

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



Case Number: S ECI 2023 01835

Filed: S ECI 2023 01835 04:45 PM

BETWEEN

JUSTINE LIDGETT

First Plaintiff

CAMERON LIDGETT

Second Plaintiff

AND

DOWNER EDI LIMITED (ACN 003 872 848)

Defendant

AND

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

Third Party

THIRD PARTY NOTICE

Date of Document: 1 March 2024

Solicitors Code: 103351

Filed on behalf of: Defendant

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To: KPMG, of Tower Two, Collins Square, 727 Collins Street, Melbourne, VIC 3008

TAKE NOTICE that the plaintiffs have brought this proceeding against the defendant for the claim set out in the writ and consolidated statement of claim dated 3 November 2023 served herewith.

AND TAKE NOTICE that the defendant disputes the plaintiffs' claims on the grounds set out in the defendant's defence dated 1 March 2024 served herewith, and claims to be entitled to relief against you on the grounds set out in the statement of claim indorsed on this notice.

IF YOU INTEND TO DISPUTE the plaintiffs' claim against the defendant, or the defendant's claim against you, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by:

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the defendant's address for service, which is set out at the end of this notice.

IF YOU FAIL to file an appearance within the proper time you will be taken to admit the validity of any judgment against the defendant and your own liability to the defendant to the extent claimed in the statement of claim indorsed on this notice, and the defendant may **OBTAIN JUDGMENT AGAINST YOU** without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows—

- (a) where you are served with the notice in Victoria, within 10 days after service;
- (b) where you are served with the notice out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the notice in Papua New Guinea, within 28 days after service;
- (d) where you are served with the notice in New Zealand under Part 2 of the *Trans-Tasman Proceedings Act 2010* of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;

(e) in any other case, within 42 days after service of the notice.

FILED: 1 March 2024

Prothonotary

STATEMENT OF CLAIM

PRELIMINARY

If, which is denied, the defendant (**Downer**) is liable for damage to the plaintiffs, then, solely for the purposes of this statement of claim, and without admissions, Downer makes the following allegations.

A. PARTIES

1. Downer has at all relevant times been:
 - (a) incorporated in accordance with the *Corporations Act 2001* (Cth) (**Corporations Act**); and
 - (b) included in the official list of the financial market operated by the Australian Securities Exchange (**ASX**).
2. The members of the third party (**KPMG**) have at all relevant times:
 - (a) carried on business as partners in Victoria; and
 - (b) in the course of that business, practised, and professed to practise, as auditors, accountants, and consultants.

B. Shares in Downer

3. Shares in Downer 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 *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**); and
 - (c) given paragraph 3(b) above, “financial services” within the meaning of s 12DA(1) of *ASIC Act*.

C. Retainers & duties of care for audits of FY20-22

C.1 Retainer and duty of care for audit of FY20

4. 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].
5. There were express 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).
6. It was an implied term of the FY20 Retainer that KPMG would 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 5(c) above.

Particulars

The term was implied by law.

7. Further, given paragraphs 2(b), 4 and 5 above, KPMG owed 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 5(c) above.

Particulars

The duty was imposed by law.

C.2 Retainer and duty of care for audit of FY21

8. 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 (**FY21 Arrangements Letter**) [DOW.1059.0003.3496].
9. There were express 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).

10. It was an implied term of the FY21 Retainer that KPMG would 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 9(c) above.

Particulars

The term was implied by law.

11. Further, given paragraphs 2(b), 8, and 9 above, KPMG owed 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 9(c) above.

Particulars

The duty was imposed by law.

C.3 Retainer and duty of care for audit of FY22

12. By agreement made 22 October 2021 (**FY22 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 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].

13. There were express 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).
14. It was an implied term of the FY22 Retainer that KPMG would 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 13(c) above.

Particulars

The term was implied by law.

15. Further, given paragraphs 2(b), 12, and 13 above, KPMG owed 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 13(c) above.

Particulars

The duty was imposed by law.

D. Auditing & Accounting Standards

D.1 ASA 450 (Evaluation of Misstatements Identified during the Audit)

16. 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” (para 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” (para 8, italics added);
- (c) “[t]he auditor shall determine whether uncorrected misstatements are material, individually or in aggregate. In making this determination, the auditor shall consider:
 - (i) [t]he size and nature of the misstatements, both in relation to particular classes of transactions, account balances or disclosures and the financial report as a whole, and the particular circumstances of their occurrence; and
 - (ii) [t]he effect of uncorrected misstatements related to prior periods on the relevant classes of transactions, account balances or disclosures, and the financial report as a whole” (para 11); and
- (d) “[t]he auditor shall communicate with those charged with governance uncorrected misstatements ... The auditor shall request that uncorrected misstatements be corrected” (para 13).

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

17. Australian Auditing Standard ASA 700 (*Forming an Opinion and Reporting on a Financial Report*) provided, for FY20–22, that:
- (a) “[t]he auditor shall form an opinion on whether the financial report is prepared, in all material respects, in accordance with the applicable financial reporting framework” (para 10); and
 - (b) “[i]n order to form that opinion, the auditor shall conclude as to whether the auditor has obtained reasonable assurance about whether the financial report as a whole is free from material misstatement ... That conclusion shall take into account ... [t]he auditor’s conclusion, in accordance with ASA 450 [see para 16(c) above], whether uncorrected misstatements are material, individually or in aggregate” (para 11(b)).

D.3 Definitions in ASA 450 & 700

“Materiality”

18. In each of ASA 450 and 700, for FY20–22, “material” had the meaning given in ASA 320 (*Materiality in Planning and Performing an Audit*), which provided that, “in general, misstatements are considered to be material if they could reasonably be expected to influence the economic decisions of users taken on the basis of the financial report as a whole” (para A2).

“Those charged with governance”

19. In each of ASA 450 and 700, for FY20–22, “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” (para 10(a)).
20. 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.
21. Given paragraphs 19 and 20 above, “those charged with governance” of the Downer Group, within the meaning of ASA 450 and 700, were the Audit & Risk Committee of Downer and otherwise the board.

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

22. 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” (para 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” (para 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" (para 35);
- (d) "[f]or each performance obligation satisfied over time in accordance with [para 35, quoted in sub-para 22(c) above] an entity shall recognise revenue over time by measuring the progress towards complete satisfaction of that performance obligation" (para 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" (para 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" (para 73).

E. Contract with AusNet

- 23. On 22 July 2019, Downer Utilities Australia Pty Ltd (**Downer Utilities**), a subsidiary of Downer, entered into an Operations and Maintenance Services Agreement (**AusNet Contract** or **OMSA**) with AusNet Electricity Services Pty Ltd and AusNet Transmission Group Pty Ltd (together, **AusNet Services**) [DOW.3000.0022.9999; DOW.3000.0021.9999].
- 24. The term of the AusNet Contract was five years, renewable, at Downer's option, for two terms of three years each (cll 3.1–3.3).
- 25. On 23 July 2019, Downer announced to the ASX, in reference to the AusNet Contract, that [DOW.3000.0070.9990]:
 - (a) "[Downer] had been selected by AusNet Services to provide operational and maintenance services on the electricity distribution network in Victoria";
 - (b) "[t]he five-year contract is worth approximately \$600 million and includes options to extend for a further six years";
 - (c) "[u]nder the contract, Downer's services will expand from the current work delivered in AusNet Services' Central region [under an Electricity Services

Contract dated 25 September 2012] to include the remainder of AusNet Services' electricity distribution network in Victoria's Northern and Eastern Regions"; and

- (d) "[t]he Chief Executive Officer of Downer, Grant Fenn, said this contract award reinforced Downer as a benchmark end-to-end service provider to owners of utilities assets. "We are pleased to extend our 19-year partnership with AusNet Services for at least a further five years and to now service their entire electricity distribution network in Victoria," Mr Fenn said".

26. Under the AusNet Contract:

- (a) AusNet Services could issue Works Orders to Downer Utilities (cl 7.2(b)(i)); and
- (b) 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).

27. The AusNet Contract commenced on 1 April 2020.

28. From then, throughout FY20–22, AusNet Services issued, and Downer Utilities accepted, about 20,000 Works Orders a month.

F. Overstatements of revenue from AusNet Contract

F.1 Overstatement of revenue for FY20

29. From 1 April 2020 to 30 June 2020, the Downer Group recognised \$36.911m as revenue from the AusNet Contract.

30. Of that amount, about \$2.43m or 6.58% 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 22(b)–22(d) 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 22(a), 22(e), and 22(f) above).

31. As a result of the recognition of those amounts, in the Consolidated Financial Report of the Downer Group for FY20, the Group's revenue was, according to AASB 15, overstated by about \$2.43m (**FY20 Overstatement**).

32. As a result of the FY20 Overstatement, in the Consolidated Financial Report for FY20 [DOW.3000.0070.9995]:
- (a) the Downer Group's net loss before tax was understated, according to AASB 15, by about \$2.43m or 1.59%; and
 - (b) the Group's net loss after tax was understated, according to AASB 15, by about \$1.7m or 1.09%.
33. The plaintiffs have alleged against Downer, in relation to the Consolidated Financial Report of the Downer Group for FY20, that:
- (a) the accounts upon which it was based were not prepared in accordance with the applicable Australian Accounting Standards; and
 - (b) did not give a true and fair view of the financial performance and financial position of Downer
34. For the purposes of this statement of claim only, and without admission, Downer repeats the plaintiffs' allegations pleaded in paragraph 33 above.
35. In the premises of paragraphs 25, 28, and 30-34 above, and without admission, the FY20 Overstatement could, given the particular circumstances of its occurrence, have reasonably been expected to influence the economic decisions of users taken on the basis of the Consolidated Financial Report as a whole.
36. In the premises of paragraphs 16(c)(i), 17(b), 18, 34 and 35 above, and without admission, the FY20 Overstatement was "material" to the Consolidated Financial Report, within the meaning of ASA 450 and, therefore, of ASA 700.
37. In the premises of paragraphs 35 and 36 above, and without admission, the Consolidated Financial Report of the Downer Group for FY20:
- (a) had not, within the meaning of ASA 700 (see para 17(a) above), been "prepared, in all material respects, in accordance with the applicable financial reporting framework"; and
 - (b) was not, within the meaning of ASA 700 (see para 17(b) above), "as a whole ... free from material misstatement".
38. Further, in the premises of paragraphs 31, 32, 34 and 36 above, the Consolidated Financial Report of the Downer Group for FY20:
- (a) did not comply with Australian Accounting Standards; and

- (b) without admission, did not give a true and fair view of the financial performance of the Downer Group for FY20.

F.2 Overstatement of revenue for FY21

- 39. In FY21, the Downer Group recognised \$175.99m as revenue from the AusNet Contract.
- 40. Of that amount, about \$12.63m or 7.18% 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 22(b), and 22(d) 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 22(a), 22(e), and 22(f) above).
- 41. As a result of the recognition of those amounts, in the Consolidated Financial Report of the Downer Group for FY21 [DOW.3000.0070.9997], the Group’s revenue was, according to AASB 15, overstated by about \$12.63m (**FY21 Overstatement**).
- 42. As a result of the FY21 Overstatement, in the Consolidated Financial Report for FY21:
 - (a) the Downer Group’s net profit before tax was overstated, according to AASB 15, by about \$12.63m or 5.49%; and
 - (b) the Group’s net profit after tax was overstated, according to AASB 15, by about \$8.9m or 4.84%.
- 43. As a result of misstatements, other than the FY20 Overstatement, in the Consolidated Financial Report for FY20 (**Acknowledged FY20 Overstatements**), in the Consolidated Financial Report for FY21:
 - (a) the Downer Group’s net profit before tax was further overstated, according to AASB 15, by \$8.5m or 3.7%; and
 - (b) the Group’s net profit after tax was further overstated, according to AASB 15, by \$5.9m or 3.21%.

Particulars

These overstatements were acknowledged by KPMG in its report to the Audit & Risk Committee on 29 July 2021 (pp 2 & 14) [DOW.1059.0020.6027].

44. Given paragraphs 42 and 43 above, as a result of the FY21 Overstatement and the Acknowledged FY20 Overstatements, in the Consolidated Financial Report for FY21:
- (a) the Downer Group's net profit before tax was overstated, according to AASB 15, by \$21.13m or 9.19%; and
 - (b) the Group's net profit after tax was overstated, according to AASB 15, by \$14.8m or 8.1%.
45. Given paragraphs 25, 28, 31, 36, 40–42, and 44 above, the FY21 Overstatement could, given the particular circumstances of its occurrence, have reasonably been expected to influence the economic decisions of users taken on the basis of the Consolidated Financial Report as a whole.
46. Given paragraphs 16(c), 17(b), 18, and 45 above, the FY21 Overstatement was “material” to the Consolidated Financial Report for FY21, within the meaning of ASA 450 and, therefore, of ASA 700.
47. Given paragraph 46 above, the Consolidated Financial Report of the Downer Group for FY21:
- (a) had not, within the meaning of ASA 700 (see para 17(a) above), been “prepared, in all material respects, in accordance with the applicable financial reporting framework”; and
 - (b) was not, within the meaning of ASA 700 (see para 17(b) above), “as a whole ... free from material misstatement”.
48. Further, given paragraphs 41, 42, 44, and 46 above, the Consolidated Financial Report of the Downer Group for FY21 did not:
- (a) comply with Australian Accounting Standards; or
 - (b) give a true and fair view of the financial performance of the Downer Group for FY21.

F.3 Overstatement of revenue for FY22

49. In FY22, the Downer Group recognised \$171.5m as revenue from the AusNet Contract.
50. Of that amount, \$16.7m or 9.74% 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 22(b)–22(d) 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 22(a), 22(e), 22(f) above).
51. As a result of the recognition of those amounts, in the Consolidated Financial Report of the Downer Group for FY22 [DOW.3000.0023.9999], the Group’s revenue was, according to AASB 15, overstated by about \$16.7m (**FY22 Overstatement**).
52. As a result of the FY22 Overstatement, in the Consolidated Financial Report for FY22:
- (a) the Downer Group’s net profit before tax was overstated, according to AASB 15, by about \$16.7m or 7.02%, and
 - (b) the Group’s net profit after tax was overstated, according to AASB 15, by about \$11.6m or 7.63%.
53. Given paragraphs 25, 28, 31, 36, 41, 46, 51, and 52 above, the FY22 Overstatement could, given the particular circumstances of its occurrence, have reasonably been expected to influence the economic decisions of users taken on the basis of the Consolidated Financial Report as a whole.
54. Given paragraphs 16(c), 17(b), 18, and 53 above, the FY22 Overstatement was “material” to the Consolidated Financial Report, within the meaning of ASA 450 and, therefore, of ASA 700.
55. Given paragraph 54 above, the Consolidated Financial Report of the Downer Group for FY22:
- (a) had not, within the meaning of ASA 700 (see para 17(a) above), been “prepared, in all material respects, in accordance with the applicable financial reporting framework”; and
 - (b) was not, within the meaning of ASA 700 (see para 17(b) above), “as a whole ... free from material misstatement”.
56. Further, given paragraphs 51, 52, and 54 above, the Consolidated Financial Report of the Downer Group for FY22 did not:
- (a) comply with Australian Accounting Standards; or

- (b) give a true and fair view of the financial performance of the Downer Group for FY22.

G. Audits for FY20-22

G.1 Audit for FY20

- 57. KPMG audited the Consolidated Financial Report of the Downer Group for FY20.
- 58. In breach of the FY20 Retainer (see para 6(a) above), and in breach of its duty of care (see para 7(a) above), KPMG did not exercise reasonable care and skill in auditing the Consolidated Financial Report of the Downer Group for FY20.

Particulars

See Schedule 1.

- 59. On 12 August 2020, KPMG reported to Downer's shareholders that, in KPMG's opinion, the Consolidated Financial Report of the Downer Group for FY20 complied with the Corporations Act, including:
 - (a) giving a true and fair view of the Group's financial position as at 30 June 2020 and of its financial performance for FY20; and
 - (b) complying with Australian Accounting Standards

(FY20 Audit Opinions) [DOW.3000.0070.9995].
- 60. In breach of the FY20 Retainer (see para 6(b) above), and in breach of its duty of care (see para 7(b) above), KPMG did not exercise reasonable care and skill in forming the FY20 Audit Opinions.

Particulars

Downer repeats paragraphs 17, 37, and 38 above, and paragraphs 1–9 of Schedule 1.

- 61. Given paragraph 2(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).

62. 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 shares in Downer.
63. Given paragraphs 2 and 62 above, the FY20 Audit Representations were made in trade or commerce.
64. Given paragraph 62 above, the FY20 Audit Representations were made in relation to shares in Downer.
65. Given paragraphs 3(a) and 64 above, the FY20 Audit Representations were made in relation to financial products within the meaning of s 1041(1) of the Corporations Act.
66. Given paragraphs 3(c) and 64 above, the FY20 Audit Representations were made in relation to financial services within the meaning of s 12DA(1) of the ASIC Act.
67. 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 the particulars to paragraph 60 above.

68. Given paragraphs 61, 63, and 67 above, 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).
69. Given paragraphs 61, 65, and 67 above, the FY20 Audit Representations were misleading or deceptive contrary to s 1041H(1) of the Corporations Act.
70. Given paragraphs 61, 63, 66, and 67 above, the FY20 Audit Representations were misleading or deceptive contrary to s 12DA(1) of the ASIC Act.

G.2 Audit for FY21

71. KPMG audited the Consolidated Financial Report of the Downer Group for FY21.
72. In breach of the FY21 Retainer (see paragraph 10(a)), and in breach of its duty of care (see paragraph 11(a) above), KPMG did not exercise reasonable care and skill in auditing the Consolidated Financial Report of the Downer Group for FY21.

Particulars

See Schedule 2.

G.3 Audit opinion

73. On 12 August 2021, KPMG reported to Downer's shareholders that, in KPMG's opinion, the Consolidated Financial Report of the Downer Group for FY20 complied with the Corporations Act, including:
- (a) giving a true and fair view of the Group's financial position as at 30 June 2021 and of its financial performance for FY21; and
 - (b) complying with Australian Accounting Standards
- (FY21 Audit Opinions)** [DOW.3000.0070.9997].
74. In breach of the FY21 Retainer (see para 10(b) above), and in breach of its duty of care (see para 11(b) above), KPMG did not exercise reasonable care and skill in forming the FY21 Audit Opinions.

Particulars

Downer repeats paragraphs 17, 47, and 48 above, and paragraphs 1–16 of Schedule 2.

75. Given paragraph 2(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)**.
76. 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 shares in Downer.
77. Given paragraphs 2 and 76 above, the FY21 Audit Representations were made in trade or commerce.
78. Given paragraph 76 above, the FY21 Audit Representations were made in relation to shares in Downer.

79. Given paragraphs 3(a) and 78 above, the FY21 Audit Representations were made in relation to financial products within the meaning of s 1041(1) of the Corporations Act.
80. Given paragraphs 3(c) and 78 above, the FY21 Audit Representations were made in relation to financial services within the meaning of s 12DA(1) of the ASIC Act.
81. 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 the particulars to paragraph 74 above.

82. Given paragraphs 75, 76, and 81 above, the FY21 Audit Representations were misleading or deceptive contrary to s 18(1) of the Australian Consumer Law.
83. Given paragraphs 75, 79, and 81 above, the FY21 Audit Representations were misleading or deceptive contrary to s 1041H(1) of the Corporations Act.
84. Given paragraphs 75, 76, 80, and 81 above, the FY21 Audit Representations were misleading or deceptive contrary to s 12DA(1) of the ASIC Act.

G.4 Audit for FY22

85. KPMG audited the Consolidated Financial Report of the Downer Group for FY22.
86. In breach of the FY22 Retainer (see para 14(a)), and in breach of its duty of care (see para 15(a)), KPMG did not exercise reasonable care and skill in auditing the Consolidated Financial Report of the Downer Group for FY22.

Particulars

See Schedule 3.

87. On 17 August 2022, KPMG reported to Downer's shareholders that, in KPMG's opinion, the Consolidated Financial Report of the Downer Group for FY22 complied with the Corporations Act, including:
- (a) giving a true and fair view of the Group's financial position as at 30 June 2022 and of its financial performance for FY22; and

(b) complying with Australian Accounting Standards

(FY22 Audit Opinions) [DOW.3000.0023.9999].

88. In breach of the FY22 Retainer (see para 14(b) above), and in breach of its duty of care (see para 15(b) above), KPMG did not exercise reasonable care and skill in forming the FY22 Audit Opinions.

Particulars

Downer repeats paragraphs 17, 55, and 56 above, and paragraphs 1–17 of Schedule 3.

89. Given paragraph 2(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).

90. 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 shares in Downer.
91. Given paragraphs 2 and 90 above, the FY22 Audit Representations were made in trade or commerce.
92. Given paragraph 90 above, the FY22 Audit Representations were made in relation to shares in Downer.
93. Given paragraphs 3(a) and 92 above, the FY22 Audit Representations were made in relation to financial products within the meaning of s 1041(1) of the Corporations Act.
94. Given paragraphs 3(c) and 92 above, the FY22 Audit Representations were made in relation to financial services within the meaning of s 12DA(1) of the ASIC Act.
95. 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 the particulars to paragraph 88 above.

96. Given paragraphs 89, 90, and 95 above, the FY22 Audit Representations were misleading or deceptive contrary to s 18(1) of the Australian Consumer Law.
97. Given paragraphs 89, 93, and 95 above, the FY22 Audit Representations were misleading or deceptive contrary to s 1041H(1) of the Corporations Act.
98. Given paragraphs 89, 90, 94, and 95 above, the FY22 Audit Representations were misleading or deceptive contrary to s 12DA(1) of the ASIC Act.

H. Loss

H.1 Alleged false, misleading, or deceptive conduct

“Capital Raise Cleansing Notice Representations”

99. If Downer made the “Capital Raise Cleansing Notice Representations” alleged by the plaintiffs in paragraph 97 of their consolidated statement of claim (**CSOC**), it was because KPMG had committed each of the breaches described in paragraphs 58 and 60 above (**FY20 KPMG Breaches**).
100. As a result, if Downer is liable for having made, or failed to correct or qualify, the “Capital Raise Cleansing Notice Representations”, either as alleged in paragraphs 102, 103, and 216 and any of prayers 1–3 of the CSOC, or as alleged in paragraphs 152 and 216 and prayer 1 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY20 KPMG Breaches.

“30 June 2020 Financial Representations”

101. If Downer made the “30 June 2020 Financial Representations” alleged in paragraph 104 of the CSOC, or the “30 June 2020 Financial Basis Representation” alleged in paragraph 105, it was because of each of the FY20 KPMG Breaches, and each of the contraventions described in paragraphs 68 – 70 above (**FY20 KPMG Contraventions**).
102. As a result, if Downer is liable for having made, or failed to correct or qualify, either the “30 June 2020 Financial Representations” or the “30 June 2020 Financial Basis Representation”, either as alleged in paragraphs 108, 109, and 216, and any of prayers 1–3 of the CSOC, or as alleged in paragraphs 152 and 216 and prayer 1 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY20 KPMG Breaches and each of the FY20 KPMG Contraventions.

“31 December 2020 Financial Representations”

103. If Downer made the “31 December 2020 Financial Representations” alleged in paragraph 110 of the CSOC, or the “31 December 2020 Financial Basis Representation” alleged in paragraph 111, it was because of each of the FY20 KPMG Breaches and each of the FY20 KPMG Contraventions.
104. As a result, if Downer is liable for having made, or failed to correct or qualify, either the “31 December 2020 Financial Representations” or the “31 December 2020 Financial Basis Representation”, either as alleged in paragraphs 114, 115, and 216, and any of prayers 1–3 of the CSOC, or as alleged in paragraphs 152 and 216 and prayer 1 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY20 KPMG Breaches and each of the FY20 KPMG Contraventions.

“30 June 2021 Financial Representations”

105. If Downer made the “30 June 2021 Financial Representations” alleged in paragraph 116 of the CSOC, or the “30 June 2021 Financial Basis Representation” alleged in paragraph 117, it was because KPMG had committed each of the breaches described in paragraphs 72 and 74 above (**FY21 KPMG Breaches**), and each of the contraventions described in paragraphs 82 – 84 above (**FY21 KPMG Contraventions**).
106. As a result, if Downer is liable for having made, or failed to correct or qualify, either the “30 June 2021 Financial Representations” or the “30 June 2021 Financial Basis Representation”, either as alleged in paragraphs 120, 121, and 216 and any of prayers 1–3 of the CSOC, or as alleged in paragraphs 152 and 216 and prayer 1 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY21 KPMG Breaches and each of the FY21 KPMG Contraventions.

“31 December 2021 Financial Representations”

107. If Downer made the “31 December 2021 Financial Representations” alleged in paragraph 122 of the CSOC, or the “31 December 2021 Financial Basis Representation” alleged in paragraph 123, it was because of each of the FY21 KPMG Breaches and each of the FY21 KPMG Contraventions.
108. As a result, if Downer is liable for having made, or failed to correct or qualify, either the “31 December 2021 Financial Representations” or the “31 December 2021 Financial Basis Representation”, either as alleged in paragraphs 126, 127, and 216 and any of prayers 1–3 of the CSOC, or as alleged in paragraphs 152 and 216 and prayer 1 of the

CSOC, the amount of that liability is a loss suffered as a result of each of the FY21 KPMG Breaches and each of the FY21 KPMG Contraventions.

“30 June 2022 Financial Representations”

109. If Downer made the “30 June 2022 Financial Representations” alleged in paragraph 128 of the CSOC, or the “30 June 2022 Financial Basis Representation” alleged in paragraph 129, it was because KPMG had committed each of the breaches described in paragraphs 86 and 88 above (**FY22 KPMG Breaches**), and each of the contraventions described in paragraphs 96–98 above (**FY22 KPMG Contraventions**).
110. As a result, if Downer is liable for having made, or failed to correct or qualify, either the “30 June 2022 Financial Representations” or the “30 June 2022 Financial Basis Representation”, either as alleged in paragraphs 132, 133, and 216 and any of prayers 1–3 of the CSOC, or as alleged in paragraphs 152 and 216 and prayer 1 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.

“First FY23 Guidance Representations”

111. If Downer made the “First FY23 Guidance Representation” alleged in paragraph 134 of the CSOC, or the “First FY23 Guidance Basis Representation” alleged in paragraph 135, it was because KPMG had committed each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.
112. As a result, if Downer is liable for having made, or failed to correct or qualify, either the “First FY23 Guidance Representation” or the “First FY23 Guidance Basis Representation”, either as alleged in paragraphs 139, 140, and 216 and any of prayers 1–3 of the CSOC, or as alleged in paragraphs 152 and 216 and prayer 1 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.

“Second FY23 Guidance Representations”

113. If Downer made the “Second FY23 Guidance Representation” alleged in paragraph 141 of the CSOC, or the “Second FY23 Guidance Basis Representation” alleged in paragraph 142, it was because KPMG had committed each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.
114. As a result, if Downer is liable for having made, or failed to correct or qualify, either the “Second FY23 Guidance Representation” or the “Second FY23 Guidance Basis Representation”, either as alleged in paragraphs 146, 147, and 216 and any of prayers

1–3 of the CSOC, or as alleged in paragraphs 152 and 216 and prayer 1 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.

H.2 Alleged failures of continuous disclosure

“Contract Management Information”

115. If Downer failed, contrary to the Corporations Act, to disclose the “Contract Management Information” to the ASX as alleged in paragraphs 73 and 160–4 of the CSOC, it was because KPMG had committed the FY20, FY21, and FY22 KPMG Breaches and the FY20, FY21, and FY22 KPMG Contraventions.

116. As a result, if Downer is liable for that contravention as alleged in paragraph 216 and prayer 4 of the CSOC, the amount of that liability is a loss suffered as a result of the FY20, FY21, and FY22 KPMG Breaches and the FY20, FY21, and FY22 KPMG Contraventions.

“AusNet Loss Information”

117. If Downer failed, contrary to the Corporations Act, to disclose the “AusNet Loss Information” to the ASX as alleged in paragraphs 75 and 166–170 of the CSOC, it was because KPMG had committed the FY20, FY21, and FY22 KPMG Breaches and the FY20, FY21, and FY22 KPMG Contraventions.

118. As a result, if Downer is liable for that contravention as alleged in paragraph 216 and prayer 4 of the CSOC, the amount of that liability is a loss suffered as a result of the FY20, FY21, and FY22 KPMG Breaches and the FY20, FY21, and FY22 KPMG Contraventions.

“30 June 2020 True Financial Information”

119. If Downer failed, contrary to the Corporations Act, to disclose the “30 June 2020 True Financial Information” to the ASX as alleged in paragraphs 76 and 172–176 of the CSOC, it was because KPMG had committed each of the FY20 KPMG Breaches and each of the FY20 KPMG Contraventions.

120. As a result, if Downer is liable for that contravention as alleged in paragraph 216 and prayer 4 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY20 KPMG Breaches and each of the FY22 KPMG Contraventions.

“31 December 2020 True Financial Information”

121. If Downer failed, contrary to the Corporations Act, to disclose the “31 December 2020 True Financial Information” to the ASX as alleged in paragraphs 78 and 178–182 of the CSOC, it was because KPMG had committed each of the FY20 KPMG Breaches and each of the FY20 KPMG Contraventions.
122. As a result, if Downer is liable for that contravention as alleged in paragraph 216 and prayer 4 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY20 KPMG Breaches and each of the FY20 KPMG Contraventions.

“30 June 2021 True Financial Information”

123. If Downer failed, contrary to the Corporations Act, to disclose the “30 June 2021 True Financial Information” to the ASX as alleged in paragraphs 80 and 184–188 of the CSOC, it was because KPMG had committed each of the FY21 KPMG Breaches and each of the FY21 KPMG Contraventions.
124. As a result, if Downer is liable for that contravention as alleged in paragraph 216 and prayer 4 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY21 KPMG Breaches and each of the FY21 KPMG Contraventions.

“31 December 2021 True Financial Information”

125. If Downer failed, contrary to the Corporations Act, to disclose the “31 December 2021 True Financial Information” to the ASX as alleged in paragraphs 82 and 190–3 of the CSOC, it was because KPMG had committed each of the FY21 KPMG Breaches and each of the FY21 KPMG Contraventions.
126. As a result, if Downer is liable for that contravention as alleged in paragraph 216 and prayer 4 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY21 KPMG Breaches and each of the FY21 KPMG Contraventions.

“30 June 2022 True Financial Information”

127. If Downer failed, contrary to the Corporations Act, to disclose the “30 June 2022 True Financial Information” to the ASX as alleged in paragraphs 84 and 196–200 of the CSOC, it was because KPMG had committed each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.
128. As a result, if Downer is liable for that contravention as alleged in paragraph 216 and prayer 4 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.

“FY23 Guidance Information”

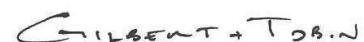
129. If Downer failed, contrary to the Corporations Act, to disclose the “FY23 Guidance Information” to the ASX as alleged in paragraphs 86 and 202–6 of the CSOC, it was because KPMG had committed each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.
130. As a result, if Downer is liable for that contravention as alleged in paragraph 216 and prayer 4 of the CSOC, the amount of that liability is a loss suffered as a result of each of the FY22 KPMG Breaches and each of the FY22 KPMG Contraventions.

Therefore Downer claims:

- A Damages
- B Further or alternatively, compensation under s 236(1) of the Australian Consumer Law
- C Further or alternatively, compensation under s 1041I(1) of the Corporations Act
- D Further or alternatively, compensation under s 12GF(1) of the ASIC Act
- E Interest
- F Costs
- G Any other relief thought fit

N Owens**A J Weinstock****P Meagher****N Wootton**

Dated: 1 March 2024

**Gilbert + Tobin**

Solicitors for Downer EDI Limited

Schedule 1

Particulars to paragraph 58 (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 paragraph 36 and particulars 1–8 above, if KPMG had exercised reasonable care and skill in auditing the revenue recognised from the AusNet Contract, it would have discovered the 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 Retainer (see para 5(b) above);
 - (b) in any case, would have reported the Overstatement to management as required by ASA 450 (see para 16(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 para 16(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 paras 16(d) and 21 above).
- 11 Further particulars may be provided after discovery.

Schedule 2

Particulars to paragraph 72 (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 paragraph 46 and 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 the 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 Retainer (see para 9(b) above);
 - (b) in any case, would have reported the Overstatement to management as required by ASA 450 (see para 16(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 para 16(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 paras 16(d) and 21 above).
- 18 Further particulars may be provided after discovery.

Schedule 3**Particulars to paragraph 86 (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 paragraph 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 paragraph 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 paragraph 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 paragraph 54 and 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 the 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 Retainer (see para 13(b) above);
 - (b) in any case, would have reported the Overstatement both to management, as required by ASA 450 (see para 16(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 para 16(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 paras 16(d) and 21 above).

19 Further particulars may be provided after discovery.

1. This notice was filed for the defendant by Crispian Lynch, solicitor, of Gilbert + Tobin, Level 25, 101 Collins Street Melbourne, VIC 3000.
 2. The address of the defendant is 39 Delhi Road, North Ryde NSW 2113.
 3. The address for service of the defendant is Gilbert + Tobin, Level 25, 101 Collins Street Melbourne, VIC 3000.
 - 3A. The email address for service of the defendant is clynch@gtlaw.com.au and downer@gtlaw.com.au
 4. The address of the third party is KPMG, Tower Two, Collins Square, 727 Collins Street, Melbourne VIC 3008
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