

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/05/2022 4:37:27 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	NSD917/2020
File Title:	COMPUMOD INVESTMENTS PTY LIMITED AS TRUSTEE FOR THE COMPUMOD PTY LIMITED STAFF SUPERANNUATION FUND v UNIVERSAL EQUIVALENT TECHNOLOGY LIMITED (FORMERLY A.C.N. 603 323 182 LIMITED AND FORMERLY AXSESSTODAY LIMITED & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 23/05/2022 8:51:42 AM AEST

Registrar

### Important Information

As required by the Court's Rules, 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 and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



## Defence to Further Amended Statement of Claim

No. NSD917 of 2020

Federal Court of Australia  
District Registry: New South Wales  
Division: General

### **Compumod Investments Pty Limited as trustee for the Compumod Pty Limited Staff Superannuation Fund**

Applicant

### **Universal Equivalent Technology Limited (formerly A.C.N. 603 323 182 Limited and formerly Axesstoday Limited)**

First Respondent

### **PricewaterhouseCoopers Securities Limited**

Second Respondent

To the Further Amended Statement of Claim dated ~~20 September 2021~~ 10 May 2022 (**FASOC**):

#### **A. Nature of the proceedings**

1. In answer to paragraph 1 of the FASOC, the First Respondent:
  - a. repeats the matters pleaded in paragraphs 3 to 91 of this Defence in relation to the alleged conduct of the First Respondent; and
  - b. otherwise does not know and therefore does not admit the balance of the paragraph.

Filed on behalf of (name & role of party)	First Respondent
Prepared by (name of person/lawyer)	Andrew Moore & Thomas Cavanagh
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(include state and postcode)

2. The First Respondent does not know and therefore does not admit paragraph 2 of the FASOC.

**B. The Parties**

3. In answer to paragraph 3 of the FASOC, the First Respondent:
  - a. admits that the Applicant is a company incorporated pursuant the *Corporations Act 2001* (Cth) (**the Corporations Act**) and is capable of suing in its own corporate name and style; and
  - b. otherwise does not know and therefore does not admit the balance of the paragraph.
4. In answer to paragraph 4 of the FASOC, the First Respondent:
  - a. admits that it:
    - i. is a company incorporated pursuant to the Corporations Act and is capable of being sued in its corporate name and style;
    - ii. is a person for the purpose of section 1041H of the Corporations Act;
    - iii. is a listed corporation and listed disclosing entity within the meaning of section 9 and section 111AL of the Corporations Act; and
    - iv. is a disclosing entity within the meaning of section 111AO of the Corporations Act;
  - b. says that prior to the appointment of administrators on 7 April 2019, the First Respondent was in the business of lending to small and medium enterprises primarily in the hospitality and transport sectors under the name Axsesstoday Limited (**AXL**).
5. The First Respondent admits paragraph 5 of the FASOC.

6. The First Respondent admits paragraph 6 of the FASOC.
7. In answer to paragraph 7 of the FASOC, the First Respondent:
  - a. admits that as at 28 June 2018, ACN 603 303 126 Pty (**ACN 603**) was:
    - i. a company incorporated pursuant to the Corporations Act; and
    - ii. a related entity of AXL;
  - b. admits that ACN 603 also became subject to the Deed of Company Arrangement dated 3 September 2019 (**DOCA**); and
  - c. otherwise does not know and therefore does not admit the balance of the paragraph.
8. In answer to paragraph 8 of the FASOC, the First Respondent:
  - a. admits that as at 28 June 2018, Axsesstoday Retail Pty Ltd Limited (**Retail**) was:
    - i. a company incorporated pursuant to the Corporations Act; and
    - ii. a related entity of AXL;
  - b. admits that Retail also became subject to the DOCA on or about 3 September 2019; and
  - c. otherwise does not know and therefore does not admit the balance of the paragraph.
9. In answer to paragraph 9 of the FASOC, the First Respondent:
  - a. admits that as at 28 June 2018, Axsesstoday Operations Pty Ltd (**Operations**) was:

- i. a company incorporated pursuant to the Corporations Act; and
    - ii. a related entity of AXL;
  - b. admits that Operations also became subject to the DOCA on or about 3 September 2019; and
  - c. otherwise does not know and cannot admit the balance of the paragraph.
10. The First Respondent does not know and therefore does not admit the allegations in paragraph 10 of the FASOC.
11. In answer to paragraph 11 of the FASOC, the First Respondent:
- a. admits that as at 28 June 2018, AET Corporate Trust Pty Ltd was a company incorporated pursuant to the Corporations Act; and
  - b. otherwise does not know and cannot admit the balance of the paragraph.
12. In answer to paragraph 12 of the FASOC, the First Respondent:
- a. admits that PwCS:
    - i. is, and was at 28 June 2018, a company incorporated pursuant to the Corporations Act and is capable of being sued;
    - ii. conducted business in Australia as accountants and accounting advisors under the names 'PricewaterhouseCoopers Securities' and 'PwCS';
  - b. says that PwCS provided AXL services prior to and at the time it offered the Bonds;
  - c. says that the Prospectus states that PwCS:

- i. provided accounting services for the offer of the Bonds; and
  - ii. reviewed section 5.1 of the Base Prospectus;
- d. otherwise does not admit the balance of the paragraph.

**C. AXL's Accounting Obligations**

- 13. The First Respondent admits paragraph 13 of the FASOC.
- 14. The First Respondent admits paragraph 14 of the FASOC.
- 15. The First Respondent admits paragraph 15 of the FASOC.
- 16. The First Respondent admits paragraph 16 of the FASOC.
- 17. The First Respondent admits paragraph 17 of the FASOC.
- 18. The First Respondent admits paragraph 18 of the FASOC.

**D. The Syndicated Facilities Agreement**

- 19. The First Respondent does not know and therefore does not admit paragraph 19 of the FASOC.
- 20. The First Respondent does not know and therefore does not admit paragraph 20 of the FASOC.
- 21. The First Respondent does not know and therefore does not admit paragraph 21 of the FASOC.

**E. The Offer**

- 22. The First Respondent admits paragraph 22 of the FASOC.



22A. The First Respondent admits paragraph 22A of the FASOC.

23. The First Respondent admits paragraph 23 of the FASOC.

24. The First Respondent does not know and therefore does not admit paragraph 24 of the FASOC.

25. The First Respondent admits paragraph 25 of the FASOC.

26. In answer to paragraph 26 of the FASOC, the First Respondent:

- a. relies on the terms of the Offer Documents as if fully set out herein; and
- b. otherwise does not admit the paragraph.

27. The First Respondent admits paragraph 27 of the FASOC.

28. In answer to paragraph 28 of the ASOC, the First Respondent:

- a. admits that it was a term of the Offer that:
  - i. the Bonds were interest paying, unsubordinated and unsecured debt obligations issued by AXL;
  - ii. each Bond was to be issued subject to the provisions of the Offer Specific Prospectus and the Replacement Offer Specific Prospectus;
  - iii. the term of the Bonds was 5 years with a maturity date of 20 July 2023 **(the Maturity Date)**;
  - iv. the Face Value of the Bonds was \$100 per bond **(the Face Value)**;
- b. says that it was a term of the Offer that:

- i. each Bond was to be issued subject to the provisions of a Trust Deed dated 26 June 2018 between AXL, the Guarantors and AET as trustee;

### **Particulars**

Trust Deed for the Axesstoday Bonds Trust dated 28 June 2018

- ii. the interest rate payable on the Bonds was the sum of the Market Rate and plus the Margin, where:
  - 1. the Market Rate was the Base Rate;
  - 2. the Base Rate was the rate which is designated as the mid-rate having a tenor closest to the Interest Period on the Thomson Reuters BBSW screen page at approximately 10.15am on the first day of the interest period; and
  - 3. the Margin was expected to be in the range of 4.90% to 5.20% per annum but may be outside of that range;
- iii. on the Maturity Date, unless the Bonds were redeemed early, Bond holders would receive:
  - 1. the Face Value; and
  - 2. the final payment of interest; and
- c. otherwise relies on the terms of the Offer Documents as if fully set out herein.

29. The First Respondent admits paragraph 29 of the FASOC.

30. The First Respondent does not know and therefore does not admit paragraph 30 of the FASOC.

31. The First Respondent admits paragraph 31 of the FASOC.



**F. Representations made in the Prospectus**

32. The First Respondent admits paragraph 32 of the FASOC.

33. The First Respondent admits paragraph 33 of the FASOC.

33A The First Respondent admits paragraph 33A of the FASOC.

34. In answer to paragraph 34 of the FASOC, the First Respondent:

- a. admits that the 2017 Pro forma Balance Sheets contained the information set out in ~~the~~sub-paragraphs (a) and (b) for the Offer Specific Prospectus and Replacement Specific Prospectus respectively; and
- b. otherwise relies on the terms of the 2017 Pro Forma Balance Sheets as if fully set out herein.

35. In answer to paragraph 35 of the FASOC, the First Respondent:

- a. admits that section 3.4 at page 18 of the Offer Specific Prospectus recorded what were said to be the key financial ratios of AXL and its subsidiaries as alleged in ~~the~~sub-paragraph (a);
- b. admits that section 3.4 at page 18 of the Replacement Specific Prospectus recorded what were said to be the key financial ratios of AXL and its subsidiaries as alleged in sub-paragraph (b); and
- c. otherwise relies on the terms of the Offer Documents as if fully set out herein.

36. In answer to paragraph 36 of the FASOC, the First Respondent:

- a. admits that section 3.8.1 of the Offer Specific Prospectus and Replacement Offer Specific Prospectus contains the following statement:
 

*“Axsesstoday has not materially breached any loan covenant or debt obligations in the two years prior to the date of this Offer Specific Prospectus.”*
  - b. otherwise relies on the terms of the Offer Documents as if fully set out herein.
37. The First Respondent denies paragraph 37 of the FASOC.
38. In answer to paragraph 38 of the FASOC, the First Respondent:
- a. admits the section 4.4 on page 79 of the Base Prospectus contained the statement alleged in the paragraph; and
  - b. otherwise relies on the terms of the Offer Documents as if fully set out herein.
39. In answer to paragraph 39 of the FASOC, the First Respondent:
- a. admits that the Base Prospectus made no express reference to the fact that AASB 9 was to become compulsory from 1 July 2018;
  - b. says that the Offer Specific Prospectus and Replacement Offer Specific Prospectus referred to the fact that AASB 9 “*would apply from 1 July 2018*”;

### Particulars

Offer Specific Prospectus Section 3.3.1 at page 16; and

Replacement Offer Specific Prospectus 3.3.1 at page 16.

- c. otherwise repeats paragraphs 43 to 49 below in respect of Section G of the FASOC.
40. ~~The First Respondent admits~~ In answer to paragraph 40 of the FASOC, the First Respondent:
- a. says Section 3.7 on page 22 of the Replacement Offer Specific Prospectus recorded that PwCS would be paid \$65,000 (excluding GST) for its accounting services for the Offer; and
  - b. otherwise admits the paragraph.
41. In answer to paragraph 41 of the FASOC, the First Respondent says:
- a. the accounting services provided by PwCS referred to in section 3.7 of the Offer Specific Prospectus and Replacement Offer Specific Prospectus included:
    - i. participating as a member of and being a reporting person to the due diligence committee (**DDC**) that AXL established for the purposes of co-ordinating due diligence investigations in connection with the Offer Documents;
    - ii. preparing materiality guidance for consideration by AXL and the DDC pursuant to *APES 350 Participation by Members in Public Practice in Due Diligence Committees in connection with a Public Document* issued by the Accounting Professional & Ethical Standards Board (**APES 350**) in relation to the Offer Documents;
    - iii. conducting a review in accordance with the Standard on Assurance Engagements *ASAE 3450 Assurance Engagements involving Corporate Fundraisings and/or Prospective Financial Information of the Financial*

*Information* and preparing an independent limited assurance report to AXL;

- iv. assisting AXL and the DDC in their verification of certain statements in the Offer Documents by performing procedures to be agreed with AXL and the DDC and confirmed in writing in accordance with Standard on Related Services ASRS 4400 Agreed-Upon Procedures Engagements to Report Factual Findings (ASRS 4400) and preparing a report of factual findings;
- v. considering and commenting on drafts of the Initial Offer Document in relation to matters relevant to the scope of work set out above;
- vi. reviewing:
  - 1. the historical financial information of AXL in order to state whether, on the basis of the review conducted, anything came to the attention of PwCS that would cause PwCS to believe that the historical financial information was not presented fairly, in all material respects, in accordance with the stated basis of preparation including the recognition and measurement principles contained in Australian Accounting Standards and the Company's adopted accounting policies; and
  - 2. the pro forma historical financial information of AXL in order to state whether, on the basis of the review conducted, anything has come to the attention of PwCS that would cause PwCS to believe that the pro forma historical financial information was not presented fairly, in all material respects, in accordance with the stated basis of preparation.

### **Particulars**

Engagement Letter dated 6 June 2018 between PwCS and AXL

42. The First Respondent admits paragraph 42 of the EASOC.

**F1. Failure to identify breaches of the Arrears Ratio Covenant**

42A. The First Respondent does not know and therefore does not admit paragraph 42A of the FASOC.

42B. In answer to paragraph 42B of the FASOC, the First Respondent:

- a. repeats the matters set out in paragraph 42A above in relation to the Old Policy;  
and
- b. therefore does not know and does not admit the paragraph.

42C. In answer to paragraph 42C of the FASOC, the First Respondent:

- a. repeats the matters set out in paragraph 42A above in relation to the Old Policy;  
and
- b. therefore does not know and does not admit the paragraph.

42D. In answer to paragraph 42D of the FASOC, the First Respondent:

- a. repeats the matters set out in paragraph 42A above in relation to the Old Policy  
and paragraphs 50 to 53 below; and
- b. otherwise does not know and therefore does not admit the paragraph.

**G. AASB 9 and its application to AXL's accounts**

43. The First Respondent admits paragraph 43 of the FASOC.

44. In answer to paragraph 44 of the FASOC, the First Respondent:

- a. does not know and therefore does not admit the allegations in the paragraph;  
and



- b. otherwise relies on the terms of AASB 9 as if fully set out herein.

45. In answer to paragraph 45 of the FASOC, the First Respondent:

- a. does not know and therefore does not admit the allegations in the paragraph;  
and
- b. otherwise relies on the terms of AASB 9 as if fully set out herein.

46. In answer to paragraph 46 of the FASOC, the First Respondent:

- a. admits that the AXL Annual Report dated 27 August 2018 (**the 2018 Annual Report**) stated that the Group's provisions for impairment of receivables for the year ended 30 June 2018 were:
  - i. Current – (\$1,247,206)
  - ii. Non-current – (\$2,648,775)
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

46A. The First Respondent does not know and therefore does not admit paragraph 46A of the FASOC.

46B. The First Respondent does not know and therefore does not admit paragraph 46B of the FASOC.

47. In answer to paragraph 47 of the FASOC, the First Respondent:

- a. admits that the Revised AXL Annual Report dated 27 August 2018 (**the 2018 Annual Report**) stated that the Group's provisions for impairment of receivables for the year ended 30 June 2018 were:



i. Current – (\$2,064,651) plus a further “other” provision of (\$882,000);

ii. Non-current – (\$2,993,330);

b. otherwise does not know and therefore does not admit the balance of the paragraph.

48. The First Respondent does not know and therefore does not admit paragraph 48 of the FASOC.

49. The First Respondent does not know and therefore does not admit paragraph 49 of the FASOC.

#### **H. The Initial Discovery of Covenant Breach**

50. The First Respondent does not know and therefore does not admit paragraph 50 of the FASOC.

51. The First Respondent admits paragraph 51 of the FASOC.

52. The First Respondent does not know and therefore does not admit paragraph 52 of the FASOC.

53. The First Respondent does not know and therefore does not admit paragraph 53 of the FASOC.

54. The First Respondent does not know and therefore does not admit paragraph 54 of the FASOC.

55. The First Respondent admits paragraph 55 of the FASOC.

56. The First Respondent does not know and therefore does not admit paragraph 56 of the FASOC.

57. In answer to paragraph 57 of the EASOC, the First Respondent:

- a. says that on 12 September 2018 the Group placed a trading halt on the ASX in relation to its securities.

### Particulars

ASX Market Announcement dated 12 September 2018

- a. otherwise denies the paragraph.

58. In answer to paragraph 58 of the EASOC, the First Respondent:

- a. repeats the matters set out in paragraph 57 above; and
- b. admits that on 12 September 2018 the Group placed a trading halt on the Bonds on the ASX.

59. The First Respondent admits paragraph 59 of the EASOC.

60. The First Respondent does not know and therefore does not admit paragraph 60 of the EASOC.

61. The First Respondent admits paragraph 61 of the EASOC.

62. In answer to paragraph 62 of the EASOC, the First Respondent:

- a. says that the reissued FY18 Annual Report (**the Reissued Report**) revised the profit after tax reported in the 2018 Annual Report from \$7,034,756 to \$3,045,908; and
- b. otherwise denies the balance of the paragraph.

63. The First Respondent admits paragraph 63 of the EASOC.

64. The First Respondent admits paragraph 64 of the FASOC.

**I. Prospectus Contraventions**

65. The First Respondent admits paragraph 65 of the FASOC.

66. In answer to paragraph 66 of the FASOC, the First Respondent:

- a. repeats the matters pleaded in paragraphs 34 to 38, 42A to 42D, 43 to 49 and 53 to 54 above;
- b. states that the Prospectus did not disclose the various matters set out at paragraph 66(a)(i) to (vi);
- c. does not know whether the matters set out in paragraph 66(a)(i) to (vi) are correct statements;
- d. says that the Prospectus states that:
  - i. the Group had not materially breached any loan covenant or debt obligations in the past two years prior to 26 June 2018;
  - ii. that the total current assets of the Group were \$131,239,000 and the total current liabilities were \$7,747,000;
- e. otherwise does not know and therefore does not admit the balance of the paragraph.

67. In answer to paragraph 67 of the FASOC, the First Respondent:

- a. repeats the matters pleaded in paragraph 66 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

68. In answer to paragraph 68 of the FASOC, the First Respondent:

- a. repeats the matters pleaded in paragraph 66 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

69. In answer to paragraph 69 of the FASOC, the First Respondent:

- a. repeats the matters pleaded in paragraphs 34 to 38, 42A to 42D, 43 to 49, 53 to 54 and 66 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

70. In answer to paragraph 70 of the FASOC, the First Respondent:

- a. repeats that matters pleaded in paragraphs 43 to 49 and 53 to 54 above;
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

71. In answer to paragraph 71 of the FASOC, the First Respondent:

- a. repeats the matters pleaded at paragraph 70 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

#### **J. AXL's Contraventions**

72. The First Respondent admits paragraph 72 of the FASOC.

73. In answer to paragraph 73 of the FASOC, the First Respondent:

- a. repeats the matters pleaded at paragraph 66 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

74. In answer to paragraph 74 of the FASOC, the First Respondent:

- a. repeats the matters pleaded at paragraph 66 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

75. In answer to paragraph 75 of the FASOC, the First Respondent:

- a. repeats the matters pleaded at paragraph 66 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

76. In answer to paragraph 76 of the FASOC, the First Respondent:

- a. repeats the matters pleaded at paragraph 66 above; and
- b. otherwise does not know and therefore does not admit the balance of the paragraph.

77. In answer to paragraph 77 of the FASOC, the First Respondent:

- a. repeats the matters pleaded at paragraphs 72 to 76 above;
- b. relies on the terms of section 728 of the Corporations Act; and
- c. otherwise does not know and therefore does not admit the balance of the paragraph.

78. In answer to paragraph 78 of the FASOC, the First Respondent:
- a. repeats the matters pleaded at paragraph 77 above;
  - b. relies on the terms of section 729(1) of the Corporations Act; and
  - c. otherwise does not know and therefore does not admit the paragraph.
79. In answer to paragraph 79 of the FASOC, the First Respondent:
- a. repeats the matters pleaded at paragraph 66 above; and
  - b. otherwise does not know and therefore does not admit the paragraph.

**K. PwCS's Liability**

80. In answer to paragraph 80 of the FASOC, the First Respondent:
- a. repeats the matters pleaded at paragraph 41 above; and
  - b. otherwise does not know and therefore does not admit the paragraph.
81. In answer to paragraph 81 of the FASOC, the First Respondent:
- a. repeats the matters pleaded at paragraph 41 above; and
  - b. otherwise does not know and therefore does not admit the paragraph.
82. In answer to paragraph 82 of the FASOC, the First Respondent:
- a. repeats the matters pleaded at paragraph 42B above; and
  - b. otherwise does not know and therefore does not admit the paragraph.



83. [not used]

84. The First Respondent does not plead to paragraph 84 of the FASOC as it makes no allegation against it.

84A. The First Respondent does not plead to paragraph 84A of the FASOC as it makes no allegation against it.

84B. The First Respondent does not plead to paragraph 84B of the FASOC as it makes no allegation against it.

84C. The First Respondent does not plead to paragraph 84C of the FASOC as it makes no allegation against it.

**L. Loss**

85. The First Respondent does not know and therefore does not admit paragraph 85 of the FASOC.

86. In answer to paragraph 86 of the FASOC, the First Respondent:

a. repeats the matters pleaded at paragraphs 32 to 36, 43 to 49 and 53 to 54 above; and

b. does not know and therefore does not admit the balance of the paragraph.

87. [not used]

88. In answer to paragraph 88 of the FASOC, the First Respondent:

a. repeats the matters pleaded at paragraphs 42C, 42D, 43 to 49 and 53 to 54 above; and

b. does not know and therefore does not admit the balance of the paragraph.

88A. The First Respondent does not know and therefore does not admit paragraph 88A of the FASOC.

88B. In answer to paragraph 88B of the FASOC, the First Respondent:

- a. repeats the matters pleaded at paragraphs 72 to 79 above; and
- b. does not know and therefore does not admit the balance of the paragraph.

88C. The First Respondent does not plead to paragraph 88C of the FASOC as it makes no allegation against it.

89. The First Respondent does not know and therefore does not admit paragraph 89 of the FASOC.

90. The First Respondent does not know and therefore does not admit paragraph 90 of the FASOC.

91. The First Respondent does not plead to paragraph 91 of the FASOC as it makes no allegation against it.

Further, and in the alternative:

92. On or about 7 April 2019 Messrs Strawbridge, Kanevsky and Algeri were appointed as administrators of the AXL Entities (**Administrators**), including the First Respondent, pursuant to Part 5.3A of the Corporations Act.

93. At meetings held on 30 August 2019 and convened pursuant to section 439A of the Corporations Act, the creditors of each of the AXL Entities, including the First Respondent, resolved that the AXL Entities execute a deed of company arrangement proposed by Promontoria Holding 304 BV as deed proponent (**Deed Proponent**) under section 444B(2)(b) of the Corporations Act.

### Particulars

Minutes of Meeting of Members, Creditors, Contributories or Committee of

## Inspection under s436E or s439A – ASIC Document No. 7EAP06906

94. On or about 3 September 2019, the Administrators as deed administrators, the AXL Entities including the First Respondent, and the Deed Proponent executed a Deed of Company Arrangement to give effect to the 30 August 2019 resolutions (**DOCA**).
95. By its operation, the DOCA binds all Creditors of the First Respondent in accordance with section 444D of the Corporations Act and also binds the First Respondent, its officers and members in accordance with section 444G of the *Corporations Act*.

**Particulars**

- (a) Clause 1.1 of the DOCA
- (b) Clause 4.1 of the DOCA

96. Clause 1.1 of the DOCA contains the following relevant definitions:
- a. The Appointment Date is 7 April 2019.
  - b. Completion was defined to mean completion of the steps set out in cl 6.2 of the DOCA.
  - c. Claim is defined to mean, inter alia:

*“...a debt owing by, or a claim against, an AXL Entity (whether present or future, certain or contingent, ascertained or sounding only in damages), irrespective of whether the debt or claim arose by virtue of contract, at law (including by statute), in equity or otherwise, being a debt or claim any of the circumstances giving rise to which occurred on or before the Appointment Date and which would be admissible to proof (or would be admissible to proof but for the operation of section 553B of the Act) against the AXL Entity had that entity been wound up and the winding up was taken to have commenced on the Appointment Date, including:*

- (a) any Claim of a Simple Corporate Bondholder;*

...  
*but does not include an Excluded Claim."*

d. Creditor is defined to mean

*"any person who would have been entitled to prove (or would have been entitled to prove but for the operation of section 553B of the Act) in a winding up of an AXL Entity, if the AXL Entities had been wound up and the winding up was taken to have commenced on the Appointment Date."*

e. Creditor Indemnity has the meaning given to it in cl 12.1(d)(i) of the DOCA.

f. Excluded Claim is defined to mean, inter alia, *"...any Insured Claim"*.

g. Excluded Creditor is defined to mean, inter alia, a Creditor with an Excluded Claim to the extent of the Excluded Claim.

h. Insured Claim is defined to mean:

*"...a Claim which a Creditor has against an AXL Entity, which would have been entitled to priority in a liquidation of the AXL Entity under section 562 of the Act, where:*

*(a) that AXL Entity is insured against the Claim under a contract of insurance (not being a contract of reinsurance) entered into before the Appointment Date; and*

*(b) an amount in respect of that Claim would be payable by the insurer to the AXL Entity under the contract of insurance, but only to the extent of such part of the Claim as would be discharged by the payment from the insurer and provided that the Creditor complies with the requirements of clause 12 in relation to such a Claim."*

i. Simple Corporate Bondholder is defined to mean:

*“means each holder of the Simple Corporate Bonds as at the Appointment Date.”*

- j. Simple Corporate Bonds is defined to mean:

*“...the Bonds issued pursuant to the Trust Deed dated 26 June 2018 between AET Corporate Trust Pty Limited (now known as Sargon CT Pty Ltd) ACN 106 424 088 and the AXL Entities.”*

- k. Trust Creditor is defined to mean Creditors other than, inter alia, Excluded Creditors.

97. It was a term of the DOCA that each Creditor who is not a Trust Creditor agreed that on the occurrence of Completion, its Claims (other than any Excluded Claim) were fully extinguished and released in respect of each AXL Entity.

#### **Particulars**

Clause 11.1 of the DOCA.

98. It was a term of the DOCA that any uninsured component of an Insured Claim is extinguished and released on the Completion Date and Creditors with Insured Claims are not entitled to participate in or receive any distribution from, and will not prove to recover any Insured Claim for the purpose of, or in relation to, the Trust Fund, in respect of an Insured Claim.

#### **Particulars**

Clause 11.3 of the DOCA.

99. On or about 14 August 2020 the Completion of the DOCA was achieved. Vaughan Strawbridge, an administrator of AXL, by notice in the form of Schedule 2 of the DOCA and dated 14 August 2020 certified that the DOCA had been wholly effectuated in respect of AXL (**Certificate of Effectuation**).

#### **Particulars**



The Certificate of Effectuation is signed by Vaughan Strawbridge an administrator of AXL and dated 14 August 2020.

Notice that Deed wholly effectuated was lodged with ASIC on 25 August 2020 – ASIC Document No. 7EAZ79867.

100. It was a term of the DOCA that the signing of the Certificate of Effectuation in respect of AXL terminates, in respect of AXL, this DOCA and all Claims of Creditors of AXL will be extinguished, discharged and released if not extinguished or released earlier under the DOCA.

### **Particulars**

#### **Clause 21.4(b) of the DOCA**

101. It was a term of the DOCA that if insurance is held by or on behalf of any AXL Entity in respect of an Insured Claim:
- a. the Creditor may, in relation to its Insured Claim and notwithstanding that Completion has occurred, take action to recover the amount due in respect of the Insured Claim against the AXL Entity, but such action must not exceed what is necessary to obtain payment from the insurer;
  - b. to the extent that the Creditor is able, by settlement, arbitral award or judgment, to obtain payment from the insurer on account of the Insured Claim, the Creditor may retain that amount in full satisfaction of its Claim;
  - c. the AXL Entity is not required to provide assistance to a Creditor in relation to any Insured Claim under this clause or take any action in response to enforcement action taken by a Creditor in accordance with this clause; and
  - d. where a Creditor intends to take action in relation to a Claim under this clause:
    - i. the Creditor must, prior to taking any action in relation to the Claim, provide the AXL Entity with an indemnity in the form of Schedule 5 of the DOCA prior to, or during, any action in relation to the Claim;



- ii. if requested by the AXL Entity, provide the AXL Entity with evidence, to the reasonable satisfaction of the AXL Entity, that the Creditor will be (and will continue to be) in a financial position, or have access to sufficient funds, to enable it to satisfy the Creditor Indemnity; and
- iii. the AXL Entity may plead this Deed as a bar to any action taken by a Creditor in relation to the Claim in circumstances where the Creditor has not, prior to commencing that action, given the Creditor Indemnity to the AXL Company.

#### **Particulars**

##### CI 12.1 of the DOCA

102. It was a term of the DOCA that to the extent that the Creditor is unable to seek or obtain payment on account of its Insured Claim from the insurer (including by reason of any excess or deductible applicable to the insurance policy, or failure by the relevant AXL Entity to take any action) the DOCA operates as a complete release and bar to that part of the Creditor's Insured Claim which has not been met by the insurer.

#### **Particulars**

##### CI 12.2 of the DOCA.

#### **Limitation of Applicant's Claim**

103. On or about November 2017 DUAL Australia Pty Limited on behalf of certain underwriters at Lloyd's issued a DUAL Evolution Insurance Policy to the First Respondent as policyholder for a period commencing on 25 November 2017, which was amended from time to time thereafter by endorsement (**17/18 Policy**).
104. It was a term of the 17/18 policy that underwriters agreed to pay on behalf of the policyholder its **loss** on account of a **securities claim** first made against the policyholder during the **insurance period**.

#### **Particulars**

##### CI 2.5 of the 17/18 Policy.

105. For the purposes of the operation of cl 2.5 of the 17/18 Policy:

- a. 'loss' was defined in cl 6.25(a) and (b) to mean the total amount which an insured becomes legally obliged to pay on account of a claim, and included, but was not limited to, damages, judgments, settlements, and adverse costs orders and defence costs.
- b. 'securities claim' was defined in cl 6.42(b) to mean, inter alia, a civil proceeding commenced by the service of a writ, complaint, summons, statement of claim, or similar originating process alleging a **wrongful act** in connection with the purchase or sale of, or offer to purchase or sell, **securities**.
- c. 'wrongful act' was defined in cl 6.48(b) to mean for the purposes of insuring cl 6.25, any actual or alleged breach of duty, breach of trust, breach of fiduciary duty, neglect, error, omission, misstatement, misleading statement, or other act, error or omission, committed or attempted by a policyholder, in connection with the purchase or sale of, or offer to purchase or sell, **securities**.
- d. 'securities' was defined in cl 6.41 to mean a bond, debenture, note, share, preference share, warrant, option, promissory note or other equity, debt or hybrid security which is issued or given by the policyholder.

106. For the purposes of the 17/18 Policy, coverage under cl 2.5 was subject to:

- a. a deductible of \$150,000; and
- b. a limit of \$2,000,000.

Hereinafter **17/18 Entities Limits**.

107. Underwriters have accepted that the 17/18 Policy responds to this Proceeding commenced by the Applicant subject to the terms and conditions of the 17/18 Policy including the 17/18 Entities Limits and known facts and circumstances.

108. By operation of the terms of the DOCA:

- a. The Applicant for itself and on behalf of the Group Members brings these proceedings in its capacity and their capacities as Simple Corporate Bondholders.
  - b. The Proceeding is a Claim under the DOCA.
  - c. The Applicant and the Group Members are persons within the definition of Creditors under the DOCA.
  - d. The effect of the DOCA is that the right of the Applicant and the Group Members to maintain proceedings against the First Respondent is extinguished and released by operation of the DOCA, except to the extent the proceedings satisfy the definition of Insured Claim under the DOCA.
  - e. The effect of the DOCA is that the right of the Applicant and the Group Members to maintain proceedings against the First Respondent is limited to that part of the Claim that is insured under the 17/18 Policy, and only to the extent that that part of the Claim would be discharged by payment by the insurer.
  - f. The extent of payment available under the 17/18 Policy is:
    - i. Subject to the application of the deductible of \$150,000; and
    - ii. The total amount which an insured becomes legally obliged to pay on account of a claim by way of damages, judgments, settlements, and adverse costs orders, at the time that such liability is established (**Liability Date**), is the sum of the limit of \$2,000,000 less the sums due and payable by way of defence costs prior to the Liability Date.
109. Further, by commencing this Proceeding, the Applicant has taken, and has evinced an intention to take, action against the First Respondent.
110. By operation of cl 12.1(d) of the DOCA, where a Creditor intends to take action in relation to a Claim under cl 12.1:

- a. The Creditor must prior to taking any action in relation to the Claim, provide, relevantly, the First Respondent with an indemnity in the form of Schedule 5 of the DOCA (**Creditor Indemnity**) prior to, or during, any action in relation to the Claim; and
- b. if requested by, relevantly the First Respondent, provide the First Respondent with evidence to the reasonable satisfaction of the First Respondent, that the Creditor will be (and will continue to be) in a financial position, or have access to sufficient funds, to enable it to satisfy the Creditor Indemnity.

### **Particulars**

Clauses 12.1(d)(i) and 12.1(d)(ii) of the DOCA

- 111. The First Respondent pleads the terms of Schedule 5 as if fully set out herein.
- 112. The Applicant did not provide the Creditor Indemnity prior to commencing this Proceeding.
- 113. On 25 March 2021, the First Respondent requested that the Applicant:
  - a. provide the Creditor Indemnity in accordance with the DOCA; and
  - b. provide the First Respondent with evidence that the Applicant had the financial means to satisfy the Creditor Indemnity.

### **Particulars**

Letter from Wotton + Kearney to Hicksons Lawyers dated 25 March 2021

- 114. On 14 April 2021, the Applicant refused to provide the Creditor Indemnity or otherwise confirm that it had the financial means to satisfy the Creditor Indemnity.

### **Particulars**

Letter from Hicksons Lawyers to Wotton + Kearney dated 14 April 2021

115. On 8 July 2021, the Applicant reiterated its request that the Creditor Indemnity be provided in accordance with the DOCA.

**Particulars**

Letter from Wotton + Kearney to Hicksons Lawyers dated 8 July 2021

116. On 15 September 2021, the Applicant again refused to provide the Creditor Indemnity.

**Particulars**

Letter from Hicksons Lawyers to Wotton + Kearney dated 15 September 2021

117. In the circumstances, the Applicant is, and continues to be, in breach of cl 12.1(d)(i) and (ii) of the DOCA.
118. The First Respondent denies that the Applicant is entitled to any relief in these proceedings until it complies with cll 12.1(d)(i) and (ii).

Date: ~~23 November 2021~~ 19 May 2022



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Signed by Andrew Stewart Moore  
Lawyer for the First Respondent

This pleading was settled by Michael Jones SC, counsel



**Certificate of lawyer**

I Andrew Stuart Moore certify to the Court that, in relation to the defence filed on behalf of the First 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: ~~23 November 2021~~ 19 May 2022



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Signed by Andrew Stewart Moore  
Lawyer for the First Respondent



