



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

Case: S ECI 2023 01835

No. S ECI 2023 01835
2025 04:08 PM

BETWEEN

JUSTINE LIDGETT

First Plaintiff

CAMERON LIDGETT

Second Plaintiff

AND

DOWNER EDI LIMITED (ACN 003 872 848)

First Defendant & Third Party

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

Second Defendant & Third Party

DEFENCE TO KPMG'S THIRD PARTY NOTICE

Date of Document:	28 May 2025	Solicitors Code:	103351
Filed on behalf of:	Defendant	Telephone:	+612 9263 4000
Prepared by:	Gilbert + Tobin	Ref:	1054222
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To the Statement of Claim indorsed on the Third Party Notice filed by the Second Defendant (**KPMG**) on 28 April 2025, the First Defendant (**Downer**) says:

1. As to paragraph 1, Downer:
 - (a) repeats the preamble to, and paragraphs 173, 175, 177, and 178 of, its Reply to KPMG's Defence to the Amended Statement of Claim indorsed on Downer's Third Party Notice (**Downer's ASOC**);
 - (b) admits that KPMG is liable to the Plaintiffs and Group Members as admitted in part GA, and as alleged in part I, of Downer's Defence to the Plaintiffs' Amended Consolidated Statement of Claim (**ACSOC**);

(c) says that, if Downer is liable to any of the Plaintiffs or Group Members for any of the “Misleading Conduct Contraventions” alleged in the ACSOC (which is denied), then:

- (i) Downer is a “concurrent wrongdoer” with KPMG, as admitted in paragraph 365 of KPMG’s Defence to the ACSOC;
- (ii) Downer’s liability for those Misleading Conduct Contraventions is apportionable as alleged in part I.6 of Downer’s Defence to the ACSOC; and
- (iii) therefore, by:

- (A) s 87CF(b) of the *Competition and Consumer Act 2010* (Cth) (**CCA**);
- (B) s 24AJ(b) of the *Wrongs Act 1958* (Vic) (**Victorian Apportionment Act**);
- (C) s 36(b) of the *Civil Liability Act 2002* (NSW) (**NSW Apportionment Act**);
- (D) s 32A(b) of the *Civil Liability Act 2003* (Qld) (**Qld Apportionment Act**);
- (E) s 43C(1)(b) of the *Civil Liability Act 2002* (Tas) (**Tasmanian Apportionment Act**);
- (F) s 5AL(1)(b) of the *Civil Liability Act 2002* (WA) (**WA Apportionment Act**);
- (G) s 9, read with s 6(7), of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA) (**SA Apportionment Act**);
- (H) s 107H(b) of the *Civil Law (Wrongs) Act 2002* (ACT) (**ACT Apportionment Act**);
- (I) s 15(1)(b) the *Proportionate Liability Act 2005* (NT) (**NT Apportionment Act**);
- (J) s 1041P(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**);
- and
- (K) s 12GT(b) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**),

Downer cannot be required to indemnify KPMG;

(d) otherwise denies every allegation made in paragraph 1; and

(e) says, in the alternative, that:

- (i) if Downer has breached, in any of the FY20–22 Retainers, the term alleged in paragraph 171 of KPMG’s Defence to Downer’s ASOC (which is denied):
 - (A) that is “a breach of a contractual duty of care that is concurrent and co-extensive with a duty of care in tort” within the meaning of paragraph (b) of the definition of *wrong* in s 8 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) (**NSW Contributory Negligence Act**);
 - (B) if KPMG’s liability to any of the Plaintiffs or Group Members is a loss suffered as a result of that breach (which is denied), it is also suffered as a result of KPMG’s failure to take reasonable care; and

Particulars

Downer repeats paragraphs 56B, 56F, 58, 60, 70B, 70F, 72, 74, 84B, 84F, 86, and 88 of Downer’s ASOC.

- (C) therefore, under s 9(1)(b) of the NSW Contributory Negligence Act, the damages recoverable in respect of the breach are to be reduced to such extent as the Court thinks just and equitable having regard to KPMG’s share in the responsibility for the loss; and
- (ii) if:
 - (A) Downer has, as alleged in paragraph 180 of KPMG’s Defence to Downer’s ASOC, engaged in misleading or deceptive conduct contrary to s 1041H(1) of the Corporations Act, s 12DA(1) of the ASIC Act, or s 18 of the ACL (Cth) (as defined in paragraph 56N of Downer’s ASOC) (which is denied); and
 - (B) KPMG’s liability to any of the Plaintiffs or Group Members is a loss suffered as a result of that contravention (which is denied),

then:

- (C) the liability is also a loss suffered as a result of KPMG’s failure to take reasonable care; and

Particulars

Downer repeats paragraphs 56B, 56F, 58, 60, 70B, 70F, 72, 74, 84B, 84F, 86, and 88 of Downer’s ASOC.

- (D) therefore, under s 1041I(1B) of the Corporations Act, s 12GF(1B) of the ASIC Act, or s 137B of the ACL (Cth) (as applicable), the damages that KPMG may recover in relation to the loss are to be reduced to the extent to which the Court thinks just and equitable having regard to KPMG's share in the responsibility for the loss.

2. As to paragraph 2:

(a) as to the chapeau to paragraph 2:

- (i) as to paragraph 365(e)(i)(A) of KPMG's Defence to the ACSOC, Downer repeats paragraph 173 of its Reply to KPMG's Defence to Downer's ASOC;
- (ii) as to paragraphs 365(e)(iii)(A)–(C) of KPMG's Defence to the ACSOC, Downer repeats paragraph 175 of its Reply to KPMG's Defence to Downer's ASOC;
- (iii) as to paragraphs 365(e)(v)(A) and (B) of KPMG's Defence to the ACSOC, Downer repeats paragraph 177 of its Reply to KPMG's Defence to Downer's ASOC;
- (iv) as to paragraph 365(e)(vi) of KPMG's Defence to the ACSOC, Downer repeats paragraph 178 of its Reply to KPMG; and
- (v) Downer otherwise denies every allegation made in the chapeau to paragraph 2;

(b) as to paragraph 2(a):

- (i) as to the chapeau to paragraph 2(a), Downer:
 - (A) repeats paragraph 2(a) above;
 - (B) admits that KPMG is liable to the Plaintiffs and Group Members as admitted in part GA, and as alleged part I, of Downer's Defence to the ACSOC;
 - (C) denies that KPMG's liability is not subject to a proportionate liability regime;

Particulars

KPMG's liability is apportionable as admitted in paragraphs 363 and 364 of KPMG's Defence to the ACSOC.

(D) otherwise denies every allegation made in the chapeau to paragraph 2(a);

(ii) as to paragraph 2(a)(i), Downer:

(A) denies that it is liable to any of the Plaintiffs or Group Members;

Particulars

Downer repeats parts A–G of its Defence to the ACSOC.

(B) says, in the alternative, that if it is liable to any of the Plaintiffs or Group Members, it is not liable in respect of the same damage as that for which KPMG is liable;

Particulars

If Downer is liable to any of the Plaintiffs or Group Members:

- a. it is a “concurrent wrongdoer” with KPMG, as admitted in paragraph 365 of KPMG’s Defence to the ACSOC;
- b. KPMG’s liability is limited, as admitted in paragraph 366 of its Defence to the ACSOC, to the share of the damage for which KPMG is responsible; and
- c. therefore Downer is not liable in respect of the same damage.

(C) says, in the alternative, that if Downer is otherwise liable to any of the Plaintiffs or Group Members in respect of the same damage as that for which KPMG is liable:

1. Downer is a “concurrent wrongdoer” with KPMG, as admitted in paragraph 365 of KPMG’s Defence to the ACSOC; and
2. KPMG’s liability is limited, as admitted in paragraph 366 of its Defence to the ACSOC, to the share of the damage for which KPMG is responsible; and

(D) otherwise denies every allegation made in paragraph 2(a)(i);

(iii) as to paragraph 2(a)(ii), Downer:

(A) denies that it is liable to any of the Plaintiffs or Group Members;

Particulars

Downer repeats parts A–G of its Defence to the ACSOC.

- (B) says, in the alternative, that if it is liable to any of the Plaintiffs or Group Members, its liability is not coordinate with KPMG's;

Particulars

If Downer is liable to any of the Plaintiffs or Group Members:

- a. it is a "concurrent wrongdoer" with KPMG, as admitted in paragraph 365 of KPMG's Defence to the ACSOC;
 - b. KPMG's liability is limited, as admitted in paragraph 366 of its Defence to the ACSOC, to the share of the damage for which KPMG is responsible; and
 - c. therefore Downer's liability is not coordinate with KPMG's.
- (C) says, in the alternative, that if Downer's liability is otherwise coordinate with KPMG's:
1. Downer is a "concurrent wrongdoer" with KPMG, as admitted in paragraph 365 of KPMG's Defence to the ACSOC; and
 2. KPMG's liability is limited, as admitted in paragraph 366 of its Defence to the ACSOC, to the share of the damage for which KPMG is responsible; and
- (D) otherwise denies every allegation made in paragraph 2(a)(ii);
- (c) as to paragraph 2(b), Downer:
- (i) denies that it is liable to make contribution as claimed in paragraph 2(b); and

Particulars

Downer:

1. repeats paragraphs 2(b)(ii)(A) and (B) and paragraphs 2(b)(iii)(A) and (B) above;
2. says, in the alternative, that:

- a. if it is liable to any of the Plaintiffs or Group Members in respect of the same damage as that for which KPMG is liable, then, given paragraph 2(b)(ii)(C) above:
 - i. there is no amount that would be “just and equitable”, “having regard to the extent of [its] responsibility for the damage”, for Downer to contribute to KPMG’s liability within the meaning of either s 24(2) of the Victorian Apportionment Act or s 3(2) of the *Wrongs Act 1954* (Tas); and
 - ii. there is no amount that would be “fair and equitable”, “having regard to the extent of each [of their] responsibility for the harm”, for Downer to contribute to KPMG’s liability within the meaning of s 6(5) of the SA Apportionment Act; and
 - b. if its liability is coordinate with KPMG’s, then, given paragraph 2(b)(iii)(C) above, there is no amount that Downer ought in equity to contribute to KPMG’s liability; and
- 3. says further or alternatively that, if Downer is a “concurrent wrongdoer” with KPMG as admitted in paragraph 365 of KPMG’s Defence to the ACSOC, and Downer’s liability is apportionable as alleged in part I.6 of its Defence to the ACSOC, then, by:
 - a. s 87CF(a) of the CCA;
 - b. s 24AJ(a) of the Victorian Apportionment Act;
 - c. s 36(a) of the NSW Apportionment Act;
 - d. s 32A(a) of the Qld Apportionment Act;
 - e. s 43C(1)(a) of the Tasmanian Apportionment Act;
 - f. s 5AL(1)(a) of the WA Apportionment Act;
 - g. s 9 of the SA Apportionment Act;
 - h. s 107H(a) of the ACT Apportionment Act;
 - i. s 15(1)(a) the NT Apportionment Act;

j. s 1041P(a) of the Corporations Act; and

k. s 12GT(a) of the ASIC Act,

Downer cannot be required to contribute to KPMG's liability.

(ii) otherwise denies every allegation made in paragraph 2(b).

A J Weinstock

P Meagher

N Wootton

Dated: 28 May 2025

A handwritten signature in dark ink that reads "GILBERT + TOBIN". The signature is written in a cursive, slightly stylized font.

Gilbert + Tobin

Solicitors for Downer EDI Limited