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Form 33  
Rule 16.32

## Defence

No. VID 176 of 2022

Federal Court of Australia  
District Registry: Victoria  
Division: General

### STUART McCULLAGH

First Applicant

### LEO TONER

Second Applicant

**CUDECO LIMITED (RECEIVERS AND MANAGERS APPOINTED (IN LIQUIDATION) (ACN 000 317 251) & Ors according to the schedule**

Respondents

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## TERMINOLOGY

The second respondent (**Hutchison**) adopts the conventions and definitions contained in the applicants' statement of claim filed 7 April 2022 (**statement of claim**) unless otherwise stated herein.

### I THE PARTIES

#### A. The Applicants and Group Members

1. As to the matters alleged in paragraph 1 of the statement of claim, Hutchison:
  - 1.1. denies that he has caused the group members loss and damage;
  - 1.2. otherwise does not know and therefore cannot admit the matters alleged in paragraph 1 of the statement of claim.
2. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 2 of the statement of claim.
3. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 3 of the statement of claim.
4. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 4 of the statement of claim.

#### B. Cudeco

5. Hutchison admits the matters alleged in paragraph 5 of the statement of claim, save that the date pleaded in paragraph 5.3 ought to be 3 February 2020.
6. As to the matters alleged in paragraph 6 of the statement of claim, Hutchison:
  - 6.1. admits the matters alleged in paragraphs 6.1 and 6.2;
  - 6.2. does not know and therefore cannot admit the matters alleged in paragraph 6.3.

**C. The Cudeco Officers**

7. Hutchison admits the matters alleged in paragraph 7 of the statement of claim.
8. Hutchison admits the matters alleged in paragraph 8 of the statement of claim, save that he is the second respondent.
9. Hutchison admits the matters alleged in paragraph 9 of the statement of claim, save that Chen is the second respondent.
10. Hutchison admits the matters alleged in paragraph 10 of the statement of claim.

**D. KPMG**

11. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 11 of the statement of claim.

**II CUDECO'S BUSINESS AND REGULATORY CONTEXT****A. Rocklands Mine**

12. As to the matters alleged in paragraph 12 of the statement of claim, Hutchison:

- 12.1. Denies that Cudeco's mining operations were continuous;
- 12.2. otherwise admits the matters alleged in paragraph 12 of the statement of claim.

**B. Cudeco Reporting Requirements*****B.1 Corporations Act reporting requirements***

13. Hutchison admits the matters alleged in paragraph 13 of the statement of claim, save that:

- 13.1. there is no subsection (1) to s 111AO;
- 13.2. The obligations in respect of s 297 of the Corporations Act are for production of financial statements and notes.

***B.2 Accounting Standards***

14. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 14 of the statement of claim.
15. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 15 of the statement of claim.
16. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 16 of the statement of claim.

17. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 17 of the statement of claim.

### **B.3 ASX Listing Requirements**

18. As to the matters alleged in paragraph 18 of the statement of claim, Hutchison:

18.1. In respect of paragraph 18.4(b) of the statement of claim says that the reporting obligation is limited to stating details of said activities for the relevant quarter;

18.2. In respect of paragraph 18.4(c)(ii) of the statement of claim says that the entity's ore reserve holdings may alternatively be reported at another appropriate disclosed date;

18.3. otherwise admits the matters alleged therein.

19. Hutchison admits the matters alleged in paragraph 19 of the statement of claim.

## **III CASE AGAINST CUDECO AND OFFICERS**

### **A. Ore Reserve Representations**

#### **A.1 Maiden ore reserve estimate**

20. Hutchison admits the matters alleged in paragraph 20 of the statement of claim.

21. As to the matters alleged in paragraph 21 of the statement of claim, Hutchison:

21.1. denies that Hutchison made the statements alleged therein;

#### **Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the third party Ore Reserve Statement to the public.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the 2015 Maiden Ore Reserves Announcement.

21.2. otherwise denies the allegations therein because by the 2015 Maiden Ore Reserves Announcement Cudeco:

21.2.1. reported ore reserve estimates contained in the *Ore Reserves Statement* dated 9 December 2015 prepared by AMDAD and attached thereto;

- 21.2.2. did not make the statements alleged in paragraphs 21.1 to 21.2 of the statement of claim;
- 21.2.3. did not make the statement alleged in paragraph 21.4 but stated that the Feasibility Study indicated that Rocklands was technically and economically viable for the metal prices assumed.

**A.2 Announcement of rights issue and publication of Feasibility Study**

22. As to the matters alleged in paragraph 22 of the statement of claim, Hutchison:

- 22.1. In respect of paragraph 22.1(b) says that the availability of the rights issue was limited by the matters stated therein under the heading *Eligibility*;
- 22.2. otherwise admits the matters alleged therein.

23. Hutchison admits the matters alleged in paragraph 23 of the statement of claim.

24. Hutchison admits the matters alleged in paragraph 24 of the statement of claim.

25. As to the matters alleged in paragraph 25 of the statement of claim, Hutchison:

- 25.1. denies that Hutchison made the statements alleged therein;

**Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the third party Feasibility Study to the public.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the Feasibility Study Announcement.

- 25.2. otherwise denies the allegations in paragraphs 25.3 and 25.4 because by the Feasibility Study Announcement Cudeco:
  - 25.2.1. reported certain forecasts contained in the Feasibility Study and attached the Feasibility Study;
  - 25.2.2. reported the net present value of Rocklands estimated in the Feasibility Study;
  - 25.2.3. did not make the independent forecasts or statements alleged in paragraphs 25.3 to 25.4 of the statement of claim;

25.3. otherwise admits the allegations therein.

26. As to the matters alleged in paragraph 26 of the statement of claim, Hutchison:

26.1. admits that the Feasibility Study contained statements to the effect of the matters alleged in paragraphs 21.1, 21.2, 25.3 and 25.4 of the statement of claim;

26.2. denies that the Feasibility Study constituted statements of CuDeco or Hutchison as pleaded in paragraphs 21 and 25 above and consequently denies the matters alleged in paragraph 26 of the statement of claim.

### **A.3 Replacement Prospectus**

27. Hutchison admits the matters alleged in paragraph 27 of the statement of claim.

28. As to the matters alleged in paragraph 28 of the statement of claim, Hutchison:

28.1. denies that Hutchison made the statements alleged therein;

#### **Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the Replacement Prospectus.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the Replacement Prospectus announcement.

28.2. Says that the 2015 Ore Reserve Announcement inclusive of the Ore Reserves Statement were attached to the Replacement Prospectus and contained statements to the effect of the matters alleged in paragraphs 21.1 to 21.2 of the statement of claim;

28.3. says that the Feasibility Study was attached to the Replacement Prospectus and contained statements to the effect of the matters alleged in paragraphs 21.1, 21.2, 25.3 and 25.4 of the statement of claim;

28.4. says further that the Replacement Prospectus:

28.4.1. contained warnings that Cudeco's actual results, performance or achievements could significantly differ from results or objectives expressed in or implied by forward-looking statements in the Replacement Prospectus;



- 28.4.2. detailed important factors that could cause Cudeco's actual results to differ from those expressed in or implied by those forward-looking statements;

**Particulars**

Replacement Prospectus pp 3, 49-55.

- 28.5. otherwise denies the allegations therein because of the matters pleaded in paragraphs 21.2, 25.2 and 26.2 above.
29. Hutchison admits the matters alleged in paragraph 29 of the statement of claim.

**A.4 Quarterly Reports**

30. Hutchison admits the matters alleged in paragraph 30 of the statement of claim.
31. As to the matters alleged in paragraph 31 of the statement of claim, Hutchison:

- 31.1. denies that Hutchison made the statements alleged therein;

**Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the said announcement.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the announcement.

- 31.2. otherwise denies the allegations therein because by the 3Q16 Report Cudeco:
- 31.2.1. at page 4 reported the content of and referred the reader to the Feasibility Study;
- 31.2.2. at page 13 reported the content of and referred the reader to the Ore Reserve Statement;
- 31.2.3. did not otherwise make the statements alleged in paragraphs 31 of the statement of claim.

32. Hutchison admits the matters alleged in paragraph 32 of the statement of claim.

33. As to the matters alleged in paragraph 33 of the statement of claim, Hutchison:

- 33.1. denies that Hutchison made the statements alleged therein;

### Particulars

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the said announcement.

Following Hutchison's removal as interim managing director on 19 May 2016, Hutchison:

- had no input to management of Cudeco;
- was provided limited information as to that management;
- had no or a limited influence on the making of the said representations.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the said announcement.

- 33.2. otherwise denies the allegations therein because by the 3Q16 Report Cudeco:
- 33.2.1. at page 4 reported the content of and referred the reader to the Feasibility Study;
  - 33.2.2. at page 13 reported the content of and referred the reader to the Ore Reserve Statement;
  - 33.2.3. did not otherwise make the statements alleged in paragraphs 31 of the statement of claim.

### **A.5 Implied representations**

34. As to the matters alleged in paragraph 34 of the statement of claim, Hutchison:

- 34.1. Repeats paragraphs 21, 25, 26, 28, 31 and 33 above in respect of the allegations that Cudeco and Hutchison made the statements alleged and repeats the non admissions and denials therein;
- 34.2. Otherwise denies the allegations.

### Particulars

No such express statements were made.

The statement of claim provides no particulars upon which the alleged representation ought be implied or inferred.

35. As to the matters alleged in paragraph 35 of the statement of claim, Hutchison:

35.1. denies that Hutchison made the statements alleged therein;

**Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the said announcement.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the announcement.

35.2. Otherwise denies the allegations because:

35.2.1. The representation alleged in paragraph 35.1 of the statement of claim does not follow and cannot be inferred from the matters pleaded in paragraph 27.5 of the statement of claim;

35.2.2. The representation in paragraph 35.2 of the statement of claim does not follow and cannot be inferred from the matters pleaded in paragraph 27.5 of the statement of claim.

36. As to the matters alleged in paragraph 36 of the statement of claim, Hutchison:

36.1. Repeats paragraphs 21, 25, 26, 28, 31, 33, 34 and 35 above in respect of the allegations that Cudeco and Hutchison made the statements alleged and repeats the non admissions and denials therein;

36.2. denies that Hutchison made representations thereby;

**Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement was solely as a director.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of Cudeco's disclosure or alleged non disclosure over the relevant period.

- 36.3. Further denies that Hutchison made continuing representations or was required to correct earlier representations because Hutchison was not able to control the issue or content of ASX announcements by Cudeco at all or alternatively from his termination as interim managing director on 19 May 2016;

And otherwise:-

- 36.4. denies the matters alleged in paragraph 36 because:

- 36.4.1. The statements made by Cudeco which are alleged to form the Rocklands Representations and the Prospectus Representation were:

36.4.1.1. statements as to the contents of the 2015 Ore Reserves Statement and the Feasibility Study, which documents are not of a continuing character;

36.4.1.2. statements conveying independent persons' opinions in respect of or based on the Rocklands ore reserve at December 2015, in respect of which Cudeco had obligations to update the market in their quarterly and annual reports, such that the representations were not of a continuing character;

- 36.4.2. The Prospectus Basis Representations are, if found to exist, dependent on and part of the Prospectus Representation, and must be inferred to bear the same non-continuous character;

- 36.5. Further or alternatively says that developments and changes in the planning and operation of the Rocklands Group Copper Project were disclosed by Cudeco pursuant to the following ASX announcements and consequently denies the matters alleged in paragraph 36 or alternatively says that the alleged representations were qualified or corrected:

36.5.1. On 11 May 2016 by "Rights Issue Closes" update p 1 stating that cobalt and magnetite circuits would be commissioned and production brought on line after copper circuits reached steady state;

36.5.2. On 16 May 2016 by "Commissioning Status Update" stating that cobalt and magnetite circuits would be commissioned and production brought on line after copper circuits reached steady state;

- 36.5.3. on or about 22 September 2016 by the ASX “Operational Update” announcement released on or about that date, p 2 as to Cudenco proposing not to commission cobalt and magnetite circuits at that stage;
- 36.5.4. on or about 31 October 2016 by the 1Q17 Quarterly Report p 3 “Mining” as to Cudenco proposing not to commission cobalt and magnetite circuits at that stage;
- 36.5.5. on or about 17 November 2016 by FY2016 Annual Report p 75-76 note 27 as to impairment arising from matters including delay in start date of full production;
- 36.5.6. on or about 18 May 2017 by the ASX announcement “Presentation at Brisbane Mining Club” p 19 as to options for non-production of cobalt and magnetite;
- 36.5.7. On 14 June 2017 by a “Rocklands Operations Update” identifying issues and remedial action to improve copper production;
- 36.5.8. On 11 July 2017 by a “Rocklands Operations Update” as to issues with the HPGR plant;
- 36.5.9. On or about 31 October 2017 by the FY2017 Annual Report p 96 New Information, and inclusion only revenue from production and sale of copper products;
- 36.5.10. On or about 29 November 2017 by the ASX announcement “Presentation to Annual General Meeting” p 15 immediate goals include “commission cobalt circuit”, p 32 looking forward regarding investigation of cobalt circuit and finding a buyer for pyrite/ cobalt product;
- 36.5.11. On or about 29 November 2017 by the ASX announcement “Chairman’s Address to AGM” p 3-4 as to working with potential customers to explore the prospect for additional revenue from production of cobalt;
- 36.5.12. On or about 27 December 2017 by the December 2017 Announcement p 1;
- 36.5.13. On or about 31 January 2018 by the 2Q2018 Report p 2-3 as to processing issues, and p 4 as to production and sale of copper products alone;
- 36.5.14. On about 23 February 2018 by the ASX Announcement “Update on Non Compliance ...” which restated that Cudenco would not be able to make a 30 June 2017 ore reserve statements until about 15 March 2018;

36.5.15. By each ASX announcement subsequent to 16 May 2016 which referred to production and sale of copper products alone;

36.5.16. By each ASX announcement subsequent to 16 May 2016 which recorded financial statements for Cudeco, each of which incorporated the remedial costs of plant and equipment rehabilitation as they then stood.

37. As to the matters alleged in paragraph 37 of the statement of claim, Hutchison:

37.1. Repeats paragraphs 21, 25, 26, 28, 31, 33, 34, 35 and 36 above in respect of the allegations that Cudeco and Hutchison made the representations alleged and repeats the non admissions and denials therein;

37.2. Otherwise admits that Cudeco's conduct which is alleged to constitute the Rockands Representations and the Rocklands Prospectus Representations was in trade or commerce as alleged in paragraph 37.1;

37.3. Admits the matters alleged in subparagraph 37.2(a)

37.4. Denies the matters alleged in subparagraph 37.2(b) because:

37.4.1. Cudeco's positive conduct was intended to comply with the ASX Listing Rules, and was not intended to influence people in relation to decisions regarding Cudeco shares;

37.4.2. Cudeco's omissions were not intended to influence people in relation to decisions regarding Cudeco shares.

## **B. The True Position**

38. As to the matters alleged in paragraph 38 of the statement of claim, Hutchison:

38.1. denies paragraph 38.1 because:

38.1.1. Cudeco had secured a commercially acceptable offtake arrangement with China Oceanwide for sale of copper and cobalt concentrates;

38.1.2. Cudeco subsequently signed a terms sheet for offtake of native copper;

38.1.3. Cudeco had previously signed a Heads of Agreement in respect of magnetite offtake;

38.1.4. There was an available market for the sale of magnetite at the prices assumed in the 2015 Ore Reserves Statement;

- 38.1.5. Determination of whether the Rocklands mineral deposits were economically mineable required only demonstration that extraction of the Ore Reserves was viable under reasonable financial assumptions;

**Particulars**

Offtake Agreement for Copper/ Gold Concentrate and Cobalt/Pyrite Concentrate with China Oceanwide International Holdings Co Ltd dated 25 April 2011.

Offtake Agreement for native copper with China Oceanwide International Holdings Co Ltd Head agreed on about 21 June 2016 and announcement via ASX on even date.

Heads of Agreement for magnetite concentrate Martin & Robson Australia Pty Ltd dated 11 June 2014 and in or about late 2015.

- 38.2. Admits the matters alleged in paragraph 38.2.

39. As to the matters alleged in paragraph 39 of the statement of claim, Hutchison:

- 39.1. Says that there was no reason to exclude cobalt and magnetite deposits from the 2015 Maiden Ore Announcement or the Feasibility Study prior to about December 2017 or January 2018 because:

- 39.1.1. The Feasibility Study provided for cobalt production to commence in the fifth quarter after production plant commissioning and magnetite production to commence in the seventh quarter after production plant commissioning;
- 39.1.2. In the course of operating the production plant for extraction of copper only, mineralised waste including cobalt and magnetite resources was stockpiled for future processing;
- 39.1.3. limited amounts of cobalt and magnetite were transferred to mineralised waste stockpiles by 30 June 2017 or alternatively during the Relevant Period;
- 39.1.4. Cudoco did not exclude cobalt or magnetite from immediate plans for exploitation of the ore reserve until in or about late 2017 or early 2018;

**Particulars**

22 September 2016 ASX "Operational Update" announcement released on or about that date, p 2 as to Cudoco proposing not to commission cobalt and magnetite circuits at that stage and 31 October 2016 by the

1Q17 Quarterly Report p 3 “Mining” as to Cudeco proposing not to commission cobalt and magnetite circuits were not limited to interim production or alternatively were unauthorised decisions of Cudeco to terminate production of cobalt and magnetite.

8 May 2017 ASX announcement “Presentation at Brisbane Mining Club” p 19 as to options for non-production of cobalt and magnetite.

29 November 2017 ASX announcement “Presentation to Annual General Meeting” p 15 immediate goals include “commission cobalt circuit”, p 32 looking forward regarding investigation of cobalt circuit and finding a buyer for pyrite/ cobalt product.

29 November 2017 ASX announcement “Chairman’s Address to AGM” p 3-4 as to working with potential customers to explore the prospect for additional revenue from production of cobalt.

Magnetite was a byproduct of cobalt production, requiring tailings from the cobalt circuit (which itself involved finer crushing of copper tailings) in order to be undertaken, and consequently delay to magnetite production followed decisions to delay cobalt production.

Further particulars will be provided following discovery.

39.2. Otherwise admits the matters alleged therein.

40. As to the matters alleged in paragraph 40 of the statement of claim, Hutchison:

40.1. denies the matters alleged in paragraph 40.1 because ore feed commissioning to Cudeco’s processing plant did not commence until 29 May 2016;

40.2. otherwise does not know the effect of the teething issues and the key economic assumptions which underpinned economic modelling and therefore cannot admit the matters alleged in paragraph 40.1;

40.3. denies the matters alleged in paragraph 40.2 because:

40.3.1. the crusher circuit was commissioned prior to the remainder of the process plant in or about late 2014 or early 2015;

40.3.2. post commissioning modification to the crushing circuit in or about early march 2016 to improve efficiency was disclosed to the market in the Feasibility Study Summary p 5 with supplementary crushing also employed as described in FY 2018 Annual Report p 16, 17;



- 40.3.3. the crusher plant was operating satisfactorily as at 29 May 2016 when ore feed commissioning commenced to Cudeco's processing plant;

#### **Particulars**

ASX announcement "Ore Feed Commissioning Starts ..." dated 31 May 2016.

- 40.3.4. a stockpile of crushed ore was maintained to ensure that ore feed to the processing plant was maintained during crusher maintenance periods.
41. Hutchison denies the matters alleged in paragraph 41 of the statement of claim because no such plan had been introduced.
42. Hutchison denies the matters alleged in paragraph 42 of the statement of claim because of the matters pleaded in paragraphs 38 to 41 above and because:
- 42.1. the revenue, net earnings and net present value of Rocklands calculated in the Feasibility Study did not assume that Cudeco's cobalt and magnetite circuits had been completed at the date of its release;
- 42.2. Cudeco's fundraising pursuant to the Replacement Prospectus was for purposes including completion of the construction and commissioning of the Rocklands Group Copper Project.

### **C. Contraventions from April 2016**

#### **C.1 April 2016 Continuous Disclosure Contraventions**

43. Hutchison denies the matters alleged in paragraph 43 of the statement of claim because the alleged information did not exist, as pleaded in paragraphs 38 to 40 above.
44. Hutchison denies the matters alleged in paragraph 44 of the statement of claim because the alleged information did not exist, as pleaded in paragraph 41 above.
45. Hutchison denies the matters alleged in paragraph 45 of the statement of claim because the alleged information did not exist, as pleaded in paragraph 42 above.
46. Hutchison denies the matters alleged in paragraph 46 of the statement of claim because:
- 46.1. of the matters pleaded in paragraphs 38 to 45 above; and
- 46.2. of the matters pleaded in paragraph 36 above.

#### **C.2 Misleading or deceptive conduct**

47. As to the matters alleged in paragraph 47 of the statement of claim, Hutchison:

- 47.1. Repeats paragraphs 21, 25, 26, 28, 31, 33, 34, 35 and 36 above in respect of the allegations that Cudeco and Hutchison made the representations alleged and repeats the non admissions and denials therein;
- 47.2. denies that Hutchison maintained representations because Hutchison was not able to control the issue or content of ASX announcements by Cudeco at all, or alternatively from his termination as interim managing director on 19 May 2016;
- 47.3. further denies that after his termination as interim managing director on 19 May 2016, Hutchison had knowledge of matters relating to the Magnetite and Cobalt Information, the Reduced Ore Reserve Information, the Processing Plant Information, the Mine Plan Information and the Financial Performance Information which required him to withdraw or correct the alleged representations because:
- 47.3.1. the information provided to him in respect of those matters was limited;
- 47.3.2. he was not in a position to control board or management decisions as to ASX disclosure.

#### **Particulars**

Hutchison does not have access to the books and records of Cudeco to further particularise the limits of the relevant information provided to him.

- 47.4. otherwise denies the matters alleged in paragraph 47 because:
- 47.4.1. of the matters pleaded in paragraphs 36, 38 to 40 and 42 or alternatively 36 and 38 to 42 above; and because:
- 47.4.1.1. the alleged representations were made on the basis of independent analysis by AMDAD (Ore Reserves Statement) and Mining Associates Limited (Feasibility Study), and other management reports, board papers and other documents which were consistent with the representations;

#### **Particulars**

Hutchison does not have access to the books and records of Cudeco, which he requires to identify other management report, board papers and other documents which record or constitute the subject matter of his inquiries.

47.4.1.2. the Company or alternatively Hutchison did not have any new data or information that materially affected the alleged representations by 11 April 2016 nor by 31 May 2016;

47.4.1.3. to the extent that the representations were representations as to future matters, Hutchison consequently had reasonable grounds for making them.

48. Hutchison denies the matters alleged in paragraph 48 of the statement of claim because of the matters pleaded in paragraph 47 above.

49. Hutchison denies the matters alleged in paragraph 49 of the statement of claim because of the matters pleaded in paragraphs 47 above.

**C.3 *Rocklands Representations – false or misleading conduct contraventions***

50. Hutchison denies the matters alleged in paragraph 50 of the statement of claim because of the matters pleaded in paragraphs 47 above.

51. Hutchison denies the matters alleged in paragraph 51 of the statement of claim because of the matters pleaded in paragraphs 47 above.

52. Hutchison denies the matters alleged in paragraph 52 of the statement of claim because of the matters pleaded in paragraphs 24 to 36, 39, 43 to 45 and 47 above.

53. Hutchison denies the matters alleged in paragraph 53 of the statement of claim because of the matters pleaded in paragraphs 24 to 36, 39, 43 to 45 and 47 above.

54. Hutchison denies the matters alleged in paragraph 54 of the statement of claim because:

54.1. of the matters pleaded in paragraphs 50 to 51 and 53 above; and because

54.2. the Rocklands Representations were not representations as to the standard, quality, value or grade of relevant services and consequently did not breach s 12DB(1)(a) of the ASIC Act or s 29(1)(b) of the ACL.

**C.4 *Prospectus Contraventions***

55. Hutchison denies the matters alleged in paragraph 55 of the statement of claim because of the matters pleaded in paragraphs 38, 39, 41 and 42 above.

56. Hutchison denies the matters alleged in paragraph 56 of the statement of claim because of the matters pleaded in paragraphs 38, 39, 40 and 42 above.

**D. *Market effects of Rocklands Contravening Conduct***

57. Hutchison denies the matters alleged in paragraph 57 of the statement of claim because of the matters pleaded in paragraphs 36, 39, 46, 49, 54, 55 and 56 above.

**E. October/November 2016 Representations**

**E.1 1Q17 Quarterly Report**

58. Hutchison admits the matters alleged in paragraph 58 of the statement of claim.

59. As to the matters alleged in paragraph 59 of the statement of claim, Hutchison:

59.1. denies that Hutchison made the representations therein because Hutchison:

59.1.1. was not able to control the issue or content of ASX announcements by Cudeco at all or alternatively from his termination as interim managing director on 19 May 2016;

59.1.2. Did not authorise the 1Q17 Report, or alternatively Hutchison's involvement in the statement was solely as a director on behalf of Cudeco in releasing the said announcement.

**Particulars**

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the announcement.

59.2. Otherwise denies the matters alleged therein because of the matters alleged in paragraph 21.2.

**E.2 FY2016 Annual Report**

60. As to the matters alleged in paragraph 60 of the statement of claim, Hutchison:

60.1. denies the matters alleged in paragraph 60.1 because of the matters alleged in paragraph 21.2 above;

60.2. as to paragraphs 60.2 and 60.3:

60.2.1. denies that Hutchison made the statements alleged therein;

**Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the said announcement.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the announcement.

60.2.2. Otherwise admits in respect of the Company the matters alleged in paragraphs 60.2 and 60.3 of the statement of claim.

### ***E.3 Implied Representations***

61. As to the matters alleged in paragraph 61 of the statement of claim, Hutchison:

61.1. Repeats paragraphs 59 and 60 above in respect of the allegations that Cudeco and Hutchison made the statements alleged and repeats denials therein;

61.2. Otherwise denies the allegations.

#### **Particulars**

No such express statements were made.

The statement of claim provides no particulars upon which the alleged representation ought be implied or inferred.

62. As to the matters alleged in paragraph 62 of the statement of claim, Hutchison:

62.1. Repeats paragraphs 59, 60 and 61 above in respect of the allegations that Cudeco and Hutchison made the statements alleged and repeats the denials therein;

62.2. denies that Hutchison made representations thereby;

#### **Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement was solely as a director.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of Cudeco's disclosure or alleged non disclosure over the relevant period.

62.3. Further denies that Hutchison made continuing representations because Hutchison was not able to control the issue or content of ASX announcements by Cudeco at

all or alternatively from his termination as interim managing director on 19 May 2016;

62.4. Otherwise denies the matters alleged in paragraph 62 because:

62.4.1. The statements made by Cudeco which are alleged to form the FY2016 Representations were:

62.4.1.1. statements conveying independent persons' opinions in respect of or based on the Rocklands ore reserve at the dates they were made, in respect of which Cudeco had obligations to update the market in their quarterly and annual reports;

62.4.1.2. statements conveying the financial position of Cudeco in respect of the period for which they were made, which representations were as to a point in time and were not of a continuing character;

62.5. Further or alternatively says that developments and changes in the planning and operation of the Rocklands Group Copper Project were disclosed by Cudeco pursuant to the following ASX announcements and consequently denies the matters alleged in paragraph 62 or alternatively says that the alleged representations were qualified or corrected:

62.5.1. on or about 31 October 2016 by the 1Q17 Quarterly Report p 3 "Mining" as to Cudeco proposing not to commission cobalt and magnetite circuits at that stage;

62.5.2. on or about 18 May 2017 by the ASX announcement "Presentation at Brisbane Mining Club" p 19 as to options for non-production of cobalt and magnetite;

62.5.3. On 14 June 2017 by a "Rocklands Operations Update" identifying issues and remedial action to improve copper production;

62.5.4. On 11 July 2017 by a "Rocklands Operations Update" as to issues with the HPGR plant;

62.5.5. On or about 31 October 2017 by the FY2017 Annual Report p 96 New Information, and inclusion only revenue from production and sale of copper products;

62.5.6. On or about 29 November 2017 by the ASX announcement "Presentation to Annual General Meeting" p 15 immediate goals include "commission

cobalt circuit”, p 32 looking forward regarding investigation of cobalt circuit and finding a buyer for pyrite/ cobalt product;

- 62.5.7. On or about 29 November 2017 by the ASX announcement “Chairman’s Address to AGM” p 3-4 as to working with potential customers to explore the prospect for additional revenue from production of cobalt;
- 62.5.8. On or about 27 December 2017 by the December 2017 Announcement p 1;
- 62.5.9. On or about 31 January 2018 by the 2Q2018 Report p 2-3 as to processing issues, and p 4 as to production and sale of copper products alone;
- 62.5.10. On about 23 February 2018 by the ASX Announcement “Update on Non Compliance ...” which restated that Cudeco would not be able to make a 30 June 2017 ore reserve statements until about 15 March 2018;
- 62.5.11. By each ASX announcement subsequent to 16 May 2016 which referred to production and sale of copper products alone;
- 62.5.12. By each ASX announcement subsequent to 16 May 2016 which recorded financial statements for Cudeco, each of which incorporated the remedial costs of plant and equipment rehabilitation as they then stood.

63. As to the matters alleged in paragraph 63 of the statement of claim, Hutchison:

- 63.1. Repeats paragraphs 62.1 to 62.2 above in respect of the allegations that Cudeco and Hutchison made the representations alleged and repeats the non admissions and denials therein;

And otherwise:-

- 63.2. admits that Cudeco’s conduct which is alleged to constitute the FY2016 Representations was in trade or commerce;
- 63.3. Admits the matters alleged in subparagraph 63.2(a)
- 63.4. Denies the matters alleged in subparagraph 63.2(b) because:
  - 63.4.1. Cudeco’s positive conduct was intended to comply with the ASX Listing Rules, and was not intended to influence people in relation to decisions regarding Cudeco shares;
  - 63.4.2. Cudeco’s omissions were not intended to influence people in relation to decisions regarding Cudeco shares;

63.5. Admits the matters alleged in subparagraph 63.2(c).

**F. True position as at October and November 2016**

64. As to the matters alleged in paragraph 64 of the statement of claim, Hutchison:

64.1. Says that Cudeco did not exclude cobalt or magnetite from its production plans until in or about late 2017 or early 2018 and repeats paragraph 39.1 above;

64.2. otherwise does not know and therefore cannot admit the matters alleged in paragraph 64 of the statement of claim.

**Particulars**

Hutchison does not recall and does not have access to the books and records of Cudeco to determine the matters alleged.

65. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 65 of the statement of claim.

**Particulars**

Hutchison repeats and relies on paragraph 64 above.

Hutchison requires expert accounting evidence to address the application and effect of the pleaded AASB standards.

**G. Contraventions from October and November 2016**

**G.1 FY2016 Continuous Disclosure Contraventions**

66. As to the matters alleged in paragraph 66 of the statement of claim, Hutchison:

66.1. repeats and relies on paragraph 64.1 above;

66.2. otherwise does not know and therefore cannot admit the matters alleged in paragraph 66 of the statement of claim because of the matters pleaded in paragraphs 64 to 65 above.

67. As to the matters alleged in paragraph 67 of the statement of claim, Hutchison:

67.1. Repeats paragraphs 64 to 66 above, repeats the non admissions therein and consequently does not know and therefore cannot admit the matters alleged;

67.2. Further or alternatively says that developments and changes in the planning and operation of the Rocklands Group Copper Project were disclosed by Cudeco as



pleaded in paragraph 62.5 above and consequently denies that the alleged information was not disclosed until the dates alleged.

**G.2 FY2016 Representations – misleading or deceptive conduct**

68. As to the matters alleged in paragraph 68 of the statement of claim, Hutchison:
- 68.1. Repeats paragraphs 38 to 42, 59, 60, 62 and 64.1 above, repeats the non admissions and denials therein and consequently denies the matters alleged;
- 68.2. says that if the representations were those of Hutchison he had reasonable grounds for making them.

**Particulars**

Hutchison relied on board papers and other documents provided to him which were consistent with the subject matter of the representations.

Hutchison does not have access to the books and records of Cudeco, which he requires to identify those documents.

69. As to the matters alleged in paragraph 69 of the statement of claim, Hutchison:
- 69.1. Repeats paragraph 60.2.1 above, and consequently denies the matters alleged in respect of the FY2016 Financial Report Representations as regards Hutchison;
- 69.2. otherwise repeats paragraphs 38 to 42 and 64 to 65 above, repeats the non admissions and denials therein and consequently denies the allegations;
- 69.3. says that if the representations were those of Hutchison and were made he had reasonable grounds for making them.

**Particulars**

Hutchison relied on board papers and other documents provided to him which were consistent with the subject matter of the representations.

Hutchison does not have access to the books and records of Cudeco, which he requires to identify those documents.

70. As to the matters alleged in paragraph 70 of the statement of claim, Hutchison:
- 70.1. Repeats paragraphs 62, 64.1, 68 and 69 above, repeats the non admissions and denials therein and consequently denies the matters alleged as regards Hutchison;
- 70.2. otherwise does not know and does not admit the allegations.

**G.3 FY2016 Representations – false or misleading statement contraventions**

71. As to the matters alleged in paragraph 71 of the statement of claim, Hutchison repeats paragraphs 38 to 42 and 64 above, repeats the non admissions and denials therein and consequently denies the allegations.
72. As to the matters alleged in paragraph 72 of the statement of claim, Hutchison repeats paragraphs 38 to 42 and 64 to 65 above, repeats the non admissions and denials therein and consequently denies the allegations.
73. As to the matters alleged in paragraph 73 of the statement of claim, Hutchison:
- 73.1. Repeats paragraphs 62 and 64.1 above and repeats the non admissions and denials therein;
- 73.2. otherwise does not know and therefore cannot admit the matters alleged in therein.
74. As to the matters alleged in paragraph 74 of the statement of claim, Hutchison:
- 74.1. Repeats paragraphs 43 to 45, 58 to 62, 64.1 and 66 above and repeats the non admissions and denials therein;
- 74.2. further denies that Hutchison ought reasonably have known the FY2016 Representations were false because:
- 74.2.1. the FY2016 Annual Report Impairment Statement and FY2016 Financial Report Representations were matters the assessment of which required detailed accounting knowledge not possessed by Hutchison;
- 74.2.2. after his termination as interim managing director on 19 May 2016 the information provided to him in respect of those matters was limited;

**Particulars**

Hutchison does not have access to the books and records of Cudeco to further particularise the limits of the relevant information provided to him.

- 74.3. otherwise:
- 74.3.1. denies that Hutchison disseminated the representations;
- 74.3.2. denies the allegations.
75. As to the matters alleged in paragraph 75 of the statement of claim, Hutchison:
- 75.1. Repeats paragraphs 71 to 74 above and repeats the non admissions and denials therein;

- 75.2. Consequently denies that Hutchison made or disseminated the relevant statements or information;
- 75.3. further denies that Hutchison's relevant conduct:
  - 75.3.1. breached s 1041E of the Corporations Act because of the matters pleaded in paragraphs 74.2 above;
- 75.4. breached s 12DB(1)(a) of the ASIC Act or s 29(1)(b) of the ACL because the FY2016 Representations were not representations as to the standard, quality, value or grade of relevant services;
- 75.5. otherwise denies the allegations therein.

#### **H. Market effects of FY2016 Contravening Conduct**

- 76. As to the matters alleged in paragraph 76 of the statement of claim, Hutchison:
  - 76.1. Repeats paragraphs 64.1, 67, 70 and 75 above and repeats the non admissions and denials therein;
  - 76.2. Otherwise denies the matters alleged therein.

#### **Particulars**

Hutchison repeats and relies on paragraphs 64.1.

Hutchison otherwise requires expert accounting evidence to address the application and effect of the pleaded AASB standards.

#### **I. FY2017 Representations**

##### ***I.1 Quarterly report representations***

- 77. Hutchison admits the matters alleged in paragraph 77 of the statement of claim.
- 78. Hutchison admits the matters alleged in paragraph 78 of the statement of claim.
- 79. As to the matters alleged in paragraph 79 of the statement of claim, Hutchison:
  - 79.1. denies that Hutchison made the statements alleged therein;

#### **Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the said announcement.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the announcement.

- 79.2. Otherwise admits in respect of Cudeco the matters alleged in paragraphs 79.1 and 79.2 of the statement of claim.

***1.2 FY2017 Annual Report***

80. As to the matters alleged in paragraph 80 of the statement of claim, Hutchison:

- 80.1. Denies the matters alleged in paragraph 80.1 in respect of Hutchison;

**Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the said announcement.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the announcement.

- 80.2. Otherwise denies the allegations in paragraph 80.1;

**Particulars**

The alleged representation is not implied in the particulars provided.

80.3. As to the matters alleged in paragraph 80.2 and 80.3:

- 80.3.1. denies that Hutchison made the statements alleged therein;

**Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement in the statements was solely as a director on behalf of Cudeco in releasing the said announcement.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of the announcement.

80.3.2. Otherwise admits in respect of Cudeco the matters alleged therein.

### ***1.3 Implied Representations***

81. As to the matters alleged in paragraph 81 of the statement of claim, Hutchison:

81.1. Repeats paragraphs 79 to 80 above in respect of the allegations that Cudeco and Hutchison made the statements alleged and repeats denials therein;

81.2. Otherwise denies the allegations.

#### **Particulars**

No such express statements were made.

The statement of claim provides no particulars upon which the alleged representation ought be implied or inferred.

82. As to the matters alleged in paragraph 82 of the statement of claim, Hutchison:

82.1. Repeats paragraphs 79, 80 and 81 above in respect of the allegations that Cudeco and Hutchison made the statements alleged and repeats the denials therein;

82.2. denies that Hutchison made representations thereby;

#### **Particulars**

Hutchison did not manage and was not responsible for Cudeco's ASX compliance or announcements.

Hutchison's involvement was solely as a director.

Hutchison does not otherwise recall and does not have access to the books and records of Cudeco to further particularise the circumstances of Cudeco's disclosure or alleged non disclosure over the relevant period.

82.3. Further denies that Hutchison made continuing representations because Hutchison was not able to control the issue or content of ASX announcements by Cudeco at all or alternatively from his termination as interim managing director on 19 May 2016;

82.4. Otherwise denies the matters alleged in paragraph 82 because:

82.4.1. The statements made by Cudeco which are alleged to form the FY2017 Representations were:

82.4.1.1. statements conveying independent opinions in respect of or based on the Rocklands ore reserve at the dates they were made, in respect of which Cudeco had obligations to update the market in their quarterly and annual reports;

82.4.1.2. statements conveying the financial position of Cudeco in respect of the period for which they were made, which representations were as to a point in time and were not of a continuing character;

82.5. Further or alternatively says that developments and changes in the planning and operation of the Rocklands Group Copper Project were disclosed by Cudeco pursuant to the following ASX announcements and consequently denies the matters alleged in paragraph 82 or alternatively says that the alleged representations were qualified or corrected:

82.5.1. On or about 31 October 2017 by the FY2017 Annual Report p 96 New Information, and inclusion only revenue from production and sale of copper products;

82.5.2. On or about 29 November 2017 by the ASX announcement "Presentation to Annual General Meeting" p 15 immediate goals include "commission cobalt circuit", p 32 looking forward regarding investigation of cobalt circuit and finding a buyer for pyrite/ cobalt product;

82.5.3. On or about 29 November 2017 by the ASX announcement "Chairman's Address to AGM" p 3-4 as to working with potential customers to explore the prospect for additional revenue from production of cobalt;

82.5.4. On or about 27 December 2017 by the December 2017 Announcement p 1;

82.5.5. On or about 31 January 2018 by the 2Q2018 Report p 2-3 as to processing issues, and p 4 as to production and sale of copper products alone;

82.5.6. On about 23 February 2018 by the ASX Announcement "Update on Non Compliance ..." which restated that Cudeco would not be able to make a 30 June 2017 ore reserve statements until about 15 March 2018.

83. As to the matters alleged in paragraph 83 of the statement of claim, Hutchison:

83.1. Repeats paragraphs 79 to 81 above in respect of the allegations that Cudeco and Hutchison made the representations alleged and repeats the non admissions and denials therein;

And otherwise:-

83.2. admits that Cudeco's conduct which is alleged to constitute the FY2017 Representations was in trade or commerce;

83.3. Admits the matters alleged in subparagraph 83.2(a)

83.4. Denies the matters alleged in subparagraph 83.2(b) because:

83.4.1. Cudeco's positive conduct was intended to comply with the ASX Listing Rules, and was not intended to influence people in relation to decisions regarding Cudeco shares;

83.4.2. Cudeco's omissions were not intended to influence people in relation to decisions regarding Cudeco shares;

83.5. Admits the matters alleged in subparagraph 83.3.

#### **J. True position in 2017**

84. As to the matters alleged in paragraph 84 of the statement of claim, Hutchison:

84.1. Repeats paragraphs 38 to 42 and 64.1 above and repeats the denials therein;

84.2. Otherwise does not know and therefore cannot admit the matters alleged in paragraph 84 of the statement of claim.

#### **Particulars**

Hutchison requires expert accounting evidence to address the application and effect of the pleaded AASB standards.

#### **K. 2017 Contraventions**

##### ***K.1 FY2017 Continuous Disclosure Contraventions***

85. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 85 of the statement of claim because of the matters pleaded in paragraph 84 above.

86. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 86 of the statement of claim because of the matters pleaded in paragraphs 84 to 85 above.

##### ***K.2 FY2017 Representations – misleading and deceptive conduct***

87. As to the matters alleged in paragraph 87 of the statement of claim, Hutchison:
- 87.1. repeats paragraphs 79 and 80.1 above, repeats the denials therein and consequently denies the matters alleged as regards Hutchison;
  - 87.2. otherwise repeats paragraphs 38 to 42 and 64 above, repeats denials therein and consequently denies the allegations;
  - 87.3. says that if the representations were those of Hutchison he had reasonable grounds for making them.

#### **Particulars**

Hutchison relied on board papers and other documents provided to him which were consistent with the subject matter of the representations.

Hutchison does not have access to the books and records of Cudeco, which he requires to identify those documents.

88. As to the matters alleged in paragraph 88 of the statement of claim, Hutchison:
- 88.1. repeats paragraph 80.3 above, repeats the denial therein and consequently denies the matters alleged as regards Hutchison;
  - 88.2. otherwise repeats paragraphs 38 to 42, 64, 65 and 84 above, repeats the non admissions and denials therein and consequently denies the allegations;
  - 88.3. says that if the representations were those of Hutchison he had reasonable grounds for making them.

#### **Particulars**

Hutchison relied on board papers and other documents provided to him which were consistent with the subject matter of the representations.

Hutchison does not have access to the books and records of Cudeco, which he requires to identify those documents.

89. As to the matters alleged in paragraph 89 of the statement of claim, Hutchison:
- 89.1. repeats paragraph 82 above, repeats the denials therein and consequently denies the matters alleged as regards Hutchison;
  - 89.2. otherwise repeats paragraphs 87 to 88 above and consequently denies the allegations.

### ***K.3 FY2017 Representations – false statement contraventions***



90. As to the matters alleged in paragraph 90 of the statement of claim, Hutchison repeats paragraphs 38 to 39 and/or 41, and 64, repeats the non admissions and denials therein and consequently denies the allegations.
91. As to the matters alleged in paragraph 91 of the statement of claim, Hutchison repeats paragraphs 38 to 39 and/or 41, and 64 above, repeats the non admissions and denials therein and consequently denies the allegations.
92. As to the matters alleged in paragraph 92 of the statement of claim, Hutchison:
- 92.1. Repeats paragraphs 82 and 64.1 above and repeats the non admissions and denials therein;
- 92.2. otherwise does not know and therefore cannot admit the matters alleged in therein.
93. As to the matters alleged in paragraph 93 of the statement of claim, Hutchison:
- 93.1. Repeats paragraphs 43 to 45, 58 to 62, 64.1 and 66 above and repeats the non admissions and denials therein;
- 93.2. further denies that Hutchison ought reasonably have known the 2Q17 Representations and 3Q2017 Representations were false because after his termination as interim managing director on 19 May 2016 the information provided to him in respect of those matters was limited.

#### **Particulars**

Hutchison does not have access to the books and records of Cudeco to further particularise the limits of the relevant information provided to him.

- 93.3. otherwise:
- 93.3.1. denies that Hutchison made the Representations;
- 93.3.2. denies the allegations.
94. As to the matters alleged in paragraph 94 of the statement of claim, Hutchison:
- 94.1. Repeats paragraphs 90 to 93 above and repeats the non admissions and denials therein;
- 94.2. Consequently:
- 94.2.1. denies that Hutchison made or disseminated the relevant statements or information;
- 94.2.2. otherwise denies the allegations therein;

94.3. further denies that Hutchison's relevant conduct:

94.3.1. breached s 1041E of the Corporations Act because of the matters pleaded in paragraphs 93.2 above;

94.3.2. breached s 12DB(1)(a) of the ASIC Act or s 29(1)(b) of the ACL because the representations were not representations as to the standard, quality, value or grade of relevant services.

**L. Market effects of FY2017 Contravening Conduct**

95. As to the matters alleged in paragraph 95 of the statement of claim, Hutchison:

95.1. Repeats paragraphs 64.1, 86, 89 and 94 above and repeats the non admissions and denials therein;

95.2. Otherwise denies the matters alleged therein.

**Particulars**

Hutchison repeats and relies on paragraph 64.1 above.

Hutchison otherwise requires expert accounting evidence to address the application and effect of the pleaded AASB standards.

**IV. CASE AGAINST KPMG (OMITTED)**

96. Paragraphs 96 to 160 of the statement of claim do not make allegations against Hutchison and he is not required to plead thereto.

97. Paragraph numbers 98 to 160 of this defence are intentionally omitted.

**V. LOSS AND DAMAGE**

**A. CORRECTIVE DISCLOSURE**

**A.1 December 2017 partial disclosure**

161. As to the matters alleged in paragraph 161 of the statement of claim, Hutchison:

161.1. admits that Cudeco made the statements alleged therein;

161.2. further says:

161.2.1. those parts of the December 2017 Announcement alleged at paragraph 161.3 were incorrect for the reasons pleaded at paragraphs 38 to 40 above;

161.2.2. Hutchison does not know the content of the "Updated Mine Plan" nor whether non-alignment was identified in March 2017.

### **Particulars**

Hutchison does not recall and does not have access to the books and records of Cudeco to determine the matters stated in 161.2.2.

162. As to the matters alleged in paragraph 162 of the statement of claim, Hutchison:

162.1. as to paragraph 162.1:

162.1.1. Says that the December Partial Disclosure related to the ore reserve at Rocklands, and to the revenue able to be generated from Rocklands;

162.1.2. Does not plead to the KPMG-related conduct as it makes no allegations against him;

162.1.3. otherwise repeats paragraphs 57, 76 and 95 above, and the denials made in respect of the conduct alleged;

162.2. admits the matters alleged in paragraph 162.2;

162.3. as to paragraph 162.3:

162.3.1. Says that the December Partial Disclosure qualified, supplemented or partly corrected information available to the Market related to the ore reserve at Rocklands, and to the revenue able to be generated from Rocklands;

162.3.2. otherwise repeats paragraph 162.1 and consequently denies the matters alleged;

162.4. does not know and therefore cannot admit the matters alleged in paragraph 162.4;

162.5. does not know and therefore cannot admit the matters alleged in paragraph 162.5.

### **A.2 March 2018 partial disclosure**

163. As to the matters alleged in paragraph 163 of the statement of claim, Hutchison:

163.1. says that CuDeco's shares entered a trading halt on or about 13 March 2018;

- 163.2. otherwise does not know and therefore cannot admit the matters alleged.
164. Hutchison admits the matters alleged in paragraph 164 of the statement of claim.
165. As to the matters alleged in paragraph 165 of the statement of claim, Hutchison:
- 165.1. as to paragraph 165.1:
- 165.1.1. Says that the March Partial Disclosure related to the ore reserve at Rocklands, and to the revenue able to be generated from Rocklands;
- 165.1.2. otherwise repeats the non admissions and denials made in respect of the conduct alleged in paragraph 165.1 and consequently cannot admit the matters alleged;
- 165.2. admits the matters alleged in paragraph 165.2;
- 165.3. as to paragraph 165.3:
- 165.3.1. Says that the December Partial Disclosure qualified, supplemented or partly corrected information available to the Market related to the ore reserve at Rocklands, and to the revenue able to be generated from Rocklands;
- 165.3.2. otherwise repeats paragraph 165.1 and consequently cannot admit the matters alleged.
166. Hutchison admits the matters alleged in paragraph 166 of the statement of claim.
167. As to the matters alleged in paragraph 167 of the statement of claim, Hutchison:
- 167.1. denies the matters alleged in paragraph 167.1 because Cudeco stated that it was temporarily suspending mining and processing operations to allow for critical maintenance work;
- 167.2. further says that suspension in fact occurred in September 2018
- 167.3. otherwise admits the matters alleged.
168. Hutchison admits the matters alleged in paragraph 168 of the statement of claim.
169. Hutchison admits the matters alleged in paragraph 169 of the statement of claim.
170. Hutchison admits the matters alleged in paragraph 170 of the statement of claim.
171. Hutchison admits the matters alleged in paragraph 171 of the statement of claim.

172. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 172.

173. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 173.

**B. CONTRAVENING CONDUCT CAUSED GROUP MEMBERS' LOSS**

174. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 174.

**B.1 Market Conditions**

175. As to the matters alleged in paragraph 175 of the statement of claim, Hutchison:

175.1. admits the matters alleged in paragraph 175.1;

175.2. admits the matters alleged in paragraph 175.2;

175.3. as to the matters alleged in paragraphs 175.3, repeats and relies on the matters pleaded in paragraph 18 above;

175.4. does not know and therefore cannot admit the matters alleged in paragraph 175.4;

175.5. as to the matters alleged in paragraph 175.5:

175.5.1. Does not plead to the KPMG-related conduct as it makes no allegations against him;

175.5.2. otherwise repeats paragraphs 57, 76 and 95 above, and the denials made in respect of the conduct alleged;

175.6. as to the matters alleged in paragraph 175.6:

175.6.1. denies the matters alleged in paragraph 175.6(a)(i) and (ii) because of the matters pleaded in paragraph 46 and 56 above;

175.6.2. does not admit the matters alleged in paragraph 175.6(a)(iii) and (iv) because of the matters pleaded in paragraphs 67 and 86 above;

175.7. as to the matters alleged in paragraph 175.7:

175.7.1. denies the matters alleged in paragraph 175.7(a) to (e) and (g) because of the matters pleaded in paragraphs 49, 54, 55, 70, 75 and 94 above;

175.7.2. does not admit the matters alleged in paragraph 175.7(f) because of the matters pleaded in paragraph 89 above;

175.7.3. Does not plead to the KPMG-related contraventions as it makes no allegations against him.

**B.2 Market-based causation – market-based acquisitions**

176. As to the matters alleged in paragraph 176 of the statement of claim, Hutchison:

176.1. repeats and relies on his earlier non admissions and denials in respect of the Market Contraventions;

176.2. says that:

176.2.1. the market was aware of the matters pleaded at paragraph 36.5 above which constituted disclosure or alternatively partial disclosure of the subject matter of the Market Contraventions;

176.2.2. the market price of Cudeco shares declined throughout the Relevant Period;

176.2.3. consequently the market had priced in wholly or in part the subject matter of the Market Contraventions;

176.3. otherwise does not know and therefore cannot admit the matters alleged.

177. As to the matters alleged in paragraph 177 of the statement of claim, Hutchison:

177.1. repeats and relies on his earlier non admissions and denials in respect of the Disclosure Contraventions and Misleading Conduct Contraventions;

177.2. says that:

177.2.1. the market was aware of the matters pleaded at paragraph 36.5 above which constituted disclosure or alternatively partial disclosure of the subject matter of the Disclosure Contraventions and the Misleading Conduct Contraventions;

177.2.2. the market price of Cudeco shares declined throughout the Relevant Period;

177.2.3. consequently the market had priced in wholly or in part the subject matter of the Disclosure Contraventions and the Misleading Conduct Contraventions;

177.3. otherwise does not know and therefore cannot admit the matters alleged.

**B.3 Market based causation – Rights Issue**

178. As to the matters alleged in paragraph 178 of the statement of claim, Hutchison:

178.1. Says that the opening and closing dates of the Rights Issue offer were 20 April 2016 and 6 May 2016 and consequently denies the allegations as to the dates Cudeco invited acquisition of shares;

178.2. Otherwise admits the matters alleged.

179. As to the matters alleged in paragraph 179 of the statement of claim, Hutchison:

179.1. admits the matters alleged at paragraphs 179.1 to 179.2;

179.2. denies the matters alleged at paragraphs 179.3 to 179.4 because of the matters pleaded in paragraphs 36, 46 and 56 above.

#### **B.4 Reliance**

180. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 180.

181. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 181.

#### **B.5 Loss and damage**

182. Hutchison does not know and therefore cannot admit the matters alleged in paragraph 182.

### **VI. ENTITLEMENT TO RELIEF**

183. Hutchison does not plead to paragraph 183 as it makes no allegations against him.

184. As to the matters alleged in paragraph 184 of the statement of claim, Hutchison:

184.1. Does not plead to the allegations against Cudeco, Chen and KPMG;

184.2. Denies the matters alleged against him in accordance with his earlier denials of the contraventions alleged.

185. As to the matters alleged in paragraph 185 of the statement of claim, Hutchison:

185.1. denies the matters alleged in paragraph 185 because of his earlier denials of contravention of s 728 of the Corporations Act;

185.2. in the alternative says that:

185.2.1. he made all inquiries that were reasonable in the circumstances;

185.2.2. thereafter believed on reasonable grounds that the prospectus was not misleading nor deceptive nor contained relevant omissions;

185.2.3. pursuant to s 731 of the Corporations Act, Hutchison consequently bears no liability under s 729 of the Corporations Act

#### **Particulars**

Hutchison referred to and relied inter alia on the 2015 Ore Reserves Statement, the Feasibility and the Company's then-existing mine plan in respect of the Prospectus.

Hutchison does not have access to the books and records of Cudeco, which he requires to identify other management reports, board papers and other documents which record or constitute the subject matter of his inquiries.

### **V CONTRIBUTORY NEGLIGENCE, PROPORTIONATE LIABILITY AND RELIEF**

186. If Hutchison has contravened s 1041H of the Corporations Act or 12DA of the ASIC Act by making the Rocklands Representations, the FY2016 Representations or the FY2017 Representations or in any other manner alleged, then:

186.1. any group member who, in buying or selling Cudeco shares:

186.1.1. failed to read or take into account the matters pleaded in paragraph 28.4 above;

186.1.2. did not review the announcements pleaded in paragraph 36.5 above (or such of those announcements as existed at the time of their decision as to whether to buy or sell shares in Cudeco); and/or

186.1.3. failed to identify or act on the withdrawal, qualification or correction to the alleged representations contained therein; -

failed to take reasonable care in relation that purchase or sale of Cudeco shares;

186.2. Hutchison did not intend to cause loss or damage arising from the purchase or sale of Cudeco shares and did not act fraudulently;

#### **Particulars**

Hutchison sought to promote the interests of the Company and shareholders at all times in his actions as board member, interim managing director and interim chairman.



Hutchison does not have access to the books and records of Cudeco, which he requires to identify further particulars.

186.3. In the premises of this paragraph the damages recoverable by any group member who falls within the criteria of 186.1 above must be reduced to the extent the Court thinks just and equitable to account for the group member's share of responsibility for their loss, pursuant to s 1041I(1B) of the Corporations Act, s 12GF(1B) of the ASIC Act, s 137B of the *Competition and Consumer Act 2010 (Cth)* and ss 26 of the *Wrongs Act 1958 (Vic)*.

#### Particulars

Hutchison will provide further particulars of group member conduct and appropriate reduction following discovery and provision of evidence.

187. In the Relevant Period Cudeco had the following further directors (**Further Directors**):

187.1. Dr Noel White as non-executive chairman until his resignation on or about 16 February 2017;

187.2. Dr Chen until his resignation on or about 12 February 2017, who was managing director from 19 May 2016 until his resignation;

187.3. Paul Keran, non-executive director;

187.4. Hongwei Liu, non-executive director;

187.5. Zhijun Ma, non-executive director

187.6. Zhu Mu Po, alternate director to Zhijun Ma

187.7. Zhaohui Wu, non-executive director

187.8. Wang Chiwei, non-executive director from 12 January 2017;

187.9. Benjamin Zhai, non-executive director from 18 May 2017.

188. Any liability of Hutchison:

188.1. arising under s 1041H and 1041I of the Corporations Act is apportionable pursuant to ss 1041L and 1041N of the Corporations Act;

188.2. arising under s 12GF of the ASIC Act is apportionable pursuant to ss 12GP and 12GR of the ASIC Act;

- 188.3. arising under s 236 of the ACL is apportionable pursuant to s 87CD of the *Competition and Consumer Act 2010 (Cth)* and/or ss 24AF, 24AH and 24AI of the *Wrongs Act 1958 (Vic)*.
189. If Hutchison has contravened s 1041H of the Corporations Act or 12DA of the ASIC Act or s 18 of the ACL by making the Rocklands Representations, the FY2016 Representations or the FY2017 Representations and has incurred liability thereby, then:
- 189.1. Each of Cudeco, each of the Further Directors who was a director at the time of the relevant contravention, and persons with responsibility for managing ASX compliance, is a concurrent wrongdoer in relation to the Rocklands Representations, the FY2016 Representations or the FY2017 Representations in that:
- 189.1.1. Hutchison's liability derives from his approval of ASX announcements as a member of the Board of Cudeco;
- 189.1.2. Cudeco and the Board approved the said announcements;
- 189.1.3. Persons within Cudeco other than Hutchison, being the company secretary who was Bruno Bamonte until 18 May 2017 and thereafter Leni Stanley during the Relevant Period, managed and were responsible for Cudeco's ASX compliance and announcements.

#### **Particulars**

The Company Secretary was responsible for identifying matters which required ASX disclosure, for drafting or assistance with managing the drafting of announcements, and for consulting with the Board and thereafter releasing the announcement, or where required recommending the announcement to and ensuring its approval or adoption by the Board.

- 189.1.4. in the premises alleged in the statement of claim to establish liability for Hutchison, Cudeco, each of the Further Directors and the persons with responsibility for managing ASX compliance contravened s 1041H of the Corporations Act or 12DA of the ASIC Act or s 18 of the ACL in a like manner to Hutchison's contraventions;
- 189.2. in respect of the liability of Hutchison, Cudeco and the Further Directors and the Company Secretaries:

- 189.2.1. Cudeco bears primary liability as the entity by which and further or alternatively on behalf of which the representations were made by directors acting in the course of their duties;
- 189.2.2. The company secretaries bear proportionately greater responsibility than ordinary board members;
- 189.2.3. In the period to Hutchison's termination as interim managing director, the liability of Hutchison and the Further Directors is otherwise equal in that Hutchison as interim managing director ensured that the Board was informed of matters relevant to the said representations and the board members participated equally in approval of ASX announcements;
- 189.2.4. In the period from Hutchison's termination as interim managing director, Hutchison bears less responsibility than the replacement managing director and other board members as Hutchison:
- 189.2.4.1. was provided limited information as to matters the subject of the FY 2016 Representations and the FY2017 Representations;
- 189.2.4.2. had no or a limited influence on the making of the said representations;
- 189.2.5. In the period from Hutchison's appointment as interim chairman, the liability of Hutchison and the Further directors is otherwise equal in that Hutchison as interim chairman received the same information and advice from management and participated equally in approval of ASX announcements;
- 189.3. KPMG is a concurrent wrongdoer in respect of the FY2016 Annual Report Impairment Statement, the FY2016 Financial Report Representations and the FY2017 Financial Report Representations in that:
- 189.3.1. The FY2016 Annual Report Impairment Statement, the FY2016 Financial Report Representations and the FY2017 Financial Report Representations for part of the Rocklands Representations, the FY2016 Representations and the FY2017 Representations;
- 189.3.2. KPMG committed the KPMG FY2016 Misleading Conduct Contravention and failed to correct or qualify it in the manners pleaded at paragraphs 123 to 126 of the Statement of claim;

- 189.3.3. KPMG committed the KPMG FY2017 Misleading Conduct Contravention and failed to correct or qualify it in the manners pleaded at paragraphs 144 to 147 of the statement of claim;
- 189.3.4. KPMG's said contraventions caused the FY2016 KPMG Inflation and the FY2016 KPMG Inflation;
- 189.3.5. Group Members acquired share in the market affected by the said contraventions and in reliance on the FY2016 Annual Report Impairment Statement, the FY2016 Financial Report Representations and the FY2017 Financial Report Representations, leading to loss and damage, as pleaded at paragraphs 174 to 177 and 180 to 182 of the statement of claim;
- 189.4. Any financial advisor of a group member who, in advising on the buying or selling Cudeco shares:
- 189.4.1. failed to read or take into account the matters pleaded in paragraph 28.4 above;
- 189.4.2. did not review the announcements pleaded in paragraph 36.5 above (or such of those announcements as existed at the time of their advice to the group member); or
- 189.4.3. failed to identify the withdrawal, qualification or correction to the alleged representations; or
- 189.4.4. Failed to advise their client of the matters in 189.4.1 to 189.4.2 prior to advising the group member on the purchase or sale of Cudeco shares;-
- is a concurrent wrongdoer in that they breached their common law and/or contractual (whether express or implied) duty to exercise reasonable skill and care in giving advice to the said group member.

### **Particulars**

Particulars of apportionment will be given following discovery and provision of evidence.

190. In the premises of paragraphs 187 to 189, any liability to group members arising from the Rocklands Representations, the FY2016 Representations or the FY2017 Representations must be apportioned amongst Hutchison and the concurrent wrongdoers in such proportion as the Court sees fit to reflect their blameworthiness and causative potency of the conduct of their conduct.

191. If Hutchison has contravened s 1041E or s 1041H of the Corporations Act as alleged, then:

191.1. Hutchison has acted honestly;

**Particulars**

Hutchison repeats and relies on paragraphs 68.2, 69.3, 87.3, 88.3 and 185.2.

Hutchison sought to progress the development of the Rockland Project in accordance with the Feasibility Study in the circumstances as they developed.

Hutchison acted as part of the Board of Cudeco in accordance with Board decision, and in accordance with advice and actions of those tasked with ASX compliance.

Hutchison does not have access to the books and records of Cudeco, which he requires for particulars.

191.2. Having regard to all the circumstance of the case, including Hutchison's varying levels of control of or engagement in the affairs of Cudeco pleaded at 189.2.3 to 189.2.5 above, Hutchison ought fairly to be excused for contraventions either wholly or in the periods pleaded in at 189.2.4 and/or 189.2.5 above; -

and pursuant to ss1041I(4) and 1317S of the Corporations Act, the Court should relieve Hutchison for liability for any of his contraventions, wholly or part.

**Particulars**

Hutchison does not have access to the books and records of Cudeco, which he requires to particularise all of the relevant circumstances.

Date: 31 March 2023




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Signed by Mark Steele  
Lawyer for the Second Respondent

This pleading was prepared by Martin Taylor of Counsel

### **Certificate of lawyer**

I MARK STEELE certify to the Court that, in relation to the defence filed on behalf of the Second Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 31 March 2023



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Signed by Mark Steele  
Lawyer for the Second Respondent

**Schedule of Parties**

**CuDeco Limited (receivers and managers appointed) (in liquidation) ACN 000 317 251**

First Respondent

**Peter Robert Hutchison**

Second Respondent

**Dianmin Chen**

Third Respondent

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

Fourth Respondent