

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/08/2020 1:17:40 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: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
File Number: NSD917/2020  
File Title: COMPUMOD INVESTMENTS PTY LIMITED AS TRUSTEE FOR THE  
COMPUMOD PTY LIMITED STAFF SUPERANNUATION FUND v  
A.C.N. 603 323 182 LIMITED (FORMERLY AXSESSTODAY LIMITED)  
(SUBJECT TO A DEED OF COMPANY ARRANGEMENT) & ANOR  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 20/08/2020 6:22:36 PM 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.



## Statement of claim

No. 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

### **A.C.N. 603 323 182 Limited (formerly Axesstoday Limited) (Subject to a Deed of Company Arrangement)**

First Respondent

### **PricewaterhouseCoopers Securities Limited**

Second Respondent

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**A. Nature of the proceedings**

1. These proceedings are brought pursuant to Part IVA of the *Federal Court of Australia Act 1976 (FCA)* by the Applicant on behalf of persons who:

- a. subscribed to corporate bonds (**the Bonds**) (either directly or through nominees or trustees) issued by the First Respondent (**AXL**) under an Offer Specific Prospectus and Base Prospectus dated 26 June 2018 (together, **the Prospectus**);
- b. suffered loss or damage by, or resulting from, the conduct of the Respondents pleaded below;
- c. have entered into a litigation funding agreement, in respect of these proceedings, with Therium Litigation Finance Atlas AFP IC;
- d. have entered into a retainer agreement, in respect of these proceedings, with Hicksons Lawyers;
- e. are not:
  - i. the Respondents, a related party, a related body corporate or an associated entity;
  - ii. and have not been directors, officers or employees of AXL;
  - iii. persons listed in s 33E(2) of the FCA.

**(Group Members)**

2. As at the date of commencement of these proceedings there are 7 or more Group Members.

**B. The Parties**

3. The Applicant:
  - a. is a company incorporated pursuant to the *Corporations Act 2001* (Cth) (**Corporations Act**) and is capable of suing in its corporate name and style;
  - b. on or about 12 July 2018 purchased 500 Bonds which were held by HSBC Custody Nominees (Australia) Ltd as nominee for the Applicant.
4. The First Respondent, AXL, is and at all material times was:
  - a. a company incorporated pursuant to the Corporations Act and is capable of being sued;
  - b. a person for the purposes of 1041H of the Corporations Act;
  - c. engaged in trade or commerce;
  - d. in the business of lending to small to medium sized enterprises (**SMEs**) primarily in the hospitality and transport sectors;
  - e. a listed corporation and listed disclosing entity within the meaning of s 9 and s 111AL of the Corporations Act;
  - f. a disclosing entity within the meaning of s 111AO of the Corporations Act.
5. On or about 7 April 2019 Mr Glen Kanesvsky, Mr Sal Algeri and Mr Vaughan Strawbridge were appointed joint and several voluntary administrators of AXL.
6. On or about 3 September 2019 AXL become subject to a Deed of Company Arrangement (**DoCA**) with Mr Glen Kanesvsky, Mr Sal Algeri and Mr Vaughan Strawbridge appointed as Deed administrators.

7. As at 28 June 2018, ACN 603 303 126 Pty Ltd (**ACN 603**) was:
  - a. a company incorporated pursuant to the Corporations Act;
  - b. a related entity of AXL;
  - c. a guarantor of AXL's payment obligations under the Bonds (as pleaded more fully below); and
  - d. also became subject to the DoCA on about 3 September 2019.
  
8. As at 28 June 2018, Axsesstoday Retail Pty (**Retail**) was:
  - a. a company incorporated pursuant to the Corporations Act;
  - b. a related entity of AXL;
  - c. a guarantor of AXL's payment obligations under the Bonds (as pleaded more fully below); and
  - d. also became subject to the DoCA on about 3 September 2019.
  
9. As at 28 June 2018, Axsess Operations Pty Ltd (**Operations**) was:
  - a. a company incorporated pursuant to the Corporations Act;
  - b. a related entity of AXL;
  - c. a guarantor of AXL's payment obligations under the Bonds (as pleaded more fully below); and
  - d. also became subject to the DoCA on about 3 September 2019.
  
10. Together, AXL, ACN 603, Retail and Operations were known as the Group (**the Group**).

11. As at 28 June 2018, AET Corporate Trust Pty Ltd (**AET**) was:
  - a. a company incorporated pursuant to the Corporations Act;
  - b. a corporate trustee appointed to hold on trust the right to (inter alia) enforce AXL's obligations in respect of the Bonds (as pleaded more fully below).
  
12. The Second Respondent, PricewaterhouseCoopers Securities Limited (**PwCS**):
  - a. is, and was as at 26 June 2018, a company incorporated pursuant to the Corporations Act and is capable of being sued;
  - b. conducted business in Australia as accountants and accounting advisors under the names "PricewaterhouseCoopers Securities" and "PwCS";
  - c. provided accounting services to AXL at the time it offered the Bonds;
  - d. was named in the Prospectus as accounting advisors for the Prospectus, and provided services for the Offer (as defined below).

**C. AXL's Accounting Obligations**

13. Pursuant to s 286 of the Corporations Act AXL was required to keep financial records that correctly recorded and explained its transactions, financial position and performance.
14. Pursuant to s 292(1)(a) of the Corporations Act AXL was required to prepare financial reports for (inter alia) the financial year ending 30 June 2018.
15. Pursuant to s 295(1) of the Corporations Act the financial report referred to in paragraph 14 above was required to include financial statements for the year.
16. Pursuant to s 296 of the Corporations Act the financial report referred to in paragraph 14 above was required to be prepared in accordance with the accounting standards.

17. The accounting standards, as defined by ss 9 and 334 of the Corporations Act (**Accounting Standards**), included:
- a. Australian Accounting Standards Board Standard 9 titled "*Financial Instruments*" (compilation dated 14 December 2014) (**AASB 9**);
  - b. Australian Accounting Standards Board Standard 15 titled "*Revenue from Contracts with Customers*" (compilation dated 14 December 2014) (**AASB 15**);
  - c. Australian Accounting Standards Board Standard 132 titled "*Financial Instruments: Disclosure and Presentation*" (compilation dated 14 August 2015) (**AASB 132**);
  - d. Australian Accounting Standards Board Standard 139 titled "*Financial Instruments: Recognition and Measurement*" (compilation dated 14 August 2015) (**AASB 139**);
  - e. Australian Accounting Standards Board Framework for the Preparation and Presentation of Financial Statements (compilation prepared 15 March 2016) (**Accounting Framework**).
18. Pursuant to s 297 of the Corporations Act the financial report referred to at paragraph 14 above was required to give a true and fair view of the financial position and performance of AXL.

#### **D. The Syndicated Facilities Agreement**

19. On about 9 November 2016, AXL entered into a syndicated facilities agreement with (inter alia) the Commonwealth Bank Australia Limited (**CBA**), Macquarie Bank Limited (**MBL**) (together, the **Syndicated Lenders**) and CBA Corporate Services (NSW) Pty Ltd as agent to the Syndicated Lenders (**Agent**) (**the SFA**).
20. Pursuant to the SFA the Group was provided various facilities by the Syndicated Lenders (**Syndicated Banking Facility**) including:
- a. a revolving credit facility;

- b. a bank guarantee facility;
  - c. an overdraft facility;
  - d. a corporate credit card facility.
21. Pursuant to the SFA the Group covenanted to maintain an arrears ratio of 4% or less (**Arrears Ratio Covenant**), which was to be calculated by reference to AXL's financial reports prepared in accordance with, *inter alia*, the accounting standards referred to in paragraph 17.

#### **E. The Offer**

22. On about 26 June 2018 AXL issued the Prospectus for the offer of the Bonds in a single series and tranche identified as *Series A, Tranche 1*.
23. The Bonds were unsecured notes within the meaning of s 283BH of the Corporations Act.
24. The registration of the Prospectus (**Offer**) with ASIC enabled the Offer to be made by the broking houses to retail investors as well as to sophisticated and institutional investors and the Offer was in fact made to retail investors.
25. The Prospectus consisted of an Offer Specific Prospectus for Series A, Tranche 1 and a Base Prospectus which together constituted the "*Offer Documents*" for the issue of the Bonds.
26. The Offer Specific Prospectus related to the issue by AXL of \$50 million of simple corporate bonds (the Bonds as defined above) on the terms set out in the Offer Documents.
27. The Offer Specific Prospectus was lodged with Australian Securities and Investments Commission (**ASIC**) on about 26 June 2018 and remained open for up to 13 months.
28. Relevantly, it was a term of the Offer that:



- a. the Bonds were interest paying, unsubordinated and unsecured debt obligations issued by AXL;

**Particulars**

Offer Specific Prospectus, page 8; Base Prospectus page 34, paragraph 2; page 41

- b. each Bond was to be issued subject to the provisions of:

- i. a trust deed entered into between:

- 1. AXL;
- 2. ACN 603, Retail and Operations as guarantors (**Guarantors**); and
- 3. AET as trustee.

- ii. the terms of the Offer Specific Prospectus;

**Particulars**

Offer Specific Prospectus, page 8; Base Prospectus page 34, paragraph 2, page 49, page, pages 62 to 64, clause 3.5, clause 3.6.

- c. the term of the Bonds was 5 years with a maturity date of 20 July 2023 (**Maturity Date**);

**Particulars**

Offer Specific Prospectus, page 8.

- d. interest was payable based on an approximate 90-Day Bank Bill Swap Rate of 2.12% plus 4.90% to 5.20% basis point which equated to a floating interest rate of between 7.02% and 7.32% payable quarterly in arrears;

**Particulars**

Offer Specific Prospectus, page 9; Base Prospectus page 42 to 44.

- e. on the Maturity Date Bond holders would receive the face value of their Bond (**Face Value**) plus a final payment of interest;

**Particulars**

Base Prospectus page 45, pages 81 to 85, clause 5.1

- f. Face Value was \$100 per bond.

**Particulars**

Offer Specific Prospectus, page 8; Base Prospectus page 34, paragraph 2.

- 29. The following were key dates for the Offer:

- a. commencement of the bookbuild: 3 July 2018;
- b. the opening date for the Offer and lodgement for the replacement Offer Specific Prospectus with ASIC: 4 July 2018;
- c. closing date for the Broker Firm Offer: 17 July 2018;
- d. Issue Date: 20 July 2018;

- e. Bonds to commence trading on the Australian Stock Exchange (**ASX**) on a deferred settlement basis: 23 July 2018;
  - f. Holding Statements dispatched by the Registry: 24 July 2018;
  - g. Bonds to commence trading on the ASX on a normal settlement basis: 25 July 2018.
30. The bookbuild closed on 4 July 2018 with the issue of the Bonds fully subscribed.
31. The Bonds were listed on the ASX under the code “AXLHA”.

#### **F. Representations made in the Prospectus**

32. Section 3.3.1 on pages 15 and 16 of the Offer Specific Prospectus contained the following statement:

*“The unaudited financial information is presented in an abbreviated form and does not contain all of the presentation, disclosures, statements and comparative information as required by the Australian Accounting Standards that are usually provided in an annual or interim financial report prepared in accordance with the Corporations Act.*

*The historical consolidated balance sheet has been derived from the Group’s financial statements for the half-year ended 31 December 2017, which have been reviewed by Axesstoday’s auditors.*

*The historical consolidated balance sheet has been prepared in accordance with the stated basis of preparation, being the recognition and measurement principles contained in the Australian Accounting Standards (“AAS”)...*

*The pro forma historical balance sheet for the Group has been prepared solely for inclusion in this Offer Specific Prospectus and has been derived from the reviewed historical balance sheet of the Group as at 31 December 2017, adjusted for the effects of the proforma transactions described below. Due to its nature, the pro*

*forma historical balance sheet does not represent the Groups' actual or prospective financial position.*

*The pro forma historical balance sheet for the Group has been prepared in accordance with recognition and measurement principles prescribed in AAS other than it includes adjustments which have been prepared in a manner consistent with AAS that reflect the impact of events or transactions as if they had occurred as at 31 December 2017."*

33. Section 3.3.1 at page 16 of the Offer Specific Prospectus also relevantly contained the following statement:

*"Set out below is a summary of the Group's historical consolidated balance sheet as at 31 December 2017, together with pro forma adjustments that assume the following transactions were completed on 31 December 2017:*

- (i) \$50 million Bond issue (pursuant to this Offer Specific Prospectus), which is classified as borrowings – this results in 'Cash and cash equivalents' increasing by \$50 million and non-current 'Borrowings' increasing by \$50 million.*
- (ii) Approximately \$1.6 million in transaction costs associated with the Bond issue – financial liabilities are recognised net of their transaction costs, in accordance with Australian Accounting Standard AASB139 (Note that AASB 9 Financial Instruments, will apply from 1 July 2018, the accounting will not change under the new standard). Accordingly, the payment of the transaction costs results in non-current "Borrowings" and "Cash and cash equivalents" each reducing by \$1.6 million."*

34. Section 3.3.2 at page 17 of the Offer Specific Prospectus set out an historical and pro-forma historical balance sheet as at 31 December 2017 which relevantly represented the following:

	Historical balance sheet 31 Dec 2017	Pro-forma historical balance sheet
	\$'000s	\$'000s
<i>Current assets</i>	82,822	131,239
<i>Non-current assets</i>	191,379	191,379
<i>Total assets</i>	274,201	322,618
<i>Current liabilities</i>	7,747	7,747
<i>Non-current liabilities</i>	218,471	266,888
<i>Total liabilities</i>	226,218	274,636
<i>Net assets</i>	47,983	47,983
<i>Total equity</i>	47,983	47,938

35. Section 3.4 at page 18 of the Offer Specific Prospectus recorded what were stated to be the key financial ratios of AXL and its subsidiaries as follows:

<i>Prescribed Key Financial Ratios as at</i>				<i>Pro forma</i>
	<i>30 Jun 16</i>	<i>30 Jun 17</i>	<i>31 Dec 17</i>	<i>31 Dec 17</i>
<i>Prescribed Gearing Ratio</i>	853%	433%	471%	572%
<i>Prescribed Cover Ratio</i>	1.9x	1.9x	1.7x	N/A
<i>Prescribed Working Capital Ratio</i>	0.7x	12.3x	10.7x	16.9x

but which made no reference to to the Arrears Ratio Covenant.

36. Section 3.8.1 on page 23 of the Offer Specific Prospectus contained a representation that AXL had not breached any loan covenant or debt obligation as follows:

*“Axsesstoday has not materially breached any loan covenant or debt obligations in the two years prior to the date of this Offer Specific Prospectus.”*

37. By containing the statement pleaded in paragraph 36 without any condition or explanation the Prospectus also contained a representation that the Group:

- a. was not imminently going to breach a loan covenant or debt obligation; or
- b. had reasonable grounds for considering that it was not imminently going to breach a loan covenant or debt obligation

38. Section 4.4 on page 79 of the Base Prospectus relevantly stated that a risk associated with the Bonds was a change in AAS as follows:

*“Axsesstoday is subject to the usual business risks that there may be changes in Australian accounting standards which have an adverse financial impact on Axsesstoday or members of the Group. Holders should be aware that Key Financial Ratios and the ratios used by Axsesstoday (disclosed in Section 3.7.2 and Section 3.7.3 of this Base Prospectus) are calculated by reference to figures from the accounts of Axcesstoday prepared on the basis of the Australian accounting standards in place as at the date of the issuance of the Bonds. Axsesstoday has the right under the Terms to notify Holders and the Trustee that components of the ratios will instead be determined in accordance with Australian accounting standards in force at the time of making the determination.*

*A new Australian Accounting Standard AASB15 Revenue from Contracts with customers, will apply to Axsesstoday from its financial year commencing on 1 July 2018. Axsesstoday continues to evaluate the potential impact of this new standard on and its consolidated financial statements. The evaluation process includes reviewing the terms of contracts and evaluating customary business practices and considering these against the measurement, recognition and disclosure requirements of AASB 15. A key judgement area will be determining when customers obtain control of land developed and residential building assets insofar as this impacts the timing of revenue recognition.”*

39. The Base Prospectus, whether in section 4.4 or elsewhere, made no express reference to the fact that AASB 9, in force as at 14 December 2014, was to become compulsory from 1 July 2018 and would have the effect pleaded below.

40. Section 3.7 on page 22 of the Offer Specific Prospectus recorded, as was the fact, that PwCS had provided accounting services for the Offer as follows:

*“PricewaterhouseCoopers Securities Ltd (“PwCS”) has provided accounting services for the Offer, and will be paid approximately \$60,000 (excluding GST).”*

41. Those accounting services referred to in paragraph 40 as provided by PwCS included, and were reasonably understood by a reader of the Prospectus as including, preparation of or approval of:
- a. the pro forma balance sheet pleaded in paragraph 34;
  - b. the ratios pleaded in paragraph 35;
  - c. the representations pleaded in paragraphs 36 and 37;
  - d. the statements about the basis of preparation of AXL’s accounts to 31 Decemeber 2017 and the pro forma balance sheet pleaded in paragraph 34; and
  - e. the statements about the risk associated with a change in the accounting standards pleaded in paragraph 38.
42. Section 3.8.5 on page 24 of the Offer Specific Prospectus recorded, as was the fact, that PwCS consented to be named Accounting Advisor for the Offer.

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

43. From 1 July 2018, for the purpose of a company with a reporting period starting after 1 January 2018, the application of AASB 9 (which had been published on 17 December 2014) became mandatory and superseded AASB 139.
44. As a matter of fact, by superseding AASB 139, AASB 9 relevantly:

- a. introduced new requirements for the classification and measurement of financial assets and liabilities;

- b. included a forward-looking 'expected credit loss' impairment model (**ECL Model**) as distinct from an incurred loss model.
45. As a matter of fact, pursuant to the ECL Model:
- a. a credit event (or impairment trigger) no longer had to occur before credit losses were recognised in an entity's financial accounts prepared as part of the financial report and financial statement pleaded in paragraphs 14 and 15;
  - b. minimum 12 month expected credit losses must always be recognised in the entity's consolidated statement of comprehensive income which formed part of the financial report and financial statement pleaded in paragraphs 14 and 15;
  - c. lifetime expected losses would be recognised on assets for which there is a significant increase in credit risk after initial recognition.
46. Prior to the application of AASB 9 the Group's provisions for the impairment of receivables for the year ended 30 June 2018 were as follows:
- a. Current – (\$1,247,206)
  - b. Non-current – (\$2,648,775)

### **Particulars**

AXL Annual Report 2018, Note 13, page 69.

47. After the application of AASB 9 the Group's provisions for the impairment of receivables for the year ended 30 June 2018 were as follows:
- a. Current – (\$2,064,651) plus a further "other" provision of (\$882,000);
  - b. Non-current – (\$2,993,330)



### Particulars

AXL Reissued Annual Report 2018, Note 13, page 65.

48. In the premises pleaded in paragraph 47 above and paragraph 53 below, as at 1 July 2018, the Group's arrears ratio calculated as required by the SFA was greater than 4% having increased from 3.25% to 7.67%.
49. As a matter of fact, as at 1 July 2018:
- a. the Group was in breach of the Arrears Ratio Covenant;
  - b. in light of that breach (if not unconditionally waived, which the breach was not) the Syndicated Banking Facility would be immediately payable and recognised as a current liability; and
  - c. AXL and the Group could not repay the Syndicated Banking Facility when payable (which was immediately) and was insolvent subject to any waiver given by the Syndicated Lenders.

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

50. In about July 2018 the Group submitted to Syndicate Lenders the management accounts for the financial year ending 30 June 2018 (**FY18 Management Accounts**) to test various covenants relevantly including (but not limited to) the Arrears Ratio Covenant pleaded at paragraph 21 above.
51. On about 27 August 2018 AXL issued the statutory accounts and annual report for the Group for the year ending 30 June 2018 (**FY18 Annual Report**).
52. On about 3 September 2018 Syndicate Lenders raised a query regarding inconsistencies between the FY18 Management Accounts and the FY18 Annual Report.

53. Following that query, AXL and the Group reported to the Syndicated Lenders that the effect of the adoption of AASB 9 was that the arrears ratio, calculated in accordance with the SFA was that, instead of the arrears ratio being 3.25%, the arrears ratio was 7.67%.
54. In the premises pleaded in paragraph 53 above, the Group was in breach of the Arrears Ratio Covenant and had been since no later than 1 July 2018.
55. On a date not presently known, but sometime between 27 August 2018 and 29 November 2018, the FY18 Annual Report was withdrawn.
56. On about 6 September 2018 the Group submitted an updated covenant certificate to the Syndicate Lenders that confirmed a breach of the Arrears Ratio Covenant.
57. On about 9 September 2018 the Group placed a trading halt on the ASX in relation to its securities.
58. On about 12 September 2018 the Group placed a trading halt on the Bonds on the ASX.
59. On about 14 September 2018 the Group voluntarily requested the ASX suspend its trading for the purpose of undertaking a strategic review (**the Review**).
60. The Review revealed (inter alia) four further breaches of covenants contained in the SFA.

### **Particulars**

See 4.1.2.4 of the Report to Creditors dated 20 August 2019 from Deloitte (at page 22).

61. On about 28 November 2018 the FY18 Annual Report was reissued.
62. The reissued FY18 Annual Report revised previously reported profit after tax from \$7,000,000 to \$3,100,000, a reduction of 55.7%.

63. Further, the reissued FY18 Annual Report, in accordance with the requirements of the Accounting Standards, reclassified (inter alia) the Syndicated Banking Facility as a current liability with effect from June 2018.
64. On about 7 April 2019, AXL and the other members of the Group were placed in voluntary administration.

#### **I. Prospectus Contraventions**

65. The Prospectus was:
  - a. an offer of securities within the meaning of s 706 of the Corporations Act;
  - b. a prospectus within the meaning of s 710 of the Corporations Act;
  - c. a disclosure document within the meaning of s 728 of the Corporations Act.
66. In the premises pleaded at paragraphs 43 to 49 and 53 to 54 the Prospectus:
  - a. omitted to disclose:
    - i. the effect of the mandatory application of AASB 9 from 1 July 2018 on the AXL's financial accounts as pleaded at paragraphs 53;
    - ii. that the mandatory application of AASB 9 from 1 July 2018 would have a material adverse effect on AXL's financial position such that, by reason of the matters pleaded at paragraph 43 to 49 and 53 to 54 above, AXL was in breach of various covenants including the Arrears Ratio Covenant;
    - iii. that the mandatory application of AASB 9 from 1 July 2018 would have the effect that the Syndicated Banking Facility was a then current liability;
    - iv. that the mandatory application of AASB 9 from 1 July 2018 would have a material adverse effect on AXL's financial position such that by reason of the matters pleaded at paragraph 43 to 49 and 53 to 54 above it was:

1. dependant upon senior lenders not exercising their rights so as to continue to trade;
  2. alternatively, insolvent;
- b. contained misrepresentations to the effect that:
- i. upon the introduction of AASB 9 "*the accounting will not change*" as pleaded at paragraph 33 above;
  - ii. by virtue of the matters pleaded at 34 to 38, an assessment of the likely effect of the application of AASB 9 on the financial position of AXL and the Group had been made;
  - iii. the historical and pro-forma historical balance sheet as pleaded at paragraph 34 above provided a reliable estimation of the Group's financial position post the issue of the Bonds;
  - iv. the historical and pro-forma historical balance sheet as pleaded at paragraph 34 complied with applicable Accounting Standards;
  - v. the Group had not materially breached any loan covenant or debt obligations in the two years prior to 26 June 2018 and was not imminently going to breach a loan covenant or debt obligation;
  - vi. the Group was solvent with current assets exceeding current liability by circa \$125 million.
67. The omissions pleaded in 66(a) (**Prospectus Omissions**) were matters that the Applicant, the Group Members and their advisors reasonably required to make an informed assessment of the financial position and prospects of AXL (within that concept in s.710 of the Corporations Act).
68. Further, the Prospectus Omissions were matters that Applicant, the Group Members and/or their advisors reasonably expected to find in the Prospectus (within that concept in

s.710 of the Corporations Act) by reason of the fact that (at the very least) AASB 9 was soon to become compulsory as noted in the Prospectus and pleaded at paragraph 39 above.

69. By reason of the matters pleaded at 43 to 49 and 53 to 54, the misrepresentations pleaded in 66(b) (the **Prospectus Misrepresentations**) were misleading or deceptive.

70. Further or alternatively, the compulsory application of AASB 9 and the material effects it had as pleaded at 43 to 49 and 53 to 54 above, including but not limited to the breach of the Arrears Ratio Covenant (**the New Circumstances**), were new circumstances that arose after:

a. the Prospectus was originally lodged with ASIC;

b. before:

i. the opening date for the Offer and lodgement for the replacement Offer Specific Prospectus with ASIC;

ii. each of the Applicant and Group Members accepted the Offer;

iii. the Offer closed.

71. The effect of the New Circumstances were that the offer of the Bonds pursuant to the Prospectus was in contravention of s 728(1)(c) of the Corporations Act.

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

72. AXL was a person making an offer of securities under the Prospectus within the meaning of s 728(1) and s729(1) (Table, Item 1) of the Corporations Act.

73. AXL was a person who was, or ought to have been, aware that the Prospectus Omissions were materially adverse from the point of view of an investor.

74. Further or alternatively, AXL was a person who was, or ought to have been, aware that the Prospectus Misrepresentations were materially adverse from the point of view of an investor.
75. Further or alternatively, AXL did not have reasonable grounds for making the Prospectus Misrepresentations within the meaning of s 728(2) of the Corporations Act.
76. Further or alternatively, AXL was a person who was, or ought to have been, aware that the effect of the New Circumstances was materially adverse from the point of view of an investor.
77. In the premises pleaded at 72 to 76 (and by each of them) AXL contravened s 728(1) and s 728(4) of the Corporations Act.
78. By reason of s 729(1) (Table, Item 1) of the Corporations Act, any person who suffers loss or damage by reason of AXL's contravention of s 728(1) may recover the amount of the loss or damage from AXL.
79. Further, or alternatively, by reason of the the Prospectus Omissions and the Prospectus Misrepresentations, and or alternatively, by the failure to disclose the effect of the New Circumstances, AXL engaged in conduct which was:
  - a. in relation to financial products within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;
  - b. in trade or commerce, in relation to financial services within the meaning of s12DA(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
  - c. likely to induce persons in Australia to subscribe for or purchase financial products;
  - d. misleading or deceptive, or likely to mislead or deceive, in contravention of:
    - i. s1041H(1) of the Corporations Act;

- ii. s12DA(1) of the ASIC Act.

**K. PwCS's Liability**

80. As a matter of fact, PwCS:

- a. provided the accounting services as pleaded in paragraphs 40 and 41;
- b. prepared, or advised in relation to, the pro forma accounts for inclusion in the Prospectus;
- c. prepared, or advised in relation to, the ratios for inclusion in the Prospectus;
- d. prepared, or advised in relation to, the passages of the Prospectus directed to the accounts of AXL and the method of preparation of the pro forma accounts pleaded in paragraphs 32 to 35 and 38 above;
- e. assessed the likely effect of AASB 9 on the accounts of AXL for the purposes of the Prospectus;
- f. assessed the likely effect of AASB 15 on the accounts of AXL for the purposes of the Prospectus;
- g. reviewed the Prospectus and provided accounting advice to the effect that the introduction of AASB 9 would not "change the accounting" as pleaded at paragraph 33 above;
- h. knew, or ought to have known, that the effect of AASB 9 would be as pleaded at paragraphs 32 to 35, 38 and 43 to 49 above;
- i. permitted the Prospectus to use its name as the named accounting advisor;
- j. alternatively, either:

- i. failed to inform AXL that it had not assessed the likely impact of AASB 9;  
or
- ii. wrongly assessed the likely impact of AASB 9.

81. By reason of the matters pleaded in paragraph 80 above, PwCS was a person who was involved in AXL's contravention of s 728(1) of the Corporations Act within the meaning of s 729(1) (Table, Item 6) of the Corporations Act.

82. By reason of s 729(1) (Table, Item 6) of the Corporations Act, any person who suffers loss or damage by reason of AXL's contravention of s 728(1) of Corporations Act may recover the amount of the loss or damage from PwCS.

83. Further, or alternatively, by reason of it performing accounting services pleaded in paragraphs 41 and 80 upon which the information was presented in the Prospectus as pleaded at paragraphs 33 to 39, PwCS engaged in conduct which was:

- a. in relation to financial products within the meaning of subsections 1041H(1) and 1041H(2)(b) of the Corporations Act;
- b. in trade or commerce, in relation to financial services within the meaning of s12DA(1) of the ASIC Act;
- c. likely to induce persons in Australia to subscribe for or purchase financial products;
- d. misleading or deceptive, or likely to mislead or deceive, in contravention of:
  - i. s1041H(1) of the Corporations Act;
  - ii. s12DA(1) of the ASIC Act.

**L. Loss**

84. Prior to its decision to enter the Bond, the Applicant was provided a copy of the Prospectus.



85. The Applicant's decision to enter the Bond was based upon:
- a. the financial information and representations pleaded at 32 to 35;
  - b. the representation that ACL had not breached any loan covenant or debt obligation as pleaded at paragraph 36;
  - c. the Prospectus;
  - d. the absence of disclosure to the effect that:
    - i. the effect of the mandatory application of AASB 9 from 1 July 2018 on AXL's financial accounts as pleaded at paragraphs 43 to 49 and 53 to 54 above;
    - ii. that the mandatory application of AASB 9 from 1 July 2018 would have a material adverse effect on AXL's financial position such that, by reason of the matters pleaded at paragraph 43 to 49 and 53 to 54 above, AXL was in breach of various covenants including the Arrears Ratio Covenant;
    - iii. that the mandatory application of AASB 9 from 1 July 2018 would have the effect that the Syndicated Banking Facility was a then current liability;
    - iv. that the mandatory application of AASB 9 from 1 July 2018 would have a material adverse effect on AXL's financial position such that by reason of the matters pleaded at paragraph 43 to 49 and 53 to 54 above it was:
      1. dependant upon senior lenders not exercising their rights so as to continue to trade;
      2. alternatively, insolvent.
86. In the premises, were it not for the Prospectus Misrepresentations, Prospectus Omissions or the failure to disclose the New Circumstances (collectively, or each of them) the Applicant and the Group Members would not have entered into the Bonds.

87. Further and alternatively, the Applicant and each Group Member would not have entered into the Bonds had it known:

- a. that the effect of the mandatory application of AASB 9 from 1 July 2018 on AXL's financial accounts as pleaded at paragraphs 43 to 49 and 53 to 54 above;
- b. that the mandatory application of AASB 9 from 1 July 2018 would have a material adverse effect on AXL's financial position such that it was in breach of various covenants including the Arrears Ratio Covenant;
- c. that the mandatory application of AASB 9 from 1 July 2018 would have the effect that the Syndicated Banking Facility was a then current liability;
- d. that the mandatory application of AASB 9 from 1 July 2018 would have a material adverse effect on AXL's financial position such that it was:
  - i. dependant upon senior lenders not exercising their rights so as to continue to trade;
  - ii. alternatively, insolvent;

88. By reason of the above the Applicant and each Group Member has suffered loss or damage.

**Particulars of loss of the Applicant**

Face value of Bonds:	\$50,000.00
Less distribution from the DoCA:	<u>\$13,514.79</u>
TOTAL:	<u>\$36,485.21</u>

In addition, the Applicant has suffered loss of interest on the Bonds, particulars of which will be provided.

89. The Applicants and each Group Member is entitled to recover from each of AXL and/or PwCS the loss or damage pursuant to:

- a. section 729(1) of the Corporations Act;
- b. section 1041I of the Corporations Act;
- c. s 12GF of the ASIC Act.

Date: 20 August 2020



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Signed by Chris Moore  
Lawyer for the Applicant

This pleading was prepared by Jeremy Giles SC & Callan O'Neill, counsel.

**Certificate of lawyer**

I, Chris Moore certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 20 August 2020

A handwritten signature in cursive script that reads "Chris Moore". The signature is written in black ink and is positioned above a horizontal dotted line.

Signed by Chris Moore  
Lawyer for the Applicant