the CSOC.

H. COMMON QUESTIONS

217. As to section H of the CSOC, the Defendant:

- (a) says that the identification of the common questions for determination is a matter to be determined by the Court (and not the Plaintiffs); and
- (b) otherwise does not plead to section H as there are no allegations pleaded against it.

218. The Defendant denies the Plaintiffs are entitled to the relief claimed in prayers 1 to 6, or any relief.

I. PROPORTIONATE LIABILITY

I.1 KPMG

219. The members of KPMG (ABN 51 194 660 183) have at all relevant times:

- (a) carried on business as partners; and
- (b) in the course of that business, practised, and professed to practise, as auditors, accountants, and consultants.

I.2 Downer Shares

220. Downer Shares have at all relevant times been:

- (a) “financial products” within the meaning of s 1041H(1) of the Corporations Act;
- (b) “financial products” within the meaning of s 12BAB(1AA) of the ASIC Act; and
- (c) given sub-paragraph (b) above, “financial services” within the meaning of s 12DA(1) of the ASIC Act.

I.3 KPMG’s duties to Plaintiffs and Group Members

Duties for audit of FY20

221. By agreement made 1 November 2019 (**FY20 Retainer**), Downer retained KPMG to audit, in consideration of fees, the Consolidated Financial Report of Downer and its controlled entities (together, the **Downer Group**) for the financial year to 30 June 2020 (**FY20**).

Particulars

The FY20 Retainer was in writing, comprising:

- i. an engagement letter from KPMG to Downer, dated 9 October 2017, countersigned 20 February 2018 (**FY18 Engagement Letter**) [DOW.2000.0001.2408];
- ii. the Terms and Conditions of Business appended, as appendix 1, to the FY18 Engagement Letter; and
- iii. an “Annual arrangements” letter from KPMG to Downer, dated 10 October 2019, countersigned 1 November 2019 (**FY20 Arrangements Letter**) [DOW.3000.0058.7364].

222. There were terms of the FY20 Retainer that KPMG would:

- (a) audit the Consolidated Financial Report of the Downer Group for FY20 in accordance with Australian Auditing Standards (FY18 Engagement Letter, cl 1.1, as updated by the FY20 Arrangements Letter);
 - (b) “inform the directors, Audit and Risk Committee and/or management, as appropriate, about any misstatements ... [KPMG] identif[ied]” (FY18 Engagement Letter, cl 3.3, as updated by the FY20 Arrangements Letter); and
 - (c) report to Downer’s shareholders on whether, in KPMG’s opinion, the Consolidated Financial Report complied with the Corporations Act, including:
 - (i) giving a true and fair view of the Downer Group’s financial position as at 30 June 2020 and of its financial performance for FY20; and
 - (ii) complying with Australian Accounting Standards (FY18 Engagement Letter, cl 1.1, as updated by the FY20 Arrangements Letter).
223. KPMG should reasonably have anticipated that, if it should report the opinions described in paragraph 222(c) above, shareholders and potential shareholders in Downer would be likely to rely on those opinions in deciding how to deal with shares in Downer.
224. Further, if KPMG should report the opinions described in paragraph 222(c) above:
- (a) it would be reasonable for shareholders and potential shareholders in Downer to rely on those opinions in deciding how to deal with shares in Downer; and
 - (b) shareholders and potential shareholders in Downer, knowing less than KPMG of the financial position and performance of the Downer Group, would not be able to protect themselves from any failure by KPMG to exercise reasonable care and skill in forming those opinions.
225. Given paragraphs 219(b)–224 above, KPMG owed shareholders and potential shareholders in Downer a duty to exercise reasonable care and skill:
- (a) in auditing the Consolidated Financial Report of the Downer Group for FY20; and
 - (b) in forming the opinions described in paragraph 222(c) above
- (FY20 Duty of Care).**

Particulars

The FY20 Duty of Care was imposed by law.

Duties for audit of FY21

226. By agreement made 30 October 2020 (**FY21 Retainer**), Downer retained KPMG to audit, in consideration of fees, the Consolidated Financial Report of the Downer Group for the financial year to 30 June 2021 (**FY21**).

Particulars

The FY21 Retainer was in writing, comprising:

- (i) an engagement letter from KPMG to Downer, dated 20 October 2020, countersigned 30 October 2020 (**FY21 Engagement Letter**) [DOW.1059.0019.8372];
- (ii) the Terms and Conditions of Business appended, as appendix 1, to the FY21 Engagement Letter; and
- (iii) an “Annual arrangements” letter from KPMG to Downer, dated 20 October 2020, countersigned 30 October 2020 [DOW.1059.0003.3496].

227. There were terms of the FY21 Retainer that KPMG would:

- (a) audit the Consolidated Financial Report of the Downer Group for FY21 in accordance with Australian Auditing Standards (FY21 Engagement Letter, cl 1.1);
- (b) “inform the directors, Audit and Risk Committee and/or management, as appropriate, about any misstatements ... [KPMG] identif[ied]” (FY21 Engagement Letter, cl 3.3); and
- (c) report to Downer’s shareholders on whether, in KPMG’s opinion, the Consolidated Financial Report complied with the Corporations Act, including:
 - (i) giving a true and fair view of the Downer Group’s financial position as at 30 June 2021 and of its financial performance for FY21; and
 - (ii) complying with Australian Accounting Standards (FY21 Engagement Letter, cl 1.1).

228. KPMG should reasonably have anticipated that, if it should report the opinions described in paragraph 227(c) above, shareholders and potential shareholders in Downer would be likely to rely on those opinions in deciding how to deal with shares in Downer.

229. Further, if KPMG should report the opinions described in paragraph 227(c) above:

- (a) it would be reasonable for shareholders and potential shareholders in Downer to rely on those opinions in deciding how to deal with shares in Downer; and
 - (b) shareholders and potential shareholders in Downer, knowing less than KPMG of the financial position and performance of the Downer Group, would not be able to protect themselves from any failure by KPMG to exercise reasonable care and skill in forming those opinions.
230. Given paragraphs 219(b), 226–229 above, KPMG owed shareholders and potential shareholders in Downer a duty to exercise reasonable care and skill:
- (a) in auditing the Consolidated Financial Report of the Downer Group for FY21; and
 - (b) in forming the opinions described in paragraph 227(c) above
- (FY21 Duty of Care).**

Particulars

The FY21 Duty of Care was imposed by law.

Duties for audit of FY22

231. By agreement made 22 October 2021 (**FY22 KPMG Retainer**), Downer retained KPMG to audit, in consideration of fees, the Consolidated Financial Report of the Downer Group for the financial year to 30 June 2022 (**FY22**).

Particulars

The FY22 KPMG Retainer was in writing, comprising:

- (i) the FY21 Engagement Letter [DOW.1059.0019.8372];
 - (ii) the Terms and Conditions of Business appended, as appendix 1, to the FY21 Engagement Letter; and
 - (iii) an “Annual arrangements” letter from KPMG to Downer, dated 19 October 2021, countersigned 22 October 2021 (**FY22 Arrangements Letter**) (which misdescribed the FY21 Engagement Letter as dated 13 October 2020) [DOW.1059.0005.9253].
232. There were terms of the FY22 Retainer that KPMG would:
- (a) audit the Consolidated Financial Report of the Downer Group for FY22 in accordance with Australian Auditing Standards (FY21 Engagement Letter, cl 1.1, as updated by the FY22 Arrangements Letter);

- (b) “inform the directors, Audit and Risk Committee and/or management, as appropriate, about any misstatements ... [KPMG] identif[ied]” (FY21 Engagement Letter, cl 3.3, as updated by the FY22 Arrangements Letter); and
 - (c) report to Downer’s shareholders on whether, in KPMG’s opinion, the Consolidated Financial Report complied with the Corporations Act, including:
 - (i) giving a true and fair view of Downer the Group’s financial position as at 30 June 2022 and of its financial performance for FY22; and
 - (ii) complying with Australian Accounting Standards (FY21 Engagement Letter, cl 1.1, as updated by the FY22 Arrangements Letter).
233. KPMG should reasonably have anticipated that, if it should report the opinions described in paragraph 232(c) above, shareholders and potential shareholders in Downer would be likely to rely on those opinions in deciding how to deal with shares in Downer.
234. Further, if KPMG should report the opinions described in paragraph 232(c) above:
- (a) it would be reasonable for shareholders and potential shareholders in Downer to rely on those opinions in deciding how to deal with shares in Downer; and
 - (b) shareholders and potential shareholders in Downer, knowing less than KPMG of the financial position and performance of the Downer Group, would not be able to protect themselves from any failure by KPMG to exercise reasonable care and skill in forming those opinions.
235. Given paragraphs 219(b), 231–234 above, KPMG owed shareholders and potential shareholders in Downer a duty to exercise reasonable care and skill:
- (a) in auditing the Consolidated Financial Report of the Downer Group for FY22; and
 - (b) in forming the opinions described in paragraph 232(c) above
- (FY22 Duty of Care).**

Particulars

The FY22 Duty of Care was imposed by law.

I.4 Auditing & Accounting Standards

ASA 450 (Evaluation of Misstatements Identified during the Audit)

236. Australian Auditing Standard ASA 450 (*Evaluation of Misstatements Identified during the Audit*) provided, for FY20–22, that:

- (a) “[t]he auditor shall accumulate misstatements identified during the audit, other than those that are clearly trivial” (paragraph 5);
- (b) “[t]he auditor shall communicate, unless prohibited by law or regulation, on a timely basis all misstatements accumulated during the audit with the appropriate level of management. The auditor shall request management to correct those misstatements” (paragraph 8); and
- (c) “[t]he auditor shall communicate with those charged with governance uncorrected misstatements ... The auditor shall request that uncorrected misstatements be corrected” (paragraph 13).

“Those charged with governance”

237. In ASA 450, “those charged with governance” had the meaning given in ASA 260 (*Communication With Those Charged with Governance*), which defined it as “[t]he person(s) ... with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity. This includes overseeing the financial reporting process” (paragraph 10(a)).
238. At all relevant times, the persons with responsibility for overseeing the strategic direction of the Downer Group and obligations related to the accountability of the Group, including overseeing the financial reporting process, were the Audit & Risk Committee of Downer and otherwise the board, of which the Audit & Risk Committee was a subset.
239. Given paragraphs 237 and 238 above, “those charged with governance” of the Downer Group, within the meaning of ASA 450, were the Audit & Risk Committee of Downer and otherwise the board.

AASB 15 (Revenue from Contracts with Customers)

240. Australian Accounting Standard AASB 15 (*Revenue from Contracts with Customers*) provided, for FY20–22, that:
- (a) “an entity shall recognise revenue to depict the transfer of promised goods or services to customers in an amount that reflects the consideration to which the entity expects to be entitled in exchange for those goods or services” (paragraph 2);
 - (b) “[a]n entity shall recognise revenue when (or as) the entity satisfies a performance obligation by transferring a promised good or service ... to a customer” (paragraph 31);

- (c) “[a]n entity transfers control of a good or service over time and, therefore, satisfies a performance obligation and recognises revenue over time, if one of the following criteria is met:
- (i) the customer simultaneously receives and consumes the benefits provided by the entity’s performance as the entity performs ...; and
 - (ii) the entity’s performance creates or enhances an asset (for example, work in progress) that the customer controls as the asset is created or enhanced” (paragraph 35);
- (d) “[f]or each performance obligation satisfied over time in accordance with [paragraph 35, quoted in sub-paragraph (c) above] an entity shall recognise revenue over time by measuring the progress towards complete satisfaction of that performance obligation” (paragraph 39);
- (e) “[w]hen (or as) a performance obligation is satisfied, an entity shall recognise as revenue the amount of the transaction price ... that is allocated to that performance obligation” (paragraph 46); and
- (f) “[t]he objective when allocating the transaction price is for an entity to allocate the transaction price to each performance obligation ... in an amount that depicts the amount of consideration to which the entity expects to be entitled in exchange for transferring the promised goods or services to the customer” (paragraph 73).

I.5 KPMG’s breaches of duties to, and contraventions against, plaintiffs and Group Members

Breaches and contraventions for FY20

241. KPMG audited the Consolidated Financial Report of the Downer Group for FY20 [DOW.3000.0070.9995].
242. In the alternative to paragraph 77(c) above, KPMG, in breach of the FY20 Duty of Care, did not exercise reasonable care and skill in auditing the Consolidated Financial Report of the Downer Group for FY20.

Particulars

See Schedule 1 of this Defence.

243. On 12 August 2020, KPMG reported the FY20 Audit Opinions to Downer’s shareholders [DOW.3000.0070.9995].

244. In the alternative to paragraph 77(c) above, KPMG, in breach of the FY20 Duty of Care, did not exercise reasonable care and skill in forming the FY20 Audit Opinions.

Particulars

Downer repeats paragraph 77(b) above, and paragraphs 1–9 of Schedule 1 of this Defence.

245. Given paragraph 219(b) above, KPMG, in expressing the FY20 Audit Opinions, represented that it:

- (a) had exercised reasonable care and skill in forming those Opinions; and
- (b) had reasonable grounds for those Opinions

(FY20 Audit Representations) [DOW.3000.0070.9995].

246. The FY20 Audit Representations were made to provide shareholders and potential shareholders in Downer with information, about the financial position and performance of the Downer Group, which would be material to their decisions on how to deal with Downer Shares.

247. Given paragraphs 219 and 246 above, the FY20 Audit Representations were made in trade or commerce.

248. Given paragraph 246 above, the FY20 Audit Representations were made in relation to Downer Shares.

249. Given paragraphs 220(a) and 248 above, the FY20 Audit Representations were made in relation to financial products within the meaning of s 1041(1) of the Corporations Act.

250. Given paragraphs 220(c) and 248 above, the FY20 Audit Representations were made in relation to financial services within the meaning of s 12DA(1) of the ASIC Act.

251. In the alternative to paragraph 77(c) above, KPMG, contrary to the FY20 Audit Representations, KPMG:

- (a) had not exercised reasonable care and skill in forming the FY20 Audit Opinions; and
- (b) did not have reasonable grounds for the FY20 Audit Opinions.

Particulars

Downer repeats paragraph 77(b) above, and paragraphs 1–9 of Schedule 1 of this Defence.

252. Given paragraphs 245, 247, and 251 above, in the alternative to paragraph 77(c), the FY20 Audit Representations were misleading or deceptive contrary to s 18(1) of the Australian Consumer Law set out in Sch 2 to the *Competition and Consumer Act 2010* (Cth).
253. Given paragraphs 245, 249, and 251 above, in the alternative to paragraph 77(c), the FY20 Audit Representations were misleading or deceptive contrary to s 1041H(1) of the Corporations Act.
254. Given paragraphs 245, 250 and 251 above, in the alternative to paragraph 77(c), the FY20 Audit Representations were misleading or deceptive contrary to s 12DA(1) of the ASIC Act.

Breaches and contraventions for FY21

255. KPMG audited the Consolidated Financial Report of the Downer Group for FY21 [DOW.3000.0070.9997].
256. In breach of the FY21 Duty of Care, KPMG did not exercise reasonable care and skill in auditing the Consolidated Financial Report of the Downer Group for FY21.

Particulars

See Schedule 2 of this Defence.

257. On 12 August 2021, KPMG reported the FY21 Audit Opinions to Downer's shareholders [DOW.3000.0070.9997].
258. In breach of the FY21 Duty of Care, KPMG did not exercise reasonable care and skill in forming the FY21 Audit Opinions.

Particulars

Downer repeats paragraph 81(b) above, and paragraphs 1–16 of Schedule 2 of this Defence.

259. Given paragraph 219(b) above, KPMG, in expressing the FY21 Audit Opinions, represented that it:
- (a) had exercised reasonable care and skill in forming those Opinions; and
 - (b) had reasonable grounds for those Opinions
- (FY21 Audit Representations)** [DOW.3000.0070.9997].

260. The FY21 Audit Representations were made to provide shareholders and potential shareholders in Downer with information, about the financial position and performance of the Downer Group, which would be material to their decisions on how to deal with Downer Shares.
261. Given paragraphs 219 and 260 above, the FY21 Audit Representations were made in trade or commerce.
262. Given paragraph 260 above, the FY21 Audit Representations were made in relation to Downer Shares.
263. Given paragraphs 220(a) and 262 above, the FY21 Audit Representations were made in relation to financial products within the meaning of s 1041(1) of the Corporations Act.
264. Given paragraph 220(c) and 262 above, the FY21 Audit Representations were made in relation to financial services within the meaning of s 12DA(1) of the ASIC Act.
265. Contrary to the FY21 Audit Representations, KPMG:
- (a) had not exercised reasonable care and skill in forming the FY21 Audit Opinions; and
 - (b) did not have reasonable grounds for the FY21 Audit Opinions.

Particulars

Downer repeats paragraph 81(b) above, and paragraphs 1–16 of Schedule 2 of this Defence.

266. Given paragraphs 259, 261, and 265 above, the FY21 Audit Representations were misleading or deceptive contrary to s 18(1) of the *Australian Consumer Law*.
267. Given paragraphs 259, 263, and 265 above, the FY21 Audit Representations were misleading or deceptive contrary to s 1041H(1) of the Corporations Act.
268. Given paragraphs 259, 261, 264, and 265 above, the FY21 Audit Representations were misleading or deceptive contrary to s 12DA(1) of the ASIC Act.

Breaches and contraventions for FY22

269. KPMG audited the Consolidated Financial Report of the Downer Group for FY22 [DOW.3000.0023.9999].
270. In breach of the FY22 Duty of Care, KPMG did not exercise reasonable care and skill in auditing the Consolidated Financial Report of the Downer Group for FY22.

Particulars

See Schedule 3 of this Defence.

271. On 17 August 2022, KPMG reported the FY22 Audit Opinions to Downer's shareholders [DOW.3000.0023.9999].
272. In breach of the FY22 Duty of Care, KPMG did not exercise reasonable care and skill in forming the FY22 Audit Opinions.

Particulars

Downer repeats paragraph 85(b) above, and paragraphs 1–17 of Schedule 3 of this Defence.

273. Given paragraph 219(b) above, KPMG, in expressing the FY22 Audit Opinions, represented that it:
- (a) had exercised reasonable care and skill in forming those Opinions; and
 - (b) had reasonable grounds for those Opinions
- (FY22 Audit Representations)** [DOW.3000.0023.9999].
274. The FY22 Audit Representations were made to provide shareholders and potential shareholders in Downer with information, about the financial position and performance of the Downer Group, which would be material to their decisions on how to deal with Downer Shares.
275. Given paragraphs 219 and 274 above, the FY22 Audit Representations were made in trade or commerce.
276. Given paragraph 274 above, the FY22 Audit Representations were made in relation to Downer Shares.
277. Given paragraphs 220(a) and 276 above, the FY22 Audit Representations were made in relation to financial products within the meaning of s 1041(1) of the Corporations Act.
278. Given paragraph 220(c) and 276 above, the FY22 Audit Representations were made in relation to financial services within the meaning of s 12DA(1) of the ASIC Act.
279. Contrary to the FY22 Audit Representations, KPMG:
- (a) had not exercised reasonable care and skill in forming the FY22 Audit Opinions; and
 - (b) did not have reasonable grounds for the FY22 Audit Opinions.

Particulars

Downer repeats paragraph 85(b) above, and paragraphs 1–17 of Schedule 3 of this Defence.

280. Given paragraphs 273, 275, and 279 above, the FY22 Audit Representations were misleading or deceptive contrary to s 18(1) of the Australian Consumer Law.
281. Given paragraphs 273, 277, and 279 above, the FY22 Audit Representations were misleading or deceptive contrary to s 1041H(1) of the Corporations Act.
282. Given paragraphs 273, 275, 278, and 279 above, the FY22 Audit Representations were misleading or deceptive contrary to s 12DA(1) of the ASIC Act.

I.6 Apportionment

283. If, as a result of any of the alleged Misleading Conduct Contraventions, any of the plaintiffs or Group Members has suffered any of the loss or damage alleged in paragraph 216 of the CSOC, which is denied, that loss or damage was also caused, independently or jointly, by each of the breaches and contraventions described in paragraphs 242, 244, 252–254, 256, 258, 266–268, 270, 272, and 280–282 above.
284. If so, KPMG and Downer are, in relation to those Market Contraventions, “concurrent wrongdoers” as defined in s 87CB(3) of the Australian Consumer Law, in s 24AH(1) of the *Wrongs Act 1958* (Vic) (**Wrongs Act**), in s 1041L(3) of the Corporations Act, and in s 12GP(3) of the ASIC Act.
285. If so, by s 87CD(1) of the *Australian Consumer Law*, s 24AH(1) of the *Wrongs Act*, s 1041N(1) of the Corporations Act, and s 12GR(1) of the ASIC Act:
- (a) Downer’s liability for those Market Contraventions is limited to an amount reflecting that proportion of the loss or damage that the Court considers just, having regard to the extent of Downer’s responsibility for the loss or damage; and
 - (b) the Court may give judgment against Downer for not more than that amount.

N OWENS

A J WEINSTOCK

P MEAGHER

N WOOTTON

Dated: 1 March 2024

GILBERT + TOBIN

Gilbert + Tobin
Solicitors for Downer EDI Limited

SCHEDULE 1**Particulars to paragraph 242 (conduct of audit for FY20)**

1. In its External Audit Plan of 15 October 2019, KPMG identified “revenue recognition ... and WIP” (“work in progress”, being unbilled amounts recognised as revenue) as high “[r]elative risk[s]” and a “Potential Key Audit Matters” (p 7) [DOW.1059.0014.2436].
2. By email of 19 May 2020, KPMG wrote to Downer, “[p]lease provide detailed WIP balance breakdowns for OMSA \$9.2m ... Provide the May invoices for \$6.8m of April WIP which will be billed. Provide a tracking schedule or other ability to reconcile the May invoices to the April WIP” [DOW.1002.0015.8343].
3. In reply, on 22 May 2020, Downer wrote “that not all of the WIP that has been generated in April-20 will necessarily be billed in May; we will have some WIP that is re-generated depending on when the work is completed”, suggesting that some of the WIP had been recognised for work not yet completed [DOW.1002.0015.8343].
4. Attached to that reply was an Excel Workbook entitled “WIP April 20 OMSA”, which included a spreadsheet, entitled “WIP April 20-Manual”, which listed 174 Works Orders for which WIP, totalling \$0.543m, which had been recognised for 100% of the unbilled amount of the agreed rates, however little cost had been incurred. On 84 of these Works Orders, the cost was less than half the sum of the amount billed and the WIP, together recognised as revenue, suggesting that revenue had been recognised for work not yet done [DOW.1002.0015.8346].
5. On 9 July 2020, KPMG emailed Downer a spreadsheet, entitled “30 April Utilities contracts”, which listed the AusNet Contract as one of six “selected [for audit testing] as a result of ... having large WIP balances, expected to be > \$5m and we need to have a discussion regarding the expected recoverability of the WIP position and the audit evidence we can obtain for these contracts” [DOW.3000.0057.4882; DOW.3000.0057.4883].
6. When selecting contracts for testing, according to its report on the Consolidated Financial Report for FY20, KPMG had “included factors which indicated to us a greater level of judgement was required by the Group when assessing the revenue recognition” (pp 53–4) [DOW.3000.0070.9995].
7. In the Consolidated Financial Report for FY20, Downer recognised “[r]evenue recognition” as one of its “[k]ey estimates and judgments”, explaining that “[d]etermining

the stage of completion require[d] an estimate of expenses incurred to date as a percentage of total estimated costs” (p 73) [DOW.3000.0070.9995].

8. In its report on the Consolidated Financial Report, KPMG confirmed that “[r]evenue recognition [was] a key audit matter” (p 53) [DOW.3000.0070.9995].
9. Given particulars 1–8 above, in the alternative to paragraph 77(c) above, if KPMG had exercised reasonable care and skill in auditing the revenue recognised from the AusNet Contract, it would have discovered that about \$2.43m of that revenue should not have been recognised, according to AASB 15, as it comprised:
 - (a) amounts recognised for work not yet done, hence for stages of “performance obligations” not yet completed, contrary to paragraphs 31, 35, and 39 of AASB 15 (see paras 240(b)–(c) above); and
 - (b) amounts not recoverable at all, being in excess of the agreed rates for the Works Orders, contrary to paragraphs 2, 46, and 73 of AASB 15 (see paras 240(a), (e), and (f) above)

(FY20 Overstatement).

10. Had it discovered the FY20 Overstatement, KPMG, exercising reasonable care and skill:
 - (a) would have reported the Overstatement either to the directors or to the Audit & Risk Committee or to management, as required by the FY20 KPMG Retainer (see paragraph 222(b) above);
 - (b) in any case, would have reported the Overstatement to management as required by ASA 450 (see paragraph 236(b) above) and as promised in its interim status report to the Audit & Risk Committee on 15 April 2020, where it had promised to report any error worth more than \$1m (p 5);
 - (c) would have requested that management correct the error, as required by ASA 450 (see paragraph 236(b) above); and
 - (d) had management not corrected the error, would have reported it either to the Audit & Risk Committee or otherwise to the board and requested that they correct it, as required by ASA 450, interpreted in accordance with ASA 260 (see paragraphs 236(a) and 239 above).
11. Further particulars may be provided after discovery.

SCHEDULE 2

Particulars to paragraph 256 (conduct of audit for FY21)

1. In its External Audit Plan of 13 October 2020, KPMG identified “revenue recognition ... and WIP” as high “[r]elative risk[s]” and “Potential Key Audit Matters” (p 4) [DOW.1059.0006.6154].
2. By email of 12 November 2020, KPMG sent Downer an agenda for a meeting to be held 13 November 2020 [DOW.3000.0057.3404; DOW.3000.0057.3405]. In the agenda, the AusNet Contract was listed as one of five “previously discussed and still identified as a risk ... Risk flagged due to; **High WIP \$13.9**” (bold in original).
3. Also attached to the email was a spreadsheet, entitled “31 Oct Utilities contracts”, which listed the AusNet Contract as one of seven to be tested [DOW.3000.0057.3406].
4. By email of 12 January 2021, KPMG requested “the breakdown of WIP that sits in a Contract management Utilities subledger. This is largely/should be OMSA/Ausnet” [DOW.3000.0057.4956].
5. Attached to that email was the proposed agenda for a meeting to be held 14 January 2021 [DOW.3000.0057.4958]. In the proposed agenda, the AusNet Contract was again identified as one of five “previously discussed and still identified as a risk ... Risk flagged due to; **High WIP**” (bold in original).
6. Also attached to the email was a spreadsheet, entitled “31 Dec Utilities contracts”, in which the AusNet Contract was again listed as one of seven to be tested [DOW.3000.0057.4957]. “As part of our procedures”, it was explained, “we will obtain evidence of ... OMSA/Ausnet as we have performed at 30 June 2020 we will request information to satisfy ourselves that the WIP for these contracts is recoverable and a function of the 1 or 2 month billing/approval cycle”.
7. When selecting contracts for testing, according to its report on the Consolidated Financial Report for FY21 [DOW.3000.0070.9997], KPMG had “included factors which indicated to us a greater level of judgement was required by the Group when assessing the revenue recognition” (p 55).
8. By email of 18 January 2021, KPMG requested, for the AusNet Contract, a “[b]reakdown of WIP for December 20” [DOW.1061.0001.2373].
9. In reply, on 18 January 2021, Downer emailed KPMG an Excel Workbook, entitled “WIP – OMSA Dec-20”, which included a spreadsheet, entitled “December 20 WIP”, which listed [DOW.1061.0001.2373; DOW.1061.0001.2374]:

- (a) 1,934 Works Orders for which WIP, totalling \$6.838m, had been recognised for 100% of the unbilled amount of the agreed rates, even though the cost incurred on those Works Orders was less than half the sum of the amount billed and the WIP, together recognised as revenue, suggesting that revenue had been recognised for work not yet done; and
 - (b) 502 Works Orders for which WIP, totalling \$1.681m, had been recognised even as it exceeded the agreed rates, so that the excess, amounting to \$1,545m, was not recoverable at all.
10. On 7 May 2021, KPMG emailed Downer a draft agenda for a meeting to be held 11 May 2021 [DOW.3000.0057.4938; DOW.3000.0057.4939]. In the draft agenda, the AusNet Contract was identified as one of five “for KPMG to obtain information to cover standard WIP positions”.
 11. By email of 12 July 2021, KPMG requested a “WIP breakdown as at June 21 with invoicing details” [DOW.3000.0057.3360; DOW.3000.0057.3361].
 12. In reply, on 13 July 2021, Downer emailed KPMG a spreadsheet, entitled “OMSA WIP June21”, in which WIP was recognised at \$27.821m, broken down by Works Order, but it was not explained how the WIP for any Works Order had been calculated [DOW.1058.0013.8638; DOW.1058.0013.8640].
 13. On 29 July 2021, KPMG presented the Audit & Risk Committee with a draft opinion acknowledging that “[r]ecognition of revenue [was] a key audit matter” (p 3) [DOW.1059.0020.6027].
 14. In the Consolidated Financial Report for FY21, Downer recognised that “[r]evenue recognition” was one of its “[k]ey estimates and judgments”, explaining that “[d]etermining the stage of completion [of work] requires an estimate of expenses incurred to date as a percentage of total estimated costs” (p 73) [DOW.3000.0070.9997].
 15. In its report on the Consolidated Financial Report, KPMG confirmed that “[r]evenue recognition [was] a key audit matter” (p 54) [DOW.3000.0070.9997].
 16. Given particulars 1–15 above, after the FY20 Overstatement, if KPMG had exercised reasonable care and skill in auditing the revenue recognised from the AusNet Contract in FY21, it would have discovered that about \$12.63m of that revenue should not have been recognised, according to AASB 15, as it comprised:

- (a) amounts recognised for work not yet done, hence for stages of “performance obligations” not yet completed, contrary to paragraphs 31, 35, and 39 of AASB 15 (see paras 240(b)–(c) above); and
- (b) amounts not recoverable at all, being in excess of the agreed rates for the Works Orders, contrary to paragraphs 2, 46, and 73 of AASB 15 (see paras 240(a), (e), and (f) above)

(FY21 Overstatement).

17. Had it discovered the FY21 Overstatement, KPMG, exercising reasonable care and skill:
- (a) would have reported the Overstatement either to the directors or to the Audit & Risk Committee or to management, as required by the FY21 KPMG Retainer (see paragraph 227(b) above);
 - (b) in any case, would have reported the Overstatement to management as required by ASA 450 (see paragraph 236(b) above) and as represented in its report to the Audit & Risk Committee on 29 July 2021, where it said it had reported “audit differences greater than ... \$0.75m” (p 2) [DOW.1059.0020.6027];
 - (c) would have requested that management correct the Overstatement, as required by ASA 450 (see paragraph 236(b) above); and
 - (d) had management not corrected the Overstatement, would have reported it either to the Audit & Risk Committee or otherwise to the board and requested that they correct it, as required by ASA 450, interpreted in accordance with ASA 260 (see paragraphs 236(a) and 239 above).
18. Further particulars may be provided after discovery.

SCHEDULE 3**Particulars to paragraph 270 (conduct of audit for FY22)**

1. In its Audit Plan of 13 October 2021, KPMG identified “[r]evenue recognition” as one of two “primary audit focusses” (p 2), and identified “revenue recognition ... and WIP” as high “[r]elative risk[s]” and “Potential Key Audit Matters” (p 4) [DOW.1059.0005.9925].
2. On 12 November 2021, KPMG emailed Downer an agenda for a meeting to be held 15 November 2021 [DOW.3000.0057.1803; DOW.3000.0057.1804]. In the agenda, the AusNet Contract was identified as one of seven “ongoing/known risk contracts” due to its “**High and aged WIP**” (bold in original).
3. By email of 22 November 2021, KPMG requested a “[b]reakdown of WIP at 31-Oct-21 and ageing of items” [DOW.3000.0057.1797; DOW.3000.0057.1798].
4. In reply, on 29 November 2021, Downer emailed KPMG a table, entitled “OMSA Total WIP – October 21”, in which WIP was recognised at \$25.625m, including \$4.019m that was over 90 days old. None of this was broken down by Works Order [DOW.3000.0019.6701].
5. By email of 18 January 2022, KPMG requested a “[b]reakdown of the WIP/accrued revenue as at 31-Dec-21. Please provide timing of expected billings. Please provide amount invoiced in January for 31-Dec-21 position” [DOW.3000.0057.1746; DOW.3000.0057.1747].
6. In reply, on 21 January 2022, Downer emailed KPMG a spreadsheet, entitled “WIP Networks Dec21-Audit”, in which WIP was recognised at \$32.409m, including \$5.583m that was over 90 days old [DOW.3000.0020.9363; DOW.3000.0020.9364]. None of this was broken down by Works Order.
7. On 2 February 2022, Downer emailed KPMG a further spreadsheet, entitled “WIP Networks Dec21-Jan-22 Billing”, showing that of the \$32.409m of WIP recognised at December 2021 (see particular 6 above), only \$11.107m or 34% had been billed in January 2022, suggesting that WIP had been recognised for work not yet done [DOW.3000.0019.6949; DOW.3000.0019.6950].
8. On 21 June 2022, KPMG acknowledged, in a “Revenue recognition refresher” provided to Downer’s finance staff, that “[r]evenue recognition [was] a key financial statement risk” [DOW.3000.0021.0795; DOW.3000.0021.0796].
9. On 2 August 2022, Downer emailed KPMG an Excel Workbook, entitled “OMSA GSC WIP Detail Jun22”, which included a spreadsheet, entitled “OMSA WIP”, which listed

22,453 Works Orders for which WIP had been recognised at \$38.825m [DOW.3000.0020.8945; DOW.3000.0020.8946]. Although the WIP was broken down by Works Order, it was not explained how the WIP had been calculated for any Works Order.

10. By email of 3 August 2022, KPMG requested further information about three of the Works Orders, numbered 111412395, 111463035, and 111441356, listed in the “OMSA WIP” spreadsheet [DOW.3000.0020.9042; DOW.3000.0020.9043].
11. In reply, on 9 August 2022, Downer emailed KPMG an Excel Workbook entitled “OMSA WIP Detail June 22 KPMG”, which disclosed that [DOW.3000.0020.9063; DOW.3000.0020.9066]:
 - (a) for Works Order 111412395, for which WIP had been recognised at \$4,239.28, the WIP was 60% of the agreed rate; yet “0” hours of “[a]ctual work” had been done;
 - (b) for Works Order 111463035, for which WIP had been recognised at \$1,221.74, the WIP was 60% of the agreed rate; yet “0” hours of “[a]ctual work” had been done; and
 - (c) for Works Order 111441356, for which WIP had been recognised at \$15,946.53, the WIP was 192% of the agreed rate.
12. On 11 August 2022, Downer emailed KPMG another Excel Workbook, entitled “OMSA JUN WIP Detail 110822”, which included a spreadsheet entitled “June 22 WIP Cals 060722” (**June 22 WIP Cals Spreadsheet**), which listed 25,712 Works Orders for which WIP had been recognised at \$39.480m [DOW.1001.0001.4940; DOW.1001.0001.4941]. For each of these Works Orders, there was recorded:
 - (a) the agreed rate (described as “SAP Sell Rate”, SAP being the software used by AusNet to issue the Works Order);
 - (b) a percentage, ranging from 40% to 100%;
 - (c) if the percentage was less than 100% (and, in many cases, even if it was 100%), an “Operation Status” equated to the percentage;
 - (d) a “WO Start Date”; and
 - (e) the age of the WIP.

13. From these data, it could be seen that:
- (a) for each of the 25,712 Works Orders listed in the spreadsheet (apart from 191 that would be identified two days later by KPMG, as described in particular 15 below), the WIP was recognised at the agreed rate multiplied by the percentage;
 - (b) for 16,088 of the Works Orders, accounting for \$18.122m of the WIP, the "Operation Status" was given as "SCHD TRAN" or "SCPD TRAN", each of which, which would be translated two days later, as described in particular 14 below, was equated to 60% of the agreed rate;
 - (c) for 6,653 of the Works Orders, accounting for \$9.026m of the WIP, the "WO Start Date" was after 30 June 2022; yet, for each of these, the WIP was recognised at 60% or more of the agreed rate, and for 2,632 of them, accounting for \$0.653m of the WIP, the WIP was recognised at 100% of the agreed rate;
 - (d) for 12,068 of the Works Orders, accounting for \$15.199m of the WIP, the WIP was recognised at 100% of the agreed rate; yet for only 1,602 of these, accounting for \$4.097m of the WIP, did the "Operation Status" include "BCOM", which would be translated two days later, as described in particular 14 below; and
 - (e) for 3,808 of the Works Orders, accounting for \$8.705m of the WIP, the WIP was aged over six months; and for 1,633 of these, accounting for \$3.3m of the WIP, the WIP was aged over 12 months.
14. On 13 August 2022, at 9:03 am, Downer emailed KPMG a spreadsheet, entitled "WIP Descriptions", which translated the "Operation Statuses" used in the June 22 WIP Cals Spreadsheet (see particulars 13(b) and 13(d) above) [DOW.1001.0001.2588; DOW.1001.0001.2589]. In this spreadsheet:
- (a) "SCHD TRAN" was translated as "Scheduled, Transferred to Downer system";
 - (b) "SCPD TRAN" was translated as "Scoped, Transferred to Downer system"; and
 - (c) "BCOM" was translated as "Business complete". So, of the \$15.199m of WIP recognised in the June 22 WIP Cals Spreadsheet at 100% of the agreed rate, as described in particular 13(d) above, \$11.1m was recognised without the status, "Business complete".

15. By email 13 August 2022, 12:54 pm, KPMG wrote to Downer [DOW.1001.0001.2561]:

WIP journal calculation

- We have recalculated the expected WIP balance per the [June 22 WIP Cals Spreadsheet]. Our recalculation has been of SAP sell rate * percentage complete, has identified that there are 191 line items where the calculation identified a variance versus the WIP recognised.
- Of these 70 WOs recognise a greater value for WIP than that per the calculation. This totals \$951,395. There appears to be a formula adjustment within the tab to increase the WIP by 4.5% for each of these Wos. ...
- What is the 4.5% with respect to as it has not been identified in our conversations on the calculations?
- ...

Percentage complete definitions

- SCHD and SCOPED revenue is recognised at 60% per the file
- This recognises \$17.0m of WIP based on this on this status.
- How do you consider the 60% to be the appropriate percentage for these types of WO status. This may require additional conversations to help understand from our side.

16. On 29 August 2022, after it had reported on the Consolidated Financial Report, KPMG emailed Downer a spreadsheet entitled “Downer list of audit misstatements”, which acknowledged that revenue from the AusNet Contract, in the Consolidated Financial Report, had been overstated by \$6m [DOW.1016.0001.0582; DOW.1016.0001.0583].

17. Given particulars 1–16 above, after the FY20 and FY21 Overstatements, if KPMG had exercised reasonable care and skill in auditing the revenue recognised from the AusNet Contract in FY22, it would have discovered that about \$16.7m of that revenue should not have been recognised, according to AASB 15, as it comprised:

- (a) amounts recognised for work not yet done, hence for stages of “performance obligations” not yet completed, contrary to paragraphs 31, 35, and 39 of AASB 15 (see paras 240(b)–(c) above); and

- (b) amounts not recoverable at all, being in excess of the agreed rates for the Works Orders, contrary to paragraphs 2, 46, and 73 of AASB 15 (see paras 240(a), (e), and (f) above)

(FY22 Overstatement).

18. Had it discovered the FY22 Overstatement, KPMG, exercising reasonable care and skill:
 - (a) would have reported the Overstatement either to the directors or to the Audit & Risk Committee or to management, as required by the FY22 KPMG Retainer (see paragraph 232(b) above);
 - (b) in any case, would have reported the Overstatement both to management, as required by ASA 450 (see paragraph 236(b) above), and to the Audit & Risk Committee, as promised in the Audit Plan of 13 October 2021, where KPMG had promised to “report to the ... A&RC all unadjusted audit differences greater than \$2.0m” (p 2);
 - (c) would have requested that management correct the Overstatement, as required by ASA 450 (see paragraph 236(b) above); and
 - (d) had management not corrected the Overstatement, would have reported the uncorrected Overstatement either to the Audit & Risk Committee or otherwise to the board and requested that they correct it, as required by ASA 450, interpreted in accordance with ASA 260 (see paragraphs 236(a) and 239 above).
19. Further particulars may be provided after discovery.