

## THIRD DEFENDANT'S DEFENCE TO THE AMENDED JOINT STATEMENT OF CLAIM

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Class Action Panel
Registry	Sydney
Case number	2017/294069 & 2018/52431

### TITLE OF PROCEEDINGS

#### Proceeding 2017/294069

First plaintiff	Haliburton Charles David Findlay
Second plaintiff	Marian Jennifer Denny Findlay
First defendant	DSHE Holdings Limited ACN 166 237 841 (receivers and managers appointed) (in liquidation)
Number of defendants	457

#### Proceeding 2018/52431

First plaintiff	Epaminondas Mastoris
Second plaintiff	Lena Mastoris
First defendant	DSHE Holdings Limited ACN 166 237 841 (receivers and managers appointed) (in liquidation)
Number of defendants	457

### FILING DETAILS

Filed for	Michael Potts, third defendant
Legal representative	Tobin Meagher, Clayton Utz
Legal representative reference	842/11250/80200538
Contact name and telephone	Andrew Moore, (02) 9353 4299
Contact email	amoore@claytonutz.com

### HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at

### PLEADINGS AND PARTICULARS

The Third Defendant, Michael Potts (**Potts**), responds as follows to the allegations in the Amended Joint Statement of Claim filed 7 March 2019. (Unless otherwise indicated, defined terms in the Amended Joint Statement of Claim have the same meaning where used below.)

For ease of reference, this Defence adopts the headings used in the Amended Joint Statement of Claim. Those headings are for convenience only and the use of such headings is not intended to admit any of the defined terms used in those headings, unless those matters are otherwise expressly admitted below.

### **NARRATIVE SUMMARY OF THE CLAIM**

- 1 In response to paragraphs 1-25 of the Amended Joint Statement of Claim, Potts:
- (a) agrees that the Plaintiffs' summary of the case (contained in paragraphs 1-25 of the Amended Joint Statement of Claim) reflects the Plaintiffs' contentions in the proceedings;
  - (b) denies liability to the Plaintiffs on the basis pleaded in the Amended Joint Statement of Claim, or at all;
  - (c) refers to his specific responses to the Plaintiffs' allegations pleaded in sections A to F of this Defence; and
  - (d) otherwise does not admit the matters alleged in paragraphs 1-25 of the Amended Joint Statement of Claim.

### **Structure of the pleading**

- 2 Potts does not plead to paragraphs 26-32 of the Amended Joint Statement of Claim, as those paragraphs do not contain any allegations against him.

### **A. PARTIES AND BACKGROUND**

#### **A.1. PART 10 OF THE CIVIL PROCEDURE ACT 1995 (NSW)**

- 3 In response to paragraphs 33-37 of the Amended Joint Statement of Claim, Potts:
- (a) denies the allegations in subparagraph 34(d) of the Amended Joint Statement of Claim so far as they concern Potts;
  - (b) denies the allegations in subparagraph 36(d) of the Amended Joint Statement of Claim so far as they concern Potts; and
  - (c) otherwise does not plead to paragraphs 33-37 of the Amended Joint Statement of Claim, as those paragraphs do not otherwise contain any allegations against him.

## **A.2 THE PARTIES**

### **A.2.1. The plaintiffs in the Findlay proceedings**

4 Potts does not admit paragraph 38 of the Amended Joint Statement of Claim.

### **A.2.2. The plaintiffs in the Mastoris proceedings**

5 Potts does not admit paragraph 39 of the Amended Joint Statement of Claim.

### **A.2.3. The first defendant in both proceedings: DSH**

6 Potts admits paragraphs 40-42 of the Amended Joint Statement of Claim.

7 Potts does not admit paragraph 43 of the Amended Joint Statement of Claim.

### **A.2.4. The second defendant in both proceedings: Mr Abboud**

8 Potts admits paragraph 44 of the Amended Joint Statement of Claim.

### **A.2.5. The third defendant in both proceedings: Mr Potts**

9 Potts admits paragraph 45 of the Amended Joint Statement of Claim.

### **A.2.5. The fourth to 457<sup>th</sup> defendants: Deloitte**

10 Potts admits paragraphs 45A and 45B of the Amended Joint Statement of Claim.

## **A.3 BACKGROUND**

11 Potts admits paragraphs 46-49 of the Amended Joint Statement of Claim.

12 In response to paragraph 50 of the Amended Joint Statement of Claim, Potts:

(a) admits that Dick Smith Sub-Holdings (then named Anchorage DS Pty Ltd) entered into a share sale agreement with Woolworths on 26 September 2012; and

(b) relies upon the share sale agreement for its full terms and effect.

13 Potts admits paragraphs 51-54 of the Amended Joint Statement of Claim.

14 Potts does not plead to paragraph 55 of the Amended Joint Statement of Claim, as that paragraph does not otherwise contain any allegations against him.

15 Potts admits paragraph 56 of the Amended Joint Statement of Claim.

## **B. THE REPRESENTATIONS**

### **B.1. THE PROSPECTUS REPRESENTATIONS**

#### **B.1.1. The Legal Status of the Prospectus**

16 Potts admits paragraph 57 of the Amended Joint Statement of Claim.

- 17 In response to paragraphs 58-59 of the Amended Joint Statement of Claim, Potts:
- (a) says that on 13 November 2013 the board of DSH resolved that the First Prospectus be approved for lodgement with ASIC, ASX and the NZ Registrar; and
  - (b) otherwise does not admit paragraphs 58-59 of the Amended Joint Statement of Claim.
- 18 Potts admits paragraph 60 of the Amended Joint Statement of Claim.

**B.1.2. Financial Information Basis Representation**

- 19 Potts admits paragraphs 61-62 of the Amended Joint Statement of Claim, and relies upon the Prospectus for its full terms and effect.
- 20 In response to paragraph 63 of the Amended Joint Statement of Claim, Potts:
- (a) admits that he verified the Financial Information Basis Representation; and
  - (b) says that in verifying the Financial Information Basis Representation, Potts relied on:
    - (i) the FY13 Audit Report, including Deloitte's FY13 Express Representations and Deloitte's FY13 Implied Representations, pleaded in paragraphs 411-416 of the Amended Joint Statement of Claim;
    - (ii) the contents of the report by Deloitte headed "Project Yellow: Review of financial information" and dated 13 November 2013; and
    - (iii) the contents of the report by Deloitte headed "Investigating Accountant's Report and Financial Services Guide" and dated 14 November 2013.

**Particulars**

Prospectus, pages 126-130.

**B.1.3. FY13 Performance Representations**

- 21 In response to paragraph 64 of the Amended Joint Statement of Claim, Potts:
- (a) as to subparagraph 64(a):
    - (i) says that the Prospectus stated that the historical financial information for the three years ended 30 June 2013 had been derived from:

1. the audited financial statements of Dick Smith Sub-Holdings for the period from Acquisition to 30 June 2013; and
  2. the unaudited accounting records of DSE Holdings Pty Limited for the period from 28 June 2010 to 26 November 2012; and
- (ii) otherwise denies subparagraph 64(a) of the Amended Joint Statement of Claim; and
- (b) admits subparagraph 64(b) of the Amended Joint Statement of Claim, and repeats paragraph 20 of this Defence.

22 Potts admits paragraph 65 of the Amended Joint Statement of Claim.

23 Potts admits paragraph 66 of the Amended Joint Statement of Claim, and says that in verifying the FY13 Performance Representations Potts relied on the matters pleaded in paragraph 20(b)(i)-(iii) of this Defence.

#### **B.1.4. FY13 Balance Sheet Representations**

24 Potts admits paragraph 67 of the Amended Joint Statement of Claim.

25 Potts admits paragraph 68 of the Amended Joint Statement of Claim, and says that in verifying the FY13 Balance Sheet Representations Potts relied on the matters pleaded in paragraph 20(b)(i)-(iii) of this Defence.

#### **B.1.5. Obsolete Stock Representation**

26 Potts admits paragraphs 69-70 of the Amended Joint Statement of Claim.

#### **B.1.6. 1Q14 Representations**

27 Potts admits paragraph 71 of the Amended Joint Statement of Claim.

28 Potts admits paragraph 72 of the Amended Joint Statement of Claim, and says that in verifying the 1Q14 Representations Potts relied on the matters pleaded in paragraph 20(b)(i)-(iii) of this Defence.

#### **B.1.7. The Transformation Representations**

29 Potts admits paragraph 73 of the Amended Joint Statement of Claim.

30 Potts does not admit paragraph 74 of the Amended Joint Statement of Claim.

31 In response to paragraph 75 of the Amended Joint Statement of Claim, Potts:

- (a) says that each of the statements pleaded in subparagraphs 73(a)-(j) of the Amended Joint Statement of Claim was verified by one or more of DSH's directors and/or officers;

- (b) says that Potts verified each of the following statements:
  - (i) the statement “to an expected pro forma EBITDA of \$71.8 million in FY2014” pleaded in subparagraph 73(e) of the Amended Joint Statement of Claim; and
  - (ii) the statement pleaded in subparagraph 73(h) of the Amended Joint Statement of Claim;
- (c) says that in verifying the statements referred to in paragraph (b) above, Potts relied on the matters pleaded in paragraph 20(b)(i)-(iii) of this Defence; and
- (d) otherwise does not admit paragraph 75 of the Amended Joint Statement of Claim.

#### **B.1.8. The Growth and Forecast Representations**

32 In response to paragraph 76 of the Amended Joint Statement of Claim, Potts:

- (a) admits subparagraphs 76(a)-(f) of the Amended Joint Statement of Claim; and
- (b) denies subparagraph 76(g) of the Amended Joint Statement of Claim.

33 In response to paragraph 77 of the Amended Joint Statement of Claim, Potts:

- (a) admits that each of the statements pleaded in subparagraphs 76(a)-(f) of the Amended Joint Statement of Claim was verified by one or more of DSH’s directors and/or officers;
- (b) says that Potts verified each of the following statements and says that in verifying those statements, Potts relied on the matters pleaded in paragraph 20(b)(i)-(iii) of this Defence:
  - (i) the statement pleaded in subparagraph 76(a) of the Amended Joint Statement of Claim;
  - (ii) the statement pleaded in subparagraph 76(b) of the Amended Joint Statement of Claim;
  - (iii) the first sentence pleaded in subparagraph 76(c) of the Amended Joint Statement of Claim;
  - (iv) the statement pleaded in subparagraph 76(d) of the Amended Joint Statement of Claim;
  - (v) the first sentence in subparagraph 76(e) of the Amended Joint Statement of Claim;

(vi) the statement "Pro forma gross margin is forecast to increase from 23.7% in FY2013 to 25.1% in FY2014" pleaded in subparagraph 76(f)(ii) of the Amended Joint Statement of Claim; and

(c) otherwise denies paragraph 77 of the Amended Joint Statement of Claim.

34 Potts does not admit paragraphs 78-79 of the Amended Joint Statement of Claim.

#### **B.1.9. Financial Covenants Representations**

35 Potts admits paragraph 80 of the Amended Joint Statement of Claim.

36 Potts admits paragraph 81 of the Amended Joint Statement of Claim, and relies upon the facility agreement for its full terms and effect.

37 Potts admits paragraphs 82-83 of the Amended Joint Statement of Claim.

38 In response to paragraph 84 of the Amended Joint Statement of Claim, Potts:

(a) admits that he verified the Financial Covenants Representations and says that in verifying the Financial Covenants Representations, Potts relied on the matters pleaded in paragraph 20(b)(i)-(iii) of this Defence; and

(b) says that he held the opinions stated in the Financial Covenants Representations as at the date of the Prospectus.

#### **B.2. POST-PROSPECTUS REPRESENTATIONS**

##### **B.2.1. August 2014 – FY14 Financial Statements**

39 Potts admits paragraph 85 of the Amended Joint Statement of Claim, and relies upon the FY14 Financial Statements for their full terms and effect.

40 Potts admits paragraphs 86-88 of the Amended Joint Statement of Claim.

41 Potts admits paragraphs 89-90 of the Amended Joint Statement of Claim, and relies upon the declaration (the **FY14 Directors' Declaration**) for its full terms and effect.

42 Potts admits paragraph 91 of the Amended Joint Statement of Claim.

##### **B.2.1.1. Directors' FY14 Representations**

43 In response to paragraph 92 of the Amended Joint Statement of Claim, Potts:

(a) says that he held the opinions stated in the FY14 Directors' Declaration as at the date of the declaration;

(b) says that in forming the opinions stated in the FY14 Directors' Declaration, Potts relied on reports from DSH's auditor, Deloitte Touche Tohmatsu

(Deloitte), of the audit work which it had carried out, and the conclusions which it had reached, including:

- (i) the contents of Deloitte's FY13 Audit Report, which made Deloitte's FY13 Express Representations and Deloitte's FY13 Implied Representation (pleaded in paragraphs 411-416 of the Amended Joint Statement of Claim);
- (ii) the contents of the report by Deloitte headed "Report to the Finance and Audit Committee for the year ended 29 June 2014" and dated 6 August 2014 (**FY14 FAC Report**);
- (iii) Deloitte's representation to the Board at the meeting on 18 August 2014 that Deloitte intended to issue a report on its audit of the FY14 Financial Statements containing statements to the effect set out in subparagraph (iv) below;

#### **Particulars**

Minutes of the meeting of the board of directors of DSH held on 18 August 2014, "Adoption of full year accounts".

- (iv) Deloitte's report dated 18 August 2014 to the members of DSH on the FY14 Financial Statements, which stated, inter alia, that:
  - A. Deloitte's audit of the FY14 Financial Statements had been conducted in accordance with Australian Accounting Standards, and had involved, inter alia, performing procedures to obtain audit evidence about the amounts and disclosures in the financial report, and also evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the directors;
  - B. Deloitte was of the opinion that the FY14 Financial Statements were in accordance with the CA, including:
    - 1) giving a true and fair view of the consolidated entity's financial position as at 29 June 2014 and of its performance for the year ended on that date, and
    - 2) complying with Australian Accounting Standards and the *Corporations Regulations* 2001 (Cth) (**Corporations Regulations**);

- C. Deloitte was of the opinion that the financial report also complied with International Financial Reporting Standards;

**Particulars**

Deloitte's Independent Auditor's Report to the members of DSH dated 18 August 2014 (**FY14 Audit Report**).

- (v) does not plead to the matters alleged in paragraph 92 of the Amended Joint Statement of Claim so far as they concern Mr Abboud; and
- (vi) otherwise does not admit the matters alleged in paragraph 92 of the Amended Joint Statement of Claim.

44 Potts denies paragraph 93 of the Amended Joint Statement of Claim.

**B.2.1.2. DSH's FY14 Representations**

45 Potts does not admit paragraph 94 of the Amended Joint Statement of Claim.

46 Potts denies paragraph 95 of the Amended Joint Statement of Claim.

**B.2.2. FY14 ASX Announcement & Results Briefing**

47 In response to paragraph 96 of the Amended Joint Statement of Claim, Potts:

- (a) admits that on or about 19 August 2014 DSH caused the FY14 ASX Announcement & Results Briefing to be made to the ASX;
- (b) says that the FY14 ASX Announcement & Results Briefing was made by DSH to the ASX following the passing of a resolution by the DSH directors which approved the FY14 ASX Announcement & Results Briefing being made, and that Potts voted in favour of that resolution; and

**Particulars**

Minutes of the meeting of the board of DSH held on 18 August 2014, "Adoption of full year accounts".

- (c) otherwise denies paragraph 96 of the Amended Joint Statement of Claim.

48 In response to paragraph 97 of the Amended Joint Statement of Claim, Potts:

- (a) admits that the FY14 ASX Announcement & Results Briefing made various statements about the financial position and performance of DSH;
- (b) relies upon the FY14 ASX Announcement & Results Briefing for their full terms and effect; and

- (c) otherwise does not admit the matters alleged in paragraph 97 of the Amended Joint Statement of Claim.

**B.2.3. August 2015 – FY15 Financial Statements**

- 49 Potts admits paragraphs 98-102 of the Amended Joint Statement of Claim.
- 50 Potts admits paragraphs 103-104 of the Amended Joint Statement of Claim, and relies upon the declaration (the **FY15 Directors' Declaration**) for its full terms and effect.

**B.2.3.1. Directors' FY15 Representations**

- 51 In response to paragraph 105 of the Amended Joint Statement of Claim, Potts:
  - (a) says that he held the opinions stated in the FY15 Directors' Declaration as at the date of the declaration;
  - (b) says that in forming the opinions held in the FY15 Directors' Declaration, Potts relied on reports from Deloitte of the audit work which it had carried out, and the conclusions which it had reached, including:
    - (i) the reports and representations in paragraph 43(b) of this Defence;
    - (ii) the contents of the report by Deloitte headed "Report to the Finance and Audit Committee for the year ended 28 June 2015" and dated 6 August 2015 (**FY15 FAC Report**);
    - (iii) Deloitte's representation to the Board at its meeting on 17 August 2015 that Deloitte intended to issue a report on its audit of the FY15 Financial Statements containing statements to the effect set out in subparagraph (iv) below;

**Particulars**

Minutes of the meeting of the board of DSH held on 17 August 2015, "Adoption of full year accounts".

- (iv) the contents of Deloitte's report dated 17 August 2015 to the members of DSH on the FY15 Financial Statements, which stated, inter alia, that:
  - A. Deloitte's audit of the FY15 Financial Statements had been conducted in accordance with Australian Accounting Standards, and had involved, inter alia, performing procedures to obtain audit evidence about the amounts and disclosures in the financial report, and also evaluating the appropriateness of accounting

policies used and the reasonableness of accounting estimates made by the directors;

B. Deloitte was of the opinion that the FY15 Financial Statements were in accordance with the CA, including:

- 1) giving a true and fair view of the consolidated entity's financial position as at 28 June 2015 and of its performance for the year ended on that date, and
- 2) complying with Australian Accounting Standards and the Corporations Regulations;

C. Deloitte was of the opinion that the financial report also complied with International Financial Reporting Standards;

### **Particulars**

Deloitte's Independent Auditor's Report to the members of DSH dated 17 August 2015 (**FY15 Audit Report**).

- (c) does not plead to the matters alleged in paragraph 105 of the Amended Joint Statement of Claim so far as they concern Mr Abboud; and
- (d) otherwise does not admit the matters alleged in paragraph 105 of the Amended Joint Statement of Claim.

52 Potts denies paragraph 106 of the Amended Joint Statement of Claim.

### **B.2.3.2. DSH's FY15 Representations**

53 Potts does not admit paragraph 107 of the Amended Joint Statement of Claim.

54 Potts denies paragraph 108 of the Amended Joint Statement of Claim.

### **B.2.4. FY15 ASX Announcement & Results Briefing**

55 In response to paragraph 109 of the Amended Joint Statement of Claim, Potts:

- (a) admits that on or about 18 August 2015 DSH caused the FY15 ASX Announcement & Results Briefing to be made to the ASX;
- (b) says that the FY15 ASX Announcement & Results Briefing was made by DSH to the ASX following the passing of a resolution by the DSH directors which approved the FY15 ASX Announcement & Results Briefing being made, and that Potts voted in favour of that resolution; and

### Particulars

Minutes of the meeting of the board of DSH held on 17 August 2015, "Adoption of full year accounts".

(c) otherwise denies paragraph 109 of the Amended Joint Statement of Claim.

56 In response to paragraph 110 of the Amended Joint Statement of Claim, Potts:

(a) admits that the FY15 ASX Announcement & Results Briefing made various statements about the financial position and performance of DSH;

(b) relies upon the FY15 ASX Announcement & Results Briefing for their full terms and effect; and

(c) otherwise does not admit the matters alleged in paragraph 110 of the Amended Joint Statement of Claim.

### **C. REQUIRED ACCOUNTING ADJUSTMENTS**

#### **C.1. DSH'S ACCOUNTING OBLIGATIONS**

57 Potts admits paragraph 111 of the Amended Joint Statement of Claim, and relies upon Australian Accounting Standards AASB 3, AASB 101, AASB 102, AASB 108, AASB 112, AASB 116, AASB 118, AASB 132, AASB 136, AASB 139 and AASB 1031 for their full terms and effect.

58 Potts admits paragraph 112 of the Amended Joint Statement of Claim and relies upon the AASB Framework for its full terms and effect.

59 In response to paragraph 113 of the Amended Joint Statement of Claim, Potts repeats his responses to paragraphs 111 and 114-134 of the Amended Joint Statement of Claim, and otherwise does not admit the allegations in paragraph 113 of the Amended Joint Statement of Claim.

##### **C.1.1. AASB 101**

60 In response to paragraph 114-118 of the Amended Joint Statement of Claim, Potts:

(a) relies upon Australian Accounting Standard AASB 101 for its full terms and effect; and

(b) otherwise does not admit the matters alleged in paragraphs 114-118 of the Amended Joint Statement of Claim.

##### **C.1.2. AASB 102**

61 In response to paragraph 119-123 of the Amended Joint Statement of Claim, Potts:

- (a) relies upon Australian Accounting Standard AASB 102 for its full terms and effect; and
- (b) otherwise does not admit the matters alleged in paragraphs 119-123 of the Amended Joint Statement of Claim.

**C.1.3. AASB 108**

62 In response to paragraph 124-126 of the Amended Joint Statement of Claim, Potts:

- (a) relies upon Australian Accounting Standard AASB 108 for its full terms and effect; and
- (b) otherwise does not admit the matters alleged in paragraphs 124-126 of the Amended Joint Statement of Claim.

**C.1.4. AASB 132 and AASB 139**

63 In response to paragraph 127-130 of the Amended Joint Statement of Claim, Potts:

- (a) relies upon Australian Accounting Standards AASB 132 and AASB 139 for their full terms and effect; and
- (b) otherwise does not admit the matters alleged in paragraphs 127-130 of the Amended Joint Statement of Claim.

**C.1.5. AASB Framework**

64 In response to paragraph 131-134 of the Amended Joint Statement of Claim, Potts:

- (a) relies upon AASB Framework for its full terms and effect; and
- (b) otherwise does not admit the matters alleged in paragraphs 131-134 of the Amended Joint Statement of Claim.

**C.2. INVENTORY**

65 In response to paragraphs 135-137 of the Amended Joint Statement of Claim, Potts:

- (a) says that "End of Life" was introduced as a new category in 2014; and
- (b) otherwise admits paragraphs 135-137 of the Amended Joint Statement of Claim.

66 In response to paragraph 138 of the Amended Joint Statement of Claim, Potts:

- (a) says that Agile Commerce Consulting was retained by DSH by a letter dated 25 September 2015, which was signed by Potts on behalf of DSH;
- (b) relies on that retainer letter for its full terms and effect; and

- (c) otherwise does not admit the allegations in that paragraph.

67 In response to paragraphs 139-141 of the Amended Joint Statement of Claim, Potts:

- (a) says that on or around 26 October 2015 he received a document headed "Dick Smith Holdings Inventory Paper" prepared by Mike Holtzer and Andy Powell (**Holtzer Paper**), and that he had a meeting with Mr Holtzer and Mr Powell on around 27 October 2015;

#### Particulars

Email from Mike Holtzer to Michael Potts dated 26 October 2015 and attachment titled "Dick Smith Holdings Inventory Paper".

- (b) admits that the Holtzer Paper contained statements to the effect of those pleaded in subparagraphs 139(a)-(e) of the Amended Joint Statement of Claim, and relies on the Holtzer Paper for its full terms and effect;
- (c) says that the Holtzer Paper stated that their analysis suggested a value impairment liability of over \$63m versus a \$7m provision;
- (d) says that at the meeting referred to in subparagraph (a) above, Mr Holtzer and Mr Powell informed Potts that they believed that the level of impairment of inventory was \$63m;
- (e) says that Potts did not accept that the views in the Holtzer Paper and the information referred to in subparagraphs (c)-(d) above were correct, and asked for further work to be done by Mr Holtzer and Mr Powell regarding these matters;
- (f) says that on 26 November 2015 Mr Holtzer sent Potts an email, attaching a document which stated that the value of the problem stock as identified by the business and as verified by Mr Holtzer and Mr Powell was \$190m, and relies on the attachment for its full terms and effect; and
- (g) otherwise denies the matters alleged in paragraphs 139-141 of the Amended Joint Statement of Claim.

68 Potts admits paragraph 142 of the Amended Joint Statement of Claim, and further says that:

- (a) on 29 November 2015, the Board resolved to announce that:
  - (i) it had conducted a review which remained in progress, the objectives of which included:

- A. achieving category right sizing;
  - B. optimising the depth and breadth of inventory;
  - C. identifying the anticipated impact of achieving preferred weeks cover and the level of marketing support required to achieve these objectives;
  - D. driving customer-centric outcomes; and
- (ii) while the inventory review had not concluded, the Board had determined that a non-cash impairment of \$60 million (pre-tax) was required; and

#### **Particulars**

Minutes of Board Meeting held on 29 November 2015, "Inventory Analysis".

- (b) an announcement to that effect was made by DSH on 30 November 2015.

#### **Particulars**

ASX Announcement dated 30 November 2015, "Non-cash adjustment following inventory review".

- 69 Potts does not admit paragraph 143 of the Amended Joint Statement of Claim.
- 70 Potts denies paragraphs 144-151 of the Amended Joint Statement of Claim insofar as it contains allegations against Potts, and further says that:

- (a) in respect of the FY14 Financial Statements:
- (i) Deloitte identified the inventory provisions in the FY14 Financial Statements as a key area of focus and audit response in the course of the FY14 Audit;

#### **Particulars**

Report by Deloitte headed "Report to the Finance and Audit Committee for the year ended 29 June 2014" and dated 6 August 2014 (**FY14 FAC Report**), section 3.2.

- (ii) Deloitte performed the following procedures in the course of the FY14 Audit in respect of the inventory provisions:
  - A. reviewing the inventory costing and provisioning methodologies adopted as required under AASB 102 *Inventories*;

- B. reviewing management's evolving provision methodologies and providing guidance as to the appropriateness of the methodology for both pre- and post- acquisition inventory balances;
- C. analysing reports developed by management to track actual selling prices for stock sold during the period and the allocation of 'scan' provision utilisation rates; and
- D. reviewing management's allocation of 1.0% of purchases as a balance sheet-only adjustment with recognition in the profit and loss on sale of the products to ensure that the appropriate amount has been taken to profit or loss relating to inventory purchases;

#### **Particulars**

Deloitte presentation to DSH headed "External audit strategy for the financial year ending 29 June 2014", dated January 2014 (the **FY14 Audit Strategy Presentation**), p. 8.

- (iii) Deloitte reported, at the conclusion of the FY14 Audit, that:
  - A. DSH's methodology used to calculate the provision for inventory obsolescence had been evolving as more historical data was available under the restructured business model;
  - B. as at June 2014, a process was undertaken to assess the inventory obsolescence provision based on various factors, and that this process had included the investigation of major product lines with the buying team to understand the expected future sell through and potential future write-downs;
  - C. Deloitte had reviewed both the assumptions and the methodology which were to be applied by management in the financial year ending 28 June 2015 in determining inventory provisions (the **2015 Inventory Provisions Methodology**);
  - D. Deloitte concurred with the 2015 Inventory Provisions Methodology, the application of which resulted in a provision for obsolescence some \$1.5m less than was in fact adopted in the FY14 Financial Statements, with Deloitte including this positive \$1.5m figure in its summary of unadjusted differences; and

- E. Deloitte had also reviewed the calculation methodology in relation to provision for shrinkage and concurred with the assumptions adopted by DSH management;

### Particulars

FY14 FAC Report, p. 10.

- (iv) on 18 August 2014, at the conclusion of the FY14 Audit, Deloitte issued the FY14 Audit Report, which made the representations pleaded in paragraph 43 of this Defence;
  - (v) Potts was aware of, and relied on, the matters in subparagraphs (i)-(iv) above when on 19 August 2014 he gave the FY14 Directors' Declaration and joined in the resolution of the board of DSH to approve the making of the FY14 ASX Announcement & Results Briefing to the ASX, and when he presented the 'FY2014 Results Briefing' which formed part of the FY14 ASX Announcement & Results Briefing; and
- (b) in respect of the FY15 Financial Statements:
- (i) Deloitte identified the inventory provisions in the FY15 Financial Statements as a "key area of focus and audit response" in the course of FY15 Audit;

### Particulars

Report by Deloitte headed "Report to the Finance and Audit Committee for the year ended 28 June 2015" and dated 6 August 2015 (**FY15 FAC Report**), section 3.2

- (ii) Deloitte adopted the following procedures in respect of inventory provisions in the course of the FY15 Audit:
  - A. testing of controls around the inventory obsolescence, reconciliation, review and approvals process;
  - B. reviewing the inventory costing and provisioning methodologies adopted as required under AASB 102 *Inventories*;
  - C. using data analytics to analyse reports developed by management to track actual selling prices for stock sold; and
  - D. reviewing management's assessment of provisions based on this information and other evidence as to the appropriateness of the percentages provided on stock lines;

(the **FY15 Audit Inventory Procedures**)

**Particulars**

Deloitte presentation to DSH headed "External audit strategy for the year ending 28 June 2015", dated 18 November 2014 (the **FY15 Audit Strategy Presentation**), p. 8.

- (iii) having performed the FY15 Audit Inventory Procedures, Deloitte reported to DSH that:
  - A. Deloitte had assessed the assumptions and methodology applied by DSH in its accounts, and concurred with the methodology; and
  - B. the overall costs which had been recognised in the total cost of inventory under Accounting Standard AASB 102 Inventories were appropriate;

**Particulars**

FY15 FAC Report, pp. 5 and 9

- (iv) on 17 August 2015, at the conclusion of the FY15 Audit, Deloitte issued the FY15 Audit Report, which made the representations pleaded in paragraph 51 of this Defence; and

**Particulars**

Minutes of the meeting of the board of directors of DSH held on 17 August 2015, "Adoption of full year accounts".

- (v) Potts was aware of, and relied on, the matters in subparagraphs (i)-(iv) above when on 17 August 2015 he gave the FY15 Directors' Declaration and on 18 August 2015 he joined in the resolution of the board of DSH to approve the making of the FY15 ASX Announcement & Results Briefing to the ASX, and when he presented the 'FY2015 Results Briefing' which formed part of the FY15 ASX Announcement & Results Briefing; and
- (c) otherwise does not admit the allegations in paragraphs 144-151 of the Amended Joint Statement of Claim.

**C.3. REBATES**

**C.3.1. The Rebate Maximization Practice and Its Consequences**

71 In response to paragraph 152 of the Amended Joint Statement of Claim, Potts:

- (a) says that at all material times, DSH obtained rebates from suppliers and service providers, including O&A Rebates (defined in paragraph 170 of the Amended Joint Statement of Claim);
- (b) says that the practice of obtaining such rebates from suppliers commenced at the time when the Dick Smith business was under the management of Woolworths Limited and Anchorage Capital Partners;
- (c) says that by at least May 2014 DSH had, as part of a strategy of seeking to obtain improved terms from suppliers, implemented a practice of seeking to maximise the rebates which were obtained from its suppliers, including O&A Rebates;
- (d) the adoption of the strategy referred to in subparagraph (c) above, including the strategy of seeking to negotiate pricing and marketing support from suppliers, was referred to in the Prospectus;

### **Particulars**

The Prospectus included statements that:

- (i) the "transformation strategy" implemented by DSH included the following initiatives in respect of "Suppliers and buying" and "Marketing" (p. 34):
  - A. "Renegotiated a number of supplier agreements (e.g. pricing and terms)";
  - B. "Developed new pricing and promotional practices in collaboration with suppliers"; and
  - C. "Renegotiated marketing supplier agreements".
- (ii) "Despite the increase in marketing frequency, net marketing costs incurred by Dick Smith have reduced reflecting ... increased collaboration with suppliers." (p. 44)
- (iii) "The management team has worked with suppliers ..., with terms and conditions now aligned with standard market practice, including price and marketing support." (p. 45)
- (iv) "The major initiatives of the transformation program include ... Suppliers and buying: Revitalised range and relationships with suppliers, resulting in mutually beneficial agreements and vendor

support in key areas such as access to product, promotions and marketing.” (p. 47)

- (v) “New pricing and promotion practices were developed in collaboration with suppliers, ...” (p. 59)

- (e) says that in the case of O&A Rebates, the accounting treatment which was adopted by management of DSH in preparing the FY14 Financial Statements and the FY15 Financial Statements involved such rebates being recognised in the P&L, either as a Cost of Doing Business, or as a Cost of Sales which derived the Gross Margin, depending on the purpose for which the O&A Rebate was allowed to DSH; and

#### **Particulars**

Email from Damien Cork of Deloitte to Potts, copied to Nigel Mills of DSH and to David White of Deloitte, sent on Monday 26 May 2014, and headed “Dick Smith: O&A Rebates”.

Email from Potts to David White of Deloitte, copied to Damien Cork of Deloitte, sent on Friday 6 June 2014 and headed “RE:O&A”, attaching two papers, headed:

- “Position Paper – Vendor Rebates – Profit/Loss and Balance Sheet Recognition, dated 28 May 2014 and prepared by Nigel Mills of DSH”
- “Vendor Rebates – O&A”

- (f) otherwise denies paragraph 152 of the Amended Joint Statement of Claim.

72 Potts denies paragraphs 153-154 of the Amended Joint Statement of Claim.

#### **C.3.2. Accounting Treatment of Switched Invoice Rebates**

73 Potts does not admit paragraph 155 of the Amended Joint Statement of Claim.

74 Potts does not admit paragraphs 156-162 of the Amended Joint Statement of Claim, and further says that:

- (a) Deloitte identified the accounting treatment of rebates in the FY15 Financial Statements as a “key area of focus and audit response” in the course of the FY15 Audit;

#### **Particulars**

FY15 FAC Report, pp. 10-11.

- (b) Deloitte adopted the following procedures in respect of rebates in the course of the FY15 Audit:
- (i) understanding the key controls associated with the completeness and validity of the recording of rebate income;
  - (ii) critically evaluating management's methodologies in capturing, calculating and recognising rebates received and receivable, including the underlying key assumptions;
  - (iii) testing the controls in place to ensure that they are operating effectively throughout the year;
  - (iv) performing substantive testing on a sample of rebates recorded or accrued at balance sheet date as well as reviewing a sample of supplier agreements to ensure they have been correctly treated; and
  - (v) assessing the completeness and accuracy of the provision for any disputed claims with suppliers;

**Particulars**

FY15 Audit Strategy Presentation, p. 8.

- (c) the procedures carried out by Deloitte in the course of the FY15 Audit in respect of the accounting treatment of supplier rebates also included:
- (i) analysing the various types of rebates recognised, by assessing the nature and the classification of the rebates,
  - (ii) performing a walkthrough of the process for classifying rebates,
  - (iii) detailed testing of a sample of rebates recognised throughout the year by tracing to supporting documentation, with a focus on rebates accrued as at 28 June 2015,
  - (iv) assessing whether any supplier rebates represented amounts which should be deferred; and
  - (v) analysing the gross margin, net advertising costs and overall costs of doing business as a percentage of sales to determine whether the recognition of rebates was reasonable and reflected the fundamental economic nature of the activities;

**Particulars**

FY15 FAC Report, pp. 10 and 11

- (d) having undertaken the procedures referred to in subparagraphs (b) and (c) above, Deloitte reported that:
- (i) Deloitte concurred with management's accounting treatment of supplier rebates in the accounts of DSH;

**Particulars**

FY15 FAC Report, p. 10

- (ii) based on the procedures performed by Deloitte, Deloitte had not identified any unadjusted differences in respect of supplier rebates in the FY15 Financial Statements; and

**Particulars**

FY15 FAC Report, p. 10

- (iii) DSH's processes, reconciliations and supporting evidence for O&A Rebates had significantly improved compared to the previous financial year ending 29 June 2014, with those rebates accrued in the accounts being based on supporting evidence provided by the buyers and reviewed by finance before accruals were raised;

**Particulars**

FY15 FAC Report, p. 10

- (e) Deloitte concurred with the allocation by DSH management of a portion of the O&A Rebates in cost of sales where the rebates exceed the underlying promotional costs;

**Particulars**

FY15 FAC Report, p. 11

- (f) on 17 August 2015, at the conclusion of the FY15 Audit, Deloitte issued the FY15 Audit Report, which made the representations pleaded in paragraph 51 above; and
- (g) Potts was aware of, and relied on, the matters in subparagraphs (a)-(f) above when on 17 August 2015 he gave the FY15 Directors' Declaration and on 18 August 2015 he joined in the resolution of the board of DSH to approve the making of the FY15 ASX Announcement & Results Briefing to the ASX, and when he presented the 'FY2015 Results Briefing' which formed part of the FY15 ASX Announcement & Results Briefing.

### C.3.3. Accounting treatment of Volume Rebates

75 Potts admits paragraph 163 of the Amended Joint Statement of Claim.

76 Potts does not admit paragraphs 164-169 of the Amended Joint Statement of Claim, and further says:

(a) in relation to the FY14 Financial Statements:

- (i) Deloitte identified the accounting treatment of rebates in the FY14 Financial Statements as a "key area of focus and audit response" in the FY14 Audit;

#### Particulars

FY14 FAC Report, section 3.3.

- (ii) Deloitte performed the following procedures in the course of the FY14 Audit in respect of the accounting treatment of rebates in the FY14 Financial Statements:

- A. discussing the rebates with key members of Dick Smith management;
- B. analysing the various types of rebates recognised;
- C. confirming the key controls associated with the completeness and validity of the recording of rebate revenues;
- D. performing substantive testing on a sample of rebates recorded in the year;
- E. assessing the provision for any disputed claims which were expected to be granted by the vendors; and
- F. assessing whether any rebates represented amounts which should be deferred;

#### Particulars

FY14 Audit Strategy Presentation, p. 11.

FY14 FAC Report, p. 11.

- (iii) Deloitte requested, was provided with and reviewed papers prepared by DSH management which explained the accounting treatment of rebates in the accounts of DSH;

### Particulars

Potts repeats the particulars to paragraph 71(e) of this Defence.

- (iv) Deloitte reported that Deloitte concurred with the accounting treatment of rebates which had been adopted by management of DSH in preparing the FY14 Financial Statements;

### Particulars

FY14 FAC Report, p. 11.

- (v) on 18 August 2014, at the conclusion of the FY14 Audit, Deloitte issued the FY14 Audit Report, which made the representations pleaded in paragraph 43 of this Defence; and
- (vi) Potts was aware of, and relied on, the matters in subparagraphs (i)-(v) above when on 19 August 2014 he gave the FY14 Directors' Declaration and joined in the resolution of the board of DSH to approve the making of the FY14 ASX Announcement & Results Briefing to the ASX, and when he presented the 'FY2014 Results Briefing' which formed part of the FY14 ASX Announcement & Results Briefing; and
- (b) in relation to the FY15 Financial Statements, repeats paragraph 74(a)-(g) above.

#### **C.3.4. Accounting treatment of O&A Rebates**

77 In response to paragraph 170 of the Amended Joint Statement of Claim, Potts:

- (a) admits that in FY14 and FY15 DSH had obtained O&A Rebates;
- (b) repeats paragraph 71 above; and
- (c) otherwise does not admit the allegations in paragraph 170 of the Amended Joint Statement of Claim.

78 In response to paragraph 171 of the Amended Joint Statement of Claim, Potts:

- (a) admits that the rebates which DSH obtained from suppliers from time to time included rebates as generally described in each of subparagraphs 171(a)-(d) of the Amended Joint Statement of Claim; and
- (b) otherwise does not admit the allegations in that paragraph.

- 79 In response to paragraph 172 of the Amended Joint Statement of Claim, Potts repeats paragraphs 71(e), 74(d)-(e) and 76(a)(iii)-(iv) of this Defence, and otherwise does not admit the allegations in that paragraph.

### **Particulars**

Potts repeats paragraphs 71, 74 and 76 of this Defence.

#### **C.3.5. Transfers from Cost of Doing Business to the Cost of Goods Sold**

- 80 Potts does not admit paragraphs 173-175 of the Amended Joint Statement of Claim and repeats paragraphs 71, 74, 76 and 79 of this Defence.

#### **C.3.6. Recording income prior to the sale of relevant stock or the incurring of the relevant marketing expense**

- 81 Potts does not admit paragraph 176 of the Amended Joint Statement of Claim and repeats paragraphs 71, 74, 76 and 79 of this Defence.

#### **C.3.7. Double counting rebate income and "pulling forward" rebate income**

- 82 Potts does not admit paragraphs 177-179 of the Amended Joint Statement of Claim and repeats paragraph 76 of this Defence.

#### **C.3.8. Recording rebates when recovery was not probable**

- 83 Potts does not admit paragraphs 180-181 of the Amended Joint Statement of Claim and repeats paragraphs 71, 74, 76 and 79 of this Defence.

#### **C.3.9. O&A Rebates and Accounting Standards**

- 84 Potts does not admit paragraphs 182-187 of the Amended Joint Statement of Claim and repeats paragraphs 71, 74, 76 and 79 of this Defence.

#### **C.3.10. Lack of system to reliably track and record rebates**

- 85 Potts denies paragraphs 188-189 of the Amended Joint Statement of Claim.
- 86 Potts denies paragraphs 190-192 of the Amended Joint Statement of Claim, and repeats paragraphs 71, 74, 76 and 79 of this Defence.

### **C.4. WARRANTY SIGN ON LIABILITY**

- 87 In response to paragraph 193 of the Amended Joint Statement of Claim, Potts:
- (a) says that Deloitte, at the conclusion of its audit of the FY13 Report, reported to the board of DSH that:
    - (i) "Other adjustments relate primarily to an unearned revenue liability raised in respect of The Warranty Group sign-on bonus. Management

ascribed a fair value of \$2.1 million to this liability at acquisition, however due to the requirements of AASB 3 we have assessed the fair value of this as \$nil. This adjustment has been included on the schedule of unadjusted differences in Appendix A";

- (ii) the unadjusted difference referred to in paragraph (i) above did not, either individually or in aggregate with other unadjusted differences identified by Deloitte, have a material effect on the FY13 Report; and

#### **Particulars**

FY13 Board Report, section 2.1 and Appendix A.

- (b) otherwise does not admit paragraph 193 of the Amended Joint Statement of Claim.

88 Potts does not admit paragraphs 194-197 of the Amended Joint Statement of Claim.

89 Potts does not admit paragraphs 198-201 of the Amended Joint Statement of Claim, repeats paragraph 87 above, and further says that:

- (a) at the conclusion of Deloitte's review of the financial report of DSH for the half-year ended 29 December 2013 (**HY14 Financial Statements**), Deloitte reported that:
  - (i) it had identified an overstatement of the Warranty Sign-on fee recognised on acquisition; and
  - (ii) this overstatement did not, either individually or in aggregate with other unadjusted differences, have a material effect on the HY14 Financial Statements;

#### **Particulars**

Report by Deloitte headed "Report to the Finance and Audit Committee for the half-year ended 29 December 2013" and dated 4 February 2014, Appendix A.

- (b) at the conclusion of the FY14 Audit, Deloitte reported that:
  - (i) included in the statutory and pro forma results were a number of one-off items which included the release of The Warranty Group sign-on fee;
  - (ii) in FY14 management renegotiated its warranty service agreement with The Warranty Group;

- (iii) DSH had previously received a sign on fee of \$2.5m which was being amortised over the period of the warranty service agreement;
- (iv) on renegotiation of this agreement, the unamortised portion of this fee (\$1.7m) was released to profit or loss; and
- (v) this adjustment complied with relevant Australian Accounting Standards;

**Particulars**

FY14 FAC Report, section 3.1.

- (c) on 18 August 2014, at the conclusion of the FY14 Audit, Deloitte issued the FY14 Audit Report, which made the representations pleaded in paragraph 43 of this Defence; and
- (d) Potts was aware of, and relied on, the matters in subparagraphs (a)-(c) above when on 19 August 2014 he gave the FY14 Directors' Declaration and joined in the resolution of the board of DSH to approve the making of the FY14 ASX Announcement & Results Briefing to the ASX, and when he presented the 'FY2014 Results Briefing' which formed part of the FY14 ASX Announcement & Results Briefing.

**C.5. DOUBTFUL DEBTS PROVISION**

90 Potts does not admit paragraphs 202-207 of the Amended Joint Statement of Claim, and says that:

- (a) at the conclusion of its audit of the FY13 Financial Statements, Deloitte reported to the board of DSH that Deloitte had identified an overstatement of provision for doubtful debts, but that this overstatement did not, either individually or in aggregate, have a material effect of the FY13 Financial Statements;

**Particulars**

FY13 Board Report, section 1.1 and Appendix A.

- (b) at the conclusion of the FY14 Audit, Deloitte reported that nothing had come to Deloitte's attention that caused Deloitte to believe that the financial information as presented in the FY14 Financial Statements was materially misstated;

**Particulars**

FY14 FAC Report, page 2.

- (c) on 18 August 2014, Deloitte issued the FY14 Audit Report, which made the representations pleaded in paragraph 43 of this Defence; and
- (d) Potts was aware of, and relied on, the matters in subparagraphs (b)-(c) above when on 19 August 2014 he gave the FY14 Directors' Declaration and joined in the resolution of the board of DSH to approve the making of the FY14 ASX Announcement & Results Briefing to the ASX, and when he presented the 'FY2014 Results Briefing' which formed part of the FY14 ASX Announcement & Results Briefing.

#### **C.6. DEFERRED EXPENSES**

- 91 Potts does not plead to paragraphs 208-210 of the Amended Joint Statement of Claim as those paragraphs do not contain any allegations against him.

#### **C.7. CAPITALISATION OF WAGES**

- 92 Potts admits paragraph 211 of the Amended Joint Statement of Claim.
- 93 Potts does not admit paragraphs 212-213 of the Amended Joint Statement of Claim.

#### **C.8. ONEROUS LEASES**

- 94 Potts does not admit paragraphs 214-218 of the Amended Joint Statement of Claim, and says that:

- (a) Deloitte reported to the Finance & Audit Committee, in respect of its audit of the FY14 Financial Statements, that:
  - (i) "During the year an amount of \$4.1 million was released from the onerous lease provision. This related primarily to the New Zealand warehouse, for which management secured a 3rd party logistics contract to mitigate the impact of the unused warehouse space, along with provisions raised for loss making stores";
  - (ii) Deloitte had reviewed this one-off item with respect to the requirements of the relevant Australian Accounting Standards and had not noted any significant findings; and
  - (iii) Deloitte had assessed the recognition of the amount as compliant with the relevant Australian Accounting Standards;

#### **Particulars**

FY14 FAC Report, section 3.1.

- (b) on 18 August 2014, Deloitte issued the FY14 Audit Report, which made the representations pleaded in paragraph 43 of this Defence; and
- (c) Potts was aware of, and relied on, the matters in subparagraphs (a)-(b) above when on 19 August 2014 he gave the FY14 Directors' Declaration and joined in the resolution of the board of DSH to approve the making of the FY14 ASX Announcement & Results Briefing to the ASX, and when he presented the 'FY2014 Results Briefing' which formed part of the FY14 ASX Announcement & Results Briefing.

### **C.9. DEED OF RELEASE PAYMENT**

95 Potts admits paragraph 219 of the Amended Joint Statement of Claim.

96 Potts does not admit paragraphs 220-222 of the Amended Joint Statement of Claim, and says that:

- (a) Deloitte reported to the Finance & Audit Committee, in respect of its audit of the FY15 Financial Statements, that:
  - (i) a key area of focus and audit response was one-off events which DSH management had excluded from the DSH Group's underlying profit reported, including the settlement of the dispute with Star Track;
  - (ii) "We note that management has capitalised the Deed of Release Payment made subsequent to the year end and this will be amortised over FY16. As the transitional services were completed by 28 June 2015, we consider that the whole amount of the settlement payment should be expensed in FY15. Therefore, an immaterial unadjusted difference of \$1.4 million has been raised in Appendix A"; and
  - (iii) the unadjusted difference referred to in subparagraph (i) above did not, either individually or in aggregate with other unadjusted differences identified by Deloitte, have a material effect on the FY15 Financial Statements;

### **Particulars**

FY15 FAC Report, sections 1.1 and 3.1 and Appendix A.

- (b) on 17 August 2015, at the conclusion of the FY15 Audit, Deloitte issued the FY15 Audit Report, which made the representations pleaded in paragraph 51 above; and

- (c) Potts was aware of, and relied on, the matters in subparagraphs (a)-(b) above when on 17 August 2015 he gave the FY15 Directors' Declaration and on 18 August 2015 he joined in the resolution of the board of DSH to approve the making of the FY15 ASX Announcement & Results Briefing to the ASX, and when he presented the 'FY2015 Results Briefing' which formed part of the FY15 ASX Announcement & Results Briefing.

#### **C.10. RESTATEMENT OF FY14 AND FY15 FINANCIAL STATEMENTS**

- 97 Potts does not admit paragraph 223 of the Amended Joint Statement of Claim, and repeats sections C.2-C.8 of this Defence.
- 98 Potts does not admit paragraph 224 of the Amended Joint Statement of Claim, and repeats sections C.2, C.3 and C.9 of this Defence.
- 99 Potts does not admit paragraph 225 of the Amended Joint Statement of Claim, and repeats paragraph 97 of this Defence.
- 100 Potts does not admit paragraph 226 of the Amended Joint Statement of Claim, and repeats paragraph 98 of this Defence.

#### **D. ALLEGED CONTRAVENTIONS**

##### **D.1. DSH'S ALLEGED MISLEADING OR DECEPTIVE CONDUCT**

###### **D.1.1. The Prospectus**

- 101 Potts does not plead to paragraphs 227-229 of the Amended Joint Statement of Claim as those paragraphs do not contain any allegations against him.
- 102 In response to paragraph 230 of the Amended Joint Statement of Claim, Potts repeats sections C.2, C.4, C.5 and C.6 of this Defence and otherwise does not plead to paragraph 230 as it does not contain any allegations against him.
- 103 Potts does not plead to paragraphs 231-238 of the Amended Joint Statement of Claim as those paragraphs do not contain any allegations against him.

###### **D.1.2. FY14 Financial Statements**

- 104 Potts denies paragraphs 239-241 of the Amended Joint Statement of Claim and repeats sections C.2, C.3.1, C.3.3-C.3.8, C.3.10, C.4, C.5, C.6, C.7 and C.8 of this Defence.

**D.1.3. DSH's FY14 Express Representation and FY14 Implied Representation**

105 Potts denies paragraphs 242-243 of the Amended Joint Statement of Claim so far as those paragraphs contain allegations against him, and repeats sections C.2, C.3.1, C.3.3-C.3.10, C.4, C.5, C.7 and C.8 of this Defence.

**D.1.4. FY14 ASX Announcement & Results Briefing**

106 Potts denies paragraph 244 of the Amended Joint Statement of Claim and repeats sections C.2, C.3.1, C.3.3-C.3.10, C.4, C.5, C.7 and C.8 of this Defence.

**D.1.5. FY15 Financial Statements**

107 Potts denies paragraphs 245-247 of the Amended Joint Statement of Claim and repeats sections C.2, C.3 and C.9 of this Defence.

**D.1.6. DSH's FY15 Express Representation and FY15 Implied Representation**

108 Potts denies paragraphs 248-249 of the Amended Joint Statement of Claim so far as those paragraphs contain allegations against him, and repeats sections C.2, C.3 and C.9 of this Defence.

**D.1.7. FY15 ASX Announcement & Results Briefing**

109 Potts denies paragraph 250 of the Amended Joint Statement of Claim and repeats sections C.2, C.3 and C.9 of this Defence.

**D.2. DSH'S ALLEGED CONTRAVENTION OF SECTION 1041E OF THE CA****D.2.1. The Prospectus**

110 Potts does not plead to paragraph 251 of the Amended Joint Statement of Claim as it does not contain any allegations against him.

111 In response to paragraph 252 of the Amended Joint Statement of Claim, Potts:

- (a) does not admit the allegations in subparagraph (a) so far as they concern him;
- (b) as to subparagraph (g), admits that he had access to and was aware of the contents of the Deloitte Project Yellow Report when DSH issued the Prospectus, but denies that he was or ought to have been aware of any alleged limitations of DSH's inventory ageing system; and
- (c) otherwise does not plead to paragraph 252 of the Amended Joint Statement of Claim as it does not contain allegations against him.

112 Potts does not plead to paragraph 253 of the Amended Joint Statement of Claim as it does not contain any allegations against him.

**D.2.2. FY14 Financial Statements**

113 Potts denies paragraph 254 of the Amended Joint Statement of Claim.

114 In response to paragraph 255 of the Amended Joint Statement of Claim, Potts:

- (a) as to subparagraphs (a)-(b), admits that he was aware that DSH received O&A Rebates and of DSH's accounting treatment of those rebates in the FY14 Financial Statements, repeats paragraphs 71 and 76(a) of this Defence, and otherwise does not admit the allegations in subparagraphs (a)-(b);
- (b) denies subparagraphs (c)-(e);
- (c) does not admit subparagraphs (g)-(i);
- (d) as to subparagraph (j), admits that, prior to the publication of the FY14 Financial Statements, Potts received from Deloitte the advice pleaded in paragraphs 70(a), 76(a), 87, 89, 90 and 94 of this Defence, and otherwise does not admit the allegations in subparagraph (j);
- (e) denies subparagraph (k) so far as it contains allegations against Potts;
- (f) as to subparagraph (l), admits that he had access to and was aware of the contents of the Deloitte Project Yellow Report when DSH issued the Prospectus, but denies that he was or ought to have been aware of any alleged limitations of DSH's inventory ageing system;
- (g) denies subparagraph (m) so far as it contains allegations against Potts, and repeats section C.3 of this Defence;
- (h) denies subparagraph (n) so far as it contains allegations against Potts, and repeats section C.2 of this Defence; and
- (i) otherwise does not plead to paragraph 255 of the Amended Joint Statement of Claim.

115 Potts denies paragraph 256 of the Amended Joint Statement of Claim.

**D.2.3. DSH's FY14 Express Representation and FY14 Implied Representation**

116 Potts denies paragraph 257 of the Amended Joint Statement of Claim.

117 In response to paragraph 258 of the Amended Joint Statement of Claim, Potts repeats sections C.2-C.5, C.7, C.9 and D.2.2 of this Defence, and otherwise does not plead to that paragraph as it does not contain any allegations against him.

118 In response to paragraph 259 of the Amended Joint Statement of Claim, Potts:

- (a) denies the allegations in subparagraphs (a)-(d) so far as they concern Potts; and
- (b) otherwise does not plead to paragraph 259 of the Amended Joint Statement of Claim.

119 Potts denies paragraph 260 of the Amended Joint Statement of Claim.

**D.2.4. FY14 ASX Announcement & Results Briefing**

120 Potts denies paragraphs 261-263 of the Amended Joint Statement of Claim.

**D.2.5. FY15 Financial Statements**

121 Potts denies paragraph 264 of the Amended Joint Statement of Claim.

122 In response to paragraph 265 of the Amended Joint Statement of Claim, Potts:

- (a) denies subparagraphs (a)-(b) so far as they concern Potts;
- (b) as to subparagraphs (c)-(e), admits that he was aware that DSH received volume rebates and O&A Rebates from suppliers in FY15, repeats section C.3 of this Defence, and otherwise denies the allegations in subparagraphs (c)-(e) so far as they concern him;
- (c) denies subparagraphs (f)-(i) so far as they concern him, and repeats sections C.2 and C.3 of this Defence; and
- (d) otherwise does not plead to paragraph 265 of the Amended Joint Statement of Claim.

123 Potts denies paragraph 266 of the Amended Joint Statement of Claim.

**D.2.6. DSH's FY15 Express Representation and FY15 Implied Representation**

124 Potts denies paragraphs 267-268 of the Amended Joint Statement of Claim and repeats paragraph 122 of this Defence.

125 In response to paragraph 269 of the Amended Joint Statement of Claim, Potts:

- (a) denies the allegations in subparagraphs (a)-(d) so far as they concern Potts; and
- (b) otherwise does not plead to paragraph 269 of the Amended Joint Statement of Claim.

126 Potts denies paragraph 270 of the Amended Joint Statement of Claim.

**D.2.7. FY15 ASX Announcement & Results Briefing**

- 127 Potts denies paragraphs 271-273 of the Amended Joint Statement of Claim and repeats paragraphs 109 and 122 of this Defence.

**D.3. DSH'S ALLEGED CONTINUOUS DISCLOSURE CONTRAVENTIONS**

- 128 Potts admits paragraph 274 of the Amended Joint Statement of Claim.
- 129 Potts does not plead to paragraphs 275-284 of the Amended Joint Statement of Claim, as those paragraphs contain no allegations against him.

**D.4. MR ABBOUD'S ALLEGED CONTRAVENTIONS**

- 130 In response to paragraphs 285-320 of the Amended Joint Statement of Claim, Potts:
- (a) admits paragraphs 299 and 316; and
  - (b) otherwise does not plead to those paragraphs, as they do not contain any allegations against him.

**D.5. MR POTTS' ALLEGED CONTRAVENTIONS**

- 131 In response to paragraph 321 of the Amended Joint Statement of Claim, Potts:
- (a) admits that he joined in resolutions of the board of DSH authorising the issue of the FY14 Financial Statements, the FY14 ASX Announcement & Results Briefing, the FY15 Financial Statements and the FY15 ASX Announcement & Results Briefing;

**Particulars**

Potts repeats the particulars to paragraphs 47(b) and 55(b) of this Defence.

- (b) admits that he made the FY14 Directors' Declaration and the FY15 Directors' Declaration;
  - (c) admits that he presented the Results Briefings forming part of the FY14 ASX Announcement & Results Briefing and the FY15 ASX Announcement & Results Briefing; and
  - (d) otherwise denies paragraph 321 of the Amended Joint Statement of Claim.
- 132 Potts denies paragraph 322 of the Amended Joint Statement of Claim.

**D.5.1. FY14 Financial Statements and DSH's FY14 Express Representation**

- 133 In response to paragraph 323 of the Amended Joint Statement of Claim, Potts admits that he had knowledge of the contents of the FY14 Financial Statements,

including the FY14 Directors' Declaration, and otherwise denies the allegations in that paragraph.

134 In response to paragraph 324 of the Amended Joint Statement of Claim, Potts:

- (a) repeats paragraph 130 of the Defence; and
- (b) otherwise denies paragraph 324 of the Amended Joint Statement of Claim.

135 Potts denies paragraphs 325-328 of the Amended Joint Statement of Claim.

**D.5.2. Directors' FY14 Implied Representation**

136 Potts denies paragraphs 329-332 of the Amended Joint Statement of Claim.

**D.5.3. FY14 ASX Announcement & Results Briefing**

137 Potts admits paragraph 333 of the Amended Joint Statement of Claim.

138 In response to paragraph 334 of the Amended Joint Statement of Claim, Potts:

- (a) repeats paragraph 130 of the Defence; and
- (b) otherwise denies paragraph 334 of the Amended Joint Statement of Claim.

139 Potts admits paragraph 335 of the Amended Joint Statement of Claim.

140 Potts denies paragraphs 336-339 of the Amended Joint Statement of Claim.

**D.5.4. FY15 Financial Statements and DSH's FY15 Express Representation**

141 In response to paragraph 340 of the Amended Joint Statement of Claim, Potts admits that he had knowledge of the contents of the FY15 Financial Statements, including the FY15 Directors' Declaration, and otherwise denies the allegations in that paragraph.

142 In response to paragraph 341 of the Amended Joint Statement of Claim, Potts:

- (a) repeats paragraph 130 of the Defence; and
- (b) otherwise denies paragraph 341 of the Amended Joint Statement of Claim.

143 Potts denies paragraphs 342-345 of the Amended Joint Statement of Claim.

**D.5.5. Directors' FY15 Implied Representation**

144 Potts denies paragraphs 346-349 of the Amended Joint Statement of Claim.

**D.5.6. FY15 ASX Announcement & Results Briefing**

145 Potts admits paragraph 350 of the Amended Joint Statement of Claim.

146 In response to paragraph 351 of the Amended Joint Statement of Claim, Potts:

- (a) repeats paragraph 130 of the Defence; and
- (b) otherwise denies paragraph 351 of the Amended Joint Statement of Claim.

147 Potts admits paragraph 352 of the Amended Joint Statement of Claim.

148 Potts denies paragraphs 353-356 of the Amended Joint Statement of Claim.

**E. CAUSATION, LOSS AND DAMAGE**

149 Potts does not admit paragraph 357 of the Amended Joint Statement of Claim.

150 In response to paragraph 358 of the Amended Joint Statement of Claim, Potts:

- (a) admits that at all material times the provisions of the CA which were in force included ss. 674, 728, 729, 1041E and 1041H;
- (b) admits that the market in which DSH shares were traded was and is regulated by the ASX Listing Rules;
- (c) repeats sections C.2 to C.9 of this Defence; and
- (d) otherwise denies the allegations in paragraph 358 of the Amended Joint Statement of Claim.

151 In response to paragraphs 359-360 of the Amended Joint Statement of Claim, Potts:

- (a) repeats sections B.1, C.2, C.4, C.5, C.6, D.1.1 and D.2.1 of this Defence; and
- (b) otherwise does not admit the allegations in paragraphs 359-360 of the Amended Joint Statement of Claim.

152 In response to paragraphs 361-363 of the Amended Joint Statement of Claim, Potts:

- (a) denies the alleged contraventions of the CA in the Amended Joint Statement of Claim insofar as they are pleaded against him;
- (b) denies that the plaintiffs or Group Members have suffered any loss or damage as a result of any alleged contraventions of the CA pleaded against him; and
- (c) otherwise does not admit the allegations in paragraphs 361-363 of the Amended Joint Statement of Claim.

153 In response to paragraph 364 of the Amended Joint Statement of Claim, Potts:

- (a) admits that DSH did not, in the results for the half year 2014 or the half year 2015 publish any correction to the financial information in the Prospectus, or the FY14 Financial Statements or the FY15 Financial Statements, but denies that there was any need for any such correction to be published;

- (b) denies that the FY14 Financial Statements and the FY15 Financial Statements conveyed the alleged misleading statements or information; and
- (c) does not plead to the allegations in paragraph 364 concerning the alleged misleading statements or information in the Prospectus, as those allegations are not made against him.

154 Potts denies paragraph 365 of the Amended Joint Statement of Claim.

155 In response to paragraph 366 of the Amended Joint Statement of Claim, Potts denies that the plaintiffs and Group Members are entitled to the relief claimed against him in the Amended Joint Statement of Claim.

#### **F. CLAIM AGAINST DELOITTE**

156 Potts admits paragraphs 376-386 of the Amended Joint Statement of Claim.

157 Potts does not plead to paragraphs 387-410 of the Amended Joint Statement of Claim, as those paragraphs contain no allegations against him.

158 Potts admits paragraphs 411-426 of the Amended Joint Statement of Claim.

159 In response to paragraphs 427-444 of the Amended Joint Statement of Claim, Potts repeats sections C.2 and C.4 of this Defence, and otherwise does not plead to those paragraphs as they contain no allegations against him.

160 In response to paragraphs 445-455 of the Amended Joint Statement of Claim, Potts repeats sections C.2 and C.3 of this Defence, and otherwise does not plead to those paragraphs as they contain no allegations against him.

161 In response to paragraphs 456-466 of the Amended Joint Statement of Claim, Potts repeats sections C.2 and C.3 of this Defence, and otherwise does not plead to those paragraphs as they contain no allegations against him.

162 Potts does not plead to paragraphs 467-515 of the Amended Joint Statement of Claim, as those paragraphs contain no allegations against him.

#### **G. COMMON QUESTIONS**

163 Potts does not plead to paragraphs 516-528 of the Amended Joint Statement of Claim as those paragraphs contain no allegations against him.

#### **H. DEFENCES**

##### **H.1 RELIEF PURSUANT TO CA, S.1318**

164 In further answer to the whole of the Amended Joint Statement of Claim, Potts says that, if it is established that he engaged in misleading or deceptive conduct in

contravention of the CA, the ASIC Act and/or the Australian Consumer Law (**ACL**) as pleaded in paragraphs 321-356 of the Amended Joint Statement of Claim (which is denied), he acted honestly and, having regard to all the circumstances of the case, he ought fairly be excused for the contravening conduct pursuant to s.1318 of the CA.

## **H.2 PROPORTIONATE LIABILITY – APPORTIONABLE CLAIMS**

165 In further answer to the whole of the Amended Joint Statement of Claim, Potts says that, if (which is denied) Potts contravened s.1041H of the CA or s.12DA of the ASIC Act or s.18 of the ACL, and is liable to the Plaintiffs or Group Members for any loss or damage which resulted from any such contravention, then:

- (a) each of the claims of the Plaintiffs and Group Members against Potts in respect of such loss or damage is an apportionable claim within the meaning of (respectively) s.1041L of the CA, s.12GP of the ASIC Act and s.87CB of the *Competition and Consumer Act 2010* (Cth) (**CCA**); and
- (b) by reason of the matters pleaded in paragraphs 166-176 below, each of Potts, Abboud, DSH, the Other DSH Directors and Deloitte is a concurrent wrongdoer in respect of such loss or damage, within the meaning of s.1041L of the CA, s.12GP of the ASIC Act and s.87CB of the CCA.

### **H.2.1 Proportionate Liability – DSH and Abboud**

166 If the Plaintiffs establish that:

- (a) Potts engaged in conduct in contravention of s.1041H of the CA, s.12DA of the ASIC Act or s.18 of the ACL (as pleaded in paragraphs 323-325, 329, 333-336, 340-342, 346, 350-353 of the Amended Joint Statement of Claim, which is denied);
- (b) Abboud engaged in conduct in contravention of the CA, the ASIC Act or the ACL (as pleaded in section D.4 of the Amended Joint Statement of Claim);
- (c) DSH engaged in conduct in contravention of the CA, the ASIC Act or the ACL (as pleaded in sections D.1-D.3 of the Amended Joint Statement of Claim); and
- (d) the Plaintiffs and/or the Group Members have suffered loss or damage as a result of the conduct referred to in subparagraphs (a)-(c) above (as pleaded in paragraphs 357-365 of the Amended Joint Statement of Claim, which is denied);

then each of Potts, Abboud and DSH is a person whose acts or omissions caused the same loss or damage allegedly suffered by the Plaintiffs and/or Group Members which is the subject of their claim, and therefore, each is a concurrent wrongdoer within the meaning of s.1041L of the CA, s.12GP of the ASIC Act and s.87CB of the CCA.

- 167 By reason of the matters pleaded in paragraphs 165-166 above, and pursuant to s.1041L of the CA, s.12GP of the ASIC Act and/or s.87CB of the CCA, any liability (which is denied) of Potts to the Plaintiffs and/or Group Members is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Potts' responsibility, and the extent of Abboud's and DSH's responsibility, for such loss or damage.

#### **H.2.2 Proportionate Liability – Other DSH Directors**

- 168 In the period from 25 October 2013 to 3 January 2016, the directors of DSH were:

- (a) Potts (from 12 August 2014 until 4 February 2016, when he ceased to be a director of DSH);
- (b) Abboud;
- (c) Robert Murray (from 12 August 2014 until 4 January 2016, when he ceased to be a director of DSH);
- (d) Lorna Kathleen Raine (from 25 October 2013 until 4 January 2016, when she ceased to be a director of DSH);
- (e) Robert Ishak (from 25 October 2013 until January 2016, when he ceased to be a director of DSH);
- (f) Jamie Clifford Tomlinson (**Tomlinson**) (from 10 April 2015 until 4 January 2016, when he ceased to be director of DSH);
- (g) Phillip John Cave (**Cave**) (from 25 October 2013 until 28 February 2015, when he ceased to be a director of DSH); and
- (h) William Paul Renton Wavish (**Wavish**) (from 25 October 2013 until 25 March 2015, when he ceased to be a director of DSH),

(the persons in paragraphs (c)-(h) are referred to as the **Other DSH Directors**).

- 169 For the purpose only of this proportionate liability defence, and without admission, Potts repeats paragraphs 239-250, 287-289, 293, 297-300, 304-306, 310, 314-317 and 323-325, 329, 333-336, 340-342, 346, 350-353 of the Amended Joint Statement of Claim.

170 If the matters referred to in paragraph 169 above (which are the subject of denials and non-admissions pleaded above) are established, then:

(a) in relation to the FY14 Financial Statements and the FY14 ASX Announcement & Results Briefing:

- (i) on or about 18 August 2014, each of the Other DSH Directors (except Tomlinson) joined in the resolution of the board of DSH which adopted the FY14 Financial Statements and authorised the Company Secretary to release the FY14 Financial Statements and the FY14 ASX Announcement & Results Briefing to the ASX;
- (ii) by reason of the matters pleaded in subparagraph (i) above, each of the Other DSH Directors (except Tomlinson) engaged in conduct in relation to a financial product within the meaning of s.1041H of the CA, and/or in trade or commerce in relation to financial services within the meaning of s.12DA of the ASIC Act, and/or in trade or commerce within the meaning of s.4 of the ACL;
- (iii) by reason of the matters pleaded in paragraphs 239-244 of the Amended Joint Statement of Claim, and the matters pleaded in subparagraphs (i)-(ii) above, each of the Other DSH Directors (except Tomlinson) contravened s.1041H of the CA, s.12DA of the ASIC Act, and/or s.18 of the ACL; and
- (iv) the Plaintiffs and/or Group Members have suffered loss or damage by reason of, or as a result of, the contraventions of the Other DSH Directors (except Tomlinson) pleaded in subparagraph (iii) above; and

(b) in relation to the FY15 Financial Statements and the FY15 ASX Announcement & Results Briefing:

- (i) on or about 17 August 2015, each of the Other DSH Directors (except Cave and Wavish) joined in the resolutions of the board of DSH which adopted the FY15 Financial Statements and the FY15 ASX Announcement & Results Briefing and authorised the Company Secretary to release those documents to the ASX;
- (ii) by reason of the matters pleaded in subparagraph (i) above, each of the Other DSH Directors (except Cave and Wavish) engaged in conduct in relation to a financial product within the meaning of s.1041H of the CA, and/or in trade or commerce in relation to financial services

within the meaning of s.12DA of the ASIC Act, and/or in trade or commerce within the meaning of s.4 of the ACL;

- (iii) by reason of the matters pleaded in paragraphs 239-244 of the Amended Joint Statement of Claim, and the matters pleaded in subparagraphs (i)-(ii) above, each of the Other DSH Directors (except Cave or Wavish) contravened s.1041H of the CA, s.12DA of the ASIC Act, and/or s.18 of the ACL; and
- (iv) the Plaintiffs and/or Group Members have suffered loss or damage by reason of, or as a result of, the contraventions of the Other DSH Directors (except Cave or Wavish) pleaded in subparagraph (iii) above.

171 By reason of the matters pleaded in paragraphs 169-170 above:

- (a) each of the Other DSH Directors is a person whose acts or omissions caused the loss allegedly suffered by the Plaintiffs and/or Group Members which is the subject of their claim, and therefore each is a concurrent wrongdoer within the meaning of s.1041L of the CA, s.12GP of the ASIC Act and s.87CB of the CCA; and
- (b) pursuant to s.1041L of the CA, s.12GP of the ASIC Act and/or s.87CB of the CCA, any liability (which is denied) of Potts to the Plaintiffs and/or Group Members is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Potts' responsibility, and the extent of the responsibility of each of the Other DSH Directors, for such loss or damage.

### **H.2.3 Proportionate Liability – Deloitte**

172 If the Plaintiffs establish that:

- (a) Potts engaged in conduct in contravention of s.1041H of the CA, s.12DA of the ASIC Act or s.18 of the ACL (as pleaded in paragraphs 323-325, 329, 333-336, 340-342, 346, 350-353 of the Amended Joint Statement of Claim, which is denied);
- (b) the Plaintiffs and/or the Group Members have suffered loss or damage as a result of the conduct referred to in subparagraph (a) above (as pleaded in paragraphs 357-365 of the Amended Joint Statement of Claim, which is denied);

- (c) Deloitte engaged in conduct in contravention of the CA, the ASIC Act or the ACL (as pleaded in section F of the Amended Joint Statement of Claim); and
- (d) the Plaintiffs and/or the Group Members have suffered loss or damage as a result of the conduct referred to in subparagraph (c) above (as pleaded in paragraphs 503-515 of the Amended Joint Statement of Claim, which is denied),

then each of Potts and Deloitte is a person whose acts or omissions caused the same loss or damage allegedly suffered by the Plaintiffs and/or Group Members which is the subject of their claim, and therefore, each is a concurrent wrongdoer within the meaning of s.1041L of the CA, s.12GP of the ASIC Act and s.87CB of the CCA.

173 Further or in the alternative to paragraph 172 above, and for the purpose only of this proportionate liability defence and without any admission, Potts repeats sections C.2, C.3, C.4, and C.8 of the Amended Joint Statement of Claim and says that if (which is denied) the Plaintiffs establish that:

- (a) the assumptions and methodology applied by DSH management in determining inventory provisions in the FY14 Financial Statements were inappropriate, and/or the FY14 Financial Statements overstated the carrying value of Inventories and did not comply with Australian Accounting Standard AASB 102; or
- (b) the accounting treatment in respect of rebates adopted by DSH in the FY14 Financial Statements did not comply with Australian Accounting Standards AASB 101, AASB 102 and/or AASB 108; or
- (c) the accounting treatment of the Warranty Sign On Liability in the FY14 Financial Statements did not comply with Australian Accounting Standards AASB 3, AASB 101 and/or the Accounting Framework; or
- (d) the accounting treatment in respect of the Onerous Lease Provision in the FY14 Financial Statements did not comply with Australian Accounting Standards AASB 101 and/or the Accounting Framework; or
- (e) by reason of any or all of the matters in subparagraphs (a)-(d) above, the FY14 Financial Statements:
  - (i) did not give a true and fair view of the financial position and performance of DSH and the DSE Group as at the reporting date; or
  - (ii) did not comply with the CA; or

- (iii) did not comply with Australian Accounting Standards,

then Potts says that:

- (f) Deloitte did not comply with Auditing Standards in respect of its work in the course of the FY14 Audit in relation to the provisioning for inventory;

**Particulars**

Potts repeats paragraphs 26-28 of the Third Cross-Claim (**Potts Cross-Claim**) and the particulars thereto.

- (g) Deloitte did not comply with Auditing Standards in respect of its work in the course of the FY14 Audit in relation to the accounting treatment of rebates;

**Particulars**

Potts repeats paragraphs 49-51 of the Potts Cross-Claim and the particulars thereto.

- (h) Deloitte did not comply with Auditing Standards in respect of its work in the course of the FY14 Audit in relation to the Warranty Sign On Liability;

**Particulars**

Potts repeats paragraphs 66-68 of the Potts Cross-Claim and the particulars thereto.

- (i) Deloitte did not comply with Auditing Standards in respect of its work in the course of the FY14 Audit in relation to the Onerous Lease Provision release;

**Particulars**

Potts repeats paragraphs 77-78 of the Potts Cross-Claim and the particulars thereto.

- (j) in the premises, Deloitte, by issuing the FY14 Audit Report and thereby making Deloitte's FY14 Express Representations and Deloitte's FY14 Implied Representations (pleaded in paragraphs 420-421 of the Amended Joint Statement of Claim), engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s. 18 of the ACL or alternatively s. 1041H of the CA, or alternatively s. 12DA of the ASIC Act; and

**Particulars**

By reason of Deloitte's failure to comply with Auditing Standards and/or failure to exercise reasonable skill and care in performing work in respect of the FY14 Audit, pleaded in subparagraphs (f)-(i) above,

Deloitte did not (contrary to Deloitte's FY14 Implied Representations) have a reasonable basis for Deloitte's FY14 Express Representations, and those opinions were not the result of Deloitte having exercised reasonable skill and care and/or having complied with Auditing Standards in the course of the FY14 Audit.

- (k) further or alternatively, Deloitte, in making Deloitte's FY14 Implied Representations, made a false or misleading representation:
  - (i) in connection with the supply of services, that services were of a particular standard, quality, value or grade, within the meaning of section 29(1)(b) of the ACL; and/or
  - (ii) in connection with the supply of financial services, that services were of a particular standard, quality, value or grade, within the meaning of section 12DB(1)(a) of the ASIC Act.

#### **Particulars**

Deloitte's FY14 Implied Representations were false or misleading by reason that Deloitte had in fact failed to comply with Auditing Standards and/or had failed to exercise reasonable skill and care in the course of providing services in respect of the FY14 Audit, for the reasons pleaded in subparagraphs (f)-(i) above, and therefore Deloitte did not have a reasonable basis for Deloitte's FY14 Express Representations.

174 Further or in the alternative to paragraph 172 above, and for the purpose only of this proportionate liability defence and without any admission, Potts repeats sections C.2 and C.3 of the Amended Joint Statement of Claim and says that if (which is denied) the Plaintiffs establish that:

- (a) the assumptions and methodology applied by DSH management in determining inventory provisions in the FY15 Financial Statements were inappropriate, and/or the FY15 Financial Statements overstated the carrying value of Inventories and did not comply with Australian Accounting Standard AASB 102; or
- (b) the accounting treatment in respect of rebates adopted by DSH in the FY15 Financial Statements did not comply with Australian Accounting Standards AASB 101, AASB 102 and/or AASB 108; or
- (c) by reason of the matters in paragraphs (a) and/or (b) above, the FY15 Financial Statements:

- (i) did not give a true and fair view of the financial position and performance of DSH and the DSE Group as at the reporting date; or
- (ii) did not comply with the CA; or
- (iii) did not comply with Australian Accounting Standards

then Potts says that:

- (d) Deloitte did not comply with Auditing Standards in respect of its work in the course of the FY15 Audit in relation to the provisioning for inventory;

**Particulars**

Potts repeats paragraphs 26 and 31-32 of the Potts Cross-Claim and the particulars thereto.

- (e) Deloitte did not comply with Auditing Standards in respect of its work in the course of the FY15 Audit in relation to the accounting treatment of rebates;

**Particulars**

Potts repeats paragraphs 54-56 of the Potts Cross-Claim and the particulars thereto.

- (f) in the premises, Deloitte, by issuing the FY15 Audit Report and thereby making Deloitte's FY15 Express Representations and Deloitte's FY15 Implied Representations (pleaded in paragraphs 425-426 of the Amended Joint Statement of Claim), engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s. 18 of the ACL or alternatively s. 1041H of the CA, or alternatively s. 12DA of the ASIC Act; and

**Particulars**

By reason of Deloitte's failure to comply with Auditing Standards and/or failure to exercise reasonable skill and care in performing work in respect of the FY15 Audit, pleaded in paragraphs (d)-(e) above, Deloitte did not (contrary to Deloitte's FY15 Implied Representations) have a reasonable basis for Deloitte's FY15 Express Representations, and those opinions were not the result of Deloitte having exercised reasonable skill and care and/or having complied with Auditing Standards in the course of the FY15 Audit.

- (g) further or alternatively, Deloitte, in making Deloitte's FY15 Implied Representations, made a false or misleading representation:

- (i) in connection with the supply of services, that services were of a particular standard, quality, value or grade, within the meaning of section 29(1)(b) of the ACL; and/or
- (ii) in connection with the supply of financial services, that services were of a particular standard, quality, value or grade, within the meaning of section 12DB(1)(a) of the ASIC Act.

### Particulars

Deloitte's FY15 Implied Representations were false or misleading by reason that Deloitte had in fact failed to comply with Auditing Standards and/or had failed to exercise reasonable skill and care in the course of providing services in respect of the FY15 Audit, for the reasons pleaded in paragraphs (d)-(e) above, and therefore Deloitte did not have a reasonable basis for Deloitte's FY15 Express Representations.

175 For the purposes only of this proportionate liability defence and without any admission, Potts repeats paragraphs 506-515 of the Amended Joint Statement of Claim and says that if the matters pleaded in those paragraphs are established, then it will also be the case that the contraventions by Deloitte pleaded in paragraphs 173 and/or 174 above caused the loss or damage claimed by the Plaintiffs and Group Members in these proceedings.

176 By reason of the matters pleaded in paragraph 172 above, and further or alternatively by reason of the matters pleaded in paragraphs 173-174 above, if it is established (which is denied) that Potts is liable to the Plaintiffs and/or Group Members for any loss or damage, then:

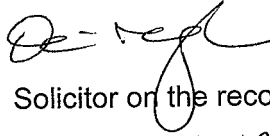
- (a) each of Potts and Deloitte is a concurrent wrongdoer within the meaning of s.1041L of the CA; and
- (b) pursuant to s.1041L of the CA, any liability (which is denied) of Potts to the Plaintiffs and/or Group Members for any such loss is to be limited to an amount reflecting that proportion of the loss or damage claimed that the Court considers just having regard to the extent of Potts' responsibility, and the extent of the responsibility of Deloitte, for that loss or damage.

### **SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a

reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature

A handwritten signature in black ink, appearing to be 'D. Regh'.

Capacity

Solicitor on the record

Date of signature

8 March 2019