

NOTICE OF FILING

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
Court of Filing FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 10/03/2023 5:46:18 PM AEDT
Date Accepted for Filing: 10/03/2023 5:46:24 PM AEDT
File Number: VID649/2018
File Title: Vince Impiombato, and Klemweb Nominees Pty Ltd as trustee for the Klemweb Superannuation Fund v BHP Group Ltd
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Form 33
Rule 16.32



Defence

No. VID 649 of 2018

Federal Court of Australia
District Registry: Victoria
Division: General

VINCE IMPIOMBATO AND KLEMWEB NOMINEES PTY LTD (AS TRUSTEE FOR THE KLEMWEB SUPERANNUATION FUND)

Joint Applicants

BHP GROUP LIMITED (ACN 004 028 077)

Respondent

In response to the Amended Consolidated Statement of Claim dated 7 September 2020 (ACSOC), the Respondent pleads as follows.

Filed on behalf of (name & role of party) BHP GROUP LIMITED (ACN 004 028 077), Respondent

Prepared by (name of person/lawyer) _____

Law firm (if applicable) Herbert Smith Freehills

Tel +61 2 9225 5000 Fax +61 2 9322 4000

Email jason.betts@hsf.com

Address for service ANZ Tower 161 Castlereagh Street SYDNEY NSW 2000
(include state and postcode)

105638215

[Form approved 01/08/2011]

NOTE

- A. Unless otherwise stated, terms defined in the ACSOC have the same meanings when used in this Defence to the ACSOC.
- B. Headings and definitions are adopted from the ACSOC for ease of reference and are not treated as part of the pleadings.
- C. For the avoidance of doubt, the Respondent does not plead to the headings or definitions employed by the Joint Applicants and in particular does not plead to (and does not admit) headings or definitions which incorporate characterisations of conduct.
- D. In this Defence, where the Respondent pleads that it "*Does not know and therefore does not admit*" an allegation:
- (1) "*due to the unavailability of BHP Brasil representatives*", it does so on the basis that it does not have access to instructions from Randolph, Wilson, Zweig, Beck, Fernandes, Ferreira, Cardoso, Tony Ottaviano (a director nominated by BHP Billiton Brasil Ltda (**BHP Brasil**) on Samarco's board of directors from about August 2015 to the end of the Relevant Period) (**Ottaviano**) due to ongoing criminal appeal proceedings in Brazil.
 - (2) "*due to it concerning a Samarco management matter*", it does so on the basis that the allegation concerns a matter which was the responsibility of the management of Samarco Mineração S.A. (**Samarco**), and is not within the knowledge of the Respondent, in the circumstances referred to at paragraph 48(c) below.

A. THE JOINT APPLICANTS AND GROUP MEMBERS

1. It does not plead to paragraph 1 as it makes no allegation against the Respondent.
2. It admits subparagraph 2(a), but does not plead to subparagraph 2(b) as it makes no allegation against the Respondent.
3. As to paragraph 3, it:
 - (a) as to subparagraph 3(a), says that the entity formerly known as BHP Group Plc and BHP Billiton Plc, referred to in subparagraph 3(a)(ii), is now known as BHP Group (UK) Ltd, and otherwise does not plead to the subparagraph as it makes no material allegation against the Respondent;
 - (b) as to subparagraph 3(b), does not plead to the subparagraph as it makes no material allegation against the Respondent; and
 - (c) as to subparagraph 3(c), denies that the Joint Applicants or Group Members have suffered loss or damage as pleaded in the subparagraph.
4. It does not know and therefore does not admit the paragraph.

B. BHP LTD

5. It admits paragraph 5, save that the reference in paragraph 5(c)(iv) to s 764(1)(a) of the *Corporations Act 2001* (Cth) (**Corporations Act**) should be a reference to s 764A(1)(a).

C. BHP LTD'S CONTINUOUS DISCLOSURE OBLIGATIONS

6. It admits paragraph 6.
7. It admits paragraph 7.

D. BHP PLC

8. As to paragraph 8, it:
 - (a) says that at all material times up to around 22 November 2018, BHP LSE Shares were traded on the LSE under the designation "BLT";
 - (b) says that at all material times up to around 22 November 2018, BHP JSE Shares were traded on the JSE under the designation "BIL"; and
 - (c) otherwise admits the paragraph.

E. BHP GROUP

E.1 DLC Structure and Management

9. As to paragraph 9, it:

- (a) says that BHP Ltd and BHP Plc operated under the DLC Structure at all material times from 29 June 2001 to 28 January 2022; and
- (b) otherwise admits the paragraph.

10. As to paragraph 10, it says that:

- (a) as to subparagraphs 10(a) and 10(b), it admits that at all material times from 29 June 2001 to 28 January 2022, BHP Ltd and BHP Plc operated with identical boards of directors which comprised the same individuals and a single unified management team, including the BHP GMC (as defined);
- (b) as to subparagraph 10(c), it:
 - i. admits that at all material times from 29 June 2001 to 28 January 2022, clause 3.1(a) of the DLC Structure Sharing Agreement provided that where the 'Equalisation Ratio' (as defined in that agreement) was 1:1, a holder of one 'BHP Ordinary Share' and a holder of one 'Billiton Ordinary Share' shall, as far as practicable:
 - A. receive equivalent economic returns; and
 - B. enjoy equivalent rights as to voting in relation to 'Joint Electorate Actions' (as defined in that agreement);
 - ii. otherwise denies the subparagraph; and
- (c) otherwise admits the paragraph.

E.2 Persons alleged to be officers of BHP Ltd

11. As to paragraph 11, it:

- (a) as to subparagraph 11(a):
 - i. says that Randolph was a member of the BHP GMC from 11 July 2007 to 10 May 2013; and
 - ii. otherwise admits the subparagraph;
- (b) as to subparagraph 11(b):
 - i. says that Randolph was Chief Executive, Ferrous & Coal from about 11 July 2007 to 10 May 2013; and

- ii. otherwise admits the subparagraph;
- (c) as to subparagraph 11(c):
- i. admits that Randolph was an executive officer of the Respondent for the purposes of ASX Listing Rule 19.12 (as in force during the Relevant Period) at all times from the start of the Relevant Period up to 30 April 2013;
 - ii. admits that Randolph was an officer of the Respondent for the purposes of ASX Listing Rule 19.12 at all times from 1 May 2013 to 10 May 2013; and
 - iii. otherwise denies the subparagraph.
12. As to paragraph 12, it:
- (a) as to subparagraph 12(a):
- i. says that Ashby was President, Iron Ore from around 1 March 2005 to 29 March 2012; and
 - ii. otherwise admits the subparagraph; and
- (b) denies subparagraph 12(b).
13. As to paragraph 13, it:
- (a) as to subparagraph 13(a):
- i. says that Wilson's engagement as President, Iron Ore commenced on about 30 March 2012; and
 - ii. otherwise admits the subparagraph;
- (b) as to subparagraph 13(b):
- i. says that Wilson's membership on the BHP GMC commenced on 10 May 2013; and
 - ii. otherwise admits the subparagraph; and
- (c) as to subparagraph 13(c):
- i. admits that Wilson was an officer of the Respondent for the purposes of ASX Listing Rule 19.12 at all times from 10 May 2013 to the end of the Relevant Period; and
 - ii. otherwise denies the subparagraph.

14. As to paragraph 14, it:
 - (a) as to subparagraph 14(a):
 - i. says that Zweig was Vice President, Strategy and Development, Iron Ore, from about 24 February 2012 to 31 October 2014; and
 - ii. otherwise admits the subparagraph; and
 - (b) denies subparagraph 14(b).
15. As to paragraph 15, it:
 - (a) admits subparagraph 15(a); and
 - (b) denies subparagraph 15(b).
16. As to paragraph 16, it:
 - (a) as to subparagraph 16(a):
 - i. says that Fernandes was General Manager, Business Development Brazil & Americas (Iron Ore) from about 30 May 2012 to 21 September 2015;
 - ii. says that Fernandes had the title of Director Samarco JV (Samarco) for BHP Brasil Iron Ore from about 22 September 2015 to the end of the Relevant Period (but remained, as he had been from about December 2012, an alternate member of the Samarco board of directors); and
 - iii. otherwise denies the subparagraph; and
 - (b) denies subparagraph 16(b).
17. It admits paragraph 17.
18. As to paragraph 18, it:
 - (a) admits the paragraph in respect of the Relevant Period insofar as it applies to:
 - i. Randolph from 8 August 2012 to 10 May 2013; and
 - ii. Wilson from 10 May 2013 to 9 November 2015;
 - (b) says further that the definition of “aware” under ASX Listing Rule 19.12:
 - i. operates in respect of information which an officer “*has, or ought reasonably to have come into possession of the information in the course of the performance of their duties as an officer of that entity*”; and

- ii. only applies to information which the officer “has”, or which the company has, and which thereby ought reasonably to have come into the possession of the officer, within the terms of ASX Listing Rule 19.12; and
- (c) otherwise denies the paragraph.

F. BHP’S SAMARCO ASSET

- 19. It admits paragraph 19.
- 20. It denies paragraph 20 and says further that:
 - (a) from August 2012 to May 2013, it had eight business units (called ‘Customer Sector Groups’) comprising Petroleum; Aluminium and Nickel; Base Metals; Diamonds and Specialty Products; Iron Ore; Manganese; Metallurgical Coal; and Energy Coal;
 - (b) from May 2013 to May 2015, it had five business units (called ‘Businesses’) comprising Petroleum and Potash; Copper; Iron Ore; Coal; Aluminium, Manganese and Nickel;
 - (c) from May 2015, it had four business units (called ‘Businesses’) comprising Petroleum and Potash; Copper; Iron Ore; Coal; and
 - (d) while, during the Relevant Period, the Respondent had a business unit with primary responsibility for the Respondent’s iron ore business, that business unit did not have sole responsibility for all of the activities or functions of the Respondent’s iron ore business.
- 21. As to paragraph 21, it:
 - (a) says that, during the Relevant Period, the Respondent’s iron ore assets comprised:
 - i. the “Western Australia Iron Ore” or “WAIO” business, which included various mines, transport and operation assets located in Western Australia; and
 - ii. a 50% ownership share in Samarco, owned via a subsidiary within the BHP Ltd corporate group, BHP Brasil; and

Particulars

Annexure A to this Defence shows the relevant corporate structure for the holding of BHP Brasil's interest in Samarco during the Relevant Period.

(b) otherwise denies the paragraph.

22. As to paragraph 22, it:

(a) as to subparagraph 22(a):

- i. refers to paragraph 21(a)(ii);
- ii. says that in 1984, the Respondent acquired Utah Marcona Corp. and as a result of that acquisition, acquired an indirect 49% share in Samarco;
- iii. says further that, from 1 July 2013, Samarco was an equity accounted investment in the BHP consolidated financial statements; and

Particulars

FY2014 Annual Report.

FY2015 Annual Report.

iv. otherwise denies the subparagraph; and

(b) denies subparagraphs 22(b) and (c).

23. It admits paragraph 23.

24. It admits paragraph 24.

25. As to paragraph 25, it:

(a) as to subparagraphs 25(a), 25(b) and 25(c), says that:

- i. as at 31 December 2013, there were only seven members on Samarco's board of directors, comprising four serving members and three alternate members;
- ii. as at 31 December 2014, there were only six members on Samarco's board of directors, comprising two serving members and four alternate members;
- iii. at times there were unequal numbers of Samarco board members appointed by Vale and BHP Brasil;

- iv. alternate members did not have the right to vote at meetings when their respective serving members were present; and
 - v. otherwise admits the subparagraphs; and
- (b) as to subparagraphs 25(d) and 25(e):
- i. admits that Samarco's board of directors had responsibility for setting company strategy, overseeing company performance and overseeing management;
 - ii. says that responsibility for managing Samarco's operations (including the Fundão Dam) rested with Samarco's executive functions as assisted and advised by its management team, including the geotechnical department (hereafter referred to as "**Samarco management**"); and

Particulars

*Samarco's most senior executive function is referred to as the "**Executive Board**" and is comprised of Samarco employees.*

- iii. otherwise denies the subparagraphs.
26. As to paragraph 26, it:
- (a) says that:
 - i. Randolph was a serving member of the Samarco board of directors until about April 2013, and was the Chairman in 2010 and 2012;
 - ii. Ashby was a serving member of the Samarco board of directors until about April 2012;
 - iii. Wilson was a serving member of the Samarco board of directors from about December 2012;
 - iv. Zweig was an alternate member of the Samarco board of directors from about December 2012;
 - v. Beck was an alternate member of the Samarco board of directors from about September 2014; and
 - vi. Fernandes was an alternate member of the Samarco board of directors from about December 2012;
 - (b) says that each of the persons referred to in the preceding subparagraph (the **BHP Brasil Representatives**) was appointed to the Samarco board of directors by BHP Brasil;

- (c) says that the appointment of the BHP Brasil Representatives to the Samarco board of directors occurred pursuant to a Shareholders' Agreement entered into between BHP Brasil and Vale and the By-Laws of Samarco; and

Particulars

Samarco Shareholders' Agreement between BHP Brasil Ltda and S.A. Mineração da Trindade – SAMITRI dated 29 June 2000 and the By-Laws of Samarco.

- (d) otherwise admits the paragraph.
27. As to paragraph 27, it:
- (a) says that during the Relevant Period, certain committees provided advice or information directly to Samarco's board of directors; and
 - (b) otherwise admits the paragraph.
28. As to paragraph 28, it:
- (a) says that during the Relevant Period, the Independent Tailings Review Board (**ITRB**) provided advice or information directly to Samarco management, including the "Dams Committee" (a committee of the Executive Board) and Samarco's geotechnical department;
 - (b) says further that the ITRB was composed of experienced geotechnical consultants appointed by Samarco management to provide independent technical review of tailings storage facilities, including their design, operation, monitoring and maintenance and closure;

Particulars

ITRB Report No. 3 to Samarco management, October 2011, p 4.

- (c) says further that the committees and organisations referred to in the paragraph had the roles pleaded (among other roles);
- (d) says further that the F&S Committee, Operations Committee and P4P Project Committee were committees of the Samarco board of directors;
- (e) says further that the Dams Committee was a committee of Samarco management; and
- (f) otherwise does not know and therefore does not admit the paragraph, due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter.

29. As to paragraph 29, it:
- (a) admits that, from July 2011, Ferreira regularly attended meetings of the Operations Committee (a committee of the Samarco board of directors);
 - (b) says further that Ferreira was an employee of BHP Brasil; and
 - (c) otherwise denies the paragraph.
30. As to paragraph 30, it:
- (a) admits that:
 - i. from December 2013, Fernandes regularly attended meetings of the Operations Committee (a committee of the Samarco board of directors);
 - ii. from December 2013, Fernandes and Cardoso regularly attended meetings of the F&S Committee (a committee of the Samarco board of directors);
 - iii. from December 2013 until its disbandment in 2014, Fernandes and Ferreira regularly attended meetings of the P4P Project Committee (a committee of the Samarco board of directors); and
 - iv. from December 2013, Wilson regularly attended meetings of the Remuneration Committee (a committee of the Samarco board of directors);
 - (b) refers to subparagraph 29(b) above and says further that Fernandes and Cardoso were each an employee of BHP Brasil; and
 - (c) otherwise denies the paragraph.

G. THE FUNDÃO DAM

G.1 Design, location and construction of the Fundão Dam

31. As to paragraph 31, it:
- (a) admits that, in October 2005, BHP announced the approval of the Third Pellet Plant Project at the Germano Complex, which would increase Samarco's annual iron ore pellet production capacity by 7.6 million tonnes;
 - (b) says that neither the Respondent nor BHP Plc invested their own funds in the Third Pellet Plant Project; and
 - (c) otherwise denies the paragraph.
32. It admits paragraph 32.

33. It admits paragraph 33.
34. It admits paragraph 34.
35. As to paragraph 35, it:
 - (a) admits subparagraph 35(a);
 - (b) as to subparagraph 35(b):
 - i. admits that, at all material times, the site of the Fundão Dam was in the proximity of the Gualaxo do Norte river in the Municipality of Mariana;
 - ii. admits that the Gualaxo do Norte river flowed into or merged downstream with the river Carmo and river Doce; and
 - iii. otherwise denies the subparagraph; and
 - (c) does not know and therefore does not admit subparagraph 35(c).
36. It admits paragraph 36.
37. It denies paragraph 37.
38. It denies paragraph 38 and says further that tailings from the operation of the Germano Complex commenced being deposited at the Fundão Dam on or around 2 December 2008.
39. As to paragraph 39, it:
 - (a) admits subparagraph 39(a);
 - (b) as to subparagraph 39(b), says:
 - i. the design of the Fundão Dam was revised over time;
 - ii. design changes regularly occur through the construction and use of major tailings dam facilities, such as the Fundão Dam; and
 - iii. the proportion of sand tailings and slime tailings deposited at the Fundão Dam was a matter to be managed by Samarco management (including the Executive Board) in light of ongoing advice received from experts (such as the ITRB);
 - (c) as to subparagraph 39(c), says:
 - i. the manner in which the Fundão Dam was operated was a matter to be managed by Samarco management (including the Executive Board) in light of ongoing advice received from experts; and

- ii. the specifications for the operation of the Fundão Dam (as documented in the Operations Manual or other Samarco management documents) was the responsibility of Samarco management (including the Executive Board) in light of ongoing advice received from experts;
- (d) as to subparagraph 39(d), says the precise area reserved for the deposit of sands at the Fundão Dam was a matter to be managed by Samarco management (including the Executive Board) in light of ongoing advice received from experts;
- (e) admits subparagraph 39(e); and
- (f) otherwise denies the paragraph.

G.2 Problems as at 8 August 2012

40. As to paragraph 40, it says that:

- (a) as to subparagraph 40(a), it:
 - i. admits that problems had emerged with the Fundão Dam prior to 8 August 2012;

Particulars

*Papers tabled before the Samarco board of directors on 22 July 2009 record that, in or around April 2009, shortly after the Fundão Dam commenced operation, seepage flows appeared on the downstream slope of Dike 1 of the Fundão Dam near the main underdrain (**Piping Incident**) (Samarco Board Meeting No. 77, Board Meeting Report, pp 50-51).*

Further particulars may be provided after discovery and/or lay and expert evidence.

- ii. says that those problems had been addressed by Samarco management as they emerged;

Particulars

Minutes of the meetings of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 22 July 2009 and 2 December 2009 record that the cause of the Piping Incident was identified as arising from a failure of the main underdrain of the Fundão Dam and, by December 2009, the Samarco board of directors accepted the various corrective

measures proposed to be implemented by Samarco management in relation to the failure of the main underdrain which had been mutually agreed by several geotechnical experts following an investigation and report (Samarco Board Meeting No. 80, Board Meeting Minutes, 2 December 2009). (See also: Samarco Board Meeting No. 77, Board Meeting Report, pp 51-53; Presentation to the Samarco Board, Fundão Tailings Dyke 1: Incident and Recovery Plan, July 2009; Samarco Board Meeting No. 77, Board Meeting Minutes, 22 July 2009; Samarco Board Meeting No. 80, Board Meeting Report).

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 12 May 2010 record that the Samarco board of directors was informed in May 2010 that the remedial actions in relation to the Piping Incident (which followed all recommendations made by Vale, the Engineer of Record, the ITRB and Andrew Robertson) had been completed (Samarco Board Meeting No. 85, Board Meeting Report; Presentation to the Samarco Board, Update of Fundão Tailings Dam, 12 May 2010; Samarco Board Meeting No. 85, Board Meeting Minutes, 12 May 2010).

Further particulars may be provided after discovery and/or lay and expert evidence.

- iii. says further that, on or around 8 August 2012, Samarco management informed the Samarco board of directors that the ITRB had held its last inspection and meeting in May 2012 and its main conclusions and recommendations included:
 - A. that the tailings disposal operation system, including the Fundão Dam, was adequate; and
 - B. the tailings governance model presented was considered adequate;

Particulars

Papers tabled before the Samarco board of directors on 8 August 2012 record a summary of the ITRB's reported

conclusions and recommendations (Samarco Board Meeting No. 108, Samarco Board Meeting Report).

- iv. says further that it is routine for tailings dams to be monitored to identify and address problems (such as the problems referred to above); and
 - v. save as addressed in subparagraphs 40(a)(i) to 40(a)(iv) above, does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (b) as to subparagraph 40(b), it:
- i. admits that, by 8 August 2012, certain changes had been made to the Original Design of the Fundão Dam;

Particulars

As recorded in a report prepared by Pimenta de Ávila for Samarco management, initially, the Fundão Dam consisted of two dike structures made of compacted dirt for the containment of tailings (Pimenta de Ávila "Fundão Tailings System Summary Report", July 2009, pp 2-3).

Papers tabled before the Samarco board of directors on 22 July 2009 record that, in response to the Piping Incident, Samarco took corrective actions for the repair of one dike (Dike 1) (Samarco Board Meeting No. 77, Board Meeting Report, p 49).

As recorded in a report prepared by Geoestável for Samarco management, the corrective actions included the construction of a stabilising berm downstream, the lowering of the reservoir upstream of Dike 1, and the construction of an itabirite block fill at the base of the downstream slope (Laudo Técnico de Segurança – Ano 2011 – Disposição de Rejeitos no Vale do Córrego Fundão – Unidade de Germano" dated June 2011, pp 6-7).

As recorded in a report prepared by Pimenta de Ávila for Samarco management, in response to a settlement observed in the Main Gallery in August 2010, Samarco constructed the new Dike "1A", located upstream of the previous temporary

Dike 1A. The slope of the new Dike 1A was reinforced in January 2011 (Pimenta de Ávila “Memória de Cálculo, Projecto de Alçamento do Novo Dique 1A”, February 2011, p 2).

As recorded in a report prepared by Geoestável for Samarco management, in January 2011, following investigations of the Main and Secondary Galleries, Samarco hired specialist companies to repair leaking joints in the Secondary Gallery and to rehabilitate the foundation of the Main Gallery through jet grouting. The works were completed in August 2012 (Geoestável Report “Laudo Técnico de Segurança – Ano 2012 – Disposição de Rejeitos no Vale do Córrego Fundão – Unidade de Germano”, dated July 2012, revised August 2012, pp 10-13).

ITRB Report No. 5 to Samarco management, October 2012, states words to the effect that the ITRB was pleased with the considerable effort that had gone into numerical modelling of the gallery remediation at Fundão, and also by the extent to which quality assurance had been performed on the remedial jet grouting (ITRB Report No. 5, October 2012, p 2).

Further particulars may be provided after discovery and/or lay and expert evidence.

- ii. says that design changes regularly occur through the construction and use of major tailings dam facilities, such as the Fundão Dam;
 - iii. refers to and repeats subparagraph 40(a) above; and
 - iv. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (c) as to subparagraph 40(c), it:
- i. refers to and repeats subparagraph 40(a) above; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;

- (d) as to subparagraph 40(d), it:
- i. admits that, between the deposition of tailings into the Fundão Dam commencing in December 2008 and 8 August 2012, the size of the Fundão Dam increased;
 - ii. admits that, by 8 August 2012, some tailings from Vale's iron ore operations near the Germano Complex had been deposited into the Fundão Dam;
 - iii. refers to and repeats subparagraph 40(a) above; and
 - iv. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (e) as to subparagraph 40(e), it:
- i. says that a common feature of major tailings dam facilities that are constructed and then used is that the nature of the use of the facility varies from its initial or original design, which is what occurred in relation to the Fundão Dam;
 - ii. refers to and repeats subparagraph 40(a)(iii) above; and
 - iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (f) as to subparagraph 40(f), it:
- i. refers to and repeats subparagraphs 39(d), 40(a)(iii) and 40(e)(i) above;
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (g) as to subparagraph 40(g), it:
- i. refers to and repeats subparagraphs 40(b)(ii) and 40(e)(i) above; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (h) as to subparagraph 40(h), it:
- i. refers to and repeats subparagraphs 40(a) to 40(g) above;

- ii. says that, on or about 8 August 2012, the Samarco board of directors was informed by Samarco management that the ITRB considered that the tailings disposal operation system was adequate and the tailings disposal governance model presented was adequate; and

Particulars

See subparagraph 40(a)(iii).

- iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (i) it does not know and therefore does not admit subparagraph 40(i) due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
 - (j) it admits subparagraph 40(j) and says further that:
 - i. in or around 2012, Samarco management engaged an outside consulting firm, YKS (a company with experience in relocating communities impacted by construction projects) to conduct a study regarding the alternatives for the Bento Rodrigues community; and
 - ii. the study, which was reported to the Samarco board of directors in the papers tabled for the August 2013 meeting, concluded that *“resistance to relocation (individual or group) and encouraged leaving of the area is high and risks can bring serious impacts on social, economic, environmental aspects as well as on Samarco’s image”*; and

Particulars

Samarco Board Meeting No. 113, Board Meeting Report, p 35.

- (k) as to subparagraph 40(k), it:
 - i. refers to and repeats subparagraphs 40(a) to 40(j) above; and
 - ii. denies the subparagraph.

G.3 Problems as at 30 September 2012

- 41. As to paragraph 41, it refers to and repeats paragraph 40 above and says further that:
 - (a) as to subparagraph 41(a), it:
 - i. refers to and repeats paragraph 40 above; and

- ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (b) as to subparagraph 41(b), it:
- i. admits that, in or around September 2012, the left abutment of the Fundão Dam had been realigned from the Original Design by moving it back;

Particulars

ITRB Report No. 5 to Samarco management, October 2012.

Samarco management internal presentation "Relocação do eixo da cota 855m", 6 September 2012.

- ii. says further that the ITRB was advised by Samarco management of changes in the location and orientation of Fundão Dam 1 (also referred to as 'Fundão Dike 1') to reduce stresses applied to the Secondary Gallery and concluded that:
 - A. this change appeared to be necessary and appropriate; and
 - B. the ITRB would review the design at its next meeting; and

Particulars

ITRB Report No. 5 to Samarco management, October 2012, p 19.

Further particulars may be provided following evidence.

- iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (c) as to subparagraph 41(c), it:
- i. refers to and repeats subparagraph 41(b) above; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (d) as to subparagraph 41(d), it:
- i. admits that the Operations Manual for the Fundão Dam was not updated to address the Setback;

Particulars

Operations Manual, 28 June 2007.

Operations Manual, 31 March 2011.

Operations Manual, 6 July 2012.

- ii. refers to and repeats subparagraph 39(c) above; and
 - iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter; and
- (e) says, as to subparagraph 41(e), that it:
- i. refers to and repeats subparagraphs 41(a) to 41(d) above; and
 - ii. denies the subparagraph.

G.4 Problems after 30 September 2012 and prior to 27 August 2014

42. As to paragraph 42, it refers to and repeats paragraphs 40 and 41 above and says further that:

- (a) as to subparagraph 42(a), it:
 - i. admits that certain problems had emerged with the Fundão Dam during the period 30 September 2012 to 27 August 2014;

Particulars

As recorded in an ITRB Report to Samarco management, a sinkhole was identified on the left abutment at the Secondary Gallery in November 2012, and a longitudinal crack was identified in the Main Gallery in January 2013 (ITRB Report No. 6, April 2013, p 6).

As recorded in VOGBR technical reports to Samarco management, resurgences were identified at Dike 1 between August 2013 and January 2015 (VOGBR, "Germano – Geral, Barragem do Fundão, Sistema de Drenagem, Drenagem Interna Complementar Relatório Técnico – Memorando" dated December 2014; VOGBR, "Germano – Geral, Barragens de Germano e Fundão, Plano de Fechamento Relatório Técnico" dated August 2015, pp 17-18).

Further particulars may be provided after discovery and/or lay and expert evidence.

- ii. says that those problems had been addressed by Samarco management as they emerged;

Particulars

As recorded in ITRB Reports to Samarco management, in response to the November 2012 sinkhole at the Secondary Gallery, Samarco carried out an inspection to confirm points of water infiltration and blocked the Secondary Gallery at one of the flutes or bellmouths. Further to this action, Samarco developed a design for the plugging of the Secondary Gallery (ITRB Report No. 6, April 2013, p 6). The plugging of the Secondary Gallery was completed in 2013 (ITRB Report No. 7, September 2013, p 9).

As recorded in an ITRB Report to Samarco management, in response to the January 2013 longitudinal crack in the Main Gallery and in light of analysis of the results of a stress and strain study on the Main Gallery which Samarco had undertaken in around May 2012, Samarco decided to seal and deactivate the Main Gallery (ITRB Report No. 6, April 2013, pp 6-7). As recorded in a Samarco Dams Committee paper, the plugging of the Main Gallery was completed at the end of 2013 (Samarco Dams Committee 3rd Meeting Ref. 2013).

*As recorded in an ITRB Report to Samarco management, due to the plugging of the Main and Secondary Galleries, further flood routing was required in addition to the Auxiliary spillway. To address this, Samarco engaged external engineering company BVP Engenharia to design and build a fourth spillway (**Fourth Spillway**) (ITRB Report No. 6, April 2013, p 7).*

Papers tabled before the Samarco board of directors on 4 April 2013 record a summary of the ITRB's reported conclusions, including that it was prudent to plug the Secondary Gallery and Main Gallery (Samarco Board Meeting No. 110, Board Meeting Report, p 30). Papers tabled before the Samarco board of directors on 4 December 2013 record an overview of "the main

projects in execution to reduce the risk level” for the Fundão Dam, including construction of the Fourth Spillway (Samarco Board Meeting No. 114, Board Meeting Company Report, 4 December 2013, p 25).

As recorded in a VOGBR report to Samarco management, Samarco implemented a drain to address a resurgence that appeared in the left abutment of Dike 1 at El. 855m in or around August 2013, and another drain to address a second resurgence and longitudinal cracks at the left abutment of Dike 1 at El. 860m in or around November 2013 (VOGBR, “Germano – Geral, Barragem do Fundão, Sistema de Drenagem, Drenagem Interna Complementar Relatório Técnico – Memorando” dated December 2014, pp 17-18).

As recorded in a VOGBR report to Samarco management, in response to two small resurgences which were identified in late 2014 at El. 950m and January 2015 at El. 955m at the right shoulder of Dike 1, Samarco developed a specific recovery project for treating resurgences, which culminated in corrective measures for these resurgences (VOGBR, “Germano – Geral, Barragens de Germano e Fundão, Plano de Fechamento Relatório Técnico” dated August 2015, pp 17-18).

Further particulars may be provided after discovery and/or lay and expert evidence.

- iii. refers to and repeats subparagraph 40(a)(iv) above;
- iv. says further that, between 30 September 2012 and 27 August 2014, the Samarco board of directors was variously informed by Samarco management that the dams were stable, operating satisfactorily or functioning properly and that the ITRB considered that dam management was well-controlled; and

Particulars

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 7 December 2012 record that Mr Terra reported to the Samarco board of directors: “the risk assessment focused on the dam operation is being carried out based on the methodology of

FMEA, Failure Modes and Effects Analysis, validated by the ITRB, "The assessments of the operating risks are performed every quarter for all of the tailings containment and water storage structures. All of dams operate routinely, with adequate freeboard (difference between the water level in the dam and the crest of the dam), and safety factors above the minimum limits established by Brazilian and international technical standards" and "in 2012, the dam safety audit reports have been officially registered pursuant to Brazilian legal requirements... All of dams were considered stable, based on the stability expert opinions according to external audit reports" (Samarco Board Meeting No. 109, Board Meeting Report; Samarco Board Meeting No. 109, Board Meeting Minutes, 7 December 2012).

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 4 April 2013 record that Mr Terra reported to the Samarco board of directors: "All of the projects planned for execution in 2012 were duly implemented and are operating satisfactorily" and "The flood crest is being periodically updated and the freeboard of the dams is within the limits of the remaining freeboard limit, along all rain season". It was noted that while a Risk Matrix for the Fundão Dam developed as part of the FMEA risk evaluation identified that 16 of the 45 "failure modes" were "above the risk level considered tolerable" (associated with the internal drainage system and spillway), the risks would be reduced with the implementation of a number of projects expected to conclude in December 2013 (for example, plugging the Main and Secondary Galleries and extending the auxiliary spillway). In addition, it was noted that all of the ITRB's recommendations had been or were in the process of being implemented (Samarco Board Meeting No. 110, Board Meeting Report; Samarco Board Meeting No. 110, Board Meeting Minutes, 4 April 2013).

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 14

August 2013 record that Mr Terra reported to the Samarco board of directors: "Every structure in the Tailings Disposal and Water Storage Systems are functioning properly [sic] and the behavior of the dams was highlighted as positive on the last ITRB report (april/2013 meeting). The report reads: "The monitoring presented indicated no risk condition for the safety of the dams" (Samarco Board Meeting No. 113, Board Meeting Report; Samarco Board Meeting No. 113, Board Meeting Minutes, 14 August 2013).

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 4 December 2013 record that Mr Terra reported to the Samarco board of directors: "Based on the recommendations and conclusions of the group of consultants of the ITRB, in the last meeting held in August 2013, all of the structures of the tailings disposal systems are operating accordingly" (Samarco Board Meeting No. 114, Board Meeting Company Report, 4 December 2013; Samarco Board Meeting No. 114, Board Meeting Minutes, 4 December 2013).

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 2 April 2014 record that Mr Terra reported to the Samarco board of directors: "The dam management for the short term was considered well controlled by the Independent Tailing Review Board" and "The main projects related to the dam system were the subject of the last Independent Tailing Review Board (ITRB) event, and in a general view those projects were considered well-conceived" (Samarco Board Meeting No. 115, Board Meeting Company Report, 2 April 2014; Samarco Board Meeting No. 115, Board Meeting Minutes, 2 April 2014).

- v. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (b) as to subparagraph 42(b), it:
- i. refers to and repeats subparagraph 40(b) above;

- ii. admits that during the period 30 September 2012 to 27 August 2014, certain changes had been made to the Original Design of the Fundão Dam; and

Particulars

Design changes in the period 30 September 2012 to 27 August 2014 included:

- *as recorded in an ITRB Report to Samarco management, the implementation of the Setback to reduce stresses applied to the Secondary Gallery, which stated words to the effect that the ITRB considered it to be necessary and appropriate (ITRB Report No. 5, October 2012 p 19).*
- *as recorded in an ITRB Report to Samarco management, the plugging of the Secondary Gallery in 2013 (ITRB Report No. 7, September 2013, p 9).*
- *as recorded in a Samarco Dams Committee paper, the plugging of the Main Gallery in 2013 (Samarco Dams Committee 3rd Meeting Ref. 2013).*
- *as recorded in a VOGBR Safety Technical Report to Samarco management, the partial construction of additional drainage as the Fundão Dam expanded, including the construction of a drain in the left abutment of Dike 1 in August 2013 to treat a resurgence and a second drain to treat an upwelling observed in November 2013, and extension of existing drains at elevations of 855 and 866m in 2014 (“Germano – Geral, Barragem Fundão, Avaliação de Estabilidade Laudo Técnico de Segurança, Relatório de Inspeção de Segurança Regular”, pp 8–9).*

Further particulars may be provided after discovery and/or lay and expert evidence.

- iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (c) as to subparagraph 42(c), it:
- i. refers to and repeats subparagraph 42(a) above; and

- ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (d) as to subparagraph 42(d), it:
- i. refers to and repeats subparagraph 42(a) above; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (e) as to subparagraph 42(e), it:
- i. refers to and repeats subparagraphs 41(b) and 42(a) above;
 - ii. admits that the Setback remained in place between 30 September 2012 and 27 August 2014; and

Particulars

*ITRB Report No. 8 to Samarco management, January 2014, p
4;*

*ITRB Report No. 12 to Samarco management, 6 April 2015, p
3.*

- iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (f) as to subparagraph 42(f), it:
- i. refers to and repeats subparagraphs 40(e)(i) and 42(a)(iv) above; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (g) as to subparagraph 42(g), it:
- i. refers to and repeats subparagraph 42(a)(iv) above; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;

- (h) as to subparagraph 42(h), it:
- i. refers to and repeats subparagraphs 39(d), 40(f) and 42(a)(iv) above; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (i) as to subparagraph 42(i), it:
- i. refers to and repeats subparagraphs 40(b)(ii), 40(e)(i) and 42(a)(iv) above; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (j) as to subparagraph 42(j), it:
- i. refers to and repeats subparagraphs 40(b)(ii), 40(e)(i) and 42(a)(iv) above;
 - ii. admits that, in or around January 2014, the ITRB recommended the installation of additional drains; and

Particulars

*ITRB Report No. 8 to Samarco management, January 2014, p
5.*

- iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (k) as to subparagraph 42(k), it:
- i. refers to and repeats subparagraphs 42(a) to 42(j) above;
 - ii. says that, between 30 September 2012 and 27 August 2014, the Samarco board of directors was variously informed by Samarco management that the dams were stable, operating satisfactorily or functioning properly and that the ITRB considered that dam management was well-controlled; and

Particulars

The particulars at subparagraph 42(a)(iv) are referred to and repeated.

- iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (l) as to subparagraph 42(l), it:
 - i. says that, on or around 14 December 2012 and 30 August 2013, Samarco issued revised Emergency Action Plans; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (m) as to subparagraph 42(m), it:
 - i. refers to and repeats subparagraph 40(j) above; and
 - ii. otherwise admits the subparagraph; and
- (n) as to subparagraph 42(n), it:
 - i. refers to and repeats subparagraphs 42(a) to 42(m) above; and
 - ii. otherwise denies the subparagraph.

G.5 Problems from 27 August 2014 onwards

43. As to paragraph 43, it refers to and repeats paragraphs 40 to 42 above, and says further:
- (a) as to subparagraph 43(a), it:
 - i. refers to and repeats paragraph 42 above;
 - ii. refers to and repeats subparagraph 43(g)(ii) below; and
 - iii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
 - (b) as to subparagraph 43(b), it:
 - i. says that cracks were observed at the Fundão Dam in late August 2014 during a routine inspection by Samarco management;

Particulars

Report prepared by Pimenta de Ávila for Samarco management, "Germano Geral, Programa de Disposição de Rejeitos, Inspeção de Campo, Relatório de Inspeção do Sistema de Disposição de Rejeitos Feita em 04 de Setembro de 2014", p 4.

- ii. refers to and repeats subparagraph 40(a)(iv) above;
 - iii. refers to and repeats subparagraph 43(g)(ii) below; and
 - iv. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (c) as to subparagraph 43(c), it:
- i. says that Pimenta de Ávila Consultoria Ltda (**Pimenta**) was an external consultant to Samarco, reporting to Samarco management;
 - ii. says that reports by Pimenta dated 15 September 2014 and 22 December 2014 refer to inspections of the Fundão Dam by Pimenta in or around September, October and December 2014;
 - iii. says that the Pimenta report dated 15 September 2014 contained words to the effect that Samarco immediately built a reinforcement embankment at the foot of the slope of the retreat, and made recommendations including that piezometers be installed and observed daily to measure liquid saturation; and

Particulars

Report prepared by Pimenta de Ávila for Samarco management, "Germano Geral, Programa de Disposição de Rejeitos, Inspeção de Campo, Relatório de Inspeção do Sistema de Disposição de Rejeitos Feita em 04 de Setembro de 2014," pp 4, 6.

- iv. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (d) as to subparagraph 43(d), it:
- i. refers to and repeats subparagraph 43(g)(ii) below; and

- ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (e) as to subparagraph 43(e), it:
- i. admits that, on or about 20 November 2014, the ITRB prepared a report to Samarco management, which stated words to the effect that the area should be filled as soon as possible in order to return the axis to its design position, that the required volume was approximately 2 million m³ and could be filled with cyclone material and/or dry tailings, that Samarco estimated that one year would be required to fill the area, and that the ITRB recommended every effort be made to complete the work on a priority basis; and

Particulars

*ITRB Report No. 11 to Samarco management, 20
November 2014, pp 10-11.*

- ii. otherwise does not know and therefore does not admit the subparagraph due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (f) as to subparagraph 43(f), it:
- i. refers to and repeats subparagraph 43(g)(ii) below; and
 - ii. otherwise does not know and therefore does not admit the subparagraph due to due to the unavailability of BHP Brasil representatives and/or it concerning a Samarco management matter;
- (g) as to subparagraph 43(g), it:
- i. refers to and repeats subparagraphs 43(a) to 43(f) above;
 - ii. says further that, from 27 August 2014 to the end of the Relevant Period, the Samarco board of directors was repeatedly informed by Samarco management that the ITRB considered that dam management was well-controlled and that the ITRB recommendations had been or were being implemented; and

Particulars

*Minutes of the meeting of the Samarco board of directors, and
papers tabled before the Samarco board of directors, on 19*

September 2014 record that Mr Vescovi reported to the Samarco board of directors: "The dam management for the short term was considered well controlled by the Independent Tailing Review Board (ITRB)" and "The main projects related to the dam system were the subject of the last Independent Tailing Review Board (ITRB) event, and in a general view those projects were considered well-conceived" (Samarco Board Meeting No. 117, Board Meeting Company Report, 19 September 2014; Samarco Board Meeting No. 117, Board Meeting Minutes, 19 September 2014).

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 10 December 2014 record that Mr Terra reported to the Samarco board of directors: "Dam management for the short term was considered well controlled by the Independent Tailing Review Board (ITRB)" and "84% of the actions recommended by the ITRB in its last report had been implemented with the remaining 16% of recommended actions on track" (Samarco Board Meeting No. 119, Board Meeting Company Report, 10 December 2014; Samarco Board Meeting No. 119, Board Meeting Minutes, 10 December 2014).

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 15 April 2015 record that Mr Terra reported to the Samarco board of directors: "Short term planning, as well as studies on physical dam stability and flood periods are on schedule. Dam management was considered well controlled by the Independent Tailing Review Board", "tailings systems are safely protected at a surplus of 23 percent above the safe reference" and that 37% of the actions recommended by the ITRB had been concluded with the remaining 63% of recommended actions on schedule (Samarco Board Meeting No. 120, Board Meeting Company Report, 15 April 2014; Samarco Board Meeting No. 120, Board Meeting Minutes, 15 April 2015).

Minutes of the meeting of the Samarco board of directors, and papers tabled before the Samarco board of directors, on 5

August 2015 record that Mr Terra reported to the Samarco board of directors: "For the tailing operations all planning, as well as studies on physical dam stability and flood periods, are on schedule. Dam management was considered well controlled by the Independent Tailing Review Board" and that 46% of the actions recommended by the ITRB had been concluded with the remaining 54% of recommended actions on time (Samarco Board Meeting No. 121, Board Meeting Company Report, 5 August 2015; Samarco Board Meeting No. 121, Board Meeting Minutes, 5 August 2015).

- iii. otherwise denies the subparagraph.

G.6 Consequential Risks

44. As to paragraph 44, it:

- (a) admits that a catastrophic failure of the Fundão Dam had the potential to cause one or more of the consequences alleged in subparagraphs (a) to (e); and
- (b) otherwise denies the paragraph.

45. As to paragraph 45, it:

- (a) admits that a prolonged interruption of operations at the Fundão Dam arising from a catastrophic failure of the Fundão Dam had the potential to cause one or more of the consequences alleged in subparagraphs (a) to (d); and
- (b) otherwise denies the paragraph.

H. CONTINUOUS DISCLOSURE CONTRAVENTIONS

H.1 Awareness of information and risks

46. As to paragraph 46, it:

- (a) as to subparagraph 46(a):
 - i. says the minutes of meetings of Samarco's board of directors from 2012 until the end of the Relevant Period record the BHP Brasil Representatives attending meetings in their capacity as serving or alternate members of the Samarco board as follows:
 - A. Randolph attended four Samarco board meetings;
 - B. Ashby attended one Samarco board meeting;

- C. Wilson attended 11 Samarco board meetings;
 - D. Zweig attended six Samarco board meetings;
 - E. Fernandes attended 13 Samarco board meetings;
 - F. Beck attended four Samarco board meetings; and
 - ii. otherwise denies the subparagraph; and
- (b) as to subparagraph 46(b), says:
- i. it does not know and therefore does not admit whether the BHP Brasil Representatives read the minutes of meetings which they did not attend due to the unavailability of BHP Brasil representatives; and

Particulars

Further particulars may be provided following evidence.

- ii. otherwise denies the subparagraph.
47. As to paragraph 47, it:
- (a) refers to and repeats paragraphs 40 to 44 above;
 - (b) admits that:
 - i. minutes of meetings of the Samarco board of directors;
 - ii. reports prepared by the ITRB and/or minutes of meetings of the ITRB; and
 - iii. minutes of meetings of certain Samarco board committees, record discussion of some of the matters pleaded in paragraphs 40 to 44 above;
 - (c) says further that the paragraph is pleaded in a rolled-up, conclusory and objectionable way;
 - (d) says that it reserves the right to plead to the paragraph with more specificity if and when the Joint Applicants identify the specific information they allege was discussed at particular meetings of, or in the reports of, the respective boards and committees; and
 - (e) otherwise denies the paragraph.
48. As to paragraph 48, it:
- (a) refers to and repeats paragraphs 40 to 45 and 47 above;

- (b) subject to the pleas in paragraphs 40 to 45 and 47 above, does not know and therefore does not admit whether directors on Samarco's board of directors nominated by BHP Brasil had any of the information alleged in paragraph 48 due to the unavailability of BHP Brasil representatives;
- (c) says whether Samarco had any of the alleged August 2012 Information, the alleged September 2012 Information, the alleged Pre-August 2014 Information, the alleged Post-August 2014 Information and/or the alleged General Consequential Risks is not determinative of whether the Respondent had that information in circumstances where:
- i. Samarco was an entity in which BHP Brasil (not the Respondent) owned 50% of the issued shares;
 - ii. the BHP Brasil Representatives were appointed to the Samarco board of directors by BHP Brasil, not the Respondent;
 - iii. Samarco was not controlled by BHP Brasil or by the Respondent;
 - iv. Samarco was operationally independent of BHP Brasil;
 - v. Samarco was operationally independent of the Respondent;
 - vi. within Samarco's structure, there were two distinct tiers: the governance tier (represented by the Samarco board of directors), and the management tier (represented by the Executive Board and the management team);
 - vii. the Executive Board was elected by the Samarco CEO and was independent of the Samarco board of directors;
 - viii. the Executive Board was responsible for managing Samarco's day-to-day operations, making operational decisions and maintaining the Fundão Dam, not the Samarco board of directors (or BHP Brasil or the Respondent); and
 - ix. in discharging that responsibility in relation to the Fundão Dam, the Executive Board was assisted and advised by its management team, its own internal geotechnical experts (e.g. the Dams Committee and the geotechnical department) and, directly or indirectly, external consultants (e.g. Pimenta de Ávila and the ITRB);

- (d) says further that it:
- i. will rely upon the definition of “*aware*” in ASX Listing Rule 19.12 for its full force and effect, including that an entity becomes aware of information if an officer of the entity has, or ought reasonably to have “*come into possession of the information in the course of the performance of their duties as an officer of that entity*”;
 - ii. will rely upon the particular roles, obligations and duties of each of the BHP Brasil Representatives respectively as:
 - A. a director or alternate director of the Samarco board of directors;
 - B. a director or alternate director of the Samarco board of directors appointed as such by BHP Brasil; and
 - C. an officer of the Respondent (where applicable);
 - iii. will rely on the capacity in which each of the BHP Brasil Representatives respectively acted in the course of the performance of their duties respectively as:
 - A. a director or alternate director of the Samarco board of directors;
 - B. a director or alternate director of the Samarco board of directors appointed as such by BHP Brasil; and
 - C. an officer of the Respondent (where applicable);
- (e) reserves its position to plead additional facts once it has access to instructions from individuals to whom it currently does not have access due to the unavailability of BHP Brasil representatives;
- (f) denies that:
- i. facts or information known to, or opinions held by, the BHP Brasil Representatives or any of them in their capacity as directors of Samarco; or
 - ii. facts or information which ought to have been (but were not) known to, or opinions which ought to have been (but were not) held by, the BHP Brasil Representatives or any of them in their capacity as directors of Samarco,

constituted facts, information or opinions possessed by or attributable to the Respondent simply by reason that they were (where applicable) also officers of the Respondent;

(g) says further that:

i. to the extent that the alleged August 2012 Information, the alleged September 2012 Information, the alleged Pre-August 2014 Information, the alleged Post-August 2014 Information, the alleged General Consequential Risks and the alleged BHP Consequential Risks constituted matters of fact, the Respondent's continuous disclosure obligations, whether pursuant to the Listing Rules or s 674 of the Corporations Act, were not enlivened in respect of:

A. information which the Respondent did not have (even if the company ought to have had it);

B. information which any one or more officers of the company ought to have had, but did not have; and

ii. to the extent that the alleged August 2012 Information, the alleged September 2012 Information, the alleged Pre-August 2014 Information, the alleged Post-August 2014 Information, the alleged General Consequential Risks and the alleged BHP Consequential Risks constituted matters of opinion, BHP's continuous disclosure obligations, whether pursuant to the Listing Rules or s 674 of the Corporations Act, were not enlivened in respect of opinions which the company or one or more officers of the Respondent ought to have formed, but did not form; and

(h) otherwise denies the paragraph.

49. As to paragraph 49, it:

(a) refers to and repeats paragraph 48 above; and

(b) otherwise denies the paragraph.

H.2 Failure to make continuous disclosure

50. As to paragraph 50, it:

(a) refers to and repeats paragraphs 40 to 49 above;

(b) says further that:

- i. there was no August 2012 Information, September 2012 Information, Pre-August 2014 Information, Post-August 2014 Information or Risks as alleged and in those circumstances no obligation arose to disclose that information to the ASX;
- ii. further or alternatively, to the extent that the August 2012 Information, September 2012 Information, Pre-August 2014 Information, Post-August 2014 Information or Risks did exist as alleged, the Respondent did not have that information and in those circumstances no obligation arose to disclose that information to the ASX;
- iii. further or alternatively, if the alleged matters pleaded in paragraphs 44 and 45 existed as alleged (which is denied), those matters constitute information which was generally available within the meaning of s 676 of the Corporations Act; and
- iv. further or alternatively, even if the matters comprising the August 2012 Information, September 2012 Information, Pre-August 2014 Information, Post-August 2014 Information or Risks constituted information that a reasonable person would expect to have a material effect on the price or value of shares in the Respondent (which is denied), the information:
 - A. was information that:
 - a. a reasonable person would not expect to be disclosed;
 - b. was confidential, and the ASX had not formed the view that the information had ceased to be confidential; and
 - c. comprised matters of supposition, further or alternatively was insufficiently definite to warrant disclosure,

within the meaning of ASX Listing Rules 3.1A.1 to 3.1A.3; and
 - B. by reason of the matters in subparagraph (A) above:
 - a. was not information to which ASX Listing Rule 3.1 applied; and
 - b. was not information which s 674(2) of the Corporations Act required to be notified to the ASX at any time prior to 9 November 2015; and

- (c) otherwise denies the paragraph.
51. As to paragraph 51, it:
- (a) refers to and repeats paragraph 48 and subparagraph 50(b) above; and
 - (b) denies the paragraph.
52. As to paragraph 52, it:
- (a) says that it did not make the “Required Disclosures” (as defined), and was not required to make such disclosures; and
 - (b) otherwise denies the paragraph.
53. It denies paragraph 53.

I. MISLEADING OR DECEPTIVE CONDUCT

I.1 BHP Ltd’s Statements prior to 9 November 2015

54. As to paragraph 54, it:
- (a) admits that it published or caused to be published the BHP Annual Report 2011 (**FY2011 Annual Report**) on or to the ASX;
 - (b) relies on the full terms and effect of the FY2011 Annual Report;
 - (c) says further that the FY2011 Annual Report included statements that non-controlled assets may not comply with the Respondent’s standards, concerning risk factors impacting the Respondent, and disclaiming the effect of forward-looking statements contained within the FY2011 Annual Report; and

Particulars

FY2011 Annual Report pp 7-11.

*FY2011 Annual Report p 9: “...**Our non-controlled assets may not comply with our standards***

Some of our assets are controlled and managed by joint venture partners or by other companies. Some joint venture partners may have divergent business objectives which may impact business and financial results. Management of our non-controlled assets may not comply with our management and operating standards, controls and procedures (including our health, safety, and environment standards). Failure to adopt equivalent standards, controls and procedures at these assets

could lead to higher costs and reduced production and adversely impact our results and reputation...”

*FY2011 Annual Report p 10: “...**Unexpected natural and operational catastrophes may adversely impact our operations***

We operate extractive, processing and logistical operations in many geographic locations both onshore and offshore. Our operational processes may be subject to operational accidents such as port and shipping incidents, fire and explosion, pitwall failures, loss of power supply, railroad incidents, loss of well control, environmental pollution and mechanical failures. Our operations may also be subject to unexpected natural catastrophes such as earthquakes, flood, hurricanes and tsunamis... Existing business continuity plans may not provide protection for all of the costs that arise from such events. The impact of these events could lead to disruptions in production, increased costs and loss of facilities more than offsetting premiums saved which would adversely affect our financial results and prospects. Third party claims arising from these events may exceed the limit of liability insurance policies we have in place....”

FY2011 Annual Report p 11: “This Annual Report contains forward looking statements... These forward looking statements are not guarantees or predictions of future performance, and involve known and unknown risks, uncertainties and other factors, many of which are beyond our control, and which may cause actual results to differ materially from those expressed in the statements contained in this Annual Report. Readers are cautioned not to put undue reliance on forward looking statements.”

(Emphases added)

(d) otherwise admits the paragraph.

55. As to paragraph 55, it:

- (a) admits that it published or caused to be published the BHP Annual Report 2012 (**FY2012 Annual Report**) on or to the ASX;
- (b) relies on the full terms and effect of the FY2012 Annual Report;
- (c) says further that the FY2012 Annual Report included statements that non-controlled assets may not comply with the Respondent’s standards, concerning

risk factors impacting the Respondent, and disclaiming the effect of forward-looking statements contained within the FY2012 Annual Report; and

Particulars

FY2012 Annual Report pp 7-13.

*FY2012 Annual Report p 9: “...**Unexpected natural and operational catastrophes may adversely impact our operations***

We operate extractive, processing and logistical operations in many geographic locations both onshore and offshore. Our operational processes may be subject to operational accidents such as port and shipping incidents, underground mine and processing plant fire and explosion, open-cut pit wall failures, loss of power supply, railroad incidents, loss of well control, environmental pollution and mechanical critical equipment failures... Our operations may also be subject to unexpected natural catastrophes such as earthquakes, flood, hurricanes and tsunamis... Existing business continuity plans may not provide protection for all of the costs that arise from such events. The impact of these events could lead to disruptions in production, increased costs and loss of facilities more than offsetting premiums saved, which would adversely affect our financial results and prospects. Third party claims arising from these events may exceed the limit of liability insurance policies we have in place...”

*FY2012 Annual Report p 10: “...**Our non-controlled assets may not comply with our standards***

Some of our assets are controlled and managed by joint venture partners or by other companies. Management of our non-controlled assets may not comply with our management and operating standards, controls and procedures (including our HSEC standards). Failure to adopt equivalent standards, controls and procedures at these assets could lead to higher costs and reduced production and adversely impact our results and reputation...”

FY2012 Annual Report p 13: “This Report contains forward looking statements... These forward looking statements are not guarantees or predictions of future performance, and involve known and unknown risks, uncertainties and other factors, many of which are beyond our control, and which may cause actual results to differ materially from

those expressed in the statements contained in this release. Readers are cautioned not to put undue reliance on forward looking statements.”

(Emphases added)

- (d) otherwise admits the paragraph.
56. As to paragraph 56, it:
- (a) admits that it published or caused to be published the BHP Annual Report 2013 (**FY2013 Annual Report**) on or to the ASX;
 - (b) relies on the full terms and effect of the FY2013 Annual Report;
 - (c) says further that the FY2013 Annual Report included statements that non-controlled assets may not comply with the Respondent’s standards, concerning risk factors impacting the Respondent, and disclaiming the effect of forward-looking statements contained within the FY2013 Annual Report; and

Particulars

FY2013 Annual Report pp 14-19.

*FY2013 Annual Report p 15-16: “...**Unexpected natural and operational catastrophes may adversely impact our operations***

We operate extractive, processing and logistical operations in many geographic locations both onshore and offshore... Our operational processes may be subject to operational accidents such as port and shipping incidents, underground mine and processing plant fire and explosion, open-cut pit wall failures, loss of power supply, railroad incidents, loss of well control, environmental pollution and mechanical critical equipment failures. Our operations may also be subject to unexpected natural catastrophes such as earthquakes, flood, hurricanes and tsunamis... Existing business continuity plans may not provide protection for all of the costs that arise from such events. The impact of these events could lead to disruptions in production, increased costs and loss of facilities more than offsetting premiums saved, which would adversely affect our financial results and prospects. Third party claims arising from these events may exceed the limit of liability insurance policies we have in place...”

FY2013 Annual Report p 16: "...Our non-controlled assets may not comply with our standards

Some of our assets are controlled and managed by joint venture partners or by other companies. Management of our non-controlled assets may not comply with our management and operating standards, controls and procedures, including our health, safety, environment and community (HSEC) standards. Failure to adopt equivalent standards, controls and procedures at these assets could lead to higher costs and reduced production and adversely impact our results and reputation..."

FY2013 Annual Report p 19: "This Annual Report contains statements relating to past performance (which cannot be relied on as a guide to future performance) and also contains forward looking statements... These forward looking statements are not guarantees or predictions of future performance, and involve known and unknown risks, uncertainties and other factors, many of which are beyond our control, and which may cause actual results to differ materially from those expressed in the statements contained in this Annual Report. Readers are cautioned not to put undue reliance on forward looking statements."

(Emphases added)

(d) otherwise admits the paragraph.

57. As to paragraph 57, it:

- (a) admits that it published or caused to be published the BHP Annual Report 2014 (**FY2014 Annual Report**) on or to the ASX;
- (b) relies on the full terms and effect of the FY2014 Annual Report;
- (c) says further that the FY2014 Annual Report included statements that non-operated assets may not comply with the Respondent's standards, concerning risk factors impacting the Respondent, and disclaiming the effect of forward-looking statements contained within the FY2014 Annual Report; and

Particulars

FY2014 Annual Report pp 5, 20-25.

FY2014 Annual Report p 5: "...This Annual Report contains forward looking statements... These forward looking statements are not

guarantees or predictions of future performance, and involve known and unknown risks, uncertainties and other factors, many of which are beyond our control, and which may cause actual results to differ materially from those expressed in the statements contained in this Annual Report. readers are cautioned not to put undue reliance on forward looking statements...

*FY2014 Annual Report p 22: "...**Unexpected natural and operational catastrophes may adversely impact our operations***

We operate extractive, processing and logistical operations in many geographic locations, both onshore and offshore... Our operational processes may be subject to operational accidents, such as port and shipping incidents, underground mine and processing plant fire and explosion, open-cut pit wall failures, loss of power supply, railroad incidents, loss of well control, environmental pollution and mechanical critical equipment failures. Our operations may also be subject to unexpected natural catastrophes, such as earthquakes, flood, hurricanes and tsunamis... Existing business continuity plans may not provide protection for all of the costs that arise from such events. The impact of these events could lead to disruptions in production, increased costs and loss of facilities more than offsetting external premiums saved, which would adversely affect our financial results and prospects. Where external insurance is purchased, third party claims arising from these events may exceed the limit of liability of the insurance policies we have in place..."

*FY2014 Annual Report p 22: "...**Our non-operated assets may not comply with our standards***

Some of our assets are operated and managed by joint venture partners or by other companies. Management of our non-operated assets may not comply with our management and operating standards, controls and procedures, including our health, safety, environment and community (HSEC) standards. Failure to adopt equivalent standards, controls and procedures at these assets could lead to higher costs and reduced production and adversely impact our results and reputation..."

(Emphases added)

- (d) otherwise admits the paragraph.

58. As to paragraph 58, it:

- (a) admits that it published or caused to be published the BHP Annual Report 2015 (**FY2015 Annual Report**) on or to the ASX;
- (b) relies on the full terms and effect of the FY2015 Annual Report;
- (c) says further that the FY2015 Annual Report included statements that non-operated assets may not comply with the Respondent's standards, concerning risk factors impacting the Respondent, and disclaiming the effect of forward-looking statements contained within the FY2015 Annual Report; and

Particulars

FY2015 Annual Report pp 9, 20-25.

FY2015 Annual Report p 9: "...This Annual Report contains forward looking statements... These forward looking statements are not guarantees or predictions of future performance, and involve known and unknown risks, uncertainties and other factors, many of which are beyond our control, and which may cause actual results to differ materially from those expressed in the statements contained in this Annual Report. Readers are cautioned not to put undue reliance on forward looking statements ..."

*FY2015 Annual Report p 22: "...**Unexpected natural and operational catastrophes may adversely impact our operations***

We operate extractive, processing and logistical operations in many geographic locations, both onshore and offshore... Our operational processes may be subject to operational accidents, such as port and shipping incidents, underground mine and processing plant fire and explosion, open-cut pit wall failures, loss of power supply, railroad incidents, loss of well control, environmental pollution and mechanical critical equipment failures. Our operations may also be subject to unexpected natural catastrophes such as earthquakes, flood, hurricanes and tsunamis ... Existing business continuity plans may not provide protection for all of the costs that arise from such events. The impact of these events could lead to disruptions in production, increased costs and loss of facilities. Where external insurance is purchased, third party claims arising from these events may exceed the limit of liability of the insurance policies we have in place ..."

FY2015 Annual Report p 22: "...Our non-operated assets may not comply with our standards

Some of our assets are operated and managed by joint venture partners or by other companies. Management of our non-operated assets may not comply with our management and operating standards, controls and procedures, including our health, safety, environment and community (HSEC) standards. Failure to adopt equivalent standards, controls and procedures at these assets could lead to higher costs and reduced production and adversely impact our results and reputation..."

Further particulars may be provided following evidence.

(d) otherwise admits the paragraph.

59. As to paragraph 59, it:

(a) refers to and repeats paragraphs 54 to 58 above;

(b) says that, amongst other matters, the FY2011 to FY2015 Annual Reports included statements to the effect that:

- i. the Respondent prioritised and was committed to the safety and sustainability of its people, operations and the broader communities in which it operated;
- ii. notwithstanding that commitment, health, safety, environmental and community incidents or accidents could occur and impact the Respondent's people, business, operations and reputation; and

Particulars

FY2011 Annual Report p 45:

"... Our approach to sustainability is reflected in Our BHP Billiton Charter, which defines our values, purpose and how we measure success, and the BHP Billiton Sustainable Development Policy, which defines our public commitments to safety, health, environmental and social responsibility..."

FY2011 Annual Report p 9:

"...Health, safety, environmental and community incidents or accidents and related regulations may adversely affect our operations and reputation or licence to operate

We are a major producer of carbon-related products such as energy and metallurgical coal, oil, gas, and liquefied natural gas. Our oil and gas operations are both onshore and offshore.

The nature of the industries in which we operate means that many of our activities are highly regulated by health, safety and environmental laws. As regulatory standards and expectations are constantly developing, we may be exposed to increased litigation, compliance costs and unforeseen environmental rehabilitation expenses.

Potential health, safety, environmental and community events that may have a material adverse impact on our operations include rockfall incidents in underground mining operations, aircraft incidents, light vehicle incidents, well blowouts, explosions or gas leaks, incidents involving mobile equipment, uncontrolled tailings breaches, escape of polluting substances, uncontrolled releases of hydrocarbons, human rights breaches and community protests or civil unrest...”

FY2012 Annual Report p 46:

“... Our BHP Billiton Charter value of Sustainability reflects our priority of putting health and safety first, being environmentally responsible and supporting our communities....”

FY2012 Annual Report p 10:

“... HSEC impacts, incidents or accidents and related regulations may adversely affect our people, operations and reputation or licence to operate

We are a major producer of carbon-related products such as energy and metallurgical coal, oil, gas, and liquefied natural gas. Our oil and gas operations are both onshore and offshore.

The nature of the industries in which we operate means that many of our activities are highly regulated by health, safety and environmental laws. As regulatory standards and expectations are constantly developing, we may be exposed to increased litigation, compliance costs and unforeseen environmental rehabilitation expenses.

Potential safety events that may have a material adverse impact on our operations include fire, explosion or rock fall incidents in underground mining operations, personnel conveyance equipment failures in underground operations, aircraft incidents, incidents involving light vehicles and mining mobile equipment, ground control failures, well blowouts, explosions or gas leaks, isolation, working from heights or lifting operations.

Environmental incidents that have the potential to create a material impact include uncontrolled tailings breaches, subsidence from mining activities, escape of polluting substances and uncontrolled releases of hydrocarbons.

Our operations by their nature have the potential to impact biodiversity, water resources and related ecosystem services...

Due to the nature of our operations HSEC incidents or accidents and related regulations may adversely affect our reputation or licence to operate..."

FY2013 Annual Report p 8:

"...Our overriding commitment is ensuring the safety of our people, and respecting our environment and the communities in which we work. This commitment informs everything we do and influences every aspect of our work..."

FY2013 Annual Report p 16:

"...HSEC impacts, incidents or accidents and related regulations may adversely affect our people, operations and reputation or licence to operate

Safety

Potential safety events that may have a material adverse impact on our operations include fire, explosion or rock fall incidents in underground mining operations, personnel conveyance equipment failures in underground operations, aircraft incidents, incidents involving light vehicles and mining mobile equipment, ground control failures, well blowouts, explosions or gas leaks, isolation and working from heights or lifting operations.

Environment

Environmental incidents that have the potential to create a material impact include uncontrolled tailings containment breaches, subsidence from mining activities, escape of polluting substances and uncontrolled releases of hydrocarbons.

Our operations by their nature have the potential to impact biodiversity, water resources and related ecosystem services...

FY2014 Annual Report p 18:

"...Our Charter values and commitment to putting health and safety first, being environmentally responsible and supporting the communities in which we operate will remain unchanged..."

FY2014 Annual Report p 23:

"... Safety, health, environmental and community impacts, incidents or accidents and related regulations may adversely affect our people, operations and reputation or licence to operate

Safety

Potential safety events that may have a material adverse impact on our operations include fire, explosion or rock fall incidents in underground mining operations, personnel conveyance equipment failures in underground operations, aircraft incidents, incidents involving light vehicles and mining mobile equipment, ground control failures, well blowouts, explosions or gas leaks, and accidents involving inadequate isolation and working from heights or lifting operations...

Environment

Environmental incidents have the potential to lead to material adverse impacts on our operations. These include uncontrolled tailings containment breaches, subsidence from mining activities, escape of polluting substances and uncontrolled releases of hydrocarbons.

Our operations by their nature have the potential to adversely impact biodiversity, water resources and related ecosystem services...

Due to the nature of our operations, HSEC incidents or accidents and related regulations may adversely affect our reputation or licence to operate...

FY2015 Annual Report p 12:

"...Our overriding commitment is to ensuring the safety of our people, and respecting our environment and the communities in which we work. This commitment informs everything we do and influences every aspect of our work..."

FY2015 Annual Report p 23:

"...Safety, health, environmental and community impacts, incidents or accidents and related regulations may adversely affect our people, operations and reputation or licence to operate

Safety

Potential safety events that may have a material adverse impact on our operations include fire, explosion or rock fall incidents in underground mining operations, personnel conveyance equipment failures in underground operations, aircraft incidents, incidents involving light vehicles and mining mobile equipment, ground control failures, well blowouts, explosions or gas leaks, and accidents involving inadequate isolation and working from heights or lifting operations...

Environment

Environmental incidents have the potential to lead to material adverse impacts on our operations. These include uncontrolled tailings containment breaches, subsidence from mining activities, escape of polluting substances and uncontrolled releases of hydrocarbons.

Our operations by their nature have the potential to adversely impact biodiversity, water resources and related ecosystem services...

Due to the nature of our operations, HSEC incidents or accidents and related regulations may adversely affect our reputation or licence to operate..."

(c) otherwise denies the paragraph.

60. As to paragraph 60, it:

(a) refers to and repeats paragraphs 54 to 59 above;

(b) says that it did not make the “Representations” (as defined), and that as such the Representations were not withdrawn or qualified, and were not continuing representations; and

(c) otherwise denies the paragraph.

I.2 Misleading or Deceptive Conduct Contraventions

61. As to paragraph 61, it:

(a) admits that statements made in the Respondent’s annual reports is conduct engaged:

i. in trade or commerce, in relation to financial services within the meaning of s 12DA(1) of the ASIC Act;

ii. in relation to financial products, or financial services within the meaning of s 1041H of the Corporations Act; and

(b) otherwise denies the paragraph.

62. As to paragraph 62, it:

(a) denies the paragraph;

(b) refers to and repeats paragraphs 54 to 61 above; and

(c) says that if the Representations were made (which is denied);

i. to the extent that the alleged Representations were representations as to present and existing fact, they were true in substance; and

ii. alternatively, to the extent the alleged Representations comprised matters of opinion, the Respondent held the represented opinions and had a basis, alternatively a reasonable basis, for holding those opinions.

Particulars

BHP’s Charter acknowledged its commitment to safety and sustainability, which was one of six key values. BHP’s sustainability value included: “putting health and safety first, being environmentally responsible and supporting BHP’s communities”.

BHP Iron Ore's 5 Year Business Plans from July 2012 – July 2014, recorded that Iron Ore's message was "Safe and Sustainable Operations before all else" (Iron Ore 5Y Business Plan FY13-17; Iron Ore 5Y Business Plan FY14-18; Iron Ore 5Y Business Plan FY15-19).

The Respondent put in place various systems to ensure its value of safety and sustainability was reflected in the conduct of its business during the Relevant Period including introducing minimum mandatory performance requirements of: (a) identifying and reporting all material risks that have the potential to impact the delivery of business plans; (b) conducting a risk assessment on all material risks to understand their potential causes and impacts and to determine the tolerance of the material risks in the context of business plans; (c) ensuring that critical controls were implemented and managed so that material risks were "well-controlled" (BHP's Group Level Document (GLD) on Risk Management (GLD.017)).

BHP refers to and repeats the particulars subjoined to paragraphs 54 to 58 above and the statements, within each relevant Annual Report, that BHP's non-operated assets may not comply with its standards and that unexpected natural and operational catastrophes may adversely impact BHP's operations.

63. As to paragraph 63, it:
- (a) refers to and repeats paragraphs 61 and 62 above; and
 - (b) denies the paragraph.

J. THE DAM FAILURE

64. As to paragraph 64, it:
- (a) admits that at around 3.45pm on 5 November 2015 in Brazil, the Fundão Dam failed;
 - (b) as to subparagraph 64(a), admits that the Dam Failure resulted in 43.7 million cubic metres of tailings mud being released;

- (c) as to subparagraph 64(b):
 - i. as to subparagraph 64(b)(i), says that operations at the Germano Complex ceased following the Dam Failure and that the Germano Complex resumed operations in 2020, and otherwise denies the subparagraph; and
 - ii. admits subparagraphs 64(b)(ii)-(iii);
- (d) admits that the matters at subparagraphs 64(a)-(b) exposed the Respondent to remediation costs and reputational damage; and
- (e) otherwise denies the paragraph.

K. INFORMATION DISCLOSURE AND SHARE PRICE IMPACTS

- 65. It admits paragraph 65.
- 66. It admits paragraph 66.
- 67. As to paragraph 67, it:
 - (a) says that the paragraph is vague and embarrassing; and
 - (b) under cover of that objection:
 - i. admits that:
 - A. the price of BHP ASX shares was:
 - a. \$23.28 at the close of trade on 5 November 2015; and
 - b. \$18.09 at the close of trade on 30 November 2015;
 - B. the price of BHP LSE shares was:
 - a. GBP 10.34 at the close of trade on 5 November 2015; and
 - b. GBP 7.97 on 30 November 2015;
 - C. the price of BHP JSE Shares was:
 - a. ZAR 221.59 at the close of trade on 5 November 2015; and
 - b. ZAR 170.30 on 30 November 2015;
 - ii. otherwise denies the paragraph.

L. CONTRAVENTIONS CAUSED LOSS**L1. BHP ASX Shares**

68. As to paragraph 68, it:

- (a) admits subparagraph 68(a); and
- (b) otherwise denies the paragraph.

69. As to paragraph 69, it says:

- (a) if (which is denied) the Respondent committed the Continuous Disclosure Contraventions and the Misrepresentations Contraventions alleged by the Joint Applicants, the matters pleaded in paragraphs 68 to 69 of the ACSOC would not, even if established, constitute any causal nexus sufficient to support a claim for compensation pursuant to any of ss 1041I, 1317HA or 1325 of the Corporations Act or ss 12GF or 12GM of the ASIC Act; and
- (b) it otherwise denies the paragraph.

70. It denies paragraph 70.

L.2 BHP LSE Shares

71. As to paragraph 71, it:

- (a) says that ss 674, 1041H, 1041I, 1317HA and/or 1325 of the Corporations Act and/or ss 12DA, 12GF and/or 12GM of the ASIC Act do not operate to provide shareholders in BHP Plc with causes of action in respect of alleged contraventions by the Respondent; and
- (b) otherwise denies the paragraph.

72. As to paragraph 72, it:

- (a) refers to and repeats subparagraph 71(a) above; and
- (b) otherwise denies the paragraph.

73. As to paragraph 73, it:

- (a) refers to and repeats subparagraph 71(a) above; and
- (b) otherwise denies the paragraph.

74. As to paragraph 74, it says:

- (a) it refers to and repeats subparagraph 71(a) above;

- (b) if (which is denied) the Respondent committed the Continuous Disclosure Contraventions and the Misrepresentations Contraventions alleged by the Joint Applicants, the matters pleaded in paragraphs 68 to 69 and 71 to 73 of the ACSOC would not, even if established, constitute any causal nexus sufficient to support a claim for compensation pursuant to any of ss 1041I, 1317HA or 1325 of the Corporations Act or ss 12GF or 12GM of the ASIC Act; and
- (c) it otherwise denies the paragraph.

75. It denies paragraph 75.

L.3 BHP JSE Shares

76. As to paragraph 76, it:

- (a) refers to and repeats subparagraph 71(a) above which applies, *mutatis mutandis*, to shareholders of BHP Plc; and
- (b) otherwise denies the paragraph.

77. As to paragraph 77, it:

- (a) refers to and repeats subparagraph 71(a) above which applies, *mutatis mutandis*, to shareholders of BHP Plc; and
- (b) otherwise denies the paragraph.

78. As to paragraph 78, it:

- (a) refers to and repeats subparagraph 71(a) above which applies, *mutatis mutandis*, to shareholders of BHP Plc; and
- (b) otherwise denies the paragraph.

79. As to paragraph 79, it says:

- (a) it refers to and repeats subparagraph 71(a) above which applies, *mutatis mutandis*, to shareholders of BHP Plc;
- (b) if (which is denied) the Respondent committed the Continuous Disclosure Contraventions and the Misrepresentations Contraventions alleged by the Joint Applicants, the matters pleaded in paragraphs 68 to 69 and 76 to 78 of the ACSOC would not, even if established, constitute any causal nexus sufficient to support a claim for compensation pursuant to any of ss 1041I, 1317HA or 1325 of the Corporations Act or ss 12GF or 12GM of the ASIC Act; and
- (c) it otherwise denies the paragraph.

80. It denies paragraph 80.

M. LOSS OR DAMAGE SUFFERED BY THE JOINT APPLICANTS AND GROUP MEMBERS

81. It denies paragraph 81.
82. It denies paragraph 82.
83. It does not plead to paragraph 83 as it makes no allegation against the Respondent.
84. Further, or in the alternative, as to the whole of the ACSOC, the Respondent says that if it is liable to the Joint Applicants or any Group Members by reason of the facts and matters alleged in the ACSOC (which is denied), then the Respondent acted honestly and having regard to all of the circumstances of the case, ought fairly be excused from any such liability (in whole, or in the alternative, in part) pursuant to s 1317S (by reason of s 1041I(4)) and/or s 1318 of the Corporations Act.
85. Further, or in the alternative, as to the whole of the ACSOC, the Respondent says that
- (a) the Joint Applicants and Group Members make claims pursuant to:
 - i. section 1041I(1) of the Corporations Act in relation to economic loss allegedly caused by the conduct of the Respondent that was allegedly done in contravention of s 1041H of the Corporations Act; and/or
 - ii. section 12GF(1) of the ASIC Act in relation to economic loss allegedly caused by conduct of the Respondent that was allegedly done in contravention of s 12DA of the ASIC Act;
 - (b) if and to the extent that the Joint Applicants or any Group Member failed to have adequate regard to any of the FY2011 Annual Report, FY2012 Annual Report, FY2013 Annual Report, FY2014 Annual Report and/or FY2015 Annual Report in full then, if the Joint Applicants or Group Member suffered the loss claimed or any loss at all (which is denied), the Joint Applicants or Group Member did so as a result wholly or partly of the Joint Applicants' or Group Member's failure to take reasonable care;
 - (c) the Respondent did not intend to cause the loss claimed by the Joint Applicants or any Group Member or any loss at all and, if the Respondent caused that loss (which is denied), it did not do so fraudulently; and
 - (d) in the premises, if the Joint Applicants or any Group Member suffered the loss claimed or any loss at all (which is denied), the damages which the Joint Applicant or Group Member may recover in relation to the loss are to be reduced pursuant to s 1041I(1B) of the Corporations Act and/or s 12GF(1B) of the ASIC

of the ASIC Act to the extent to which the Court thinks is just and equitable having regard to the Joint Applicants' or Group Member's share in the responsibility for the loss.

Date: 10 March 2023



Signed by Jason Betts
Lawyer for the Respondent

This pleading was prepared by Wendy Harris KC, Kane Loxley and Benjamin Cameron.

Certificate of lawyer

I, Jason Betts, certify to the Court that, in relation to the defence filed on behalf of the 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: 10 March 2023



Signed by Jason Betts
Lawyer for the Respondent

ANNEXURE A

RELEVANT CORPORATE STRUCTURE FOR THE HOLDING OF BHP BRASIL'S INTEREST IN SAMARCO DURING THE RELEVANT PERIOD

