

NOTICE OF FILING

Details of Filing

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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

Registrar

Important Information

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

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



Second-Third 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

**[Hardy \(Underwriting Agencies\) Limited, Managing Agent for and on behalf of Lloyd's
Syndicate HDU 382](#)**

[Third Respondent](#)

[Liberty Managing Agency Limited for and on behalf of Syndicate 4473](#)

[Fourth Respondent](#)

[Asta Managing Agency Ltd acting for and on behalf of Everest Syndicate 2786](#)

[Fifth Respondent](#)

[Arch Underwriting at Lloyd's Limited for and on behalf of Syndicate 2012](#)

[Sixth 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 dated 26 June 2018 (**Offer Specific Prospectus**) and Base Prospectus dated 26 June 2018 (**Base Prospectus**) or under the Replacement Offer Specific Prospectus dated 4 July 2018 (**Replacement Offer Specific Prospectus**) and Base Prospectus_ (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 and other entities

- 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;](#)
 - f.g. [was deregistered on 29 October 2023.](#)
5. On or about 7 April 2019 Mr Glen Kanavsky, 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 Kanavsky, 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, Axesstoday Retail Pty Limited (**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, Axesstoday 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).
- 12A. PricewaterhouseCoopers:
- a. conducted business in Australia as tax advisors and auditors under the names “PricewaterhouseCoopers” and “PwC”;
 - b. provided tax advisory services and auditing services to AXL at the time it offered the Bonds;
 - c. was named in the Prospectus as tax advisors and auditors for the Prospectus.
- 12B. The Third to Sixth Respondents (collectively **Underwriters**):
- a. are underwriting agencies and are capable of being sued;
 - b. from in or about November 2017 underwrote a DUAL Evolution Insurance Policy Number EVO53983417J1 with AXL as policyholder for a period commencing on 25 November 2017, which was amended from time to time thereafter by endorsement (**the Policy**);
 - a-c. the Policy was issued on Underwriters’ behalf by Dual Insurance Pty Limited.

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 Offer Specific Prospectus for the offer of the Bonds in a single series and tranche identified as *Series A, Tranche 1*.
- 22A. On about 4 July 2018 AXL issued the Replacement Offer Specific 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, a later Replacement 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) and the Replacement Offer Specific Prospectus related to the issue by AXL of \$55 million of simple corporate bonds (the Bonds as defined above), each 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, the Replacement Offer Specific Prospectus was lodged with ASIC on about 4 July 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 and Replacement 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.

Particulars

Offer Specific Prospectus and Replacement Offer Specific Prospectus, page
9; Base Prospectus page 34, paragraph 2, page 49, page 54, pages 62 to
64, clause 3.5, clause 3.6.

- ii. the terms of the Offer Specific Prospectus and Replacement Offer Specific Prospectus and the Base Prospectus.
- c. the term of the Bonds was 5 years with a maturity date of 20 July 2023 (**Maturity Date**);

Particulars

Offer Specific Prospectus and Replacement 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 and Replacement 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 and Replacement 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 and Replacement 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 and (but for the distinctions pleaded below) Replacement 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."

33A. Section 3.3.1 at page 16 of the Replacement Offer Specific Prospectus relevantly contained the identical statement to that pleaded in paragraph 33 above, save that:

(a) the figure of "\$50 million" wherever appearing in subparagraph (i) was replaced with the figure "\$55 million";

(b) the figure of "\$1.6 million" wherever appearing in subparagraph (ii) was replaced with the figure "\$1.7 million".

34. Section 3.3.2 at page 17 of the Offer Specific Prospectus and the Replacement Offer Specific Prospectus set out an historical and pro-forma historical balance sheet as at 31 December 2017 (**2017 Pro Forma Balance Sheets**) which relevantly represented the following:

(a) Offer Specific Prospectus:

	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

(b) Replacement Offer Prospectus:

	Historical balance sheet 31 Dec 2017	Pro-forma historical balance sheet
	\$'000s	\$'000s
<i>Current assets</i>	82,822	136,098
<i>Non-current assets</i>	191,379	191,379
<i>Total assets</i>	274,201	327,477
<i>Current liabilities</i>	7,747	7,747
<i>Non-current liabilities</i>	218,471	271,747
<i>Total liabilities</i>	226,218	279,494
<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 and the Replacement Offer Specific Prospectus recorded what were stated to be the key financial ratios of AXL and its subsidiaries as follows:

(a) Offer Specific Prospectus

<i>Prescribed Key Financial Ratios as at</i>	<i>30 Jun 16</i>	<i>30 Jun 17</i>	<i>31 Dec 17</i>	<i>Pro forma 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 the arrears ratio.

(b) Replacement Offer Specific Prospectus

<i>Prescribed Key Financial Ratios as at</i>	<i>30 Jun 16</i>	<i>30 Jun 17</i>	<i>31 Dec 17</i>	<i>Pro forma 31 Dec 17</i>
<i>Prescribed Gearing Ratio</i>	853%	433%	471%	582%
<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	17.6x

36. Section 3.8.1 on page 23 of the Offer Specific Prospectus and Replacement 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:
- was not in breach, or alternatively was not imminently going to breach, a loan covenant or debt obligation; or
 - had reasonable grounds for considering that it was not in breach, or alternatively 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 Accounting Standards 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 Axsesstoday prepared on the basis of the Australian

accounting standards in place as at the date of the issuance of the Bonds. Axesstoday 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 Axesstoday from its financial year commencing on 1 July 2018. Axesstoday 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 on the Group pleaded in Section G below.
40. Section 3.7 on page 22 of the Offer Specific Prospectus and Replacement 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 the Pro Forma Balance Sheets pleaded in paragraph 34.
42. Section 3.8.5 on page 24 of the Offer Specific Prospectus and the Replacement Offer Specific Prospectus recorded, as was the fact, that PwCS consented to be named Accounting Advisor for the Offer.

F1. Failure to identify breaches of the Arrears Ratio Covenant

- 42A. At all material times up to about 6 September 2018 the Group had adopted an accounting policy that automatically wrote off receivables outstanding for a period of greater than 120 days (**the Old Policy**).
- 42B. The Old Policy did not accord with the Accounting Standards, and in particular clauses 58 – 70 of AASB 139, on the basis that:
- 42B.1 it did not seek to engage, either adequately or at all, with the requisite assessment for determining impairment;
- 42B.2 instead in applying the Old Policy AXL adopted a fixed rule of fully impairing any debt which had been in default for 120 days regardless of prospect of recovery;
- 42B.3 which in turn had the effect of understating both receivables and arrears; and
- 42B.4 also had the effect that the arrears covenant ratio was misstated because the portion by which arrears were understated was greater than the portion by which receivables were understated.
- 42C. The effect of the Old Policy was such that as at the time the 2017 Pro Forma Balance Sheets were prepared, receivables and arrears as stated in the 2017 Pro Forma Balance Sheets were less than if they had been determined in accordance with the Accounting Standards (and arrears significantly understated), as pleaded in paragraphs 46-48 below.
- 42D. Had the 2017 Pro Forma Balance Sheets been prepared in accordance with the Accounting Standards (instead of the Old Policy), AXL would have been in breach of (inter alia) the Arrears Ratio Covenant.

Particulars

See paragraphs 50-53 below

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, and by the application of the Old Policy, 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.

- 46A. Following the matters pleaded below at paragraphs 50 to 53, AXL adopted a new accounting policy whereby receivables were only to be written off if they were outstanding for greater than 365 days or if there was no prospect of recovery before then (**New Policy**).
- 46B. The New Policy would have conformed with AASB 139 had it applied prior to 30 June 2018 and conformed with AASB 9 from 30 June 2018.
47. After the application of the New Policy prior to 30 June 2018 or of AASB 9 and, or alternatively or, the New Policy, 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 30 June 2018 or 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, in the period to 30 June 2018 and 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.

G1. AXL's and PwCS' knowledge in relation to AASB9

49A. On or about 10 August 2017 AXL became aware that AASB 9, which would take effect for the 2019 financial year:

- a. required a more detailed assessment of bad debt history than was previously the case and an actuarial approach to provisioning;
- b. required the provision to cover both incurred and anticipated losses;
- c. would have the greatest impact on entities whose primary business is lending;
- d. required new models and processes to be developed in order to determine loan loss provisions using a complex predicted loss model;
- e. could result in losses on loan defaults being recognised far earlier than they are under AASB 139;
- f. required far more disclosure about credit deterioration of a lender's loan book, even if the losses were not expected to eventuate.

Particulars

PwC Audit Committee Report for year ended 30 June 2017 (AXL.001.001.0509)
pages 5 and 19.

49B. On or about 9 February 2018 AXL was informed by PwC that:

- a. PwC recommended that AXL's management continue to monitor the provision against the arrears profile;
- b. significant attention would be directed towards the completeness of the arrears balance for the purposes of the year end audit;
- c. PwC recommended that AXL's management strengthen the controls and policy surrounding what is included in arrears for the purposes of determining its year end provision;
- d. AXL's 30 June 2018 financial report would be required to disclose how the change in the standard from AASB 139 to AASB 9 would impact its financial statements when applied;
- e. the change in the Financial Instruments standard was expected to have the greatest implication on AXL considering AASB 9 required the recognition of impairment provisions based on expected credit losses rather than only incurred credit losses;
- f. the new standards would introduce expanded disclosure requirements and changes in presentation of accounts;
- g. for AXL disclosures were important and disclosures about the provisions for impairment of receivables would be relevant;
- h. notes to the financial statements should disclose the expected impact of new requirements for accounting for revenue, leases and financial instruments.

Particulars

PwC draft Half year Review Report to AXL Board Audit Committee (AXL.001.001.1028) emailed to AXL on 9 February 2018 (AXL.001.001.1027) pages 6, 7, 13 and 15.

49C. On or about 15 February 2018 AXL was informed by PwC that:

- a. guidance issued by ASIC would require the 30 June 2018 financial report to disclose how the change in AASB9 and AASB 15 would impact financial statements when applied;
- b. the PwC planned audit would test the adequacy of the provision against arrears;
- c. a breach in covenants could result in all debts being called in;
- d. the new standard introduces a new impairment model that will require impairment losses to be recognised using an expected rather than incurred loss model that will impact how AXL then accounted for receivables;
- e. PwC had agreed with management that management would prepare an impact assessment for AASB 9 by 10 June 2018;
- f. preparers of accounts should provide required disclosure in the notes to financial statements prior to the effective date of the new standards regarding known or reasonably estimable information relevant to assessing the possible impact that adoption of the new standards will have on the issuer's future financial statements.

Particulars

PwC Audit Plan for AXL (AXL.001.001.1434) emailed to AXL on 15 February 2018 (AXL.001.001.1433) pages 13, 14, 28 and 30.

- 49D. On 28 May 2018, in its Audit Plan for the year ending 30 June 2018, PwC informed AXL that PwC would assess the impact of AASB 9 for financial statement disclosure and that it proposed to charge a fee of \$15,000 for doing so.

Particulars

PwC Audit Plan dated 28 May 2018 (AXL.001.001.1434_0026)

- 49E. From at least about 17 June 2018 PwCS was aware that AXL was required to consider the impact of AASB 9 on AXL's financial statements and financial position after 30 June

2018 and on the calculation of key financial ratios for the purpose of determining breach of any loan covenant or debt obligation.

Particulars

- a. Draft Base Prospectus (v4) emailed by Ms Ellen Jones to AXL by email dated 17 June 2018 (AXL.001.001.1209) section 4.4.6 at page 35 (AXL.001.001.1210) (see Ms Jones's note).
- b. Participation in meetings of AXL's due diligence committee on the following dates:
 - (i) Meeting 1 – 4 June 2018 (Doc - AXL.001.001.1191)
 - (ii) Meeting 2 – 8 June 2018 (Doc - AXL.001.001.1188)
 - (iii) Meeting 3 – 15 June 2018 (Doc - AXL.001.001.2065)
 - (iv) Meeting 4 – 22 June 2018 (Doc - AXL.001.001.1320)
 - (v) Meeting 5 – 25 June 2018 (Doc - AXL.001.001.1334)
 - (vi) Meeting 6 – 3 July 2018 (Doc - AXL.001.001.1416)

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 and, or alternatively or, the New Policy, 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 at all material times, or alternatively 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;
- a)b) an offer of simple corporate bonds within the meaning of s 713A of the Corporations Act;
- b)c) a 2-part simple corporate bonds prospectus within the meaning of s 713B of the Corporations Act, including:
 - (i) a base prospectus within the meaning of s713C of the Corporations Act which was required to contain the information set out in Reg 6D.2.04 of the Corporations Regulations 2001;
 - (ii) an offer specific prospectus within the meaning of s713D of the Corporations Act which was required to contain the information set out in Reg 6D.2.05 of the Corporations Regulations 2001;
- c)d) a disclosure document within the meaning of s 728 of the Corporations Act.

66. In the premises pleaded at paragraphs 42A to 42D, 43 to 49, 49A to 49E and 53 to 54 the Prospectus:

- a. omitted to disclose:
 - i. the effect of the mandatory application of AASB 9 from 1 July 2018 and, or alternatively or, the New Policy, on AXL's financial accounts as pleaded at paragraph 53;
 - ii. that the mandatory application of AASB 9 from 1 July 2018 and, or alternatively or, the New Policy in the period to 30 June 2018 and after that period, would have a material adverse effect on AXL's financial position such that, by reason of the matters pleaded at paragraphs 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 and, or alternatively or, the New Policy in the period to 30 June 2018 and after that

period, 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 and, or alternatively or, the New Policy in the period to 30 June 2018 and after that period, 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. in breach of various covenants including the Arrears Ratio Covenant;
 2. dependant upon senior lenders not exercising their rights so as to continue to trade;
 3. alternatively, insolvent;
- v. the Old Policy did not conform with AASB 139 in the period to 30 June 2018 and AASB 9 from 1 July 2018 as pleaded at paragraph 42B to the effect pleaded at paragraphs 42C to 42D;
- vi. that the application of the Old Policy misrepresented AXL's financial position such that as at the date of the 2017 Pro Forma Balance Sheets, the true financial position of AXL was such that it was:
 1. in breach of various covenants including the Arrears Ratio Covenant;
 2. dependant upon senior lenders not exercising their rights so as to continue to trade;
 3. alternatively, insolvent.

- vii. that the introduction of AASB 9 required assessment and disclosure including of the impact of its introduction on AXL's financial statement and financial position;
 - viii. that upon the introduction of AASB 9 there was a real prospect that AXL's accounting would change in a material manner.
- 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 and, or alternatively or, the New Policy, on the financial position of AXL and the Group had been made;
 - iii. the 2017 Pro Forma Balance Sheets as pleaded at paragraph 34 above provided a reliable estimation of the Group's financial position as at the date it was made, or alternatively post the issue of the Bonds;
 - iv. the historical and pro-forma historical balance sheets 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 [or 4 July 2018](#) and was not in breach, or alternatively 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;
 - vii. the application of the Old Policy misrepresented AXL's financial position such that as at the date of the 2017 Pro Forma Balance Sheets, the true financial position of AXL was such that it was:

1. in breach of various covenants including the Arrears Ratio Covenant;
2. dependant upon senior lenders not exercising their rights so as to continue to trade;
3. alternatively, insolvent.

67. The omissions pleaded in 66(a) (**Prospectus Omissions**) were matters [\(being business risks\)](#) that [were relevant to the investment decision to be made by](#) the Applicant, the Group Members and/or their advisors ~~reasonably required to make an informed assessment of the financial position and prospects of AXL~~ (within that concept in [reg 6D.2.04\(8\)\(d\) of the Corporations Regulations.710 of the Corporations Act](#)).
68. Further, the Prospectus Omissions were matters [\(being business risks\)](#) that [were relevant to the investment decision to be made by](#) the Applicant, the Group Members and/or their advisors ~~reasonably expected to find in the Prospectus~~ (within that concept in [reg 6D.2.04\(8\)\(d\) of the Corporations Regulations.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 42A to 42D, 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:
 - a. after 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 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.

J1. Underwriters' Liability

79A. It was a term of the Policy that Underwriters agreed to pay on behalf of the policyholder (AXL) its loss on account of a securities claim first made against the policyholder during the insurance period.

Particulars

Cl 2.5 of the Policy

79B. For the purposes of the operation of cl 2.5 of the 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.

79C. The Policy responds to these proceedings.

79D. Underwriters have accepted the Policy responds to these proceedings.

Particulars

First Respondent's defence filed 2 June 2023, paragraph [107].

79E. By operation of s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) Underwriters stand in the place of AXL as if the proceedings were proceedings to recover damages, compensation or costs from AXL.

PwCS's Liability

- 80. As a matter of fact, PwCS was engaged by AXL to:
 - a. provide accounting services for the Offer;
 - b. prepare the pro forma accounts, including the 2017 Pro Forma Balance Sheets, for inclusion in the Prospectus;

- c. prepare the 2017 Pro Forma Balance Sheets for AXL, adjusted for the effects of the pro forma transactions referred to in the Prospectus, in accordance with the recognition and measurement principles prescribed in Accounting Standards other than in respect of the adjustments to reflect the proposed bond issue as if it had occurred as at 31 December 2017, and for the purpose of being included in the Prospectus;
- d. participate as a member of and be a reporting person to the AXL due diligence committee (**DDC**) that was established for the purposes of co-ordinating due diligence investigations in connection with the Prospectus;
- e. consider and comment on drafts of the Prospectus.

Particulars

- I. PwCS consented to being named in Prospectus as providing accounting services for the offer as pleaded at paragraph 40.
- II. PwCS received a fee for providing accounting services for the offer as pleaded at paragraph 40.
- III. Representations made in the Prospectus by AXL pleaded in paragraphs 32 to 34 above.
- IV. Letter of engagement dated 6 June 2018 from PwCS to AXL (PWC.601.002.2792).
- V. Addendum to engagement dated 24 June 2018 from PwCS to AXL (PWC.601.002.2810).
- VI. The Applicant repeats the particulars to paragraph 49E above.

81. As a matter of fact, PwCS:

- a. prepared the 2017 Pro Forma Balance Sheets for the purpose of inclusion in the Prospectus;
- b. knew that the 2017 Pro Forma Balance Sheets were included in the Prospectus;
- c. participated as a member of, and was, a reporting person to the DDC;
- d. reviewed drafts of the Prospectus and provided its input into those drafts and consequently into the final form of the Prospectus prior to the Offer;
- e. knew that the introduction of AASB 9 required assessment and disclosure including of the impact of its introduction on AXL's financial position;
- f. knew that upon the introduction of AASB 9 there was a real prospect that AXL's accounting would change in a material manner;
- g. knew that the Prospectus contained a representation that upon the introduction of AASB 9 "*the accounting will not change*";
- h. knew that the Prospectus omitted an assessment and disclosure of the impact of the introduction of AASB 9 on AXL's financial statement and financial position;
- i. knew that the Prospectus omitted an assessment or disclosure that upon the introduction of AASB 9 there was a real prospect that AXL's accounting would change in a material manner.

Particulars

- i. PwCS' knowledge follows from the facts pleaded in paragraph 80 and the matters identified in the particulars to paragraph 80, and the fact that it performed the functions pleaded in sub-paragraph (a), (c) and (d) of this paragraph.

82. The 2017 Pro Forma Balance Sheets were not prepared by PwCS in accordance with the recognition and measurement principles prescribed in Accounting Standards, other than

in respect of the adjustments to reflect the proposed bond issue as if it had occurred as at 31 December 2017, in that:

- a. the 2017 Pro Forma Balance Sheets were prepared using the Old Policy which, as pleaded in paragraphs 42B.1 and 42B.2 did not comply with AASB 139, in particular clauses 58-70;
- b. the 2017 Pro Forma Balance Sheets were prepared on a basis which understated both receivables and arrears (but to varying extents, the arrears misstated by a greater proportion).

83. [not used]

84. In the circumstances pleaded in paragraph 81, in preparing the 2017 Pro Forma Balance Sheets and in preparing it to be including in the Prospectus PwCS represented that there were reasonable grounds for an opinion that the 2017 Pro Forma Balance Sheets were prepared in accordance with the recognition and measurement principles prescribed in Accounting Standards, other than in respect of the adjustments to reflect the proposed bond issue as if it had occurred as at 31 December 2017.

84A. In the circumstances pleaded in paragraphs 81 and 82 there were not reasonable grounds for an opinion that the 2017 Pro Forma Balance Sheets were prepared in accordance with the recognition and measurement principles prescribed in Accounting Standards, other than in respect of the adjustments to reflect the proposed bond issue as if it had occurred as at 31 December 2017.

84B. By reason of the matters pleaded in paragraphs 12, 34, 80 to 82, 84 and 84A above, in preparing the 2017 Pro Forma Balance Sheets and in preparing it to be including in the Prospectus PwCS engaged in conduct in relation to a financial product, and, or alternatively or, a financial service, that was misleading or deceptive or was likely to mislead or deceive in contravention of s 1041H of the Corporations Act.

84C. By reason of PwCS' misleading or deceptive conduct pleaded in paragraph 84B the Applicant and each Group Member were presented with the 2017 Pro Forma Balance Sheets in the Prospectus, and in reliance upon that financial information being prepared in accordance with the recognition and measurement principles prescribed in Accounting

Standards, other than in respect of the adjustments to reflect the proposed bond issue as if it had occurred as at 31 December 2017, acquired the Bonds.

- 84D. Further, in the circumstances pleaded at paragraphs 49E, 80 and 81 PwCS was aware of the Prospectus and knew its contents prior to it being issued.
- 84E. By reason of its knowledge and conduct pleaded at paragraphs 49E, 80, 81 and 84D, PwCS was knowingly involved in that part of AXL's contravention of s 728(1) of the Corporations Act pleaded in paragraphs 66(a)(vii), 66(a)(viii) and 66(b)(i) in that PwCS performed the functions pleaded in sub-paragraph (a), (c) and (d) of paragraph 81 and:
- a. knew that the introduction of AASB 9 required assessment and disclosure by AXL, including in the Prospectus, including of the impact of its introduction on AXL's financial position;
 - b. knew that upon the introduction of AASB 9 there was a real prospect that AXL's accounting would change in a material manner;
 - c. knew that the Prospectus contained a representation that upon the introduction of AASB 9 "*the accounting will not change*";
 - d. knew that the Prospectus omitted an assessment of and disclosure of the impact of the introduction of AASB 9 on AXL's financial statement and financial position;
 - e. knew that the Prospectus omitted an assessment or disclosure that upon the introduction of AASB 9 there was a real prospect that AXL's accounting would change in a material manner which would affect the calculation of various loan covenants;

Particulars

- I. PwCS was engaged to undertake the services set out in its letters of engagement dated 6 June 2018 and 24 June 2018;

- II. PwCS staff engaged for that purpose included Mr Iain Tan (Partner) and Ms Ellen Jones (Manager);
- III. Mr Tan and Ms Jones attended the Due Diligence Committee (DDC) Meetings on:
 - (i) 5 June 2018;
 - (ii) 8 June 2018;
 - (iii) 15 June 2018;
 - (iv) 22 June 2018;
 - (v) 3 July 2018;
- IV. The DDC's tasks were contractually outlined in the Due Diligence Planning Memorandum prepared by Thomson Geer;
- V. Prior to the offering, in an attachment to an email dated 17 June 2018, Ms Jones identified a key issue, being the necessity for there to be an assessment of the impact of AASB 9 as a main risk associated with the Bonds;
- VI. Despite the key issue being identified, no changes to the Prospectus were:
 - (i) proposed by PwCS;
 - (ii) made by AXL;
- VII. The DDC was satisfied with the form and content of the Prospectus and the outcome of the Process and finalised its report;

VIII. PwCS knew, through Iain Tan and Ellen Jones, the matters pleaded in paragraph 84E;

IX. Despite the above matters, PwCS failed to ensure the Prospectus contained an assessment of the impact of AASB 9 on AXL's financial statements and financial position after 30 June 2018, including the impact of its introduction on AXL's financial position;

84F. 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) may recover the amount of the loss or damage from PwCS.

84G. Further and in the alternative, by reason of the matters pleaded in paragraphs 49E, 80 and 81 above, PwCS engaged in conduct in relation to a financial product, and, or alternatively or, a financial service, that was misleading or deceptive or was likely to mislead or deceive in contravention of s 1041H of the Corporations Act in that it participated in preparation of the relevant parts of the Prospectus which contained the misleading omissions pleaded in paragraphs 66(a)(vii) and 66(a)(viii) (in the circumstances pleaded in paragraph 67), and the misrepresentation pleaded in paragraph 66(b)(i).

Particulars

The applicant repeats the particulars [(I) – (IX)] to paragraph 84E set out above.

84H. By reason of PwCS' misleading or deceptive conduct pleaded in paragraph 84G the Applicant and each Group Member were presented with the Prospectus, and in reliance upon it, acquired the Bonds.

84I. By reason of its knowledge pleaded at paragraphs 49E, 80, 81 and 84D PwCS was knowingly involved in that part of AXL's contravention of s 1041H of the Corporations Act pleaded by reference to the omissions pleaded in paragraphs 66(a)(vii) and 66(a)(viii) and the misrepresentation pleaded in paragraph 66(b)(i) in that PwCS performed the functions pleaded in sub-paragraph (a), (c) and (d) of paragraph 81 and:

- a. knew that the introduction of AASB 9 required assessment and disclosure by AXL, in the Prospectus, including of the impact of its introduction on AXL's financial position;
- b. knew that upon the introduction of AASB 9 there was a real prospect that AXL's accounting would change in a material manner;
- c. knew that the Prospectus contained a representation that upon the introduction of AASB 9 "*the accounting will not change*";
- d. knew that the Prospectus omitted an assessment of and disclosure of the impact of the introduction of AASB 9 on AXL's financial statement and financial position;
- e. knew that the Prospectus omitted an assessment or disclosure that upon the introduction of AASB 9 there was a real prospect that AXL's accounting would change in a material manner which would affect calculation of various loan covenants;

Particulars

The applicant repeats the particulars [(I) – (IX)] to paragraph 84E set out above.

84J. By reason of its knowledge pleaded at paragraphs 49E, 80, 81 and 84D PwCS was knowingly involved in that part of AXL's contravention of s 12DA of the ASIC Act pleaded by reference to the omissions pleaded in paragraphs 66(a)(vii) and 66(a)(viii) and the misrepresentation pleaded in paragraph 66(b)(i) in that PwCS performed the functions pleaded in sub-paragraph (a), (c) and (d) of paragraph 81 and:

- a. knew that the introduction of AASB 9 required assessment and disclosure by AXL, in the Prospectus, including of the impact of its introduction on AXL's financial position;
- b. knew that upon the introduction of AASB 9 there was a real prospect that AXL's accounting would change in a material manner;

- c. knew that the Prospectus contained a representation that upon the introduction of AASB 9 “*the accounting will not change*”;
- d. knew that the Prospectus omitted an assessment of and disclosure of the impact of the introduction of AASB 9 on AXL’s financial statement and financial position;
- e. knew that the Prospectus omitted an assessment or disclosure that upon the introduction of AASB 9 there was a real prospect that AXL’s accounting would change in a material manner which would affect calculation of various loan covenants.

Particulars

The applicant repeats the particulars [(I) – (IX)] to paragraph 84E set out above.

K. Loss

- 85. Prior to its decision to enter the Bond, the Applicant was provided a copy of the Prospectus.
- 86. 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 AXL had not breached any loan covenant or debt obligation as pleaded at paragraph 36;
 - c. the Prospectus;
 - d. the 2017 Pro Forma Balance Sheets:
 - i. being prepared in accordance with the recognition and measurement principles prescribed in Accounting Standards, other than in respect of the adjustments to reflect the proposed bond issue as if it had occurred as at 31 December 2017; or

- ii. that there was a reasonable basis to hold the opinion that the 2017 Pro Forma Balance Sheets had been so prepared;
- e. the absence of disclosure to the effect that:
- i. the effect of the mandatory application of AASB 9 and, or alternatively or, the New Policy, from any time, or alternatively 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 and, or alternatively or, the New Policy in the period to 30 June 2018, or from any time, or alternatively 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 and, or alternatively or, the New Policy in the period to 30 June 2018, or from any time, or alternatively 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 and, or alternatively or, the New Policy in the period to 30 June 2018, or from any time, or alternatively 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.
 - v. that the introduction of AASB 9 required assessment and disclosure including of the impact of its introduction on AXL's financial position;

- vi. that upon the introduction of AASB 9 there was a real prospect that the accounting would change in a material manner.

87. [not used]

88. 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 and, or alternatively or, the New Policy, in the period to 30 June 2018, or from any time, or alternatively 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 and, or alternatively or, the New Policy, from in the period to 30 June 2018, or any time, or alternatively 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 and, or alternatively or, the New Policy, from in the period to 30 June 2018, or any time, or alternatively 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 and, or alternatively or, the New Policy, in the period to 30 June 2018, or from any time, or alternatively from 1 July 2018 would have a material adverse effect on AXL's financial position such that it was:
 - i. in breach of various covenants including the Arrears Ratio Covenant;
 - ii. dependant upon senior lenders not exercising their rights so as to continue to trade;
 - iii. alternatively, insolvent;

- e. the effect of the Old Policy on AXL's financial accounts as pleaded at paragraph 42C and 42D;
 - f. that the application of the Old Policy misrepresented AXL's financial position such that as at the date of the 2017 Proforma Balance Sheets, the true financial position (calculated in accordance with AASB 139) of AXL was such that it was:
 - i. dependant upon senior lenders not exercising their rights so as to continue to trade;
 - ii. in breach of various covenants including the Arrears Ratio Covenant;
 - iii. alternatively, insolvent.
 - g. that the introduction of AASB 9 required assessment and disclosure including of the impact of its introduction on AXL's financial statements and financial position;
 - h. that upon the introduction of AASB 9 there was a real prospect that the accounting would change in a material manner.
- 88A. Further and alternatively, the Applicant and each Group Member would not have entered into the Bonds had they known that:
- (a) the 2017 Pro Forma Balance Sheets had not been prepared in accordance with the recognition and measurement principles prescribed in Accounting Standards other than in respect of the adjustments to reflect the proposed bond issue as if it had occurred as at 31 December 2017; or
 - (b) there was not a reasonable basis to hold the opinion that the 2017 Pro Forma Balance Sheets had not been prepared in accordance with the recognition and measurement principles prescribed in Accounting Standards other than in respect of the adjustments to reflect the proposed bond issue as if it had occurred as at 31 December 2017.

- 88B. In the premises, were it not for the AXL's contraventions pleaded at 72 to 79 the Applicant and the Group Members would not have acquired the Bonds.
- 88C. Further and alternatively, in the premises but for PwCS's contraventions pleaded in 84B and further and alternatively 84D, 84E, 84F and 84G, and the facts pleaded in 84C, 86(d), 88A and 84H, the Applicant and the Group Members would not have acquired the Bonds.
89. 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 first distribution from the DoCA:	<u>\$13,514.79</u>
<u>Less second distribution from the DoCA:</u>	<u>\$3,523.86</u>
TOTAL:	<u><u>\$36,485.21</u></u> <u>32,961.35</u>

Particulars of loss of the Group

Face value of Bonds:	————— \$55,000,000
Less distribution from the DoCA:	————— <u>\$14,850,000</u>
TOTAL:	————— <u>\$40,150,000</u>

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

90. The Applicants and each Group Member is entitled to recover from [Underwriters \(standing in the place of AXL\)](#) 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.

91. The Applicants and each Group Member is entitled to recover from PwCS the loss or damage pursuant

- a. to section 1041I of the Corporations Act;
- b. section 729(1) of the Corporations Act.

Date: [27 October 2023](#) [21 December 2023](#)



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: ~~27 October 2023~~ 21 December 2023

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