

## NOTICE OF FILING

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### Details of Filing

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A handwritten signature in blue ink, reading "Warwick Soden".

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.

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Rule 16.32

**Further Amended Defence**

**(Amended pursuant to Rule 16.51(1) of the Federal Court Rules  
2014 Filed pursuant to the orders made by the Honourable Justice  
Middleton dated 13 March 2013)**

No. VID 114 of 2014  
Federal Court of Australia  
District Registry: Victoria  
Division: General

**TOBIAS MITIC**

Applicant

**OZ MINERALS LIMITED (ACN 005 482 824)**

Respondent

To the Applicant's Second Further Amended Statement of Claim dated 17 March 2015  
(SFASOC) 3 July 2014 (~~FASOC~~), the Respondent says as follows (adopting the definitions and  
Section headings contained in the ~~FASOC~~ SFASOC unless otherwise indicated):

**Table of Contents**

<b>A.....</b>	<b>2</b>
<b>B.....</b>	<b>2</b>
<b>C.....</b>	<b>8</b>
<b>D.....</b>	<b>15</b>
<b>E.....</b>	<b>19</b>
<b>F.....</b>	<b>24</b>

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<b>G.....</b>	<b>27</b>
<b>H. APPORTIONMENT DEFENCES.....</b>	<b>29</b>
<b>I KPMG.....</b>	<b>29</b>
<b>II KPMG TS .....</b>	<b>51</b>
<b>III CLAYTON UTZ.....</b>	<b>77</b>
<b>IV GRANT SAMUEL.....</b>	<b>92</b>
<b>V ZINIFEX AND MESSRS LARKIN, PRITCHARD KNIGHT AND BARNES .....</b>	<b>106</b>
<b>VI MESSRS HEGARTY, JAMIESON, BEEVOR, CUSACK AND SELLS .....</b>	<b>121</b>
<b>VII ALLENS.....</b>	<b>134</b>
<b>I. RELIEF FROM LIABILITY UNDER SECTION 1317 OF THE CORPORATIONS ACT .....</b>	<b>151</b>

**A.**

1 As to paragraph 1, it:

- (a) admits the allegations in sub-paragraph (a);
- (b) admits the allegations in sub-paragraph (b);
- (c) admits that the Applicant represents any Group Members as defined in sub-paragraph 1(c) and says further that:
  - (i) it does not admit that the Group Members acquired shares in Oxiana on 1 July 2008 as a result of the merger;
  - (ii) it denies that the applicant or any Group Member have suffered loss and damage by or resulting from the conduct of the Respondent alleged in the ~~FASOC~~ SFASOC; and,
  - (iii) otherwise does not plead to sub-paragraph 1(c).

2 It admits paragraph 2.

**B.**

3 Subject to referring at trial to the full terms and effect of the LNSA it admits the allegations in paragraph 3.

4 It admits the allegations in paragraph 4.

5 It admits the allegations in paragraph 5.

6 It admits the allegations in paragraph 6.

7 As to paragraph 7:

- (a) subject to referring at trial to the full terms and effect of the LNSA, it admits that clause 25.1 of the LNSA provides, amongst other things, that it is an Event of Default if the Obligor fails:
  - (i) to pay an amount payable by it under a Finance Document (including the Intercreditor Deed) when due, or where such failure to pay is caused by an administrative or technical error, within 2 Business Days of that due date; or
  - (ii) to comply with any of its other obligations under a Finance Document except, where in the opinion of the Agent that failure can be remedied within 10 Business Days, it remedies the failure within that period;
- (b) it otherwise does not admit the allegations therein.

8 As to paragraph 8:

- (a) subject to referring at trial to the full terms and effect of the LNSA, it admits that clause 25.2 of the LNSA provides amongst other things that in addition to any other rights provided by law or any Transaction Document at any time while an Event of Default subsists the Agent may and shall if the Majority Participants direct do all or any of the following:
  - (i) by notice to the Issuer declare the Secured Money immediately due and payable, and the Issuer shall immediately pay the Secured Money (including the total face amount of all outstanding Performance Bonds and Bank Guarantees); and
  - (ii) by notice to the Issuer, cancel the Commitments (being the facility commitments provided for under the LNSA); and
  - (iii) at the cost of the Issuer, appoint a firm of independent accountants or other experts to review and report to the Agent on the affairs, financial condition and business of any Obligor;
- (b) it otherwise does not admit the allegations therein.

9 As to paragraph 9:

- (a) it admits that by an agreement made on 28 February 2008 between the Respondent as the Company and Original Borrower, Oxiana Finance, Oxiana Golden Grove Pty Ltd, Oxiana Prominent Hill Operations Pty Ltd (formerly Minex (SA) Pty Ltd), Oxiana Prominent Hill Pty Ltd, Oxiana Finance (Holdings) Pty Ltd, Oxiana Golden Grove (Holdings) Pty Ltd, Oxiana Golden Grove (Finance) Pty Ltd and Minotaur Resources Holdings Pty Ltd as Original Guarantors, RBS as Agent, Arranger and Original Lender and ANZ as Arranger and Original Lender, (**the Mezzanine Facility**), RBS and ANZ (**the Mezzanine Lenders**) agreed to provide the Respondent with facilities for cash up to a maximum amount of US\$140 million;

### **Particulars**

*The Mezzanine Facility is in writing.*

- (a) it further says that the Mezzanine Facility specified a repayment date of 30 November 2008 for loans drawn under the Mezzanine Facility;
- (b) it otherwise denies the allegations therein;
- (c) in further answer to paragraph 9 it:
- (i) says that as at 30 June 2008 the Respondent had drawn US\$140 million under the Mezzanine Facility; and
  - (ii) refers to and repeats paragraph 13 below.

10 As to paragraph 10:

- (a) subject to referring at trial to the full terms and effect of the Mezzanine Facility, it admits that:
- (i) clause 22.1 of the Mezzanine Facility provides that it is an Event of Default if an Obligor does not pay on the due date any amount payable pursuant to a Finance Document at the place at and in the currency in which it is expressed to be payable unless:
    - (1) its failure to pay is caused by administrative or technical error beyond the control of the Obligors; and
    - (2) payment is made within 2 Business Days of its due date;

- (ii) clause 22.2 of the Mezzanine Facility provides that:
  - (1) it is an Event of Default if an Obligor does not comply with any provision of the Finance Documents (other than those referred to in sub-paragraph 10(a)(i) above (*Non-payment*)) or with any condition of any waiver or consent by a Finance Party under or in connection with any Finance Document;
  - (2) no Event of Default under sub-paragraph 10(a)(ii)(1) above will occur if the failure to comply is capable of remedy and is remedied within 10 Business Days of the Agent giving notice to the Company or the Company becoming aware of the failure to comply, whichever is the earlier; and
- (b) it otherwise does not admit the allegations therein.

11 As to paragraph 11:

- (a) subject to referring at trial to the full terms and effect of the Mezzanine Facility, it admits that clause 22.13 of the Mezzanine Facility provides that on and at any time after the occurrence of an Event of Default which is continuing the Agent may, and shall if so directed by the Majority Lenders, by notice to the Company:
  - (i) cancel the Total Commitments whereupon they shall immediately be cancelled;
  - (ii) declare that all or part of the Loans, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable, whereupon they shall become immediately due and payable; and/or
  - (iii) declare that all or part of the Loans be payable on demand, whereupon they shall immediately become payable on demand by the Agent acting on the instructions of the Majority Lenders; and
- (b) it otherwise does not admit the allegations therein.

12 As to paragraph 12:

- (a) it says that by an agreement made on 28 February 2008 between, amongst others, Oxiana Finance as Issuer and Obligor, the Respondent as Borrower

and Obligor, certain of the Respondent's controlled entities as Obligors, ANZ as Agent for the lenders under the LNSA (**LNSA Lenders**), RBS as Agent for the Mezzanine Lenders and ANZ Fiduciary Services Pty Ltd as Security Trustee (the **Intercreditor Deed**), the parties to the Intercreditor Deed agreed to regulate certain intercreditor issues;

### Particulars

*The Intercreditor Deed is in writing.*

- (b) it otherwise denies the allegations therein.

13 As to paragraph 13:

- (a) it says that:
  - (i) pursuant to sub-clause 4.6(a) of the Intercreditor Deed, (but subject to sub-clause 4.6(b) of the Intercreditor Deed), the Respondent and the other Obligors undertook *"to procure a Refinancing on or before the Refinancing Date"*;
  - (ii) a "Refinancing" was defined in the Intercreditor Deed to mean "a full refinancing of the Mezzanine Debt and the Senior [LNSA] Debt";
  - (iii) the "Refinancing Date" was defined in the Intercreditor Deed to mean "8 August 2008, or such later date as the Security Trustee (acting on the instructions of all of the Beneficiaries and the Mezzanine Financiers) may agree";
  - (iv) pursuant to sub-clause 4.6(b) of the Intercreditor Deed, the Obligors could request one or more extensions to the Refinancing Date, and the *"Security Trustee (and the relevant Beneficiaries [LNSA Lenders]) must not unreasonably withhold their consent to a request by the Obligors to extend the then current Refinancing Date if the Obligors can demonstrate that they have used their best endeavours to procure the Refinancing [of the LNSA and the Mezzanine Facility] by that date"*;
  - (v) the Intercreditor Deed was made on the same day as the amended and restated LNSA, which included the LNSA Repayment Schedule;
  - (vi) the Intercreditor Deed did not vary the LNSA Repayment Schedule, and clause 8 of the Intercreditor Deed explicitly recognised that the LNSA

Repayment Schedule was to continue in operation after the making of the Intercreditor Deed;

- (vii) the terms of the Intercreditor Deed included the following:
  - (1) the Mezzanine Facility debt was subordinated to the LNSA debt in the manner set out in the Intercreditor Deed (clause 3.1(a));
  - (2) except to the extent stated in a notice under clause 3.7, and except in relation to payments permitted by clause 4, during the Subordination Period (defined in the Intercreditor Deed to mean the period from the date of the Intercreditor Deed until the full and final payment or repayment of the LNSA debt and the cancellation of all commitments under the LNSA and other Senior Finance Documents), *"no Mezzanine Debt will be due and payable or recoverable, whether before or after acceleration, except for the purpose of allowing interest or other amounts to accrue or be capitalised"* (clause 3.2(a));
  - (3) "[s]ubject to clauses 3.7 and 4, during the Subordination Period an Obligor is not obliged to make and shall not make, whether directly or indirectly, any payment of or in reduction of the Mezzanine Debt" (clause 3.2(b));
  - (4) "[s]ubject to clauses 3.7 and 4, during the Subordination Period the Obligors shall not, without the prior written consent of the Security Trustee (acting on the instructions of all of the Beneficiaries) ... pay or otherwise satisfy any Mezzanine Debt" (clause 3.6(a));
  - (5) the Intercreditor Deed prevails over the Mezzanine Facility and the Senior Finance Documents (as defined in the Intercreditor Deed) to the extent of any inconsistency (in the sense that it is impossible to comply with both) unless otherwise expressly provided (clause 1.9(a));
- (viii) by reason of the terms of the Intercreditor Deed alleged in sub- paragraphs 13(a)(vii)(1)-(5) above, until full repayment of all moneys drawn down by Oxiana Finance under the LNSA, moneys drawn down by the Respondent under the Mezzanine Facility were not due and payable by the Respondent



or recoverable by the Mezzanine Lenders, notwithstanding the repayment terms of the Mezzanine Facility which provided that any moneys drawn down under that facility were repayable by 30 November 2008; and

(b) it otherwise denies the allegations therein.

**C.**

14 It admits the allegations in paragraph 14.

15 As to paragraph 15:

(a) it says that at page 69 of the Full Year Financial Report 2007 it is stated that the Oxiana Group had total interest bearing liabilities on a consolidated basis of A\$420.830 million, comprising the following:

Facility	Currency	Nominal Interest Rate	Year of Maturity	31 Dec 2007 \$'000	
				Face value	Carrying Amount
Secured bank loan	USD	LIBOR + 1.25%	2012	228,102	218,138
Secured bank loan	USD	LIBOR + 2.5%	2011	102,190	98,354
Secured bank loan	USD	LIBOR + 1.6%	2011	—	—
Convertible notes	USD	5.25%	2012	119,754	104,089
Finance lease liabilities	AUD	11.41%	2009	36	36
Finance lease liabilities	USD	0.80%	2008	214	214
Total interest bearing liabilities				450,296	420,830

(b) it otherwise does not admit the allegations in paragraph 15.

16 As to paragraph 16:

(a) it says that at pages 29 and 68 of the Full Year Financial Report 2007 it is stated that the Oxiana Group had total interest bearing liabilities of A\$420.830 million comprising:

- (i) current interest bearing liabilities of A\$154.421 million, consisting of:
  - (1) finance lease liabilities in the amount of A\$224,000;
  - (2) bank loans-secured-Sepon in the amount of A\$28.741 million;
  - (3) bank loans-secured-Oxiana Finance in the amount of A\$125.456 million; and
- (ii) non-current interest bearing liabilities of A\$266.409 million, consisting of:
  - (1) finance lease liabilities in the amount of A\$25,000;
  - (2) bank loans-secured-Sepon in the amount of A\$69.613 million;
  - (3) bank loans-secured-Oxiana Finance in the amount of A\$92.682 million; and
  - (4) convertible notes in the amount of A\$104.089 million;

**Particulars**

*Page 68 of the Full Year Financial Report 2007 at Note 22  
"Interest Bearing Liabilities".*

- (b) it further says that at page 3 of the Full Year Financial Results Summary 2007 it is stated that there were
  - (i) current interest bearing liabilities of A\$154.421 million; and
  - (ii) non-current interest bearing liabilities of A\$266.409 million;
- (c) it otherwise does not admit the allegations in paragraph 16.

17 It admits the allegations in paragraph 17. As to paragraph 17, it:

- ~~(a) — says that of the interest bearing liabilities reported in Oxiana's 2007 Annual Results, the current interest bearing liabilities included A\$125,456 million drawn on the LNSA;~~
- ~~(b) — further says that of the interest bearing liabilities reported in Oxiana's 2007 Annual Results, the non-current interest bearing liabilities included A\$92,682 million drawn on the LNSA; and~~
- ~~(c) — otherwise does not admit the allegations in paragraph 17.~~

18 As to paragraph 18, it:

- (a) denies the allegations;
- (b) refers to and repeats paragraph 13 above;
- (c) says further that:
  - (i) at the date of the Intercreditor Deed (28 February 2008), the LNSA Repayment Schedule provided for the repayment of a certain defined percentage of the debt drawn down under the Prominent Hill Loan Note Facility and the Revolving Loan Note Facility on dates beyond 12 months from the date of the Intercreditor Deed;
  - (ii) on or around 8 August 2008, the Obligors, the Security Trustee, the LNSA Lenders and the Mezzanine Lenders agreed to extend the then current Refinancing Date of 8 August 2008 to 30 November 2008;

#### **Particulars**

*The Security Trustee under the Intercreditor Deed provided verbal agreement to extend the Refinancing Date to the Respondent in a telephone discussion between Mr Mitch Scheer of ANZ and the Group Treasurer of the Respondent on 8 August 2008, and confirmed that agreement in writing by email from Mr Mitch Scheer of ANZ to the Group Treasurer of the Respondent on 11 August 2008.*

- (iii) by reason of the agreement to extend the Refinancing Date referred to above, the Refinancing Date for the purposes of the Intercreditor Deed became 30 November 2008, or such later date as the LNSA Lenders and the Mezzanine Lenders may agree; and
- (iv) pursuant to sub-clause 4.6(b) of the Intercreditor Deed, the Obligors (including the Respondent) could request one or more further extensions to the Refinancing Date beyond 30 November 2008, and the Security Trustee and the LNSA Lenders could not unreasonably withhold their consent to any such request if the Obligors could demonstrate that they had used their best endeavours to procure the Refinancing of the LNSA and the

Mezzanine Facility by 30 November 2008 or the then current Refinancing Date (as the case may be).

19 As to paragraph 19, it:

- (a) ~~Denies~~ admits the allegations in sub-paragraph (a) ~~and says further that by 31 March 2008, Oxiana Finance had drawn down US\$420 million under the LNSA;~~
- (b) admits ~~denies~~ the allegations in sub-paragraph (b) and says that Oxiana had drawn down US\$140m under the Mezzanine Facility;
- ~~(b1) does not admit sub-paragraph (b1); and~~
- (c) denies the allegations in sub-paragraph (c).

20 As to paragraph 20, it:

- (a) admits that a failure of the Respondent and the other Obligors to procure a refinancing in accordance with clause 4.6 of the Intercreditor Deed by the Refinancing Date, which was initially (until 8 August 2008) 8 August 2008 or such later date as the Security Trustee (acting on the instructions of all of the LNSA Lenders and the Mezzanine Lenders) may agree, and thereafter, by reason of the agreement to extend the Refinancing Date referred to in sub-paragraph 18(c)(ii) above, became 30 November 2008, or such later date as the Security Trustee (acting on the instructions of all of the LNSA Lenders and the Mezzanine Lenders) may agree, would constitute an Event of Default pursuant to the LNSA and the Mezzanine Facility;
- (b) says that that at no time in the Relevant Period was the alleged "Cross Default Risk" a real or material risk; and
- (c) otherwise denies the allegations in that paragraph.

21 As to paragraph 21:

- (a) subject to referring at trial to the full terms and effect of the 3 March Announcement it admits the allegations in sub-paragraph (a); and
- (b) subject to referring at trial to the full terms and effect of the 3 March Briefing it admits the allegations in sub-paragraph (b).

21A. Save that the “Merger Consideration Statements” and “First Balance Sheet Statement” were made by the Chairmen of both Oxiana and Zinifex, and subject to referring at trial to the full terms and effect of the 3 March Announcement, it admits the allegations in paragraph 21A.

22 As to paragraph 22, it:

- (a) denies the allegations in sub-paragraph 22(a);
- (b) denies the allegations in sub-paragraph 22(b);
- (c) admits the allegations in sub-paragraph 22(c)(i) but does not admit the allegations in sub-paragraph 22(c)(ii);
- (d) admits the allegations in sub-paragraph 22(d); and
- (e) does not admit the allegations in sub-paragraph 22(e).

23 It admits the allegations in paragraph 23.

24 It admits the allegations in paragraph 24.

25 As to paragraph 25, it:

- (a) denies the allegations in sub-paragraph (a) and sub-paragraph (a1);
- (b) denies the allegations in sub-paragraph (b) and says further that:
  - (i) in the “Second 16 April Debt Position Exchange” Mr Breen referred to “*numbers you’ve given to us*”;
  - (ii) the “numbers” referred to by Mr Breen included the following statement in the Q3 Report “[d]uring the quarter Oxiana drew down US\$220 million under an existing US\$525 million debt facility to finance the development of the Prominent Hill project”;

#### **Particulars**

*Page 8 of the Q3 Report.*

- (iii) the 2007 Financial Report stated that by 31 December 2007 the Oxiana Group had already drawn down in the sum of A\$218,138 million on its “*USD facility for the refinancing of the golden Grove acquisition bridge facility and for the development of the Prominent Hill Project*”;

#### **Particulars**

*Note 22 and footnote 4 on page 68 of the 2007 Financial Report.*

- (c) denies the allegations in sub-paragraph (c); and
  - (d) denies the allegations in sub-paragraph (c1).
- 26 It admits the allegations in paragraph 26.
- 26A. Subject to referring to the complete recording of the 17 April 2008 AGM, it admits the allegations in paragraph 26A.
- 27 As to paragraph 27:
  - (a) in so far as it is alleged that the AGM Representation was a representation of fact it denies the allegations; and
  - (b) it refers to and repeats paragraph 27A below and otherwise does not admit the allegations in paragraph 27.
- 27A. It admits the allegations in sub-paragraph 27A(a) but does not admit the allegations in sub-paragraph 27A(b).
- 28 As to paragraph 28:
  - (a) it:
    - (i) says that it:
      - (1) prepared the “Oxiana Information” in the Scheme Booklet;
      - (2) jointly prepared the “Merged Group Information” in the Scheme Booklet with Zinifex Limited, other than those parts of the “Merged Group Information” which comprised the “Zinifex Information”; and
      - (3) did not prepare the “Zinifex Information” in the Scheme Booklet;
    - (ii) admits that Zinifex lodged the Scheme Booklet with the ASX and distributed the Scheme Booklet or made it available to its shareholders on or about 12 May 2008; and
    - (iii) otherwise denies the allegations in paragraph 28(a).
  - (b) it:
    - (i) says that the Scheme Book Supplement was prepared by Grant Samuel;

- (ii) admits that Zinifex lodged the Scheme Booklet Supplement with the ASX and distributed the Scheme Booklet Supplement or made it available to its shareholders on or about 12 May 2008; and
- (iii) otherwise denies the allegations in paragraph 28(b).

29 As to paragraph 29, it:

- (a) says that it prepared the information in Part 7 of the Scheme Booklet together with its advisers (including KPMG (a firm) and Clayton Utz (a firm)) and subject to the ultimate responsibility of Zinifex for the Scheme Booklet;
- (b) says that to the extent that it contributed to the information in Parts 8 and 9 of the Scheme Booklet, it prepared that information together with its advisers (including KPMG (a firm) and Clayton Utz (a firm)) and subject to the ultimate responsibility of Zinifex for the Scheme Booklet; and
- (c) otherwise does not admit the allegations in paragraph 29.

29A. Subject to referring at trial to the full terms and effect of the Scheme Booklet, it admits that the extracts from the Scheme Booklet pleaded in paragraph 29A were included in the Scheme Booklet, but otherwise does not admit the allegations in paragraph 29A.

30 As to paragraph 30, it:

- (a) denies the allegations in sub-paragraph (a);
- (b) does not plead to sub-paragraph (b) as it contains no allegation;
- (c) does not admit the allegations in sub-paragraph (c) and says further that the pleading of cumulative or separate alternative representations is embarrassing;
- (d) denies the allegations in sub-paragraph (d); and
- (e) denies the allegations in sub-paragraph (e).

31 Subject to referring at trial to the full terms and effect of the letter from the Respondent to Grant Samuel referred to in paragraph 31, it admits the allegations in that paragraph.

32 It denies the allegations in paragraph 32.

## D.

33 Subject to referring at trial to the full terms and effect of AASB 101 and Oxiana's accounting policies, it admits the allegations in paragraph 33.

34 As to paragraph 34:

(a) it says that save to say that fluctuations in the commodity prices of copper, zinc, gold, silver and lead throughout the relevant period affected its revenue and cash flow, it does not admit the allegations in sub-paragraph (a);

(b) it does not admit the allegations in sub-paragraph (b) and says further that:

(i) most of Oxiana's sales revenue was denominated in USD; and

(ii) Oxiana held surplus cash in USD.

(c) it:

(i) says that in the absence of particulars of the allegation that "*turbulence in international credit markets*" was such that "*it had become more difficult and more expensive to access finance*" the pleading is embarrassing;

(ii) subject to that objection:

(1) it says that the availability of some forms of credit both in Australia and abroad was more constrained from late September 2007 and through the Relevant Period than had been the case in the 12 month period prior to September 2007;

(2) it further says that:

a. the nature and extent of such constraint in the said period varied over time and also varied as between different sectors of the economy and as between different countries in which borrowers and lenders operated;

b. throughout the Relevant Period, the difficulty and expense of a borrower accessing finance through the commercial bank lending market depended on the precise time at which such access was sought and the characteristics of the borrower at that time, including:



- i. the level of its gearing and the strength of its balance sheet;
  - ii. its business and financial outlook;
  - iii. the sector of the economy in which it operated;
  - iv. its pre-existing relationships with the banks or other financiers from which it was seeking finance; and
  - v. its historical and forecast performance and ability to meet interest and other payment obligations; and
- (iii) it otherwise does not admit the allegations in sub-paragraph (c);
- (d) it denies the allegations in sub-paragraph (d) and says further that at all times during the Relevant Period, Oxiana honestly and reasonably believed and expected, and/or honestly and reasonably was of the opinion, that it would be able to refinance the US Debt Facilities on terms acceptable to it and in a timely manner.

### Particulars

*Particulars are annexed at Schedule A.*

- (e) it:
  - (i) says that (whether or not the proposed merger proceeded) Oxiana had in contemplation a number of mining development projects which it was proposed would be the subject of capital outlays in the fourth quarter of FY2008 and the first half of FY2009 (**Proposed Capital Outlays**); and
  - (ii) otherwise denies the allegations in sub-paragraph (e);
- (f) it denies the allegations in sub-paragraph (f);
- (g) it does not admit the allegations in sub-paragraph (g);
- (h) it:
  - (i) says that sub-paragraph (h) is embarrassing as there is no plea as to what constitutes the “planned capital works”;
  - (ii) under cover of the foregoing objection, it denies the allegations made in that paragraph and says further that:
    - (1) there was no “material risk” of the type alleged;

- (2) throughout the Relevant Period (as defined in the FASOC SFASOC) Zinifex had a cash balance in excess of \$1 billion;
- (3) Prominent Hill was expected to produce at least A\$500 million in EBITDA during the 2009 calendar year;
- (iii) otherwise denies the allegations in sub-paragraph (h).

35 As to paragraph 35:

- (a) it denies the allegations in sub-paragraph 35(a) and says further that at all times during the Relevant Period, Oxiana honestly and reasonably believed and expected, and/or honestly and reasonably was of the opinion, that it would be able to refinance the US Debt Facilities on terms acceptable to it and in a timely manner;

#### **Particulars**

*Particulars are annexed at Schedule A.*

- (b) it denies the allegations in sub-paragraph 35(b) and says further that at all times during the Relevant Period, Oxiana honestly and reasonably believed and expected, and/or honestly and reasonably was of the opinion, that there would not be any or any significant reduction of future cash flows in respect of planned projects.

#### **Particulars**

*The Respondent refers to paragraph 34(h)(ii)(3) above and the particulars annexed at Schedules A and B.*

- (c) it denies the allegations in sub-paragraph 35(c) and says further that at all times during the Relevant Period, Oxiana honestly and reasonably believed and expected, and/or honestly and reasonably was of the opinion, that it would remain solvent and would not be forced to raise cash through the sale of assets at distressed prices.

36 As to paragraph 36:

- (a) subject to referring at trial to the full terms and effect of the MIA it admits the allegations in sub-paragraph 36(a);
- (b) it:

- (i) says that the scheme consideration took into account the volume weighted average share prices of Oxiana and Zinifex over the period during which the Boards of Oxiana and Zinifex actively considered the proposed merger;
- (ii) otherwise denies the allegations in sub-paragraph 36(b).

37 It denies the allegations in paragraph 37 and in further answer to that paragraph refers to and repeats paragraphs 34(d), 35(a), 35(b) and 35(c) above.

38 As to paragraph 38:

- (a) it says that on or around 8 August 2008, the Obligors, the Security Trustee, the LNSA Lenders and the Mezzanine Lenders agreed to extend the then current Refinancing Date of 8 August 2008 to 30 November 2008;

#### **Particulars**

*The Security Trustee under the Intercreditor Deed provided verbal agreement to extend the Refinancing Date to the Respondent in a telephone discussion between Mr Mitch Scheer of ANZ and the Group Treasurer of the Respondent on 8 August 2008, and confirmed that agreement in writing by email from Mr Mitch Scheer of ANZ to the Group Treasurer of the Respondent on 11 August 2008.*

- (b) it otherwise denies the allegations therein;
- (c) in further answer to paragraph 38 it says that:
  - (i) by reason of the agreement to extend the Refinancing Date referred to in sub-paragraph (a) above, the Refinancing Date for the purposes of the Intercreditor Deed became 30 November 2008, or such later date as the LNSA Lenders and the Mezzanine Lenders may agree;
  - (ii) pursuant to sub-clause 4.6(b) of the Intercreditor Deed, the Obligors (including the Respondent) could request one or more further extensions to the Refinancing Date beyond 30 November 2008, and the Security Trustee and the LNSA Lenders could not unreasonably withhold their consent to any such request if the Obligors could demonstrate that they had used their best endeavours to procure the Refinancing of the LNSA and the

Mezzanine Facility by 30 November 2008 or the then current Refinancing Date (as the case may be).

39 It admits the allegations in paragraph 39.

40 Subject to referring at trial to the full terms and effect of the 25 November Announcement it admits the allegations in paragraph 40.

E.

41 As to paragraph 41, it:

- (a) denies the allegations in sub-paragraph 41(a);
- (b) denies the allegations in paragraph 41(b);
- (c) refers to and repeats paragraphs 13, 18 and 19 above;
- (d) says that accordingly the alleged “8 August Refinancing Deadline” did not constitute “information” capable of being “generally available”.

42 As to paragraph 42, it:

- (a) admits that during the whole of the Relevant Period it was aware, within the meaning of ASX Listing Rule 19.12, of the Intercreditor Deed, the LNSA and the Mezzanine Facility and their respective terms;
- (b) otherwise denies the allegations in paragraph 42.

43 It denies the allegations in paragraph 43 and in further answer to that paragraph says that if, but for the matters pleaded below, the Respondent would have been required by ASX Listing Rule 3.1 to immediately tell ASX the alleged “8 August 2008 Refinancing Deadline” (which is denied), that information was within the exception to that Listing Rule provided by Listing Rule 3.1A because:

- (a) a reasonable person would not have expected the Respondent to disclose the information prior to 30 June 2008;
- (b) the information concerned incomplete proposals and ongoing negotiations and/or was a matter of supposition or insufficiently definite to warrant disclosure; and
- (c) the information was confidential and the ASX had not formed the view that the information had ceased to be confidential,

and accordingly, by virtue of Listing Rule 3.1A, Listing Rule 3.1 did not apply to that information.

44 It denies the allegations in paragraph 44.

45 As to paragraph 45, it:

- (a) denies the allegations in sub-paragraph 45(a);
- (b) denies the allegations in paragraph 45(b);
- (c) further refers to and repeats paragraphs 13, 18 and 19 above; and
- (d) says that accordingly the alleged “Current Liability Position” did not constitute “information” capable of being “generally available”.

46 As to paragraph 46, it:

- (a) admits that during the whole of the Relevant Period it was aware, within the meaning of ASX Listing Rule 19.12, of the Intercreditor Deed, the LNSA and the Mezzanine Facility and their respective terms, and of the matters admitted and affirmatively alleged by the Respondent in paragraph 19 above;
- (b) otherwise denies the allegations in that paragraph.

47 It denies the allegations in paragraph 47 and in further answer to that paragraph says that if but for the matters pleaded below the Respondent would have been required by ASX Listing Rule 3.1 to immediately tell ASX the alleged “Current Liability Position” (which is denied), that information was within the exception to that Listing Rule provided by Listing Rule 3.1A because:

- (a) a reasonable person would not have expected the Respondent to disclose the information prior to 30 June 2008;
- (b) the information concerned incomplete proposals and ongoing negotiations and/or was a matter of supposition or insufficiently definite to warrant disclosure; and
- (c) the information was confidential and the ASX had not formed the view that the information had ceased to be confidential,
- (d) and accordingly, by virtue of Listing Rule 3.1A, Listing Rule 3.1 did not apply to that information.

48 It denies the allegations in paragraph 48.

49 As to paragraph 49, it:

- (a) denies the allegations in sub-paragraph 49(a);
- (b) denies the allegations in sub-paragraph 49(b);
- (c) further refers to and repeats paragraphs 13, 18, 20, 34(d) and 35(a) above; and
- (d) says that accordingly the alleged "Cross Default Risk" did not constitute "information" capable of being "generally available".

50 As to paragraph 50, it:

- (a) admits that during the whole of the Relevant Period it was aware, within the meaning of ASX Listing Rule 19.12, of the Intercreditor Deed, the LNSA and the Mezzanine Facility and their respective terms;
- (b) otherwise denies the allegations in paragraph 50.

51 It denies the allegations in paragraph 51 and in further answer to that paragraph says that if, but for the matters alleged below, the Respondent would have been required by ASX Listing Rule 3.1 to immediately tell ASX the alleged "Cross Default Risk" (which is denied), that information was within the exception to that Listing Rule provided by Listing Rule 3.1A because:

- (a) a reasonable person would not have expected the Respondent to disclose the information prior to 30 June 2008;
- (b) the information concerned incomplete proposals and ongoing negotiations and/or was a matter of supposition or insufficiently definite to warrant disclosure; and
- (c) the information was confidential and the ASX had not formed the view that the information had ceased to be confidential,

and accordingly, by virtue of Listing Rule 3.1A, Listing Rule 3.1 did not apply to that information.

52 It denies the allegations in paragraph 52.

53 As to paragraph 53, it:

- (a) denies the allegations in sub-paragraph 53(a);
- (b) denies the allegations in sub-paragraph 53(b);
- (c) further refers to and repeats paragraph 35 above;
- (d) says that accordingly the alleged “Oxiana Risks” did not constitute “information” capable of being “generally available”.

54 It denies the allegations in paragraph 54.

55 It denies the allegations in paragraph 55 and in further answer to that paragraph says that if, but for the matters pleaded below, the Respondent would have been required by ASX Listing Rule 3.1 to immediately tell ASX the alleged “Oxiana Risks” (which is denied), that information was within the exception to that Listing Rule provided by Listing Rule 3.1A because:

- (a) a reasonable person would not have expected the Respondent to disclose the information prior to 30 June 2008;
- (b) the information concerned incomplete proposals and ongoing negotiations and/or was a matter of supposition or insufficiently definite to warrant disclosure; and
- (c) the information was confidential and the ASX had not formed the view that the information had ceased to be confidential,

and accordingly, by virtue of Listing Rule 3.1A, Listing Rule 3.1 did not apply to that information.

56 It denies the allegations in paragraph 56.

57 As to paragraph 57, it:

- (a) denies the allegations in sub-paragraph 57(a);
- (b) denies the allegations in sub-paragraph 57(b);
- (c) refers to and repeats sub-paragraph 36(b) above;
- (d) says that accordingly the alleged “Fair Consideration Information” did not constitute “information” capable of being “generally available”.

58 As to paragraph 58:

- (a) it admits that during the whole of the Relevant Period it was aware, within the meaning of ASX Listing Rule 19.12, of each of the matters admitted and affirmatively alleged by the Respondent in paragraph 36 above; and
- (b) otherwise denies the allegations in paragraph 58.

59 It denies the allegations in paragraph 59 and in further answer to that paragraph says that if, but for the matters pleaded below, the Respondent would have been required by ASX Listing Rule 3.1 to immediately tell ASX the alleged “Fair Consideration Information” (which is denied), that information was within the exception to that Listing Rule provided by Listing Rule 3.1A because:

- (a) a reasonable person would not have expected the Respondent to disclose the information prior to 30 June 2008;
- (b) the information concerned incomplete proposals and ongoing negotiations and/or was a matter of supposition or insufficiently definite to warrant disclosure;
- (c) the information was confidential and the ASX had not formed the view that the information had ceased to be confidential,

and accordingly, by virtue of Listing Rule 3.1A, Listing Rule 3.1 did not apply to that information.

60 It denies the allegations in paragraph 60.

61 As to paragraph 61, it:

- (a) denies the allegations in sub-paragraph 61(a);
- (b) denies the allegations in paragraph 61(b);
- (c) refers to and repeats paragraph 37 above;
- (d) says that accordingly the alleged “Merger Risks” did not constitute “information” capable of being “generally available”.

62 It denies the allegations in paragraph 62.

63 It denies the allegations in paragraph 63 and in further answer to that paragraph says that if, but for the matters pleaded below, the Respondent would have been required by ASX Listing Rule 3.1 to immediately tell the ASX of the alleged “Merger Risks” (which is



denied), that information was within the exception to that Listing Rule provided by Listing Rule 3.1A because:

- (a) a reasonable person would not have expected the Respondent to disclose the information prior to 30 June 2008;
- (b) the information concerned incomplete proposals and ongoing negotiations and/or was a matter of supposition or insufficiently definite to warrant disclosure; and

the information was confidential and the ASX had not formed the view that the information had ceased to be confidential, and accordingly, by virtue of Listing Rule 3.1A, Listing Rule 3.1 did not apply to that information.

64 It denies the allegations in paragraph 64.

**F.**

65 It denies the allegations in paragraph 65.

66 As to paragraph 66:

- (a) it admits that the First Balance Sheet Representation was a representation as to a future matter but otherwise denies the allegations in paragraph 66;
- (b) says further that:
  - (i) the First Balance Sheet Representation was a statement of opinion;
  - (ii) the Respondent had reasonable grounds and a reasonable basis for making the First Balance Sheet Representation.

**Particulars**

*A presentation to the Board of Oxiana on 2 March 2008 by Gryphon Partners and Morgan Stanley stated that:*

- 1. there was a strong strategic rationale for the merger, namely the creation of a company that was a major diversified miner with inter alia a: substantial and complementary development pipeline; strong resource position attractive exploration portfolio; and, strong balance sheet and cash flow generation;*
- 2. the merged entity was forecast to have:*
  - a. a combined market capitalisation of \$11.174 billion;*

- b. combined sales in 2008 of \$2.809 billion;*
- c. combined sales in 2009 of \$3.384 billion;*
- d. EBITDA in 2008 of \$1.448 billion;*
- e. EBITDA in 2009 of \$1.853 billion;*
- f. Reserves valued at \$26.979 billion; and*
- g. Resources valued at \$87.083 billion.*

*Further particulars may be provided following discovery and prior to trial.*

- 66A. It denies the allegations in paragraph 66A and in further answer to that paragraph says that if it did make the Implied Balance Sheet Representation (which is not admitted) that representation was a statement of opinion and the Respondent had reasonable grounds and a reasonable basis for making it.

#### **Particulars**

*The Respondent refers to and repeats the Particulars under sub-paragraph 66(b)(ii) above.*

- 67 There is no paragraph 67 in the ~~FASOC~~ SFASOC.
- 68 It denies the allegations in paragraph 68 and in further answer to that paragraph says that if it made the First 16 April Debt Representation, the Third 16 April Debt Representation and the AGM Representation (which is denied), they were statements of opinion for which the Respondent had reasonable grounds.

#### **Particulars**

*As at the end of March 2008, Oxiana Group had: A\$401,403,785 cash on hand; net assets of A\$1.580,881 billion; forecast net assets for the end of 2008 of A\$1.902,462 billion; and the forecast operating cash flow from the Oxiana Group's operations at Golden Grove and Sepon for calendar year 2008 was A\$580.749 million. Further, Prominent Hill was expected to produce at least A\$500 million in EBITDA during the 2009 calendar year.*

*The Respondent also refers to the particulars annexed to Schedule A (paragraphs (i) to (iii)) and Schedule B (paragraphs (i) to (vi)).*

*Further particulars may be provided following discovery and prior to trial.*

68AA. It denies the allegations in paragraph 68AA and in further answer to that paragraph says that if it made the “Debt Under Control Representation” and the “Comfortable Debt Position Opinion Representation” (which is denied), they were statements of opinion for which the Respondent had reasonable grounds.

**Particulars**

*The Respondent refers to and repeats the particulars under sub-paragraph 68 above. Further particulars may be provided following discovery and prior to trial.*

68A. It denies the allegations in paragraph 68A and in further answer to that paragraph says that:

- (a) the Respondent made the statements in the First 16 April Debt Position Exchange on the basis of a belief formed upon reasonable grounds;

**Particulars**

*The Respondent repeats the particulars under sub-paragraph 68 above. Further particulars may be provided following discovery and prior to trial.*

- (b) the AGM Statement was a statement of opinion for which the Respondent had reasonable grounds.

**Particulars**

*The Respondent repeats the particulars under sub-paragraph 68 above. Further particulars may be provided following discovery and prior to trial.*

69 It denies the allegations in paragraph 69.

70 It denies the allegations in paragraph 70.

71 It denies the allegations in paragraph 71.

72 It denies the allegations in paragraph 72.

73 It denies the allegations in paragraph 73.

74 It denies the allegations in paragraph 74.

75 It denies the allegations in paragraph 75.

76 It denies the allegations in paragraph 76.

77 It denies the allegations in paragraph 77.

77A. It denies the allegations in paragraph 77A.

77B. It denies the allegations in paragraph 77B.

77C. It denies the allegations in paragraph 77C.

G.

78 As to paragraph 78, it:

(a) says that Ssubject to referring at trial to the full terms and effect of the MIA it admits the allegations in sub-paragraphs 78 (a), (b), (c), ~~(d)~~, ~~(e)~~ and ~~(f)(ii) and (f)(iii) and (h)~~;

(b) otherwise denies the allegations in paragraph 78;

(c) says further in response to sub-paragraph (e), that it was a condition precedent of the proposed merger that the representations and warranties of each of the Respondent and Zinifex set out in clause 7.1. and clause 7.2, respectively of the MIA remained true and correct in all material respects as at the date of the MIA and as at 8.00am on the Second Court Date; and

(d) says further in response to sub-paragraph (g), that Oxiana Provided Information means:

“ all information regarding or relating to the Oxiana Group which is necessary to ensure that the Scheme Booklet complies with the requirements of section 411(3) of the Corporations Act and ASIC Regulatory Guide 60 and ASIC Regulatory Guide 142, including (but not limited to) any financial forecasts information or other information contributed by Oxiana to the Scheme Booklet concerning financial forecasts; and

all the information that would be required under section 631(1)(g) of the Corporations Act if the Scheme Booklet were a bidder's statement offering the New Oxiana Shares as consideration under a takeover bid, to the extent reasonably practicable

but for the avoidance of doubt does not include the combined information”.

79 As to paragraph 79, it:

(a) says that the scheme consideration took into account the volume weighted average share prices of Oxiana and Zinifex over the period during which

the Boards of Oxiana and Zinifex actively considered the proposed merger;

(b) otherwise denies the allegations in paragraph 79.

80 As to paragraph 80, it:

(a) says that subject to referring at trial to the full terms and effect of the Scheme, the Scheme contained the provisions alleged; and

(b) otherwise does not admit the allegations in paragraph 80.

81 It admits the allegations in paragraph 81.

82 It admits the allegations in paragraph 82.

83 It admits the allegations in paragraph 83:

84 As to paragraph 84:

(a) it admits the allegations in sub-paragraph (a);

(b) it does not admit the allegations in sub-paragraph (b).

85 It denies the allegations in paragraph 85.

86 It denies the allegations in paragraph 86.

87 It denies the allegations in paragraph 87.

88 It denies the allegations in paragraph 88.

89 It denies the allegations in paragraph 89.

90 It denies the allegations in paragraph 90.

91 It denies the allegations in paragraph 91.

92 It denies the allegations in paragraph 92.

92A It denies the allegations in paragraph 92A.

93 It denies the allegations in paragraph 93.

94 It denies the allegations in paragraph 94.

95 It denies the allegations in paragraph 95.

96 It denies that the Applicant and Group Members are entitled to any of the relief claimed in the application.

## H. APPORTIONMENT DEFENCES

97 Alternatively, if the Respondent is liable to the Applicant and Group Members as alleged in the ~~FASOC~~ SFASOC (which is denied) and if the allegations made in the ~~FASOC~~ SFASOC which are denied or not admitted above are correct (which is denied or not admitted, as the case may be), then in further answer to all of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC, the Respondent says as follows (the following allegations being made expressly on the above basis).

## I KPMG

98 KPMG (a firm) (ABN 51 194 660 183) (**KPMG**) is and was at all relevant times:

- (a) a partnership conducting business, inter alia, within Victoria as auditors and accountants; and
- (b) a person within the meaning of section 1041H of the Corporations Act, section 12DA of the *ASIC Act* and section 9 of the *Fair Trading Act 1999* (Vic) (the *Fair Trading Act*).

99 As part of the process for the proposed merger between Oxiana and Zinifex (the **Proposed Merger**), in early March 2008 Oxiana established a Due Diligence Committee (the **Oxiana Due Diligence Committee**).

100 At all relevant times KPMG was a member of the Oxiana Due Diligence Committee, and was represented on that committee by Mr Angus Reynolds and Mr Michael Bray, both partners of KPMG, with Mr David Seton (also a partner of KPMG) as alternate for Mr Reynolds and Ms Penny Stragalinos (also a partner of KPMG) as alternate for Mr Bray.

101 The Oxiana Due Diligence Committee met regularly in the period 4 March 2008 to 24 April 2008, and those committee meetings were attended by Mr Reynolds, Mr Bray and/or Ms Stragalinos as representatives of KPMG, and from time to time another representative of KPMG, Ms Vicky Carlson, also attended committee meetings (collectively, the **KPMG team**).

102 The Proposed Merger was to be effected by the Scheme, pursuant to which Oxiana would acquire all of the issued shares in Zinifex in consideration for the issue of new shares in Oxiana.

103 The Scheme was to be proposed by Zinifex under section 411 of the *Corporations Act*, and Zinifex was required to prepare and send to its shareholders the Scheme Booklet explaining the effect of the proposed Scheme and setting out information that was

material to the making of a decision by the Zinifex shareholders whether or not to agree to the proposed Scheme that was within the knowledge of the Zinifex directors.

104 The role and function of KPMG in respect of the Proposed Merger included:

- (a) to perform financial due diligence in respect of the Proposed Merger, in particular with respect to Oxiana's financial information which was to be provided by Oxiana for inclusion in the proposed Scheme Booklet (**KPMG Financial Due Diligence**);
- (b) to be a member of the Oxiana Due Diligence Committee;
- (c) as part of the KPMG Financial Due Diligence, to prepare a Due Diligence Financial Work Plan (**KPMG Financial Work Plan**) and then carry out the work required by the KPMG Financial Work Plan;
- (d) to prepare materiality guidelines setting out materiality thresholds to assist members of the Oxiana Due Diligence Committee in determining whether or not a matter needed to be disclosed in the Scheme Booklet or dealt with in some other way prior to the release of the Scheme Booklet;
- (e) to prepare and provide to Oxiana a Due Diligence Sign Off in respect of the KPMG Financial Due Diligence; and
- (f) to prepare and provide to Oxiana a KPMG Financial Due Diligence Report,

(collectively, the **KPMG Due Diligence Financial Services**).

105 On or about 3 April 2008 Mr Reynolds on behalf of KPMG signed a Due Diligence Planning Memorandum (the **Oxiana Due Diligence Planning Memorandum**), which included the following:

*"The transaction to which this planning memorandum ("**Planning Memorandum**") relates is a scheme of arrangement ("**Scheme**") by which it is proposed that Oxiana Limited ("**Oxiana**") will acquire all of the issued shares in Zinifex Limited ("**Zinifex**") in consideration for the issue of new shares in Oxiana in accordance with the Merger Implementation Agreement between Zinifex and Oxiana dated 2 March 2008 ("**MIA**").*

*The Scheme will be proposed by Zinifex under section 411 of the Corporations Act 2001 ("**Corporations Act**"). Under the Corporations Act, Zinifex will be*

*required to prepare and send to its shareholders an explanatory booklet (“Scheme Booklet”) explaining the effect of the proposed Scheme and setting out all information that is material to the making of a decision by a Zinifex shareholder whether or not to agree to the proposed Scheme that is within the knowledge of Zinifex directors. Certain other information prescribed by regulations made under the Corporations Act must also be included.*

*As the consideration to be offered under the Scheme will be shares in Oxiana, part of the information that is material to the making of a decision by a Zinifex shareholder whether to approve the Scheme includes information, equivalent to prospectus content and takeover bidder’s statement requirements, regarding Oxiana and the shares in Oxiana (“Oxiana Provided Information”).*

*For the purposes of this Planning Memorandum the term Oxiana Provided Information is all information relating to Oxiana and its subsidiaries which is necessary to ensure that the Scheme Booklet complies with the requirements of the Corporations Act (refer to section 2.1 of Attachment 1) and ASIC Regulatory Guides (refer to clause 1.1 of the MIA for the full definition).*

*This Planning Memorandum describes the process that will be followed by Oxiana in gathering, assessing, including and verifying the Oxiana Provided Information to be included in the Scheme Booklet to satisfy Australian disclosure requirements in relation to the issue of Oxiana shares as part of the Scheme.*

*In addition, pursuant to clause 5.4(e) of the MIA, Oxiana and Zinifex will jointly develop and agree the form and content of the information in the Scheme Booklet regarding the combined Oxiana/Zinifex group after the merger (“Merged Entity”) and the risk factors associated with the merger of Oxiana and Zinifex (“Combined Information”).*

#### ***Drafting process for the Oxiana Provided Information***

*Oxiana and its advisers will be responsible for preparing or reviewing the preparation of drafts of the Oxiana Provided Information. The Committee members will review, subject to and from the perspective of their expertise and accepted area of responsibility, a final draft of the Oxiana Provided Information to ensure that all material issues identified in the due diligence process have been included in the Oxiana Provided Information and must draw to the attention of*



*those responsible for preparation of the Oxiana Provided Information any material matters which have been omitted or not adequately disclosed or any material misstatements in the draft Oxiana Provided Information."*

- 106 The "requirements of the Corporations Act" with which the Oxiana Provided Information and the Scheme Booklet were required to comply, as set out in section 2.1 of Attachment 1 to the Oxiana Due Diligence Planning Memorandum, were the requirements set out in Part 5.1 of the *Corporations Act* and Part 3 of Schedule 8 of the *Corporations Regulations 2001*.
- 107 The Oxiana Due Diligence Planning Memorandum attached "Materiality Guidelines" (Attachment 2), prepared by KPMG, which set out materiality thresholds to assist members of the Oxiana Due Diligence Committee to focus due diligence investigations and to enable members of the Oxiana Due Diligence Committee to determine whether or not a matter needed to be disclosed in the Scheme Booklet or dealt with in some other way prior to the release of the Scheme Booklet.
- 108 The Oxiana Due Diligence Planning Memorandum also attached a due diligence work plan (Attachment 3) (**Oxiana Due Diligence Work Plan**) which included the following:

*"The form and content of this Due Diligence Work Plan ("**Work Plan**") has been prepared having regard to the following matters:*

***Effect of the Scheme***

*Due Diligence enquiries will in particular be conducted to assess the effect of the Scheme on the Company (primarily being the effect of the acquisition of Zinifex) and to confirm the description of that effect in the Oxiana Provided Information to be included in the Scheme Booklet is complete and not misleading or deceptive.*

***Material matters generally requiring disclosure***

*The due diligence program should ascertain:*

- (a) the effect of the Scheme on the Company, as described above;*
- (b) compliance by the Company with the continuous disclosure obligations prescribed by section 674 of the Corporations Act and ASX Listing Rule 3.1;*
- (c) compliance by the Company with section 713(5) of the Corporations Act, which requires disclosure in the Scheme Booklet of information which, pursuant to the exception in Listing Rule 3.1A to the continuous disclosure*

*obligations, has not been notified to ASX and which investors and their professional advisers would reasonably require and reasonably expect to find in the Scheme Booklet for the purpose of making an informed assessment of:*

- (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the Company; and*
- (ii) the rights and liabilities attaching to the Shares of the Company to be issued under the Scheme, noting, however, that the Oxiana Provided Information must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the Oxiana Provided Information. In addition, it is to be noted that depending upon the nature of the information, that information could be released to ASX shortly before the Scheme Booklet is lodged with ASIC, thereby removing the need for it to be included as part of the Oxiana Provided Information;*
- (d) that the Oxiana Provided Information does not contain a misleading or deceptive statement or have an omission of material required by the Corporations Act.*

*For the purpose of making an assessment of the matters referred to above, reference will be made to the materiality guidelines set out in Attachment 2 of the Planning Memorandum."*

- 109 The Oxiana Due Diligence Work Plan attached to the Oxiana Due Diligence Planning Memorandum also included the following:

***"Conducting due diligence enquiries***

*The following approaches will be adopted in conducting legal, commercial and financial due diligence: ...*

***(ii) Financial***

*KPMG will conduct financial due diligence in accordance with the financial section of the Work Plan."*

- 110 At all relevant times in the period from no later than 4 March 2008, alternatively 1 April 2008, to 1 July 2008, KPMG was engaged to provide accounting services to Oxiana, including the KPMG Due Diligence Financial Services (the **KPMG Engagement**).

### Particulars

- (i) *The terms of the KPMG Engagement were partly in writing and partly to be implied.*
- (ii) *In so far as they were in writing, they were contained in or evidenced by a letter from KPMG to Oxiana dated 1 April 2008, the Oxiana Due Diligence Planning Memorandum including the KPMG Financial Work Plan and the KPMG Due Diligence Sign Off dated 24 April 2008.*
- (iii) *In so far as the terms of the KPMG Engagement were to be implied, the implication arose from KPMG performing the KPMG Due Diligence Financial Services for reward from no later than 4 March 2008, and/or to give business efficacy to the KPMG Engagement.*

111 There were terms of the KPMG Engagement *inter alia* that:

- (a) KPMG would provide due diligence assistance to Oxiana in relation to Oxiana's contribution to the proposed Scheme Booklet of Zinifex to be issued in connection with the proposed merger of Oxiana and Zinifex, known as "Project Venice";
- (b) KPMG would review and examine such of the Oxiana Provided Information (as defined in the Oxiana Due Diligence Planning Memorandum) as comprised or related to Oxiana's financial information or matters (**Oxiana Provided Financial Information**), which were to be provided by Oxiana for inclusion in the proposed Scheme Booklet, for the purpose of considering whether this information would satisfy the content requirements of sections 411 and 412 of the *Corporations Act* by revealing all information relating to the financial position of Oxiana that was material to the making of a decision by a Zinifex security holder whether or not to agree to the proposed Scheme;
- (c) KPMG would review and examine the Oxiana Provided Financial Information to confirm that it did not contain a misleading or deceptive statement or have an omission of material required by the *Corporations Act*;
- (d) KPMG must draw to the attention of those responsible for preparation of the Oxiana Provided Information any material matters which had been

omitted or not adequately disclosed or any material misstatements in that part of the draft Oxiana Provided Information which comprised or contained the Oxiana Provided Financial Information or any of that information;

- (e) KPMG would review and comment upon the drafting of the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was presented (which included Sections 7 and 9.3(h) of the Scheme Booklet);
- (f) KPMG would review the content of the proposed Scheme Booklet which was the responsibility of Oxiana (whether separately or jointly with Zinifex), (which included Sections 7 and 9.3(h) of the Scheme Booklet);
- (g) KPMG would notify Oxiana and the Oxiana Due Diligence Committee if, upon or after its examination of the Oxiana Provided Financial Information and/or after its review of the sections of the proposed Scheme Booklet in which KPMG Financial Matters relating to Oxiana were presented and/or which were the responsibility of Oxiana (whether separately or jointly with Zinifex), it considered that this information (or those sections) would not satisfy the content requirements of sections 411 and 412 of the *Corporations Act* by revealing all information relating to the financial position of Oxiana that was material to the making of a decision by a Zinifex security holder whether or not to agree to the proposed Scheme;
- (h) KPMG would notify Oxiana and the Oxiana Due Diligence Committee if, upon or after its examination of the Oxiana Provided Financial Information and/or after its review of the sections of the proposed Scheme Booklet in which KPMG Financial Matters relating to Oxiana were presented and/or which were the responsibility of Oxiana (whether separately or jointly with Zinifex), it considered that this information (or those sections) contained a misleading or deceptive statement or had an omission of material required by the *Corporations Act*;
- (i) the due diligence system and documentation should be designed to ensure that what was contained in, or omitted from, the proposed Scheme Booklet was supportable by reason of appropriate enquiry having been made by, and from, all parties involved in the due diligence process;

- (j) the work carried out by KPMG would be carried out in accordance with the KPMG Financial Work Plan agreed with Oxiana and the Oxiana Due Diligence Committee which included the following scope of work:
  - (i) due diligence sign-off on the Oxiana historical financial information, the Oxiana pro-forma historical information and the Merged Group pro-forma historical information (the **KPMG Financial Matters**);
  - (ii) reviewing and commenting upon the drafting of sections of the proposed Scheme Booklet in which the KPMG Financial Matters were presented, (which included Sections 7 and 9.3(h));
  - (k) KPMG would investigate the basis of the financial information to be provided in the Scheme Booklet and relevant material assumptions;
  - (l) KPMG would consider the adequacy of the due diligence system, so far as it applied to the KPMG Financial Matters;
  - (m) KPMG would prepare and provide to Oxiana and the Oxiana Due Diligence Committee the KPMG Financial Due Diligence Report and the Due Diligence Sign Off;
  - (n) KPMG would carry out the work required with professional skill and diligence; further or alternatively, would provide the required services in an efficient and timely manner, using the necessary skill and expertise to an appropriate professional standard.

112 By no later than 4 March 2008, KPMG had commenced carrying out the KPMG Due Diligence Financial Services.

113 From time to time in the period from 4 March 2008 to 24 April 2008 some or all of the KPMG team attended Oxiana Due Diligence Committee meetings at Oxiana's premises at Level 9, 31 Queen Street Melbourne.

114 In the course of carrying out the KPMG Due Diligence Financial Services, and as required by the terms of the KPMG Engagement, KPMG reviewed the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented and the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), which included sections 7 and 9.3(h).

- 115 For the purpose of carrying out the KPMG Due Diligence Financial Services and/or performing the KPMG Financial Due Diligence, KPMG had access to relevant financing documents of Oxiana, including the LNSA, the Mezzanine Facility and the Intercreditor Deed (collectively, the **Financing Documents**).
- 116 Further or alternatively, by no later than 11 April 2008, KPMG was aware that:
- (a) pursuant to the terms of the Intercreditor Deed, both the LNSA and Mezzanine Facility were required to be fully refinanced by 8 August 2008 or by such later date as the Security Trustee (acting on the instructions of all of the senior financiers and mezzanine financiers) may agree (the **Refinancing Obligation**);
  - (b) failure to comply with the Refinancing Obligation would trigger a default under the LNSA and the Mezzanine Agreement, which would lead to an Event of Default under those agreements if not cured within the relevant cure periods;

#### **Particulars**

*The information was provided in a memorandum prepared by Clayton Utz, Oxiana's solicitors, and forwarded by Mr Jeff Sells of Oxiana to Mr Michael Bray of KPMG by email dated 11 April 2008.*

*Further particulars may be provided following discovery and prior to trial.*

- 117 On or around 24 April 2008, KPMG issued a "Due Diligence Sign Off" to Oxiana and the Oxiana Due Diligence Committee (the **KPMG Due Diligence Sign Off**).

#### **Particulars**

*The KPMG Due Diligence Sign Off was contained in a letter dated 24 April 2008 from KPMG addressed jointly to the directors of Oxiana and each member of the Oxiana Due Diligence Committee and their representatives.*

- 118 In the KPMG Due Diligence Sign Off, KPMG stated that:

*"In relation to Financial Matters, nothing has come to our attention, as at the date of this letter, which causes us to believe that:*

- *the content of the Scheme Booklet that is the responsibility of Oxiana (whether separately or jointly with Zinifex) contains a misleading or deceptive statement; or*
- *there is an omission from the content of the Scheme Booklet that is the responsibility of Oxiana (whether separately or jointly with Zinifex) of material required by section 411 of the Corporations Act 2001 ...”.*

119 In the KPMG Due Diligence Sign Off, KPMG did not notify or bring to the attention of Oxiana or the Oxiana Due Diligence Committee any matters in relation to the Financing Documents or their terms which it considered were material and ought to be included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which was not already included in the proposed Scheme Booklet or those sections of it.

120 In or by the KPMG Due Diligence Sign Off:

- (a) KPMG represented that there were no matters in relation to the Financing Documents or their terms which were material and which ought to be included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented, or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it (**the First KPMG Representation**).

### **Particulars**

*The First KPMG Representation was partly in writing and partly to be implied.*

*In so far as it was in writing, it was contained in the KPMG Due Diligence Sign Off.*

*In so far as it was to be implied, the implication arose from:*

- *the fact that one of the purposes of the KPMG Due Diligence Sign Off was to bring to the attention of Oxiana and the Oxiana Due Diligence*

*Committee any KPMG Financial Matters relating to Oxiana which were material and ought to have been included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), and which were not already included in the proposed Scheme Booklet or those sections of it;*

- *the fact that KPMG had reviewed and/or had access to the Financing Documents and/or were aware of their material terms, as part of its KPMG Financial Due Diligence; and*
  - *the failure by KPMG to include in the KPMG Due Diligence Sign Off any statement to the effect that there were matters in relation to the Financing Documents which were material and ought to have been included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it.*
- (b) KPMG further represented (the **Second KPMG Representations**) that:
- (i) it had exercised reasonable skill and care in undertaking the KPMG Financial Due Diligence and in making the First KPMG Representation in the KPMG Due Diligence Sign Off; and
  - (ii) it had reasonable grounds for making the First KPMG Representation in the KPMG Due Diligence Sign Off.

#### **Particulars**

*The Second KPMG Representations were to be implied from the conduct of KPMG in making the First KPMG Representation, coupled with the absence of any or any adequate reservation or qualification to the First KPMG Representation.*

121 By making each of the First KPMG Representation and the Second KPMG Representations, KPMG engaged in conduct:



- (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 section 12DA of the *ASIC Act*; and/or
- (c) in trade or commerce, within the meaning of section 9 of the *Fair Trading Act*.

- 122 The First KPMG Representation and the Second KPMG Representations were continuing representations from the dates on which they were initially made throughout the period to at least 1 July 2008, being the Implementation Date for the Scheme by which the Proposed Merger was effected (the **Scheme Implementation Date**).
- 123 Further, on or around 8 May 2008, KPMG issued a final KPMG Financial Due Diligence Report to Oxiana and the Oxiana Due Diligence Committee (the **KPMG Due Diligence Report**).
- 124 In the KPMG Due Diligence Report, KPMG made reference to Oxiana's finance facility agreements, including the LNSA, which it stated was drawn down in the amount of US\$200 million at 31 December 2007 and in the amount of US\$420 million at 10 April 2008, and the Mezzanine Facility for US\$140 million, which it stated was "*executed and fully drawn down subsequent to 31 December 2007*".
- 125 In the KPMG Due Diligence Report, KPMG did not notify or bring to the attention of Oxiana or the Oxiana Due Diligence Committee any matters in relation to the Financing Documents or their terms which it considered were material and ought be included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which was not already included in the proposed Scheme Booklet or those sections of it.
- 126 In or by the KPMG Due Diligence Report:
- (a) KPMG further represented that there were no matters in relation to the Financing Documents or their terms which were material and which ought to be included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme

Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it (the **Third KPMG Representation**).

### Particulars

*The Third KPMG Representation was partly in writing and partly to be implied.*

*In so far as it was in writing, it was contained in the KPMG Due Diligence Report.*

*In so far as it was to be implied, the implication arose from:*

- *the fact that one of the purposes of the KPMG Due Diligence Report was to bring to the attention of Oxiana and the Oxiana Due Diligence Committee any financial matters relating to Oxiana which were material and ought to have been included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it;*
- *the fact that KPMG had reviewed and/or had access to the Financing Documents and/or were aware of their material terms, as part of its KPMG Financial Due Diligence; and*
- *the failure by KPMG to include in the KPMG Due Diligence Report any statement to the effect that there were matters in relation to the Financing Documents which were material and ought to have been included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including*

*Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it.*

- (b) KPMG further represented (the **Fourth KPMG Representations**) that:
  - (i) it had exercised reasonable skill and care in undertaking the KPMG Financial Due Diligence and in making the Third KPMG Representation in the KPMG Due Diligence Report; and
  - (ii) it had reasonable grounds for making the Third KPMG Representation in the KPMG Due Diligence Report.

### **Particulars**

*The Fourth KPMG Representations were to be implied from the conduct of KPMG in making the Third KPMG Representation, coupled with the absence of any or any adequate reservation or qualification to the Third KPMG Representation.*

- 127 By making each of the Third KPMG Representation and the Fourth KPMG Representations, KPMG engaged in conduct:
- (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 section 12DA of the *ASIC Act*; and/or
  - (c) in trade or commerce, within the meaning of section 9 of the *Fair Trading Act*.
- 128 The Third KPMG Representation and the Fourth KPMG Representations were continuing representations from the dates on which they were initially made throughout the period to at least 1 July 2008, being the Scheme Implementation Date.
- 129 On or about 12 May 2008, Zinifex lodged with the ASX and distributed or made available to its shareholders:
- (a) a document entitled "*Explanatory Memorandum for the Scheme of Arrangement in relation to the proposed merger of Zinifex Limited and Oxiana Limited*" dated 9 May 2008 (being the **Scheme Booklet**), which had been prepared by Zinifex with input from Oxiana in relation to the Oxiana Provided Information and the Combined Information; and

- (b) a document entitled “Scheme Booklet Supplement for the Scheme of Arrangement in relation to the proposed merger of Zinifex Limited and Oxiana Limited” (the **Scheme Book Supplement**).

130 If, as alleged by the Applicant in the ~~FASOC~~ SFASOC:

- (a) there were matters with respect to the Financing Documents which were material and ought to have been disclosed by Oxiana and/or included by Oxiana in the Scheme Booklet as “Oxiana Information”, as defined in the Scheme Booklet, but had not been disclosed by Oxiana or included by Oxiana in the Scheme Booklet as “Oxiana Information”;

- (b) Oxiana contravened section 1041H of the *Corporations Act*, section 12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act*; and

- (c) Oxiana contravened section 674 of the *Corporations Act*,

(all of which is denied), then:

- (i) the First KPMG Representation was false and untrue;
- (ii) further or alternatively, in so far as the First KPMG Representation constituted statements of opinion by KPMG, KPMG had no proper or reasonable basis for expressing those opinions;
- (iii) further or alternatively, the Second KPMG Representations were false and untrue in that at the time of the KPMG Due Diligence Sign Off:

- (A) KPMG had not exercised reasonable skill and care in undertaking the KPMG Financial Due Diligence and in making the First KPMG Representation in the KPMG Due Diligence Sign Off;

#### **Particulars**

*Had KPMG used reasonable skill and care it:*

- *would not have made the First KPMG Representation;*
- *would have included in the KPMG Due Diligence Sign Off a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the Application and ~~FASOC~~ SFASOC were material and ought to have been disclosed by Oxiana, including the 8 August Refinancing Deadline, the Current*

*Liability Position and the Cross Default Risk) which were material and ought to have been included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it; and*

- *would have recommended to Oxiana that it take steps to include those matters in the Scheme Booklet, or the sections of the Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h).*

- (B) KPMG did not have reasonable grounds for making the First KPMG Representation in the KPMG Due Diligence Sign Off;
- (iv) in the premises, the making of the First KPMG Representation and the Second KPMG Representations constituted conduct which was misleading or deceptive or likely to mislead or deceive in contravention of:
- (A) section 1041H of the *Corporations Act*;
- (B) section 12DA(1) of the *ASIC Act*; and/or
- (C) section 9 of the *Fair Trading Act*;
- (v) further or alternatively, the Third KPMG Representation was false and untrue;
- (vi) further or alternatively, in so far as the Third KPMG Representation constituted statements of opinion by KPMG, KPMG had no proper or reasonable basis for expressing those opinions;

(vii) further or alternatively, the Fourth KPMG Representations were false and untrue in that at the time of making the KPMG Due Diligence Report:

(A) KPMG had not exercised reasonable skill and care in undertaking the KPMG Financial Due Diligence and in making the Third KPMG Representation in the KPMG Due Diligence Report;

#### **Particulars**

*Had KPMG used reasonable skill and care it:*

- *would not have made the Third KPMG Representation;*
- *would have included in the KPMG Due Diligence Report a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the Application and FASOC SFASOC were material and ought to have been disclosed by Oxiana, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk) which were material and ought to have been included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it; and*
- *would have recommended to Oxiana that it take steps to include those matters in the Scheme Booklet, or the sections of the*

*Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h).*

(B) KPMG did not have reasonable grounds for making the Third KPMG Representation in the KPMG Due Diligence Report;

(viii) in the premises, the making of the Third KPMG Representation and the Fourth KPMG Representations constituted conduct which was misleading or deceptive or likely to mislead or deceive in contravention of:

(A) section 1041H of the *Corporations Act*;

(B) section 12DA(1) of the *ASIC Act*; and/or

(C) section 9 of the *Fair Trading Act*.

131 If the Respondent engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 1041H(1) of the *Corporations Act*, section 12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC, and if the Respondent contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC, and if those contraventions caused loss and damage to the Applicant and Group Members as alleged in paragraph 95 of the ~~FASOC~~ SFASOC (the **Applicant and Group Members' loss and damage**) (all of which is denied), then by reason of:

- (a) KPMG's role in the due diligence process, including undertaking the KPMG Financial Due Diligence;
- (b) the making by KPMG of the First, Second, Third and Fourth KPMG Representations; and
- (c) KPMG's knowledge and/or conduct as alleged in paragraphs 98 to 130 above,

- (i) KPMG was involved in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively was involved in some of those contraventions) within the meaning of sections 79 and 1041I of the *Corporations Act*, section 12GF of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (ii) further or alternatively, KPMG was involved in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively was involved in some of those contraventions) within the meaning of sections 79 and 674(2A) of the *Corporations Act*, and thereby contravened section 674(2A) of the *Corporations Act*;
- (iii) KPMG's involvement in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions), further or alternatively KPMG's involvement in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions) and its resultant contravention of section 674(2A) of the *Corporations Act*, caused or contributed to the Applicant and Group Members' loss and damage; and
- (iv) by reason of KPMG's involvement in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions), further or alternatively by reason of KPMG's involvement in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions) and its resultant contravention of section 674(2A) of the *Corporations Act*, KPMG (and each partner of KPMG at the relevant time) is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act*, section 159 of the *Fair Trading Act* and/or section 1317HA of the *Corporations Act*.

132 Further or in the alternative, if the Respondent contravened section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act*



as alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC and contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage as alleged in paragraph 95 of the ~~FASOC~~ SFASOC (all of which is denied), then KPMG's contraventions of:

- (a) section 1041H of the *Corporations Act*;
- (b) section 12DA(1) of the *ASIC Act*; and/or
- (c) section 9 of the *Fair Trading Act*,

as alleged in paragraphs 130(iv) and 130(viii) above, caused or contributed to the Applicant and Group Members' loss and damage, and KPMG (and each partner of KPMG at the relevant time) is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*.

### **Particulars**

*But for KPMG's contravening conduct:*

- *KPMG would have included in the KPMG Due Diligence Sign Off and/or the KPMG Due Diligence Report a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the ~~FASOC~~ SFASOC were material and ought to have been disclosed by Oxiana, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk) which were material and ought to have been included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h); further or alternatively in the absence of the making of the First, Second, Third and Fourth KPMG Representations, the Respondent would otherwise have become aware of this;*
- *KPMG would have recommended to Oxiana that it take steps to include those matters in the Scheme Booklet, or the sections of the Scheme Booklet in which financial information relating to Oxiana was to be presented or the*

*sections of the Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h); further or alternatively the Respondent would otherwise have become aware of the need to include those matters in the Scheme Booklet, or the sections of the Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h);*

- *Oxiana would have acted upon that recommendation and taken steps to include those matters in the Scheme Booklet or the sections of the Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h); further or alternatively the Respondent would otherwise have become aware of the need to include those matters in the Scheme Booklet, or the sections of the Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and would have done so; and*
- *the contraventions alleged in the ~~FASOC~~ SFASOC would not have occurred and/or would not have caused the Applicant and Group Members to suffer any loss or damage.*

133 By reason of the matters alleged in paragraphs 131 and/or 132 above, if the Respondent is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage as alleged in the ~~FASOC~~ SFASOC (which is denied), then:

- (a) KPMG (and each partner of KPMG at the relevant time) is also liable to the Applicant and Group Members for the same loss and damage; and
- (b) KPMG (and each partner of KPMG at the relevant time) is a concurrent wrongdoer within the meaning of section 1041L(3) of the *Corporations Act*, section 12GP(3) of the *ASIC Act* and section 24AH(1) of the *Wrongs Act 1958* (Vic) (the *Wrongs Act*).

134 Further:

- (a) each of the claims made by the Applicant and Group Members in the Application and ~~FASOC~~ SFASOC for damages or compensation under section 1041I of the *Corporations Act* for alleged contraventions of section 1041H of the *Corporations Act* is a claim for damages for economic loss and accordingly is an apportionable claim within the meaning of section 1041L(1) of the *Corporations Act*;
- (b) each of the claims made by the Applicant and Group Members in the Application and ~~FASOC~~ SFASOC for damages or compensation under section 12GF of the *ASIC Act* for alleged contraventions of section 12DA of the *ASIC Act* is a claim for damages for economic loss and accordingly is an apportionable claim within the meaning of section 12GP(1) of the *ASIC Act*;
- (c) each of the claims made by the Applicant and Group Members in the Application and ~~FASOC~~ SFASOC for damages under section 159 of the *Fair Trading Act* for alleged contraventions of section 9 of the *Fair Trading Act* is an apportionable claim within the meaning of section 24AF(1)(b) of the *Wrongs Act*;
- (d) all of the claims made by the Applicant against the Respondent in the ~~FASOC~~ SFASOC (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) are in respect of the same damage or loss; and
- (e) all of the claims made by each Group Member against the Respondent in the ~~FASOC~~ SFASOC (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) are in respect of the same damage or loss.

135 In the premises, by operation of section 1041L(2) of the *Corporations Act* and/or section 12GP(2) of the *ASIC Act*:

- (a) all of the claims made by the Applicant against the Respondent in the ~~FASOC~~ SFASOC (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) are a single apportionable claim in respect of the same loss or damage; and;

- (b) all of the claims made by each Group Member against the Respondent in the ~~FASOC~~ SFASOC (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) are a single apportionable claim in respect of the same loss or damage.

- 136 By reason of the matters alleged in paragraphs 131-135 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of those claims and each of them (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) is limited by section 1041N of the *Corporations Act* and/or section 12GR of the *ASIC Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of KPMG's responsibility for that damage or loss and the extent of the responsibility of the other concurrent wrongdoers referred to in Sub-Sections H(I) to (VII) of this Further Amended Defence (being together with KPMG the **Concurrent Wrongdoers**), and the Court may give judgment against the Respondent for no more than that amount.
- 137 Alternatively to paragraph 136 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of such of those claims as are apportionable claims within the meaning of section 1041L(1) of the *Corporations Act*, section 12GP(1) of the *ASIC Act* or section 24AF of the *Wrongs Act* is limited (respectively) by section 1041N of the *Corporations Act*, section 12GR of the *ASIC Act* and section 24AI(1) of the *Wrongs Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of KPMG's responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

## II KPMG TS

- 138 KPMG TS Pty Limited (ACN 003 891 718) (**KPMG Transaction**):

- (a) is and was at all relevant times a company conducting business, inter alia, within Victoria as accountants;
- (b) was at all relevant times until 30 January 2012 known as KPMG Transaction Services (Australia) Pty Limited;
- (c) is and was at all relevant times associated with KPMG;
- (d) is and was at all relevant times a person within the meaning of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and section 9 of the *Fair Trading Act*.

139 As part of the Proposed Merger process, in early March 2008:

- (a) the Oxiana Due Diligence Committee was formed; and
- (b) Zinifex established a Due Diligence Committee (the **Zinifex Due Diligence Committee**).

140 At all relevant times:

- (a) KPMG Transaction was a member of the Zinifex Due Diligence Committee, and was represented on that committee by Mr Jack O'Connell;
- (b) KPMG was a member of the Oxiana Due Diligence Committee, and was represented on that committee by Mr Michael Bray and Mr Angus Reynolds;
- (c) Messrs Bray, Reynolds and O'Connell were partners of KPMG; and
- (d) Messrs Reynolds and O'Connell were also directors of KPMG Transaction.

141 During March and April 2008:

- (a) the Oxiana Due Diligence Committee held regular meetings, which were attended by amongst others:
  - (i) Mr Bray as a representative of KPMG;
  - (ii) Mr Reynolds, usually as a representative of KPMG, but at least on one occasion as a representative of KPMG Transaction; and
  - (iii) on one occasion, Mr O'Connell as a representative of KPMG Transaction,

- (b) the Zinifex Due Diligence Committee held regular meetings, which were attended by Mr O'Connell as a representative of KPMG Transaction and Mr Nick Harridge, a director of KPMG Transaction.

142 At all relevant times in the period from no later than 11 March 2008, alternatively 7 April 2008, to 1 July 2008, KPMG Transaction was engaged to prepare and provide an Investigating Accountant's report to Oxiana and Zinifex (the **Investigating Accountant's Engagement**).

#### Particulars

- (i) *The terms of the Investigating Accountant's Engagement were partly in writing and partly to be implied.*
- (ii) *In so far as they were in writing, they were contained in or evidenced by a letter from KPMG Transaction to Oxiana and Zinifex dated 7 April 2008 and in KPMG Transaction's Investigating Accountant's Report dated 9 May 2009 (the **Investigating Accountant's Report**).*
- (iii) *In so far as the terms of the Investigating Accountant's Engagement were to be implied, the implication arose from KPMG Transaction preparing and providing the Investigating Accountant's Report for reward and/or to give business efficacy to the Investigating Accountant's Engagement.*

143 There were terms of the Investigating Accountant's Engagement *inter alia* that:

- (a) KPMG Transaction would perform procedures to enable it to report on the combined Zinifex and Oxiana (the **Merged Group**):
  - (i) pro-forma historical balance sheet as at 31 December 2007;
  - (ii) pro-forma historical condensed income statement for the year ended 31 December 2007; and
  - (iii) pro-forma historical operating cash flows before financing activities and tax for the year ended 31 December 2007,
 (the **Merged Group Pro-Forma Historical Financial Information**);
- (b) KPMG Transaction would review the Merged Group Pro-Forma Historical Financial Information in order to state whether, on the basis of the

procedures described, anything had come to KPMG Transaction's attention that would indicate whether the Merged Group Pro-Forma Historical Information did not present fairly:

- (i) the pro-forma historical financial performance of the Merged Group for the year ended 31 December 2007;
  - (ii) the pro-forma historical operating cash flows before financing activities and tax of the Merged Group for the year ended 31 December 2007;
  - (iii) the pro-forma historical financial position of the Merged Group as at 31 December 2007; and
  - (iv) the pro-forma transactions and/or adjustments described in the Scheme document, in accordance with the recognition and measurement principles prescribed in Australian Accounting Standards and accounting policies adopted by Oxiana and as disclosed in the proposed Scheme document;
- (c) KPMG Transaction would notify Oxiana and Zinifex if, upon or after its review of the Merged Group Pro-Forma Historical Financial Information, anything had come to KPMG Transaction's attention that indicated that the Merged Group Pro-Forma Historical Information did not present fairly:
- (i) the pro-forma historical financial performance of the Merged Group for the year ended 31 December 2007;
  - (ii) the pro-forma historical operating cash flows before financing activities and tax of the Merged Group for the year ended 31 December 2007;
  - (iii) the pro-forma historical financial position of the Merged Group as at 31 December 2007; and
  - (iv) the pro-forma transactions and/or adjustments described in the Scheme document, in accordance with the recognition and measurement principles prescribed in Australian Accounting Standards and accounting policies adopted by Oxiana as disclosed in the proposed Scheme document,
- (d) KPMG Transaction's contribution to the due diligence process would be designed to enable KPMG Transaction to issue the Investigating Accountant's Report to the directors of Zinifex and Oxiana on the following information for inclusion in the proposed Scheme Booklet:

- (i) the Zinifex pro-forma historical financial information;
- (ii) the Merged Group Pro-Forma Historical Financial Information;
- (e) KPMG Transaction would review and examine the financial information to be included in the proposed Scheme Booklet, including the Merged Group Pro-Forma Historical Financial Information, for the purpose of considering whether this information would satisfy the content requirements of section 412 of the *Corporations Act* by revealing information that was material to the making of a decision by a Zinifex security holder whether or not to agree to the proposed Scheme;
- (f) KPMG Transaction would notify Oxiana and Zinifex if, upon or after its review and examination of the financial information to be included in the proposed Scheme Booklet, including the Merged Group Pro-Forma Historical Financial Information, it considered that this information would not satisfy the content requirements of section 412 of the *Corporations Act* by revealing all information relating to the financial position of Oxiana that was material to the making of a decision by a Zinifex security holder whether or not to agree to the proposed Scheme;
- (g) KPMG Transaction would review and examine the financial information to be included in the proposed Scheme Booklet, including the Merged Group Pro-Forma Historical Financial Information, to confirm that it was not misleading or deceptive or likely to mislead or deceive, and there were no material omissions of information from the Scheme Booklet;
- (h) KPMG Transaction would notify Oxiana and Zinifex, if, upon or after its review or examination of the financial information to be included in the proposed Scheme Booklet, including the Merged Group Pro-Forma Historical Financial Information, it considered that this information was misleading or deceptive (either expressly or by omission) or had an omission of material required by the *Corporations Act* to be included in the Scheme Booklet;
- (i) KPMG Transaction would draw to the attention of Oxiana and Zinifex any material matters which had been omitted or not adequately disclosed, or any material misstatements, in any financial information to be included in



the proposed Scheme Booklet which KPMG Transaction had examined or reviewed as part of its due diligence;

- (j) the KPMG Transaction Financial Due Diligence undertaken by KPMG Transaction would ensure that what was contained in, or omitted from, the Scheme Booklet in relation to financial information was supportable by reason of appropriate enquiry having been made by KPMG Transaction;
- (k) KPMG Transaction would prepare and provide to Oxiana and Zinifex the Investigating Accountant's Report; and
- (l) KPMG Transaction would carry out the work required with professional skill and diligence; further or alternatively, would provide the required services in an efficient and timely manner, using the necessary skill and expertise to an appropriate professional standard,

(the **Investigating Accountant Services**).

144 In addition to providing the Investigating Accountant Services, the role and function of KPMG Transaction in respect of the Proposed Merger included:

- (a) to perform financial due diligence for Zinifex in respect of the Proposed Merger, including with respect to Oxiana financial information to be included in the Scheme Booklet (**KPMG Transaction Financial Due Diligence**);
- (b) as part of the KPMG Transaction Financial Due Diligence, to prepare a Due Diligence Financial Work Plan (**KPMG Transaction Financial Work Plan**) and then carry out the work required by the KPMG Transaction Financial Work Plan;
- (c) to prepare a letter of advice on materiality to assist the Zinifex Due Diligence Committee with its determination of materiality guidelines to apply to its due diligence process;
- (d) to prepare and provide to Zinifex a report on the adequacy of the due diligence system so far as it applies to KPMG Transaction Financial Matters contained in the proposed Scheme document (**KPMG Transaction Due Diligence Sign Off**);

- (e) to consider key issues identified by KPMG Transaction during the course of the KPMG Transaction Financial Due Diligence and give advice and make recommendations in respect of those key issues; and
- (f) to prepare and provide to Zinifex a KPMG Transaction Financial Due Diligence Report,

(the **KPMG Transaction Due Diligence Financial Services**).

- 145 On or about 8 April 2008 the Due Diligence Committee approved a Due Diligence Planning Memorandum (the **Zinifex Due Diligence Planning Memorandum**), which included the following:

*“On 3 March 2008, Zinifex Limited and Oxiana Limited announced a proposal to pursue a ‘merger of equals’, in accordance with a Merger Implementation Agreement entered into between them on 2 March 2008.*

*The proposed merger will be effected by way of a scheme of arrangement entered into between Zinifex and its shareholders under Part 5.1 of the Corporations Act (Scheme), as contemplated by the Merger Implementation Agreement.*

*The consideration payable by Oxiana under the Scheme to Zinifex shareholders (other than ineligible foreign Zinifex shareholders) will be a specified number of new ordinary shares in Oxiana to be issued for every Zinifex share held at the Record Date for the Scheme (the Scheme Consideration).*

...

*Zinifex will need to issue the Scheme Booklet, which will include a notice of meeting and accompanying explanatory statement, to its shareholders ahead of the planned extraordinary general meeting to approve the Scheme. The Scheme Booklet will be submitted for approval by the Court prior to circulation to Zinifex shareholders. The Court must be satisfied that the Scheme Booklet contains all necessary disclosures in respect of the Scheme and that ASIC has had an adequate opportunity to review the Scheme Booklet and to present any objections to the Court.*

...

*Zinifex, as the entity proposing the Scheme to its members, will have ultimate responsibility for the preparation of the Scheme Booklet. However, given that the*

consideration proposed to be offered to Zinifex shareholders will comprise newly issued Oxiana shares, Oxiana will provide information in relation to it and its businesses to enable the assessment of the value of the new Oxiana shares and its intentions concerning Zinifex and the merged group going forward (**Oxiana Information**) for inclusion in the Scheme Booklet.

Pursuant to clause 5.4(d) of the Merger Implementation Agreement, Oxiana has agreed to prepare and provide to Zinifex all information regarding Oxiana, its Related Bodies Corporate and Oxiana's shares as is within Oxiana's knowledge that is required by the Corporations Act, applicable ASIC Regulatory Guides and the ASX Listing Rules to be included in the Scheme Booklet.

...

This Planning Memorandum provides an overview of the nature of the liability faced by Zinifex in providing the Scheme Booklet, and the processes that should be put in place to manage this exposure.

...

The Merger Implementation Agreement requires each party to prepare draft information for inclusion in the Scheme Booklet, and to review the drafts prepared by the other and provide comments on those drafts. Because Zinifex will be presenting the Scheme Booklet to the Court and its shareholders, and as it will become a part of the merged group following implementation of the Scheme and its directors will be appointed to the Oxiana board, Zinifex has an interest in ensuring, to the extent that it is able to do so on the basis of information available to it, that the Scheme Booklet (including the Oxiana Information) is not misleading or deceptive. To this end, to assist the DDC in its review of the Scheme Booklet, certain senior Zinifex executives who were involved in the Oxiana acquisition due diligence will be nominated by the Committee to review the Oxiana Information in the Scheme Booklet and, to the extent that they are able to do so on the basis of information available to them, provide any comments to Zinifex if and when they are aware of any fact or circumstance which would render that Oxiana Information misleading or deceptive, or of the absence of any references in that Oxiana Information which would constitute an omission of information from the Scheme Booklet which is misleading or deceptive. Notwithstanding this, Zinifex remains obliged to take all reasonable steps to

*ensure that the Scheme Booklet as a whole is not misleading or deceptive in any material respect and does not contain a material omission.*

...

*The purpose of the due diligence process is to ensure, so far as is possible, that the Scheme Booklet is not misleading or deceptive or likely to mislead or deceive, and there are no material omissions of information from the Scheme Booklet.”*

- 146 On 26 March 2008, KPMG Transaction sent Zinifex a letter which set out materiality thresholds to assist members of the Zinifex Due Diligence Committee to focus on due diligence investigations and to enable members of the Zinifex Due Diligence Committee to determine whether or not a matter needed to be disclosed in the Scheme Booklet or dealt with in some other way prior to the release of the Scheme Booklet.
- 147 On or about 1 April 2008, the Zinifex Due Diligence Committee approved a Due Diligence Work Plan (the **Zinifex Due Diligence Work Plan**) which included the following:

*“This note summarises the due diligence work program proposed to be carried out as part of the preparation of the Scheme Booklet for Project Venice.*

...

*KPMG [Transactions] have been engaged to act as the Investigating Accountant in respect of the pro forma historical information to be included in the Scheme Booklet and have responsibility to review the Zinifex pro forma historical information, Oxiana pro forma financial information and Merged Group pro forma historical financial information. This review will be conducted in accordance with Australian Auditing Standard AUS 902 “Review of Financial Reports”.*

*The financial due diligence will comprise the following:*

- (a) *Attendance at presentations from key Zinifex and Oxiana management by KPMG [Transactions];*
- (b) *Obtaining Management Questionnaires from all group and general managers;*

- (c) *Interviews conducted by KPMG [Transactions] with key management to identify potential key issues and understand major trends and future strategies in respect of Zinifex, Oxiana and the Merged Group;*
- (d) *Consideration of pro forma financial information presented in the Scheme Booklet for Zinifex, Allegiance, Oxiana and the Merged Group, including the need for pro forma adjustments to historical financial information;*
- (e) *consideration of acquisition accounting issues, including differences in Zinifex and Oxiana accounting policies;*
- (f) *Consideration of previous audit reports, letters to management from the external auditors and highlights memos issued in respect of historical financial information of Zinifex and Oxiana;*
- (g) *Review by KPMG [Transaction] of the minutes of meetings held by the respective Zinifex and Oxiana board of directors;*
- (h) *Comparison of the pro forma financial information with previously audited or reviewed financial statements of Zinifex, Oxiana and Allegiance;*
- (i) *Participation in the management presentations to the DDC in relation to financial matters (see section 2); and*
- (j) *Review by KPMG's US Capital Markets Group of the pro forma historical financial information."*

148 At all relevant times in the period from no later than 11 March 2008, alternatively 1 April 2008, to 1 July 2008, KPMG Transaction was engaged by Zinifex to provide accounting services to Zinifex, including the KPMG Transaction Due Diligence Financial Services (the **KPMG Transaction Due Diligence Engagement**).

#### **Particulars**

- (i) *The terms of the KPMG Transaction Due Diligence Engagement were partly in writing and partly to be implied.*
- (ii) *In so far as they were in writing, they were contained in or evidenced by a letter from KPMG Transaction to Zinifex dated 1 April 2008, the Zinifex Due Diligence Planning Memorandum including the Zinifex Due Diligence Work Plan, the KPMG Transaction Due Diligence report to Zinifex dated*

*29 April 2008 (the KPMG Transaction Due Diligence Report) and the KPMG Transaction Due Diligence Sign Off.*

- (iii) *In so far as the terms of the KPMG Transaction Due Diligence Engagement were to be implied, the implication arose from KPMG Transaction performing the KPMG Transaction Due Diligence Financial Services for reward from no later than 11 March 2008, and/or to give business efficacy to the KPMG Transaction Due Diligence Engagement.*

149 There were terms of the KPMG Transaction Due Diligence Engagement *inter alia* that:

- (a) KPMG Transaction would provide due diligence assistance to Zinifex in relation to the proposed Scheme Booklet of Zinifex to be issued in connection with the proposed merger of Oxiana and Zinifex, known as “Project Venice”, including by carrying out the KPMG Transaction Financial Due Diligence;
- (b) KPMG Transaction would review minutes of Oxiana Board meetings;
- (c) KPMG Transaction would seek to identify potential key issues in respect of Zinifex, Oxiana and the proposed Merged Group (including by reading the minutes of Oxiana Board meetings), and give advice and make recommendations to Zinifex in respect of any such key issues identified by it;
- (d) KPMG Transaction would review and examine the financial information to be included in the proposed Scheme Booklet, including the Merged Group Pro-Forma Historical Financial Information, for the purpose of considering whether this information would satisfy the content requirements of section 412 of the *Corporations Act* by revealing all information relating to the financial position of Oxiana that was material to the making of a decision by a Zinifex security holder whether or not to agree to the proposed Scheme;
- (e) KPMG Transaction would notify Zinifex if, upon or after its review and examination the financial information to be included in the proposed Scheme Booklet, including the Merged Group Pro-Forma Historical Financial Information, it considered that this information would not satisfy

the content requirements of section 412 of the *Corporations Act* by revealing all information relating to the financial position of Oxiana that was material to the making of a decision by a Zinifex security holder whether or not to agree to the proposed Scheme;

- (f) KPMG Transaction would review and examine the financial information to be included in the proposed Scheme Booklet, including the Merged Group Pro-Forma Historical Financial Information, to confirm that it was not misleading or deceptive or likely to mislead or deceive, and that there were no material omissions of information from the Scheme Booklet;
- (g) KPMG Transaction would notify Zinifex if, upon or after its review or examination of any financial information to be included in the proposed Scheme Booklet, including the Merged Group Pro-Forma Historical Financial Information, it considered that this information (either expressly or by omission) was misleading or deceptive or had an omission of material required by the *Corporations Act* to be included in the Scheme Booklet;
- (h) KPMG Transaction would draw to the attention of Zinifex any material matters which had been omitted or not adequately disclosed, or any material misstatements, in any financial information to be included in the proposed Scheme Booklet (including financial information relating to Oxiana) which KPMG Transaction had examined or reviewed as part of its due diligence;
- (i) the KPMG Transaction Financial Due Diligence undertaken by KPMG Transaction would ensure that what was contained in, or omitted from, the Scheme Booklet in relation to financial information was supportable by reason of appropriate enquiry having been made by KPMG Transaction;
- (j) KPMG Transaction would prepare a letter of advice on materiality to assist the Zinifex Due Diligence Committee with its determination of materiality guidelines to apply to its due diligence process;
- (k) the work carried out by KPMG Transaction would be carried out in accordance with the KPMG Transaction Financial Work Plan agreed with Zinifex and the Zinifex Due Diligence Committee which included due

diligence sign-off on the Oxiana historical financial information, the Oxiana pro forma historical information and the Merged Group pro forma historical information (the **KPMG Transaction Financial Matters**);

- (l) KPMG Transaction would investigate the basis of the financial information to be provided in the Scheme Booklet and relevant material assumptions;
- (m) KPMG Transaction would consider the adequacy of the due diligence system, so far as it applied to the KPMG Transaction Financial Matters;
- (n) KPMG Transaction would prepare and provide to Zinifex and the Zinifex Due Diligence Committee the KPMG Transaction Due Diligence Report and the KPMG Transaction Due Diligence Sign Off; and
- (o) KPMG Transaction would carry out the work required with professional skill and diligence; further or alternatively, would provide the required services in an efficient and timely manner, using the necessary skill and expertise to an appropriate professional standard.

150 By no later than 11 March 2008 KPMG Transaction had commenced carrying out the Investigating Accountant Services and the Zinifex KPMG Transaction Due Diligence Financial Services.

151 For the purpose of carrying out the Investigating Accountant Services and/or the KPMG Transaction Due Diligence Financial Services, KPMG Transaction had access to the Financing Documents.

152 By no later than 11 April 2008, alternatively prior to the finalisation of the KPMG Transaction Due Diligence Report dated 29 April 2008, KPMG Transaction knew:

- (a) of the Refinancing Obligation (as defined in paragraph 116(a) above); and
- (b) that failure to comply with the Refinancing Obligation would trigger a default under the LNSA and the Mezzanine Agreement, which would lead to an Event of Default under those agreements if not cured within the relevant cure periods.

### **Particulars**

*The information was provided in a memorandum prepared by Clayton Utz, Oxiana's solicitors, and forwarded by Mr Jeff*



*Sells of Oxiana to Mr Michael Bray of KPMG by email dated 11 April 2008. Mr Bray's knowledge of this information is imputed to his KPMG partners at the time, including Mr Reynolds and Mr O'Connell, both of whom were also directors of KPMG Transaction at all relevant times.*

*Further, in accordance with the Zinifex Due Diligence Work Plan, KPMG Transaction had access to the Oxiana Board Minutes of 19 February 2008, and by the terms of the KPMG Transaction Due Diligence Engagement were required to read those minutes, which provided that both the Mezzanine Facility and LNSA had to be refinanced by 8 August 2008 (p.4). Further, in the KPMG Transaction Due Diligence Report, KPMG Transaction stated that it had "Read legal DD summary" in response to the item "Read board minutes for Oxiana and consider the impact of issues discussed on the pro-forma historical financial information to be included in the Scheme Booklet". The Supplementary Legal Due Diligence Report dated 4 April 2008 (which had been prepared by Zinifex's solicitors, Allens Arthur Robinson) recorded the 19 February 2007 (sic, read 2008) minutes as stating that "[t]he [Mezzanine] facility expires in Q4 2008 and together with the initial US \$500 m facility needs to be refinanced by 8 August 2008 (this may be extended to 30 November 2008 – subject to lenders approval)" (p.18).*

*Further, that KPMG Transaction had this knowledge is to be inferred from the fact that in the KPMG Transaction Due Diligence Report dated 29 April 2008, it referred expressly to the LNSA and the Mezzanine Agreement (at page 14) and stated (under the heading "Implication" that "[w]e understand that management are reviewing the terms of these debt facilities and plan to refinance both facilities by November 2008", and further stated (under the heading "Resolution/Recommendation" that "[t]he plans to refinance*

*these facilities is appropriately disclosed in the risk section of the Explanatory Memorandum [ie the Scheme Booklet]”.*

*Further particulars may be provided following discovery and prior to trial.*

- 153 On or about 30 April 2008, KPMG Transaction provided Oxiana with the KPMG Transaction Due Diligence Report dated 29 April 2008.

#### **Particulars**

*The KPMG Transaction Due Diligence Report was provided under cover of an email from Mr O’Connell of KPMG Transaction to Mr Jeff Sells of Oxiana dated 30 April 2008.*

- 154 In the KPMG Transaction Due Diligence Report:

- (a) KPMG Transaction recorded as one of the key issues identified and considered by it during the course of the KPMG Transaction Financial Due Diligence, and in respect of which it had agreed to give advice and make recommendations to Zinifex, the Financing Documents and the refinancing risk associated with them;

#### **Particulars**

*Page 14 of the KPMG Transaction Due Diligence Report.*

- (b) KPMG Transaction stated in respect of this key issue, under the heading “Resolution/Recommendation” that “[t]he plans to refinance these facilities is appropriately disclosed in the risk section of the Explanatory Memorandum [ie the Scheme Booklet]”;

#### **Particulars**

*Page 14 of the KPMG Transaction Due Diligence Report.*

- (c) KPMG Transaction did not notify or bring to the attention of Zinifex (or to Oxiana through the provision of the report to Oxiana) any matters in relation to the Financing Documents or their terms which it considered were material and ought to be included in the proposed Scheme Booklet and which were not already included in the proposed Scheme Booklet.

155 In or by the KPMG Transaction Due Diligence Report, and by the provision of that report to Oxiana on 30 April 2008:

- (a) KPMG Transaction represented that there were no matters in relation to the Financing Documents or their terms which were material and which ought to be included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet (the **First KPMG Transaction Representation**).

#### Particulars

*The First KPMG Transaction Representation was partly in writing and partly to be implied.*

*In so far as it was in writing, it was contained in the KPMG Transaction Due Diligence Report.*

*In so far as it was to be implied, the implication arose from:*

- *the fact that one of the purposes of the KPMG Transaction Due Diligence Report was to bring to the attention of parties relying upon it, any financial matters relating to Oxiana which were material and ought to have been included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet;*
- *the fact that one of the purposes of the KPMG Transaction Due Diligence Report was to make recommendations with respect to key issues identified and considered by KPMG Transaction during the KPMG Transaction Financial Due Diligence, and the fact that one of the key issues identified by KPMG Transaction was the Financing Documents and the refinancing risk associated with them;*
- *the fact that KPMG Transaction had reviewed and/or had access to the Financing Documents, and was aware of their material terms, including the refinancing obligations and cross-default provisions contained in them, as part of its KPMG Transaction Financial Due Diligence;*

- *the inclusion in the KPMG Transaction Due Diligence Report of the statement in respect of the Financing Documents that “[t]he plans to refinance these facilities is appropriately disclosed in the risk section of the Explanatory Memorandum [ie the Scheme Booklet]”; and*
  - *the failure by KPMG Transaction to include in the KPMG Transaction Due Diligence Report any statement to the effect that there were matters in relation to the Financing Documents or their terms which were material and ought to have been included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet.*
- (b) KPMG Transaction further represented that the refinancing risk in relation to the LNSA and Mezzanine Facility was appropriately disclosed in the risk section of the proposed Scheme Booklet (the **Second KPMG Transaction Representation**);

#### **Particulars**

*The Second KPMG Transaction Representation was express and was contained on page 14 of the KPMG Transaction Due Diligence Report.*

- (c) KPMG Transaction further represented (the **Third KPMG Transaction Representations**) that:
- (i) it had exercised reasonable skill and care in preparing and presenting the KPMG Transaction Due Diligence Report and in making the First and Second KPMG Transaction Representations in the KPMG Transaction Due Diligence Report; and
  - (ii) it had reasonable grounds for making the First and Second KPMG Transaction Representations in the KPMG Transaction Due Diligence Report.

#### **Particulars**

*The Third KPMG Transaction Representations were to be implied from the conduct of KPMG Transaction in making the First and Second KPMG Transaction Representations, coupled with the absence of any or any adequate reservation or qualification to the First and Second KPMG Transaction Representations.*

156 By making each of the First KPMG Transaction Representation, the Second KPMG Transaction Representation and the Third KPMG Transaction Representations, KPMG Transaction engaged in conduct:

- (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 section 12DA of the *ASIC Act*; and/or
- (c) in trade or commerce, within the meaning of section 9 of the *Fair Trading Act*.

157 The First KPMG Transaction Representation, the Second KPMG Transaction Representation and the Third KPMG Transaction Representations were continuing representations from the dates on which they were initially made throughout the period to at least the Scheme Implementation Date.

158 On or about 8 May 2008, KPMG Transaction provided Oxiana and Zinifex with the Investigating Accountant's Report.

159 In or by the Investigating Accountant's Report:

- (a) KPMG Transaction represented that there were no matters in relation to the Financing Documents or their terms which were material and/or which meant that the financial position of the Merged Group was not presented fairly in the proposed Scheme Booklet (the **Fourth KPMG Transaction Representation**).

#### Particulars

*The Fourth KPMG Transaction Representation was partly in writing and partly to be implied.*

*In so far as it was in writing, it was contained in the Investigating Accountant's Report.*

*In so far as it was to be implied, the implication arose from:*

- *the fact that one of the purposes of the Investigating Accountant's Report was to bring to the attention of Oxiana, Zinifex and readers of the proposed Scheme Booklet any financial matters relating to Oxiana which were material and which were necessary to ensure that the financial position of the Merged Group was presented fairly;*
- *the fact that KPMG Transactions had reviewed and/or had access to the Financing Documents and/or were aware of their material terms, including the refinancing obligations and cross-default provisions contained in them; and*
- *the failure by KPMG Transactions to include in the Investigating Accountant's Report any statement to the effect that there were matters in relation to the Financing Documents or their terms which were material and ought to have been included in the proposed Scheme Booklet, and/or which meant that the financial position of the Merged Group was not presented fairly in the proposed Scheme Booklet.*

- (b) KPMG Transaction further represented (the **Fifth KPMG Transaction Representations**) that:
- (i) it had exercised reasonable skill and care in undertaking the Investigating Accountant Services and in making the Fourth KPMG Transaction Representation in the Investigating Accountant's Report; and
  - (ii) it had reasonable grounds for making the Fourth KPMG Transaction Representation in the Investigating Accountant's Report.

#### **Particulars**

*The Fifth KPMG Transaction Representations were to be implied from the conduct of KPMG Transaction in making the Fourth KPMG Transaction Representation, coupled with the absence of any or any adequate reservation or qualification to the Fourth KPMG Transaction Representation.*

160 By making each of the Fourth KPMG Transaction Representation and the Fifth KPMG Transaction Representations, KPMG Transaction engaged in conduct:

- (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 section 12DA of the *ASIC Act*; and/or
- (c) in trade or commerce, within the meaning of section 9 of the *Fair Trading Act*.

161 The Fourth KPMG Transaction Representation and the Fifth KPMG Transaction Representations were continuing representations from the dates on which they were initially made throughout the period to at least 1 July 2008, being the Scheme Implementation Date.

162 If, as alleged by the Applicant in the FASOC SFASOC:

- (a) there were matters with respect to the Financing Documents which were material and ought to have been disclosed in the Scheme Booklet, but had not been disclosed in the Scheme Booklet;
- (b) Oxiana contravened section 1041H of the *Corporations Act*, section 12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act*; and
- (c) Oxiana contravened section 674 of the *Corporations Act*,

(all of which is denied), then:

- (i) the First KPMG Transaction Representation was false and untrue;
- (ii) further or alternatively, in so far as the First KPMG Transaction Representation constituted statements of opinion by KPMG Transaction, KPMG Transaction had no proper or reasonable basis for expressing those opinions;

- (iii) the Second KPMG Transaction Representation was false and untrue;
- (iv) further or alternatively, in so far as the Second KPMG Transaction Representation constituted statements of opinion by KPMG Transaction, KPMG Transaction had no proper or reasonable basis for expressing those opinions;
- (v) further or alternatively, the Third KPMG Transaction Representations were false and untrue in that:
  - (A) KPMG Transaction had not exercised reasonable skill and care in preparing and presenting the KPMG Transaction Due Diligence Report and in making the First and Second KPMG Transaction Representations in the KPMG Transaction Due Diligence Report;

#### **Particulars**

*Had KPMG Transaction used reasonable skill and care it:*

- *would not have made the First and Second KPMG Transaction Representations;*
- *would have included in the KPMG Transaction Due Diligence Report a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the Application and ~~FASOC~~ SFASOC were material and ought to have been disclosed by Oxiana, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk as defined in the ~~FASOC~~ SFASOC) which were material and ought to have been included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet; and*
- *would have recommended that those matters be included in the Scheme Booklet.*



- (B) KPMG Transaction did not have reasonable grounds for making the First and Second KPMG Transaction Representations in the KPMG Transaction Due Diligence Report;
- (vi) in the premises, the making of the First KPMG Transaction Representation, the Second KPMG Transaction Representation and the Third KPMG Transaction Representations constituted conduct which was misleading or deceptive or likely to mislead or deceive in contravention of:
- (A) section 1041H of the *Corporations Act*;
- (B) section 12DA(1) of the *ASIC Act*; and/or
- (C) section 9 of the *Fair Trading Act*;
- (vii) further or alternatively, the Fourth KPMG Transaction Representation was false and untrue;
- (viii) further or alternatively, in so far as the Fourth KPMG Transaction Representation constituted statements of opinion by KPMG Transaction, KPMG Transaction had no proper or reasonable basis for expressing those opinions;
- (ix) further or alternatively, the Fifth KPMG Transaction Representations were false and untrue in that:
- (A) KPMG Transaction had not exercised reasonable skill and care in undertaking the Investigating Accounting Services and in making the Fourth KPMG Transaction Representation in the Investigating Accountant's Report;

#### **Particulars**

*Had KPMG Transaction used reasonable skill and care it:*

- *would not have made the Fourth KPMG Transaction Representation;*
- *would have included in the Investigating Accountant's Report a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the*

*Application and FASOC SFASOC were material and ought to have been disclosed by Oxiana, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk) which were material and ought to have been included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet;*

- *would have recommended the inclusion of those matters in the Scheme Booklet; and*
- *would have included in the Investigating Accountant's Report a statement to the effect that by reason of those matters, the financial position of the Merged Group was not presented fairly in the proposed Scheme Booklet.*

(B) KPMG Transaction did not have reasonable grounds for making the Fourth KPMG Transaction Representation in the Investigating Accountant's Report;

(x) in the premises, the making of the Fourth KPMG Transaction Representation and the Fifth KPMG Transaction Representations constituted conduct which was misleading or deceptive or likely to mislead or deceive in contravention of:

- (A) section 1041H of the *Corporations Act*;
- (B) section 12DA(1) of the *ASIC Act*; and/or
- (C) section 9 of the *Fair Trading Act*.

163 If the Respondent engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 1041(H)(1) of the *Corporations Act*, section 12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the FASOC SFASOC, and if the Respondent contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the FASOC SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage (all of which is denied), then by reason of:

- (a) KPMG Transaction's role in undertaking the KPMG Due Diligence Financial Services and the Investigating Accountant Services;
- (b) the making by KPMG Transaction of the First, Second, Third, Fourth and Fifth KPMG Transaction Representations;
- (c) KPMG Transaction's knowledge and/or conduct as alleged in paragraphs 138 to 162 above,
- (i) KPMG Transaction was involved in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively was involved in some of those contraventions) within the meaning of sections 79 and 1041I of the *Corporations Act*, section 12GF of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (ii) further or alternatively, KPMG Transaction was involved in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively was involved in some of those contraventions) within the meaning of sections 79 and 674(2A) of the *Corporations Act*, and thereby contravened section 674(2A) of the *Corporations Act*;
- (iii) KPMG Transaction's involvement in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions), further or alternatively KPMG Transaction's involvement in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions) and its resultant contravention of section 674(2A) of the *Corporations Act*, caused or contributed to the Applicant and Group Members' loss and damage; and
- (iv) by reason of KPMG Transaction's involvement in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions), further or alternatively by reason of KPMG Transaction's involvement in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions) and its resultant contravention of section 674(2A) of the *Corporations Act*,

KPMG Transaction is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act*, section 159 of the *Fair Trading Act* and/or section 1317HA of the *Corporations Act*.

164 Further or in the alternative, if the Respondent contravened section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC and contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage as alleged in paragraph 95 of the ~~FASOC~~ SFASOC (all of which is denied), then KPMG Transaction's contraventions of:

- (a) section 1041H of the *Corporations Act*;
- (b) section 12DA(1) of the *ASIC Act*; and/or
- (c) section 9 of the *Fair Trading Act*,

as alleged in sub-paragraphs 162(vi) and 162(x) above, caused or contributed to the Applicant and Group Members' loss and damage, and KPMG Transaction is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*.

### Particulars

*But for KPMG Transaction's contravening conduct:*

- *KPMG Transaction would have included in the KPMG Transaction Due Diligence Report and/or Investigating Accountant's Report a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the Application and ~~FASOC~~ SFASOC were material and ought to have been disclosed by Oxiana, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk) which were material and ought to have been included in the proposed Scheme Booklet; further or alternatively in the absence of making the First, Second, Third,*

*Fourth and Fifth KPMG Transaction Representations, Oxiana and Zinifex would otherwise have become aware of this;*

- *KPMG Transaction would have referred to those matters in the Investigating Accountant's Report in the Scheme Booklet and/or would have recommended the inclusion of those matters in the Scheme Booklet; further or alternatively Oxiana and Zinifex would otherwise have become aware of the need to include those matters in the Scheme Booklet;*
- *Oxiana and/or Zinifex would have acted upon that recommendation and taken steps to include those matters in the Scheme Booklet; further or alternatively Oxiana and Zinifex would otherwise have become aware of the need to include those matters in the Scheme Booklet, and would have done so;*
- *KPMG Transaction would have included in the Investigating Accountant's Report a statement to the effect that by reason of those matters, the financial position of the Merged Group was not presented fairly in the Scheme Booklet; and*
- *the contraventions alleged in the ~~FASOC~~ SFASOC would not have occurred and/or would not have caused the Applicant and Group Members to suffer any loss or damage.*

165 By reason of the matters alleged in paragraphs 163 and/or 164 above, if the Respondent is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage as alleged in the ~~FASOC~~ SFASOC (which is denied), then:

- (a) KPMG Transaction is also liable to the Applicant and Group Members for the same loss and damage; and
- (b) KPMG Transaction is a concurrent wrongdoer within the meaning of section 1041L(3) of the *Corporations Act*, section 12GP(3) of the *ASIC Act* and section 24AH(1) of the *Wrongs Act*.

166 Further, the Respondent repeats the allegations in paragraphs 134-135 above.

167 By reason of the matters alleged in paragraphs 163 to 166 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~

SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of those claims and each of them (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) is limited by section 1041N of the *Corporations Act* and/or section 12GR of the *ASIC Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of KPMG Transaction's responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

- 168 Alternatively to paragraph 167 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of such of those claims as are apportionable claims within the meaning of section 1041L(1) of the *Corporations Act*, section 12GP(1) of the *ASIC Act* or section 24AF of the *Wrongs Act* is limited (respectively) by section 1041N of the *Corporations Act*, section 12GR of the *ASIC Act* and section 24AI(1) of the *Wrongs Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of KPMG Transaction's responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

### III CLAYTON UTZ

- 169 Clayton Utz (a firm) (ABN 35 740 217 343) (**Clayton Utz**) is and was at all relevant times:

- (a) a partnership conducting business, inter alia, within Victoria as solicitors; and
- (b) a person within the meaning of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and section 9 of the *Fair Trading Act*.

- 170 Clayton Utz was a member of the Oxiana Due Diligence Committee, and was represented on that committee by Mr Charles Rosedale, a partner of Clayton Utz and Mr Brendan Groves, also a partner of Clayton Utz, as his Alternate, and Ms Sachi Haga, an employee solicitor of Clayton Utz, as committee secretary.

- 171 The Oxiana Due Diligence Committee met regularly in the period 4 March 2008 to 24 April 2008, and these committee meetings were attended by Mr Rosedale and/or Mr Groves as representatives of Clayton Utz, along with Ms Haga of Clayton Utz in her capacity as committee secretary, and from time to time other representatives of Clayton Utz, including Mr Ron Smooker, Ms Rebecca Hiew and Ms Amanda Jones, also attended committee meetings (collectively the **Clayton Utz team**).
- 172 The role and function of Clayton Utz in respect of the Proposed Merger included:
- (a) to perform legal due diligence in respect of the Proposed Merger (**Legal Due Diligence**);
  - (b) to be a member of the Oxiana Due Diligence Committee;
  - (c) to prepare the Oxiana Due Diligence Planning Memorandum;
  - (d) as part of the Legal Due Diligence, to prepare a Due Diligence Legal Work Plan (**Legal Work Plan**) and then carry out the work required by the Legal Work Plan (**Required Legal Work**); and
  - (e) to prepare and provide to Oxiana a Legal Due Diligence Report (**Legal Due Diligence Report**),
- (collectively, the **Due Diligence Legal Services**).
- 173 The Oxiana Due Diligence Planning Memorandum, prepared by Clayton Utz, included the extract set out at paragraph 105 above.
- 174 The "*requirements of the Corporations Act*" with which the Oxiana Provided Information and the Scheme Booklet were required to comply, as set out in section 2.1 of Attachment 1 to the Clayton Utz Due Diligence Planning Memorandum, were the requirements set out in Part 5.1 of the *Corporations Act* and part 3 of Schedule 8 of the *Corporations Regulations 2001*.
- 175 The Oxiana Due Diligence Planning Memorandum attached "Materiality Guidelines" (Attachment 2), prepared by KPMG (also a member of the Due Diligence Committee), which set out materiality thresholds to assist members of the Oxiana Due Diligence Committee to focus due diligence investigations and to enable members of the Oxiana Due Diligence Committee to determine whether or not a matter needed to be disclosed in the Scheme Booklet or dealt with in some other way prior to the release of the Scheme Booklet.

176 The Oxiana Due Diligence Planning Memorandum also attached the Oxiana Due Diligence Work Plan (Attachment 3) which included the extract set out in paragraph 108 above.

177 The Oxiana Due Diligence Work Plan also included the following:

**"Conducting due diligence enquiries**

*The following approaches will be adopted in conducting legal, commercial and financial due diligence:*

(i) *Legal*

*A. Legal Due Diligence on Oxiana*

- (ii) *Clayton Utz will conduct legal due diligence by way of questionnaires to the Directors and senior management of the Company and it will review Minutes of Board meetings and Board Committee meetings in accordance with the Legal section of the Work Plan. These legal due diligence investigations will be focussed on confirming that the company has complied with its continuous disclosure obligations under the Corporations Act and ASX Listing Rule 3.1 and that there is no information required to be disclosed pursuant to section 713(5) of the Corporations Act as described in paragraph (b)(iii) above."*

178 At all relevant times in the period 1 July 2007 to 30 June 2008, Clayton Utz was engaged to provide legal services to Oxiana, including the Due Diligence Legal Services in the period from about February 2008 (the **Clayton Utz Engagement**).

**Particulars**

*The terms of the Clayton Utz Engagement were partly in writing and partly to be implied.*

*In so far as they were in writing, they were contained in or evidenced by Clayton Utz's Terms of Engagement for FY 2008 dated 27 June 2007, the Oxiana Due Diligence Planning Memorandum, the Legal Work Plan and the Legal Due Diligence Report.*

*In so far as the terms of the Clayton Utz Engagement were to be implied, the implication arose from Clayton Utz performing the Due Diligence Legal Services in the period from about February 2008 for reward, and/or to give business efficacy to the Clayton Utz Engagement.*

179 There were terms of the Clayton Utz Engagement inter alia that:



- (a) Clayton Utz would provide Oxiana with the legal services specified by Oxiana from time to time;
- (b) Clayton Utz would provide the Legal Due Diligence as part of the Oxiana due diligence process, being work specified by Oxiana;
- (c) As part of the Legal Due Diligence, Clayton Utz would prepare the Legal Work Plan and carry out the Required Legal Work;
- (d) The Required Legal Work as set out in the Legal Work Plan included that Clayton Utz would:
  - (i) *“Undertake a review of [Oxiana’s] continuous disclosure policy, to ensure that it is compliant with current ASIC and ASX policies”;*
  - (ii) *“Seek confirmation (by way of questionnaire) from the Directors, Company Secretary and senior management of [Oxiana] that the continuous disclosure policy is operating in accordance with its terms”;*
  - (iii) *“Seek confirmation (by way of questionnaire) from the Directors, Company Secretary and senior management of [Oxiana] that there is no matter in respect of the Business of the [Oxiana] Group which has not been previously disclosed to ASX and which a reasonable person would expect to have a material effect on the price or value of [Oxiana’s] securities, including having particular regard to the following areas: ...(d) entering into, amending and breaches of, Material contracts; ...(g) borrowings or other financial indebtedness of the [Oxiana] Group; ...”*
  - (iv) *“Review minutes of Board [of Oxiana] and other Committees of the Company for 2006 to date to seek to identify if there has been any matter in respect of the Business of the Group which has been disclosed in the minutes but which has not previously been disclosed to ASX and which a reasonable person would expect to have a material effect on the price or value of [Oxiana’s] ordinary shares”;*
  - (v) *“Enquire from the Directors and Company Secretary (by way of a questionnaire) whether there is any matter in respect of the Business of [Oxiana] which, pursuant to the exception in Listing Rule 3.1A to the continuous disclosure obligations, has not been notified to ASX and which investors and their professional advisers would reasonably require and*

*reasonably expect to find in the Oxiana Provided Information for the purpose of making an informed assessment of (i) the assets and liabilities, financial position and performance, profits and losses and prospects of [Oxiana] (ii) the rights and liabilities attaching to the Shares”;*

- (vi) *“Review the relevant financial documents and update (if necessary) the Memorandum dated 20 February 2008 from the Clayton Utz Banking and Finance Team”;*
- (e) As part of the Legal Due Diligence, and after carrying out the Required Legal Work, Clayton Utz would provide the Legal Due Diligence Report to the Oxiana Due Diligence Committee and Oxiana;
- (f) In the Legal Due Diligence Report, Clayton Utz would notify Oxiana of any material matters identified by it in the course of conducting its Legal Due Diligence and carrying out the Required Legal Work (including its review of relevant financing documents and of the Oxiana Board minutes for 2006 and onwards) which had not previously been disclosed by Oxiana to the ASX and which ought to have been so disclosed as part of Oxiana’s continuous disclosure obligations and/or included in the Scheme Booklet;
- (g) Clayton Utz would carry out the work required with professional skill and diligence.

180 By no later than February 2008 Clayton Utz had commenced carrying out the Due Diligence Legal Services.

181 From time to time in the period from early March 2008 to 24 April 2008 some or all of the Clayton Utz team attended Oxiana Due Diligence Committee meetings at Oxiana’s premises at Level 9, 31 Queen Street Melbourne.

182 At all relevant times Clayton Utz and the Clayton Utz team had access to:

- (a) Oxiana Board minutes from 2006 onwards; and
- (b) Oxiana Group relevant financing documents, including the LNSA, the Mezzanine Facility and the Intercreditor Deed.

183 As part of the Legal Due Diligence work and/or pursuant to the Clayton Utz Engagement, in late February 2008 Clayton Utz prepared a document entitled “Facility Overview Project Venice” (the **Clayton Utz Facility Overview Project Venice Document**).

184 “Project Venice” was the name given to the Proposed Merger.

185 The Clayton Utz Facility Overview Project Venice Document included the following:

**“2 Documents Reviewed**

*We have reviewed:*

- (a) *the Loan Note Subscription Agreement dated 20 June 2007 (as amended and restated on 28 February 2008) (the “Loan Note Subscription Agreement”);*
  - (b) *the US\$140 Facility Agreement between among others [Oxiana], RBS and ANZ dated 28 February 2008 (the “Mezzanine Facility Agreement”);*
  - (c) *the Intercreditor Deed (the “Intercreditor Deed”) dated 28 February 2008 between, among others, ANZ, RBS and [Oxiana]; and*
  - (d) *the Sepon Project – Common Terms Deed dated 8 June 2004 (as amended) (the “Sepon Common Terms Deed”)*
- (together the “Documents”).*

**3 Request**

*You have asked us to:*

...

- (b) *generally to give you an overview of the structure of the financing under each Document, and to summarise the types of representations and warranties, undertakings and events of default which apply under each Document.*

...

**6 Intercreditor Deed**

*The Intercreditor Deed sets out the terms which govern the relationship, and rights, of the senior lenders (under the Loan Note Subscription Agreement) and the mezzanine lenders (under the Mezzanine Facility Agreement).*

*Essentially, it*

- (a) *provides for amounts owed to the mezzanine lenders to be subordinated in rights of payment to amounts owed to senior lenders; and*
- (b) *sets out limited circumstances in which payments may be made to the mezzanine lenders whilst amounts are owed to the senior lenders.*

*Most importantly, from [Oxiana's] perspective, clause 4.6(a) of the Intercreditor Deed provides that each of the Obligors undertakes to procure a Refinancing on or before the Refinancing Date.*

*The term "Refinancing" is defined as a full refinancing of all amounts owed under the Loan Note Subscription Agreement and the Mezzanine Facility Agreement.*

*The term "Refinancing Date" is defined as 8 August 2008, or such later date as the Security Trustee (acting on the instructions of all of the senior financiers and the mezzanine financiers) may agree.*

*This document is a Finance Document for the purposes of the Loan Note Subscription Agreement and the Mezzanine Facility Agreement. Accordingly, failure to comply with this provision will trigger a breach under each of those documents (which will lead to an Event of Default if not cured within the relevant cure periods).*

186 The Board minutes of Oxiana, to which Clayton Utz had access in the course of undertaking and carrying out the Legal Due Diligence, and which Clayton Utz was required to review *"to seek to identify if there has been any matter in respect of the Business of the Group which has been disclosed in the minutes but which has not previously been disclosed to ASX and which a reasonable person would expect to have a material effect on the price or value of [Oxiana's] ordinary shares"*, included the minutes of the Oxiana Board meeting held on 19 February 2008 (the **19 February 2008 Board Minutes**).

187 The 19 February 2008 Board Minutes included the following:

*"A Board Paper titled 'Financing The Prominent Hill Cost To Complete', a letter from Clayton Utz dated 18 February 2008 titled 'Oxiana Limited – Mezzanine Facility' and draft Resolutions were all tabled.*

*Jeff Sells spoke to the various documents. In summary, most of the documentation for the financing of this US\$140M facility is complete. The facility expires in Q4 2008 and together with the initial US\$500M facility needs to be refinanced by 8 August 2008. By agreement with lenders, this date may be extended to 30 November 2008."*

- 188 The 19 February 2008 Board Minutes further noted that the directors of Oxiana had resolved to execute the relevant financing documents, including the Mezzanine Facility and the Intercreditor Deed.
- 189 Further, Clayton Utz acted for Oxiana in the negotiations of the terms of the Mezzanine Facility and the Intercreditor Deed, and accordingly were aware of their terms.
- 190 On or around 12 April 2008, Clayton Utz issued a final Legal Due Diligence Report to Oxiana and the Oxiana Due Diligence Committee.
- 191 The Legal Due Diligence Report stated that its purpose was *"to bring to the attention of the DDC [Oxiana Due Diligence Committee] any matters of a legal nature arising from the due diligence undertaken in accordance with the Legal Work Plan which are "Material" within the meaning set out in the KPMG Materiality letter in Attachment 2 of the Planning Memorandum"*.
- 192 In its Legal Due Diligence Report, Clayton Utz advised, inter alia, that it had:
- (a) reviewed minutes of the Board of Oxiana, including the 19 February 2008 Board Minutes, and other Committees of the company for 2006 to date to seek to identify if there has been any matter in respect of the Business of the Group which has been disclosed in the minutes but which has not previously been disclosed to ASX and which a reasonable person would expect to have a material effect on the price or value of Oxiana's ordinary shares; and
  - (b) reviewed the relevant financial documents and updated (if necessary) the Memorandum dated 20 February 2008 from Clayton Utz Banking and Finance Team.
- 193 The Legal Due Diligence Report stated that *"[b]earing in mind the Materiality Guidelines, on the basis of the responses to the Questionnaires and our additional investigations described in the Legal Work Plan, there are no outstanding Material matters, other than those set out below, which, in our opinion, should be brought to the attention of the DDC"*.
- 194 In its Legal Due Diligence Report, Clayton Utz did not notify or bring to the attention of Oxiana or the Oxiana Due Diligence Committee any matters in relation to the Financing Documents or their terms which it considered were material and ought to have been disclosed to the ASX in accordance with Oxiana's continuous disclosure obligations

under the *Corporations Act* and the ASX Listing Rules, and which had not previously been disclosed by the company to the ASX.

195 By its Legal Due Diligence Report:

- (a) Clayton Utz represented that there were no matters in relation to the Financing Documents or their terms which were material and which ought to be disclosed to the ASX in accordance with Oxiana's continuous disclosure obligations under the *Corporations Act* and the ASX Listing Rules, and which had not previously been disclosed by Oxiana to the ASX (the **First Clayton Utz Representation**).

#### Particulars

*The First Clayton Utz Representation was partly in writing and partly to be implied.*

*In so far as it was in writing, it was contained in the Legal Due Diligence Report.*

*In so far as it was to be implied, the implication arose from:*

- *the fact that one of the purposes of the Legal Due Diligence Report was to bring to the attention of Oxiana and the Oxiana Due Diligence Committee any matters relating to Oxiana or its business which were material and ought to have been disclosed to the ASX in accordance with Oxiana's continuous disclosure obligations under the Corporations Act and the ASX Listing Rules and/or included in the Scheme Booklet, and which had not previously been disclosed by the company to the ASX;*
- *the fact that Clayton Utz had reviewed the Financing Documents as part of its Legal Due Diligence; and*
- *the failure by Clayton Utz to include in the Legal Due Diligence report any statement to the effect that there were matters in relation to the Financing Documents which were material and ought to have been disclosed to the ASX in accordance with Oxiana's continuous disclosure obligations under the Corporations Act and the ASX Listing Rules and/or included in the Scheme Booklet, and which had not previously been disclosed by Oxiana to the ASX.*

- (b) Clayton Utz further represented (the **Further Clayton Utz Representations**) that:
  - (i) it had exercised reasonable skill and care in undertaking the Legal Due Diligence and in making the Representation in the Legal Due Diligence Report;
  - (ii) it had reasonable grounds for making the Representation in the Legal Due Diligence Report.

### Particulars

*The Further Clayton Utz Representations were to be implied from the conduct of Clayton Utz in making the First Clayton Utz Representation, coupled with the absence of any or any adequate reservation or qualification to the Representation.*

196 By making the First Clayton Utz Representation and the Further Clayton Utz Representations, Clayton Utz engaged in conduct:

- (a) in relation to financial products, within the meaning of sub-sections 1041H(1) and 1041H(2)(b) of the *Corporations Act*;
- (b) in trade or commerce, in relation to financial services, within the meaning of sub-section 12DA(1) of the *ASIC Act*; and/or
- (c) in trade or commerce, within the meaning of section 9 of the *Fair Trading Act*.

197 The First Clayton Utz Representation and the Further Clayton Utz Representations were continuing from the dates on which they were initially made throughout the period to at least the Scheme Implementation Date.

198 If, as alleged by the Applicant in the FASOC SFASOC:

- (a) there were matters with respect to the Financing Documents which were material and ought to have been disclosed by the Respondent to the ASX and/or included in the Scheme Booklet but which had not previously been disclosed by Oxiana to the ASX; and
  - (b) the Respondent contravened section 1041H of the *Corporations Act*, section 12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act*;
- or

(c) the Respondent contravened section 674 of the *Corporations Act*,

(all of which is denied), then:

- (i) The First Clayton Utz Representation was false and untrue;
- (ii) further or alternatively, in so far as the First Clayton Utz Representation constituted statements of opinion by Clayton Utz, Clayton Utz had no proper or reasonable basis for expressing those opinions;
- (iii) further or alternatively, the Further Clayton Utz Representations were false and untrue in that at the time of making the Legal Due Diligence Report:

- (A) Clayton Utz had not exercised reasonable skill and care in undertaking the Legal Due Diligence and in making the Representation in the Legal Due Diligence Report;

#### **Particulars**

*Had Clayton Utz used reasonable skill and care it:*

- *would not have made the First Clayton Utz Representation;*
- *would have included in the Legal Due Diligence Report a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the Application and ~~FASOC~~ SFASOC were material and ought to have been disclosed by Oxiana to the ASX, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk) which were material and ought to have been disclosed to the ASX in accordance with Oxiana's continuous disclosure obligations under the Corporations Act and the ASX Listing Rules, and which had not previously been disclosed by Oxiana to the ASX;*
- *would have recommended to Oxiana that it immediately disclose those matters to the ASX and*



*include and/or procure their inclusion in the Scheme Booklet.*

*Further, Clayton Utz failed to review or adequately review the Board minutes of Oxiana to identify if there were any matters in respect of the business of the Group which had been disclosed in the minutes but which had not previously been disclosed to the ASX and which a reasonable person would expect to have a material effect on the price or value of Oxiana's ordinary shares, and then to notify Oxiana of such matters so that it could take steps to disclose them to the ASX and/or include them or procure their inclusion in the Scheme Booklet.*

*Further, Clayton Utz failed to review or adequately review the Financing Documents and their terms to identify if there were matters in them which had not previously been disclosed to the ASX and which a reasonable person would expect to have a material effect on the price or value of Oxiana's ordinary shares, and then to notify Oxiana of such matters so that it could take steps to disclose them to the ASX and/or include them or procure their inclusion in the Scheme Booklet.*

(B) Clayton Utz did not have reasonable grounds for making the First Clayton Utz Representation in the Legal Due Diligence Report;

(iv) in the premises, the making of the First Clayton Utz Representation and the Further Clayton Utz Representations constituted conduct which was misleading or deceptive or likely to mislead or deceive in contravention of:

- (A) section 1041H of the *Corporations Act*;
- (B) section 12DA(1) of the *ASIC Act*; and/or
- (C) section 9 of the *Fair Trading Act*.

199 If the Respondent engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 1041H(1) of the *Corporations Act*, section

12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC, and if the Respondent contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage (all of which is denied), then by reason of:

- (a) Clayton Utz's role in the due diligence process, including undertaking the Legal Due Diligence and carrying out the Required Legal Work, and reviewing the Financing Documents and the 19 February 2008 Board Minutes;
- (b) the making by Clayton Utz of the First Clayton Utz Representation and the Further Clayton Utz Representations;
- (c) Clayton Utz's knowledge and/or conduct as alleged in paragraphs 169 to 198 above,
- (i) Clayton Utz was involved in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively was involved in some of those contraventions) within the meaning of sections 79 and 1041I of the *Corporations Act*, section 12GF of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (ii) further or alternatively, Clayton Utz was involved in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively was involved in some of those contraventions) within the meaning of sections 79 and 674(2A) of the *Corporations Act*, and thereby contravened section 674(2A) of the *Corporations Act*;
- (iii) Clayton Utz's involvement in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions), further or alternatively Clayton Utz's involvement in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions) and its resultant contravention of section 674(2A) of the *Corporations Act*, caused or contributed to the Applicant and Group Members' loss and damage; and

- (iv) by reason of Clayton Utz's involvement in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions), further or alternatively by reason of Clayton Utz's involvement in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively its involvement in some of those contraventions) and its resultant contravention of section 674(2A) of the *Corporations Act*, Clayton Utz (and each partner of Clayton Utz at the relevant time) is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act*, section 159 of the *Fair Trading Act* and/or section 1317HA of the *Corporations Act*.

200 Further or in the alternative, if the Respondent contravened section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC and contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage as alleged in paragraph 95 of the ~~FASOC~~ SFASOC (all of which is denied), then Clayton Utz's contraventions of:

- (a) section 1041H(1) of the *Corporations Act*;
- (b) section 12DA(1) of the *ASIC Act*; and/or
- (c) section 9 of the *Fair Trading Act*,

as alleged in sub-paragraph 198(iv) above, caused or contributed to the Applicant and Group Members' loss and damage, and Clayton Utz (and each partner of Clayton Utz at the relevant time) is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*.

### **Particulars**

*But for Clayton Utz's contravening conduct:*

- *Clayton Utz would have included in the Legal Due Diligence Report a statement to the effect that there were matters in relation to the Financing*

*Documents (which the Applicant alleges in the Application and ~~FASOC~~ SFASOC were material and ought to have been disclosed by Oxiana to the ASX, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk) which were material and ought to have been disclosed to the ASX in accordance with Oxiana's continuous disclosure obligations under the Corporations Act and the ASX Listing Rules and/or included in the Scheme Booklet, and which had not previously been disclosed by Oxiana to the ASX; further or alternatively in the absence of the making of the First Clayton Utz Representation and the Further Clayton Utz Representations, the Respondent would otherwise have become aware of this;*

- *Clayton Utz would have recommended to Oxiana that it immediately disclose those matters to the ASX and/or include or procure their inclusion in the Scheme Booklet; further or alternatively the Respondent would otherwise have become aware of the need to include those matters in the Scheme Booklet;*
- *Oxiana would have acted upon that recommendation and taken steps to immediately disclose those matters to the ASX and/or include or procure their inclusion in the Scheme Booklet; further or alternatively the Respondent would otherwise have become aware of the need to include those matters in the Scheme Booklet, and would have taken steps to include or procure the inclusion of those matters in the Scheme Booklet; and*
- *the contraventions alleged in the ~~FASOC~~ SFASOC would not have occurred and/or would not have caused the Applicant and Group Members to suffer any loss or damage.*

201 By reason of the matters alleged in paragraphs 199 and/or 200 above, if the Respondent is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage as alleged in the ~~FASOC~~ SFASOC (which is denied), then:

- (a) Clayton Utz is also liable to the Applicant and Group Members for the same loss and damage; and
- (b) Clayton Utz is a concurrent wrongdoer within the meaning of section 1041L(3) of the *Corporations Act*, section 12GP(3) of the *ASIC Act* and section 24AH(1) of the *Wrongs Act*.

202 Further the Respondent repeats paragraphs 134-135 above.

- 203 By reason of the matters alleged in paragraphs 199 to 202 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of those claims and each of them (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) is limited by section 1041N of the *Corporations Act* and/or section 12GR of the *ASIC Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of Clayton Utz's responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.
- 204 Alternatively to paragraph 203 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of such of those claims as are apportionable claims within the meaning of section 1041L(1) of the *Corporations Act*, section 12GP(1) of the *ASIC Act* or section 24AF of the *Wrongs Act* is limited (respectively) by section 1041N of the *Corporations Act*, section 12GR of the *ASIC Act* and section 24AI(1) of the *Wrongs Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of Clayton Utz's responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

#### IV GRANT SAMUEL

205 Grant Samuel & Associates Pty Ltd (ACN: 050 036 372) (**Grant Samuel**) is and was at all material times:

- (a) a corporation registered pursuant to the *Corporations Act* and capable of being sued;
- (b) conducting business, inter alia, within Victoria as a financial product adviser on securities and interests in managed investment schemes to wholesale and retail clients; and
- (c) a person within the meaning of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and section 9 of the *Fair Trading Act*.

- 206 At all relevant times in the period from no later than 26 March 2008 to 6 May 2008, Grant Samuel was engaged by Zinifex to prepare an independent expert's report for inclusion in the Scheme documentation to be sent by Zinifex to its shareholders (the **Grant Samuel Engagement**).

#### Particulars

*The terms of the Grant Samuel Engagement were partly in writing and partly to be implied.*

*In so far as they were in writing, they were contained in or evidenced by a letter from Grant Samuel to the directors of Zinifex dated 26 March 2008.*

*In so far as the terms of the Grant Samuel Engagement were to be implied, the implication arose to give business efficacy to the Grant Samuel Engagement.*

- 207 There were terms of the Grant Samuel Engagement *inter alia* that:
- (a) Grant Samuel would prepare an independent expert's report for inclusion in the Scheme documentation to be sent by Zinifex to its shareholders (the **Independent Expert's Report**);
  - (b) the Independent Expert's Report would state whether the Proposed Merger was in the best interests of Zinifex shareholders;
  - (c) in preparing the Independent Expert's Report, Grant Samuel would conduct its work in accordance with the guidelines and practices for the preparation of independent expert's reports in Australia; and
  - (d) Grant Samuel would prepare the Independent Expert's Report and carry out the work required to do so with professional skill and diligence.
- 208 At all relevant times Grant Samuel held itself out to Zinifex and its shareholders as having special skill, knowledge and expertise in relation to preparing the Independent Expert's Report and undertaking the work required to do so.
- 209 At the time of preparing and issuing the Independent Expert's Report, Grant Samuel knew or ought to have known that:

- (a) Zinifex's shareholders would rely upon Grant Samuel preparing the Independent Expert's Report and undertaking the work required to do so with reasonable skill and care;
- (b) Zinifex's shareholders would rely upon the advice and recommendations given and made by Grant Samuel in the Independent Expert's Report; and
- (c) Zinifex's shareholders would be likely to suffer economic loss if Grant Samuel did not prepare the Independent Expert's Report and undertake the work required to do so with reasonable skill and care.

210 By reason of the above, Grant Samuel owed Zinifex's shareholders (including the Applicant and Group Members) a duty to exercise reasonable skill and care when preparing and issuing the Independent Expert's Report and undertaking the work required to do so.

211 On or around 6 May 2008, with the consent and approval of Grant Samuel, the Independent Expert's Report (in both summary form and full form) was included in the Scheme Booklet and in the Scheme Book Supplement.

212 On or around 12 May 2008, with the consent and approval of Grant Samuel, Zinifex lodged with the ASX and distributed or made available to its shareholders the Scheme Booklet and the Scheme Book Supplement, which included the Independent Expert's Report (in both summary form and full form).

213 In the Independent Expert's Report, Grant Samuel stated inter alia that:

- (a) the terms of the merger were fair to Zinifex shareholders;
- (b) based on the share market values and Grant Samuel's assessment of the full underlying values of Zinifex and Oxiana, Zinifex shareholders' collective interest in MergeCo (ie the proposed merged entity) would be approximately proportionate to Zinifex's contribution of value to MergeCo; and
- (c) upon completion of the merger, MergeCo would have a strong balance sheet.

214 In the course of preparing the Independent Expert's Report, Grant Samuel had access to and/or utilised and relied upon (inter alia) the Q3 Report and Oxiana's Board papers.

### Particulars

*The Q3 Report was lodged with the ASX on 16 April 2008 and on the same date was presented to investors via webcast on Oxiana's website. At all relevant times on and after 16 April 2008, the Q3 Report was available for inspection on Oxiana's website.*

*Further, in the Independent Expert's Report (page 3), under the heading "Sources of Information", Grant Samuel stated:*

*"The following information was utilised and relied upon, without independent verification, in preparing this report:*

#### ***Publicly available information***

- ...
- *press releases, public announcements, media and analyst presentation material and other public filings by Zinifex and Oxiana, including information available on company websites."*

...

#### ***Non Public Information provided by Zinifex and Oxiana***

- ...
- *other confidential documents, board papers, presentations and working papers."*

215 Further:

- (a) The Q3 Report included the following statement:

#### ***"Debt facilities***

*During the quarter [ending on 31 March 2008] Oxiana drew down US\$200 million under an existing US\$525 million debt facility to finance the development of the Prominent Hill project. In addition, Oxiana has drawn down a newly established short-term debt*



*facility of US\$140 million, primarily for the financing of the Oxiana Prominent Hill Project."*

- (b) the minutes of the Oxiana Board meeting held on 19 February 2008 provided:

*"A Board Paper titled 'Financing The Prominent Hill Cost To Complete', a letter from Clayton Utz dated 18 February 2008 titled 'Oxiana Limited - Mezzanine Facility' and draft Resolutions were all tabled. Jeff Sells spoke to the various documents. In summary, most of the documentation for the financing of this US\$140M facility is complete. The facility expires in Q4 2008 and together with the initial US\$500M facility needs to be refinanced by 8 August 2008. By agreement with lenders, this date may be extended to 30 November 2008."*

- (c) The letter from Clayton Utz dated 18 February 2008 titled 'Oxiana Limited - Mezzanine Facility' attached to the Board Paper titled 'Financing The Prominent Hill Cost To Complete' dated 18 February 2008 stated:

*"...please note the obligation in clause 4.6 of the Intercreditor Deed...which requires that the Companies procure a refinancing of the Facility [the Mezzanine Facility](together with the Senior Facilities which were put in place in June 2007[the LNSA])by 8 August 2008 (or such later date as the Security Trustee acting on the instructions of all of the relevant financiers may agree)."*

216 In or by the Independent Expert's Report, Grant Samuel represented that:

- (a) upon completion of the merger, the merged entity would have a strong balance sheet (the **First Grant Samuel Representation**);

### Particulars

*The First Grant Samuel Representation was express and was contained in the Independent Expert's Report at pages 95 and 98 of the Scheme Booklet Supplement and in the Summary of the Independent Expert's Report at page 126 of the Scheme Booklet.*

- (b) the terms of the merger were fair to Zinifex shareholders (the **Second Grant Samuel Representation**);

### Particulars

*The Second Grant Samuel Representation was express and was contained in the Independent Expert's Report at pages 95 to 97 of the Scheme Booklet Supplement and in the Summary of the Independent Expert's Report at pages 125 and 126 of the Scheme Booklet.*

- (c) based on the share market values and Grant Samuel's assessment of the full underlying values of Zinifex and Oxiana, Zinifex shareholders' collective interest in the proposed merged entity would be approximately proportionate to Zinifex's contribution of value to the proposed merged entity (the **Third Grant Samuel Representation**);

### Particulars

*The Third Grant Samuel Representation was express and was contained in the Independent Expert's Report at pages 95 and 97 of the Scheme Booklet Supplement and in the Summary of the Independent Expert's Report at page 125 of the Scheme Booklet.*

- (d) Grant Samuel had exercised reasonable skill and care in preparing the Independent Expert's Report and in making each of the First, Second and Third Grant Samuel Representations, and that it had reasonable grounds for making each of those representations (the **Fourth Grant Samuel Representation**).

### Particulars

*The Fourth Grant Samuel Representation was implied from the conduct of Grant Samuel in making the First, Second and Third Grant Samuel Representations, coupled with the absence of any or any adequate reservation or qualification to those express representations, and from the context in which those express representations were made, namely, in an independent expert's report prepared by an independent expert for the purpose of making a recommendation to the shareholders of Zinifex as to whether the proposed merger was in their best interests.*

- 217 By making each of the First Grant Samuel Representation, the Second Grant Samuel Representation and the Third Grant Samuel Representation, Grant Samuel engaged in conduct:
- (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 section 12DA of the *ASIC Act*; and/or
  - (c) in trade or commerce, within the meaning of section 9 of the *Fair Trading Act*.
- 218 Each of the First Grant Samuel Representation, the Second Grant Samuel Representation and the Third Grant Samuel Representation was a continuing representation from the date on which it was made up to and including the Scheme Implementation Date.
- 219 In so far as the First Grant Samuel Representation, the Second Grant Samuel Representation and/or the Third Grant Samuel Representation were representations as to a future matter or future matters, the Respondent relies on section 12BB(1) of the *ASIC Act*, section 769C of the *Corporations Act* and section 4(1) of the *Fair Trading Act* (as then applicable).
- 220 If, as alleged by the Applicant in the FASOC SFASOC:
- (a) Oxiana made the First Balance Sheet Representation (as defined in paragraph 22(d) of the FASOC SFASOC) and that representation was

misleading or deceptive or likely to mislead or deceive (as alleged in paragraph 66 of the ~~FASOC~~ SFASOC);

- (b) Oxiana made the Implied First Balance Sheet Representation (as defined in paragraph 22(e) of the ~~FASOC~~ SFASOC) and that representation was misleading or deceptive or likely to mislead or deceive (as alleged in paragraph 66A of the ~~FASOC~~ SFASOC);
- (c) there were matters with respect to the Financing Documents (including the Current Liability Position, the Cross Default Risk and the 8 August Refinancing Deadline, as defined in the ~~FASOC~~ SFASOC) which were material and ought to have been disclosed by Oxiana to the ASX and/or disclosed by Oxiana to Grant Samuel and/or included by Oxiana in the Scheme Booklet as “Oxiana Information”, as defined in the Scheme Booklet, but had not been disclosed by Oxiana to the ASX or Grant Samuel or included by Oxiana in the Scheme Booklet;
- (d) those matters were relevant to, and would or should have impacted on, Grant Samuels’ assessment of the relative values contributed to the merged company by Zinifex and Oxiana shareholders, and Grant Samuels’ assessment of whether the Proposed Merger was in the best interests of Zinifex shareholders, such that had Grant Samuel considered those matters it would or should have:
  - (i) concluded, based on the share market values and/or Grant Samuel’s assessment of the full underlying values of Zinifex and Oxiana, that Zinifex shareholders’ collective interest in the proposed merged entity would be disproportionately low compared with Zinifex’s contribution of value to the proposed merged entity; and
  - (ii) concluded and recommended to Zinifex shareholders that the Proposed Merger was not in their best interests;
- (e) the terms of the merger were not fair to Zinifex shareholders;
- (f) Oxiana contravened section 1041H of the *Corporations Act*, section 12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act*; and
- (g) Oxiana contravened section 674 of the *Corporations Act*;

(all of which is denied), then:

- (i) the First Grant Samuel Representation was false and untrue;
- (ii) alternatively, in so far as the First Grant Samuel Representation was a representation as to a future matter or matters, it was made without reasonable basis;
- (iii) further or alternatively, in so far as the First Grant Samuel Representation constituted a statement of opinion by Grant Samuel, Grant Samuel had no proper or reasonable basis for expressing that opinion;
- (iv) further or alternatively, the Second Grant Samuel Representation was false and untrue;
- (v) alternatively, in so far as the Second Grant Samuel Representation constituted a statement of opinion by Grant Samuel, Grant Samuel had no proper or reasonable basis for expressing that opinion;
- (vi) further or alternatively, the Third Grant Samuel Representation was false and untrue;
- (vii) alternatively, in so far as the Third Grant Samuel Representation constituted a statement of opinion by Grant Samuel, Grant Samuel had no proper or reasonable basis for expressing that opinion;
- (viii) further or alternatively, the Fourth Grant Samuel Representation was false and untrue in that:
  - (A) Grant Samuel had not exercised reasonable skill and care in preparing the Independent Expert's Report and in making the First, Second and Third Grant Samuel Representations;

#### **Particulars**

*Had Grant Samuel exercised reasonable skill and care it:*

- *would not have made the First, Second or Third Grant Samuel Representations;*
- *would have concluded, based on the share market values and/or Grant Samuel's assessment of the full underlying values of*

*Zinifex and Oxiana, that Zinifex shareholders' collective interest in the proposed merged entity would be disproportionately low compared with Zinifex's contribution of value to the proposed merged entity;*

- *would have concluded and recommended to Zinifex shareholders that the proposed merger was not in their best interests.*

*Further, Grant Samuel was aware or ought to have been aware (at least) that during the quarter ending 31 March 2008, Oxiana drew down US\$200 million under an existing US\$525 million debt facility to finance the development of the Prominent Hill project, and in addition Oxiana had drawn down a newly established short-term debt facility of US\$140 million, primarily for the financing of the Oxiana Prominent Hill Project, which information was included in the Q3 Report which Grant Samuel "utilised and relied upon" in preparing the Independent Expert's Report. However, this information was not taken into account by Grant Samuel when it carried out its assessment of the relative values contributed to the merged entity by Oxiana and Zinifex. Further, if the currency and repayment dates of Oxiana's debt (and any cross default provisions in its debt facilities) were relevant to the assessment of the relative values contributed to the merged entity by Oxiana and Zinifex (as alleged by the Applicant in the ~~FASOC~~ SFASOC), and if Grant Samuel did not know that information*

*(which is not admitted), it ought to have made enquiries of Zinifex and/or Oxiana to obtain that information and ought to have then used that information in undertaking its assessment of the relative values contributed to the merged entity by Oxiana and Zinifex.*

*Further Grant Samuel was aware or ought to have been aware of the fact that the Mezzanine Facility and the LNSA needed to be refinanced by 8 August 2008 (and that this date may be extended to 30 November 2008, subject to lender approval) because this information was set out in the minutes of the Oxiana Board meeting held on 19 February 2008 and the letter from Clayton Utz dated 18 February 2008 titled 'Oxiana Limited - Mezzanine Facility' attached to the Board Paper titled 'Financing The Prominent Hill Cost To Complete' dated 18 February 2008, which information Grant Samuel "utilised and relied upon" in preparing the Independent Expert's Report.*

*Further particulars may be provided after discovery.*

- (B) Grant Samuel did not have reasonable grounds for making the First, Second or Third Grant Samuel Representations;
- (ix) in the premises, the making of each of the First, Second, Third and Fourth Grant Samuel Representations constituted conduct which was misleading or deceptive or likely to mislead or deceive in contravention of:
  - (A) section 1041H of the *Corporations Act*;
  - (B) section 12DA(1) of the *ASIC Act*; and/or
  - (C) section 9 of the *Fair Trading Act*;

- (h) further or alternatively, Grant Samuel in preparing and issuing the Independent Expert's Report and undertaking the work required to do so, breached its duty of care owed to the shareholders of Zinifex as alleged in paragraph 210 above;

### **Particulars**

*Had Grant Samuel exercised reasonable skill and care in preparing and issuing the Independent Expert's Report and undertaking the work required to do so, it:*

- *would not have made the First, Second, Third or Fourth Grant Samuel Representations;*
- *would have concluded, based on the share market values and/or Grant Samuel's assessment of the full underlying values of Zinifex and Oxiana, that Zinifex shareholders' collective interest in the proposed merged entity would be disproportionately low compared with Zinifex's contribution of value to the proposed merged entity;*
- *would have concluded and recommended to Zinifex shareholders that the proposed merger was not in their best interests.*

*Further, Grant Samuel was aware or ought to have been aware (at least) that during the quarter ending 31 March 2008, Oxiana drew down US\$200 million under an existing US\$525 million debt facility to finance the development of the Prominent Hill project, and in addition Oxiana had drawn down a newly established short-term debt facility of US\$140 million, primarily for the financing of the Oxiana Prominent Hill Project, which information was included in the Q3 Report which Grant Samuel "utilised and relied upon" in preparing the Independent Expert's Report. However, this information was not taken into account by Grant Samuel when it carried out its assessment of the relative values contributed to the merged entity by Oxiana*



*and Zinifex. Further, if the currency and repayment dates of Oxiana's debt (and any cross default provisions in its debt facilities) were relevant to the assessment of the relative values contributed to the merged entity by Oxiana and Zinifex (as alleged by the Applicant in the Statement of Claim), and if Grant Samuel did not know that information (which is not admitted), it ought to have made enquiries of Zinifex and/or Oxiana to obtain that information and ought to have then used that information in undertaking its assessment of the relative values contributed to the merged entity by Oxiana and Zinifex.*

*Further Grant Samuel was aware or ought to have been aware of the fact that the Mezzanine Facility and the LNSA needed to be refinanced by 8 August 2008 (and that this date may be extended to 30 November 2008, subject to lender approval) because this information was set out in the minutes of the Oxiana Board meeting held on 19 February 2008 and the letter from Clayton Utz dated 18 February 2008 titled 'Oxiana Limited - Mezzanine Facility' attached to the Board Paper titled 'Financing The Prominent Hill Cost To Complete' dated 18 February 2008, which information Grant Samuel "utilised and relied upon" in preparing the Independent Expert's Report.*

*Further particulars may be provided after discovery.*

221 Further, if the Respondent contravened section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC and contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage as alleged in paragraph 95 of the ~~FASOC~~ SFASOC (all of which is denied), then:

- (a) Grant Samuel's contraventions of:
  - (i) section 1041H of the *Corporations Act*;

(ii) section 12DA(1) of the *ASIC Act*; and/or

(iii) section 9 of the *Fair Trading Act*,

as alleged in sub-paragraph 220(g)(ix) above; and/or

(b) Grant Samuel's breach of the duty of care owed by it to Zinifex's shareholders (including the Applicant and Group Members), as alleged in sub-paragraph 220(h) above, caused or contributed to the Applicant and Group Members' loss and damage, and Grant Samuel is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act* and/or at common law

### Particulars

*But for Grant Samuel's contravening conduct and breach of duty of care:*

- *the Scheme would not have been approved by Zinifex's shareholders and accordingly would not have been implemented; and*
- *the contraventions alleged in the ~~FASOC~~ SFASOC would not have occurred and/or would not have caused the Applicant and Group Members to suffer any loss or damage.*

222 By reason of the matters alleged in paragraph 221 above, if the Respondent is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage as alleged in the ~~FASOC~~ SFASOC (which is denied), then:

- (a) Grant Samuel is also liable to the Applicant and Group Members for the same loss and damage; and
- (b) Grant Samuel is a concurrent wrongdoer within the meaning of section 1041L(3) of the *Corporations Act*, section 12GP(3) of the *ASIC Act* and section 24AH(1) of the *Wrongs Act*.

223 Further, the Respondent repeats paragraphs 134-135 above:

224 By reason of the matters alleged in paragraphs 221 to 223 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the

Respondent in respect of those claims and each of them (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) is limited by section 1041N of the *Corporations Act* and/or section 12GR of the *ASIC Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of Grant Samuel's responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

- 225 Alternatively to paragraph 224 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the FASOC SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of such of those claims as are apportionable claims within the meaning of section 1041L(1) of the *Corporations Act*, section 12GP(1) of the *ASIC Act* or section 24AF of the *Wrongs Act* is limited (respectively) by section 1041N of the *Corporations Act*, section 12GR of the *ASIC Act* and section 24AI(1) of the *Wrongs Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of Grant Samuel's responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

## V ZINIFEX AND MESSRS LARKIN, PRITCHARD KNIGHT AND BARNES

- 226 At all material times prior to 1 July 2008, Anthony Larkin, Dean Pritchard and Richard Knight (individually **Larkin**, **Pritchard** and **Knight**, and collectively the **Zinifex Directors**) were directors of Zinifex.

- 227 At all material times prior to 1 July 2008, Anthony Barnes (**Barnes**) was

- (a) the Chief Financial Officer of Zinifex; and
- (b) an officer of Zinifex within the meaning of section 9 of the *Corporations Act*.

- 228 Zinifex:

- (a) is and was at all material times a company registered under the *Corporations Act*; and

(b) was known as Zinifex Limited between 27 January 2004 and 20 July 2008; and

(c) is now known as OZ Minerals Holdings Limited.

229 Each of the Zinifex Directors, Barnes and Zinifex is and was at all relevant times a person within the meaning of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and section 9 of the *Fair Trading Act*.

230 Prior to the announcement of the Proposed Merger, Zinifex conducted a pre-merger due diligence of Oxiana and its business (the **Pre-Merger Due Diligence**).

231 As part of the Pre-Merger Due Diligence, Zinifex retained Allens (then known as Allens Arthur Robinson) (**Allens** or **AAR**), solicitors, to conduct legal due diligence investigations in connection with the Proposed Merger.

232 On or about 1 March 2008, Allens provided a Legal Due Diligence Report dated 1 March 2008 to Zinifex and the Board of Zinifex (the **Allens Legal Due Diligence Report**).

233 In conducting its legal due diligence, Allens on behalf of Zinifex had access to, and reviewed, each of the Financing Documents.

#### Particulars

*Allens Legal Due Diligence Report, Schedule 2, p.31.*

234 On 2 March 2008, a due diligence report (the **2 March 2008 Report**), was circulated by Francesca Lee (**Lee**), Zinifex's Group General Counsel and Company Secretary, to, amongst others, each of the Directors and Barnes for the purpose of a teleconference of the Zinifex Board to be held at noon that day.

#### Particulars

*The 2 March 2008 Report was circulated under cover of an email dated 2 March 2008 from Lee to, amongst others, the Directors and Barnes.*

235 The 2 March 2008 Report adopted the following pseudonyms:

(a) "Alpha" for Oxiana; and

(b) "Sigma" for Zinifex.

236 The 2 March 2008 Report:

- (a) contained the following statements:
  - (i) the \$140m Mezzanine Facility was expected to be refinanced in the fourth quarter of the 2008 calendar year (p.26);
  - (ii) the \$140 Mezzanine Facility would be drawn down “this week” and would be “a short term facility, i.e. 364 days” (p.31);
  - (iii) the existing \$500m “PH facility” (being, the LNSA) would need to be “refinanced at the same time as the mezzanine piece, i.e. refinancing of \$640m of debt will be required by November 2008” (p.31); and
  - (iv) if Sigma wanted details of Alpha’s banking arrangements, Sue-Ann [Higgins] (being the Group Counsel of Oxiana) would provide them with Alpha’s head facility agreement and major loan facility agreements (p.56);
- (b) extracted and included an email from Jeff Sells, the Chief Financial Officer of Oxiana, to amongst others, Barnes stating “*Australian and Mezz facilities [i.e. the LNSA and the Mezzanine Facility] are the most material and biggest issue is the need to refinance this year*” (p.43).

237 As part of the Proposed Merger process, in early March 2008 Zinifex established the Zinifex Due Diligence Committee, the purpose of which was to conduct due diligence “*to ensure, so far as is possible, that the Scheme Booklet is not misleading or deceptive or likely to mislead or deceive, and there are no material omissions of information from the Scheme Booklet*”.

### Particulars

*The purpose of the Zinifex Due Diligence Committee was stated in paragraph 1.7 of the Zinifex Due Diligence Planning Memorandum referred to in paragraph 240 below.*

238 The members of the Zinifex Due Diligence Committee included Zinifex, KPMG Transaction and Allens.

239 Zinifex was represented on the Zinifex Due Diligence Committee by:

- (a) the Zinifex Directors;
- (b) Barnes;
- (c) Lee; and

(d) Andrew Coles (Coles), being the Group Treasurer of Zinifex.

240 On or about 8 April 2008 the Zinifex Due Diligence Committee approved the Zinifex Due Diligence Planning Memorandum which included the following (in addition to the extract set out at paragraph 145 above):

- (a) *"Because Zinifex will be presenting the Scheme Booklet to the Court and its shareholders, and as it will become a part of the merged group following implementation of the Scheme and its directors will be appointed to the Oxiana board, Zinifex has an interest in ensuring, to the extent that it is able to do so on the basis of information available to it, that the Scheme Booklet (including the Oxiana Information) is not misleading or deceptive"* (paragraph 1.4);
- (b) *"Zinifex remains obliged to take all reasonable steps to ensure that the Scheme Booklet as a whole is not misleading or deceptive in any material respect and does not contain a material omission"* (paragraph 1.4);
- (c) *"[T]he ultimate body responsible for the due diligence procedure is the Zinifex Board"* (paragraph 1.7);
- (d) *"[T]he DDC [Due Diligence Committee] should be responsible for the systematic examination of all relevant material in the Scheme Booklet with a view to ensuring that when finalised:*
  - (i) *the Scheme Booklet contains no statements which are misleading or deceptive or likely to mislead or deceive in any material respect; and*
  - (ii) *there are no omissions from the Scheme Booklet of information that is required to ensure that it is not misleading or deceptive and not likely to mislead or deceive in any material respect"* (paragraph 1.7);
- (e) *"The DDC will:*
  - (a) *supervise the drafting of the Scheme Booklet;*
  - (b) *be responsible for establishing and overseeing the due diligence process, including verification of the information in the Scheme Booklet"* (paragraph 2.6);
- (f) *"Zinifex will be primarily responsible for the preparation of drafts of the Scheme Booklet, but will be assisted in this regard. All other Members*

*will be required to review and comment on those documents, subject to their particular area of expertise and accepted areas of responsibility" (paragraph 2.9);*

(g) *"The third phase of the work program for the DDC comprises:*

*(a) confirmation from those participating in the verification process that verification of the Scheme Booklet is complete and confirmation from all other Members that they are satisfied with such verification process;*

*(b) confirmation by all Members, subject to their own areas of expertise and accepted areas of responsibility, that all due diligence issues have been appropriately disclosed in the Scheme Booklet or classified as not material, and there are no outstanding due diligence issues to their knowledge;*

*(c) approval of the Scheme Booklet by all Members for submission to the Zinifex Board;*

*(d) signing of the Due Diligence Report addressed to the Zinifex Board confirming the above; and*

*(e) presenting the Due Diligence Report and the proposed final Scheme Booklet to the Zinifex Board." (paragraph 4.3);*

(h) *"Each director of Zinifex must be satisfied personally that the Scheme Booklet, when finalised, is not misleading or deceptive or likely to mislead or deceive and there is no material omission of information from the Scheme Booklet, to the extent required, and should ensure that appropriate records are kept showing the investigations they have undertaken in coming to that view" (paragraph 5.4).*

241 By reason of being a member of the Zinifex Due Diligence Committee and/or a representative of Zinifex on that committee, each of the Zinifex Directors and Barnes had a continuing obligation to ensure that he individually, and the Zinifex Due Diligence Committee collectively, were satisfied that the Scheme Booklet as a whole was not misleading or deceptive or likely to mislead or deceive and that there was no material omission of information from the Scheme Booklet.

### Particulars

*The Zinifex Due Diligence Committee Planning Memorandum. An email from Paul Washington of Allens to, amongst others, the Directors and Barnes dated 12 June 2008.*

- 242 On 4 April 2008, Allens sent a Supplementary Due Diligence report to Lee of Zinifex (the **Supplementary Legal Due Diligence Report**).

### Particulars

*The Supplementary Legal Due Diligence Report was attached to an email sent by Paul Washington of Allens to Lee on 4 April 2008.*

- 243 The Supplementary Legal Due Diligence Report included in Schedule 2 an “Oxiana Board Minutes Review”, which stated *inter alia* that a “material issue” was:

*“Prominent Hill Financing*

- *Most of the documentation for the financing of the US\$140 m facility [i.e. the Mezzanine Facility] is complete.*
- *The facility expires in Q4 2008 and together with the initial US\$500 m facility [i.e. the LNSA] needs to be refinanced by 8 August 2008 (this may be extended to 30 November 2008 – subject to lenders approval).*
- *The Board decided to execute further documents in relation to the financing.”*

### Particulars

*Supplementary Due Diligence Report, Schedule 2 (p.18).*

- 244 On 8 April 2008 there was a meeting of the Zinifex Due Diligence Committee (the **8 April 2008 DDC Meeting**) which was attended by, amongst others, Knight, Pritchard and Barnes.
- 245 At the 8 April 2008 DDC Meeting, Allens tabled Schedule 2 of the Supplementary Due Diligence Report, which included the statements set out in paragraph 243 above.

### Particulars

*Minutes of the Zinifex Due Diligence Committee Meeting dated 8 April 2008, item 9, which states inter alia: “Mr Henderson [of AAR] tabled a*



*copy of the AAR report on the review of the Oxiana board minutes, which had been undertaken as part of the merger legal due diligence”.*

*“Update on Close Out of Legal Due Diligence on Oxiana” to the Board of Zinifex dated 11 April 2008, which states inter alia: “Allens have reviewed the Oxiana Board minutes and papers for the period from the beginning of 2006 to March 2008. A summary of the issues arising from the review is contained in the Supplementary Legal Due Diligence Report [ie. the Supplementary Due Diligence Report]. This has been tabled at the Due Diligence Committee meeting.”*

246 On or about 29 April 2008, KPMG Transaction provided the Zinifex Due Diligence Committee (including the Directors and Barnes) with a due diligence report, which *inter alia* stated:

- (a) the LNSA was drawn down to US\$420 million as at 31 March 2008;
- (b) the Mezzanine Facility was fully drawn down to \$140 million and was recorded as current as it matured in November 2008; and
- (c) Oxiana management planned to refinance both facilities by November 2008.

#### **Particulars**

*Report of KPMG Transaction entitled “Project Venice Report on historical and pro forma historical financial information to be included in proposed explanatory memorandum” dated 29 April 2008.*

247 On 29 April 2008 there was a meeting of the Zinifex Due Diligence Committee attended by, amongst others, the Zinifex Directors and Barnes (the **29 April 2008 DDC Meeting**).

248 In advance of the 29 April 2008 DDC Meeting, the Zinifex Scheme Booklet in the form proposed to be provided to the Court for approval at the First Court Hearing (the **Final Scheme Booklet**) had been circulated to members of the Zinifex Due Diligence Committee.

#### **Particulars**

*Minutes of the 29 April 2008 DDC Meeting, item 3.*

- 249 At the 29 April 2008 DDC Meeting, the Chairman tabled the Final Scheme Booklet, and the Zinifex Due Diligence Committee approved the Final Scheme Booklet and agreed that it be provided to the Board of Zinifex with a recommendation that it be provided to the Court for approval at the First Court Hearing.

#### **Particulars**

*Minutes of the 29 April 2008 DDC Meeting, items 3 and 10.*

- 250 Also on 29 April 2008 the Zinifex Due Diligence Committee issued and signed its final Due Diligence Committee Report (**DDC Report**), which attached the Final Scheme Booklet.
- 251 Later on 29 April 2008 the Board of Zinifex met (the **29 April 2008 Board Meeting**).
- 252 Each of the Zinifex Directors was present at the 29 April 2008 Board Meeting, and Barnes was also in attendance at that meeting.
- 253 In the course of the 29 April 2008 Board Meeting, the Chairman tabled the DDC Report and the Final Scheme Booklet, for consideration by the Board.

#### **Particulars**

*Minutes of the 29 April 2008 Board Meeting, items 6 and 7.*

- 254 The DDC Report included a statement that “*the ultimate body responsible for the due diligence procedure is the board of Zinifex*”.
- 255 At the 29 April 2008 Board Meeting the Zinifex Board resolved to approve the Final Scheme Booklet for provision to the Court at the First Court Hearing, for its approval for dispatch to Zinifex’s shareholders.

#### **Particulars**

*Minutes of the 29 April 2008 Board Meeting, item 7.*

- 256 On or about 12 May 2008, Zinifex lodged with the ASX and made available to Zinifex’s shareholders:
- (a) the Scheme Booklet; and
  - (b) the Scheme Booklet Supplement.

257 On 8 June 2008, Ms Bronwyn Wellings of Zinifex forwarded Barnes and Coles an email from Ms Margaret Peril, the Group Treasurer of Oxiana, dated 6 June 2008 which stated *inter alia*:

*“Refinancing is not required until November. The date of 8/8 was inserted in the Intercreditor Deed because of the state of the credit crisis back in February. The banks wanted to make sure that we were using best endeavours to refinance, so the 8/8 date is really a check for them.”*

258 On 12 June 2008, Coles sent an email to Barnes, stating:

*“Does the matter of Oxiana’s best endeavours obligation to refinance two of its facilities by 8/8/08 need to be brought to the DDC’s attention in your view?”*

259 Also on 12 June 2008, Allens sent an email to each member of the Zinifex Due Diligence Committee (including the Zinifex Directors and Barnes):

- (a) stating that in the course of the Zinifex Due Diligence Committee meeting held on 29 April 2008, the Chairman noted that the Committee members had an ongoing obligation to report to the Chairman any material matters of which they became aware after the date of that meeting until final approval of the Scheme;
- (b) noting that the Scheme meeting of Zinifex shareholders was to be held on 16 June 2008; and
- (c) requesting each member of the Committee to confirm by return email that they were not aware of any new material matters that should be brought to the attention of the Chairman of the Committee by close of business on 13 June 2008.

260 On 16 June 2008, Barnes at 7.59 am sent an email to Allens in response to its 12 June 2008 email stating: *“I am not aware of any material issues on the Zinifex or Allegiance fronts”*.

261 Later on 16 June 2008, the Zinifex shareholders voted in favour of the Scheme.

262 By reason of the matters referred to in paragraphs 230 to 261 above, by no later than 8 April 2008, each of the Zinifex Directors, Barnes and Zinifex knew or ought to have known:

- (a) of the existence of, and key terms of, the Financing Documents;

- (b) the “Current Liability Position” as alleged and defined in paragraphs 18 and 19 of the FASOC SFASOC;
- (c) the “8 August Refinancing Deadline” as alleged and defined in paragraph 13 of the FASOC SFASOC; and
- (d) alternatively to (c), that Oxiana was under an obligation to refinance the LNSA and Mezzanine Facility by November 2008.

263 In the Applicant’s FASOC SFASOC, the Applicant alleges that each of the following Representations (as defined in the FASOC SFASOC) was made by Oxiana in or by the Scheme Booklet, either expressly or impliedly:

- (a) the “Continuous Disclosure Representation”;
- (b) the “No Material Change Representation”;
- (c) the “Current Liabilities Representation”;
- (d) the “Planned Refinance Representation”;
- (e) the “No Material Change Statement”; and
- (f) the “Continuous Disclosure Statement”,

collectively, the **Scheme Booklet Representations**.

264 If the Respondent contravened section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the FASOC SFASOC and contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the FASOC SFASOC, and if those contraventions caused the Applicant and Group Members’ loss and damage as alleged in paragraph 95 of the FASOC SFASOC, and if as alleged in the FASOC SFASOC there were matters in respect of the Financing Documents (including the matters referred to in paragraph 262 above) which were material and ought to have been disclosed in the Scheme Booklet but were not disclosed or adequately disclosed in the Scheme Booklet (all of which is denied), then:

- (a) Zinifex represented that the Scheme Booklet contained all information that was material to the making of a decision by a shareholder of Zinifex whether or not to agree to the Scheme that was within the knowledge of the directors of Zinifex and had not previously been disclosed to Zinifex shareholders (the **Zinifex Representation**);

### Particulars

*The Zinifex Representation was partly express and partly implied. In so far as it was express, it was contained in the Scheme Booklet, which stated (on page 2) that "the purpose of this document is to explain the terms of the Scheme and the manner in which the Scheme will be considered and implemented (if approved), and to provide such information as is prescribed or otherwise material to the decision of the Zinifex Shareholders whether or not to vote in favour of the Scheme. This document includes the Explanatory Statement required by section 412(1) of the Corporations Act in relation to the Scheme." In so far as the Zinifex Representation was implied, the implication arose from the terms of section 412(1) of the Corporations Act and the obligation imposed by that section on Zinifex in relation to the Scheme Booklet to set out in the Scheme Booklet "such information as is prescribed and any other information that is material to the making of a decision by a creditor or member whether or not to agree to the compromise or arrangement, being information that is within the knowledge of the directors and has not previously been disclosed to the creditors or members".*

- (b) by making the Zinifex Representation, Zinifex engaged in conduct:
  - (i) in relation to financial products, within the meaning of sub-sections 1041H(1) and 1041H(2)(b) of the *Corporations Act*;
  - (ii) in trade or commerce, in relation to financial services, within the meaning of sub-section 12DA(1) of the *ASIC Act*; and/or
  - (iii) in trade or commerce, within the meaning of section 9 of the *Fair Trading Act*;
- (c) the Zinifex Representation was continuing from the date on which it was initially made throughout the Relevant Period (as defined in the FASOC SFASOC);

- (d) the Zinifex Representation was misleading or deceptive or likely to mislead or deceive;

### **Particulars**

*The Zinifex Representation was untrue, because the Scheme Booklet did not contain all information that was material to the making of a decision by a shareholder of Zinifex whether or not to agree to the Scheme that was within the knowledge of the directors of Zinifex and had not previously been disclosed to Zinifex shareholders, and in particular did not contain the information set out in paragraph 262 above, which was within the knowledge of the directors of Zinifex.*

*Alternatively, in so far as the Zinifex Representation constituted a statement of opinion by Zinifex, Zinifex had no proper or reasonable basis for expressing that opinion.*

- (e) by reason of the matters pleaded in sub-paragraphs (a) to (d) above, by making the Zinifex Representation, Zinifex engaged in conduct in contravention of:
  - (i) section 1041H of the *Corporations Act*;
  - (ii) section 12DA(1) of the *ASIC Act*; and/or
  - (iii) section 9 of the *Fair Trading Act*,
 (the **First Zinifex Contravention**);
- (f) further or alternatively, Zinifex also made each of the Scheme Booklet Representations in the Scheme Booklet which it lodged with the ASX and distributed or made available to its shareholders;
- (g) for the purpose only of the claims made herein, the Respondent refers to and repeats the allegations made in paragraphs 69, 70, 74-76 and 77A-77C of the ~~FASOC~~ SFASOC (in so far as those paragraphs relate to the Scheme Booklet Representations);
- (h) by reason of the matters pleaded in sub-paragraphs (f) and (g) above, by making each of the Scheme Booklet Representations, Zinifex engaged in conduct in contravention of:

- (i) section 1041H of the *Corporations Act*;
- (ii) section 12DA(1) of the *ASIC Act*; and/or
- (iii) section 9 of the *Fair Trading Act*,

(the **Second Zinifex Contravention**);

- (i) the First Zinifex Contravention and/or the Second Zinifex Contravention caused or contributed to the Applicant and Group Members' loss and damage, and Zinifex is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (j) further (or alternatively), by reason of the matters alleged in paragraphs 230 to 261 above and the knowledge and/or conduct of the Zinifex Directors and Barnes alleged in those paragraphs, each of the Zinifex Directors and Barnes was involved in the First Zinifex Contravention and/or was involved in the Second Zinifex Contravention within the meaning of sections 79 and 1041I of the *Corporations Act*, section 12GF of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (k) the Zinifex Directors' and Barnes' involvement in the First Zinifex Contravention and/or their involvement in the Second Zinifex Contravention caused or contributed to the Applicant and Group Members' loss and damage, and each of the Zinifex Directors and Barnes is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (l) further or alternatively, by reason of the matters alleged in paragraphs 230 to 261 above and the knowledge and/or conduct of the Zinifex Directors, Barnes and Zinifex alleged in those paragraphs, each of the Zinifex Directors, Barnes and Zinifex was involved in the contraventions of Oxiana alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC in so far as those contraventions are based on the making of the Scheme Booklet Representations or any one or more of them (the **Scheme Booklet Contraventions**);

- (m) the involvement of the Zinifex Directors, Barnes and Zinifex in the Scheme Booklet Contraventions caused or contributed to the Applicant and Group Members' loss and damage, and each of the Zinifex Directors, Barnes and Zinifex is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*.

265 Further or in the alternative, at all relevant times Zinifex and the Zinifex Directors knew or ought to have known that:

- (a) Zinifex's shareholders would rely on Zinifex and the Zinifex Directors to exercise reasonable care and skill in:
  - (i) preparing and/or approving the Scheme Booklet and making it available to Zinifex's shareholders;
  - (ii) ensuring that the Scheme Booklet set out the information required to be included in the Scheme Booklet by sub-section 412(1)(a) of the *Corporations Act* and/or by any other provision of the *Corporations Act* or by any *ASIC Regulatory Guide* (the **Required Information**);
- (b) Zinifex's shareholders would rely on the information provided to them by Zinifex in the Scheme Booklet; and
- (c) Zinifex's shareholders would be likely to suffer economic loss if:
  - (i) the Scheme Booklet was not prepared and/or approved by Zinifex and the Zinifex Directors with reasonable skill and care; and/or
  - (ii) Zinifex and the Zinifex Directors did not exercise reasonable care and skill to ensure that the Scheme Booklet set out the Required Information.

266 By reason of the above, Zinifex and the Zinifex Directors owed Zinifex's shareholders (including the Applicant and Group Members) a duty to exercise reasonable skill and care in:

- (a) preparing and/or approving the Scheme Booklet and making it available to Zinifex's shareholders; and
- (b) ensuring that the Scheme Booklet set out the Required Information.



- 267 Zinifex and the Zinifex Directors breached their duty of care owed to Zinifex's Shareholders as alleged in paragraph 266 above.

### Particulars

*Had Zinifex and the Zinifex Directors exercised reasonable skill and care in preparing and/or approving the Scheme Booklet and making it available to Zinifex's shareholders and ensuring that the Scheme Booklet set out the Required Information, they would have included in the Scheme Booklet the information referred to in paragraph 266 above, which information was known to the Zinifex Directors.*

- 268 Zinifex's and the Zinifex Directors' breach of duty as alleged in paragraph 267 above caused or contributed to the Applicant and Group Members' loss and damage, and Zinifex and the Zinifex Directors are liable to the Applicant and Group Members for that loss and damage.
- 269 By reason of the matters alleged in paragraphs 264 and 268 above, if the Respondent is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage as alleged in the FASOC SFASOC (which is denied), then:
- (a) Zinifex, Barnes and the Zinifex Directors are also liable to the Applicant and Group Members for the same loss and damage; and
  - (b) Zinifex, Barnes and the Zinifex Directors are concurrent wrongdoers within the meaning of section 1041L(3) of the *Corporations Act*, section 12GP(3) of the *ASIC Act* and section 24AH(1) of the *Wrongs Act*.
- 270 Further, the Respondent repeats paragraphs 134-135 above.
- 271 By reason of the matters alleged in paragraphs 269 to 270 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the FASOC SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of those claims and each of them (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) is limited by section 1041N of the *Corporations Act* and/or section 12GR of the *ASIC Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just, having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of the responsibility of Zinifex, the Zinifex Directors and Barnes for that damage or loss and the extent of the responsibility of the other

Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

- 272 Alternatively to paragraph 271 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of such of those claims as are apportionable claims within the meaning of section 1041L(1) of the *Corporations Act*, section 12GP(1) of the *ASIC Act* or section 24AF of the *Wrongs Act* is limited (respectively) by section 1041N of the *Corporations Act*, section 12GR of the *ASIC Act* and section 24AI(1) of the *Wrongs Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just, having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of the responsibility of Zinifex, the Zinifex Directors and Barnes for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

## VI MESSRS HEGARTY, JAMIESON, BEEVOR, CUSACK AND SELLS

- 273 At all relevant times Mr Owen Hegarty (**Hegarty**) was:

- (a) the Managing Director and Chief Executive Officer of Oxiana; and
- (b) a person within the meaning of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and section 9 of the *Fair Trading Act*.

- 274 At all relevant times Mr Brian Jamieson (**Jamieson**), Mr Ronald Beevor (**Beevor**) and Mr Barry Cusack (**Cusack**) each was:

- (a) a director of Oxiana; and
- (b) a person within the meaning of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and section 9 of the *Fair Trading Act*.

- 275 In this Further Amended Defence, Hegarty, Jamieson, Beevor and Cusack are referred to collectively as "the **Oxiana Directors**".

- 276 At all relevant times Mr Jeffrey Sells (**Sells**) was:

- (a) the Chief Financial Officer of Oxiana;
- (b) an officer of Oxiana within the meaning of section 9 of the *Corporations Act*; and

- (c) a person within the meaning of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and section 9 of the *Fair Trading Act*.

277 At all relevant times, each of the Oxiana Directors and Sells had knowledge of:

- (a) the Financing Documents and their terms;
- (b) the fact that prior to 1 July 2008 there had not been an extension of the Refinancing Date, which remained 8 August 2008;
- (c) the fact that as at 31 March 2008 Oxiana Finance had drawn down US\$220 million under the Prominent Hill Loan Note Facility and US\$200 million under the Revolving Loan Note Facility (ie. under the LNSA);
- (d) the fact that as at 31 March 2008, Oxiana had drawn down US\$140 million under the Mezzanine Facility.

#### **Particulars**

*The Oxiana Directors had such knowledge by virtue of their positions as directors of Oxiana and/or by virtue of the provision of this information to them in Board papers and/or at Board meetings in the relevant period, including the Oxiana Board meeting held on 19 February 2008 at which the Board resolved to approve Oxiana entering into and executing the Intercreditor Deed, the amended and restated LNSA and the Mezzanine Facility. At that Board meeting Sells spoke to the Financing Documents. The minutes of the Board meeting state inter alia: "A Board Paper titled 'Financing The Prominent Hill Cost To Complete', a letter from Clayton Utz dated 18 February 2008 titled 'Oxiana Limited - Mezzanine Facility' and draft Resolutions were all tabled. Jeff Sells spoke to the various documents. In summary, most of the documentation for the financing of this US\$140M facility is complete. The facility expires in Q4 2008 and together with the initial US\$500M facility needs to be refinanced by 8 August 2008. By agreement with lenders, this date may be extended to 30 November 2008."*

*Prior to the 19 February 2008 Board meeting, the members of the Board were provided with a Board Paper providing background on the financing of Prominent Hill and attaching draft Financing Documents (being drafts of the amended and restated LNSA, Intercreditor Deed and Mezzanine Facility).*

*Sells had such knowledge by virtue of his position as Chief Financial Officer of Oxiana. Further, as set out above, he spoke to the Financing Documents at the Board meeting on 19 February 2008.*

- 278 Oxiana provided certain information to Zinifex for inclusion in the Scheme Booklet, which was defined in the Scheme Booklet as the “Oxiana Information” (the **Oxiana Information** or the **Oxiana Provided Information**).
- 279 The Scheme Booklet also included combined information regarding the combined Oxiana/Zinifex group after the merger and risk factors associated with the merger of Oxiana with Zinifex (**Merged Group Information**).
- 280 Jamieson was a representative of Oxiana on the Oxiana Due Diligence Committee in his capacity as non-executive director of Oxiana, and was also Chairman of the Oxiana Due Diligence Committee.
- 281 Sells was a representative of Oxiana on the Oxiana Due Diligence Committee in his capacity as Chief Financial Officer of Oxiana.
- 282 The Oxiana Due Diligence Committee was responsible for establishing and overseeing the due diligence process and supervising the drafting of the Oxiana Information to be included in the Scheme Booklet according to the requirements of the *Corporations Act*.
- 283 On or about 3 April 2008, the members of the Oxiana Due Diligence Committee entered into the Oxiana Due Diligence Planning Memorandum, which included the following (in addition to the extract set out in paragraph 105 above):

- (a) *“As the consideration to be offered under the Scheme will be shares in Oxiana, part of the information that is material to the making of a decision by a Zinifex shareholder whether to approve the Scheme includes information, equivalent to prospectus content and takeover bidder’s statement requirements, regarding Oxiana and the shares in Oxiana (**‘Oxiana Provided Information’**). ... In addition, ... Oxiana and Zinifex will jointly develop and*

*agree the form and content of the information in the Scheme Booklet regarding the combined Oxiana/Zinifex group after the merger ('Merged Entity') and the risk factors associated with the merger of Oxiana and Zinifex ('Combined Information')."* (paragraph 2.1);

- (b) *"The Committee will be responsible for establishing and overseeing the due diligence process and supervising the drafting of the Oxiana Provided Information according to the requirements of the Corporations Act."* (paragraph 3.2);
- (c) *"Oxiana and its advisers will be responsible for preparing or reviewing the preparation of drafts of the Oxiana Provided Information. The Committee members will review, subject to and from the perspective of their expertise and accepted area of responsibility, a final draft of the Oxiana Provided Information to ensure that all material issues identified in the due diligence process have been included in the Oxiana Provided Information and must draw to the attention of those responsible for preparation of the Oxiana Provided Information any material matters which have been omitted or not adequately disclosed or any material misstatements in the draft Oxiana Provided Information. Ultimately the Oxiana Provided Information is the responsibility of Oxiana, not the Committee, and it will be the decision of the Oxiana Board as to whether a matter should be included in the Oxiana Provided Information."* (paragraph 6.2);
- (d) *"Oxiana and Zinifex will jointly develop and agree the form and content of the Combined Information. The Combined Information is the joint responsibility of Oxiana and Zinifex and it will be the ultimate decision of the Oxiana Board and Zinifex Board as to whether a matter should be included in the Combined Information."* (paragraph 6.3);
- (e) *"The Oxiana Provided Information to be included in the Scheme Booklet must be verified and that information must be approved by the Board."* (paragraph 7.1);
- (f) *"The verification process is designed to ensure that:*
  - (a) *each material statement contained in the Oxiana Provided Information is true, correct and not misleading;*

- (b) *there is a reasonable basis for each such material statement included in the Oxiana Provided Information; and*
- (c) *there are no material omissions from the Oxiana Provided Information."* (paragraph 7.2);
- (g) *"Each material statement in the Oxiana Provided Information will be verified. ... To a substantial degree, the verification of information will be made by the appropriate executives of Oxiana, who have knowledge of the relevant matters. ... DDC members, management of Oxiana and members of the Board may be required to verify statements in the Oxiana Provided Information and sign 'verification' certificates."* (paragraph 7.3);
- (h) *"On completion of the above, a verified copy of the Oxiana Provided Information together with copies of the certificates signed by Oxiana's management, will be delivered to the Committee which will then deliver it to each member of the Oxiana Board. The ultimate decision as to the adequacy of the Oxiana Provided Information will be for the Oxiana Board to make."* (paragraph 7.4).

284 On 24 April 2008 the Oxiana Due Diligence Committee issued its "Final Report of the Due Diligence Committee" addressed to the Board of Oxiana and each member and each member's representative of the Oxiana Due Diligence Committee (the **Oxiana DDC Final Report**).

285 The Oxiana DDC Final Report was signed by, amongst others, Jamieson and Sells in their capacity as representatives of Oxiana on the Oxiana Due Diligence Committee.

286 In the Oxiana DDC Final Report, each member representative of Oxiana (including Jamieson and Sells) confirmed on behalf of Oxiana that nothing had come to its attention that caused it to believe:

- (a) that the Oxiana Provided Information contained any statement that was false, misleading or deceptive;
- (b) having regard to the requirements of the *Corporations Act* and the ASX Listing Rules, that there was a material omission from the Oxiana Provided Information; or

- (c) that the issue of the Oxiana Provided Information constituted conduct that was misleading or deceptive or likely to mislead or deceive.

287 The Oxiana Board Charter approved by the Board of Oxiana on 17 December 2007 (and applicable at all relevant times) provided inter alia that the Board's primary responsibilities included "[a]pproving and monitoring internal and external financial and other reporting, including reporting to shareholders, the ASX and other stakeholders" (paragraph 5.3(a)) and "[e]valuating the Company's compliance with corporate governance standards" (paragraph 5.6(b)).

288 At all relevant times Oxiana had a Continuous Disclosure Policy (the **Continuous Disclosure Policy**), the purpose of which was to outline a procedure dealing with the timely disclosure of information which affects investment decisions on a continuous basis and ensuring that the company achieved the requirements set down under ASX Listing Rule 3.1.

289 The Continuous Disclosure Policy provided inter alia that:

- (a) the Managing Director was accountable to the Board for the implementation and operation of the Continuous Disclosure Policy;
- (b) the Company Secretary had responsibility for making sure the Company complied with continuous disclosure requirements and overseeing and coordinating disclosure of information to the ASX;
- (c) as soon as a Director or executive officer became aware of information that may need to be disclosed to the market, he/she should advise the Managing Director or the Company Secretary without delay. The Managing Director had the overall responsibility for disclosure however he may delegate this responsibility to the General Manager Corporate Development and Company Secretary as appropriate.

290 If as alleged in the FASOC SFASOC the "8 August Refinancing Deadline", the "Current Liability Position", the "Cross Default Risk", the "Oxiana Risks", the "Fair Consideration Information" and the "Merger Risks" was information of which the Respondent was "aware" within the meaning of ASX Listing Rule 19.12 at the times alleged in the FASOC SFASOC (which is denied), then by reason of the matters alleged in paragraph 277 above each of the Oxiana Directors and Sells was also aware of that information at those times.

291 In the Applicant's ~~FASOC~~ SFASOC, the Applicant alleges that each of the following Representations (as defined in the ~~FASOC~~ SFASOC) was made by Oxiana in or by documents published and/or issued by the company, either expressly or impliedly:

- (a) the "Fair Market Price Representation", in so far as that alleged representation is said to have been made in or by the 3 March Announcement;
- (b) the "Relative Market Value Representation" (which is alleged to have been made in or by the 3 March Announcement);
- (c) the "First Balance Sheet Representation" (which is alleged to have been made in or by the 3 March Announcement);
- (d) the "Implied First Balance Sheet Representation" (which is alleged to have been made in or by the 3 March Announcement);
- (e) the "Continuous Disclosure Representation" (which is alleged to have been made in or by the Oxiana Information included in the Scheme Booklet);
- (f) the "No Material Change Representation" (which is alleged to have been made in or by the Oxiana Information included in the Scheme Booklet);
- (g) the "Current Liabilities Representation" (which is alleged to have been made in or by the Oxiana Information included in the Scheme Booklet);
- (h) the "Planned Refinance Representation" (which is alleged to have been made in or by the Oxiana Information included in the Scheme Booklet);
- (i) the "No Material Change Statement" (which is alleged to have been made in or by the Oxiana Information included in the Scheme Booklet);
- (j) the "Continuous Disclosure Statement" (which is alleged to have been made in or by the Oxiana Information included in the Scheme Booklet); and
- (k) the "Financing Risks Statement" (which is alleged to have been made in or by the Oxiana Information included in the Scheme Booklet).

292 The terms of the 3 March Announcement were approved by the Oxiana Directors at a meeting of the Board of directors of Oxiana on 2 March 2008.



### Particulars

*Minutes of Oxiana Board meeting held on 2 March 2008, page 2.*

- 293 On 28 April 2008 Jamieson, Beevor and Cusack signed a circular resolution approving the Oxiana Provided Information for inclusion in the Scheme Booklet (the **Circular Resolution**).
- 294 On 29 April 2008 Hegarty also signed the Circular Resolution.
- 295 In the Applicant's FASOC SFASOC, the Applicant alleges that each of the following Representations was made by Hegarty on behalf of Oxiana:
- (a) the "Fair Market Price Representation" (in so far as that alleged representation is said to have been made in the course of the 3 March Briefing);
  - (b) the "First 16 April Debt Representation";
  - (c) the "Second 16 April Debt Representation";
  - (d) the "Third 16 April Debt Representation";
  - (e) the "Debt Under Control Opinion Representation";
  - (f) the "Comfortable Debt Position Opinion Representation";
  - (g) the "AGM Representation";
  - (h) the "AGM Debt Opinion Representation";
  - (i) the statements made in the "First 16 April Debt Position Exchange";
  - (j) the statements made in the "Second 16 April Debt Position Exchange";
  - and
  - (k) the "AGM Statement",
- (collectively, the **Hegarty Representations**).
- 296 In his capacity as Chief Financial Officer and/or as a representative of Oxiana on the Oxiana Due Diligence Committee, Sells:
- (a) attended Oxiana Due Diligence Committee meetings on 6 March 2008, 13 March 2008, 20 March 2008, 27 March 2008, 11 April 2008 and 24 April 2008;

- (b) on 8 March 2008 was sent a copy of the first draft of the Oxiana Provided Information attached to an email of that date from Sue-Ann Higgins (**Higgins**), Oxiana Group Counsel, together with instructions on his obligations to verify certain material;
- (c) on 28 March 2008 was sent a revised draft of the Scheme Booklet attached to an email of that date from Higgins, to which Sells responded by email to Higgins on 30 March 2008: *"The comments about refinance risk and hedging on Oxiana are not correct. I need to have a chat to you to get them amended."*;
- (d) was involved in the drafting of Section 9.3(h) in the "Financing Risks" section of the Scheme Booklet;
- (e) on or about 1 April 2008 amended the draft "Financing Risk" section of the draft Scheme Book;
- (f) on 11 April 2008 signed a letter addressed to the Oxiana Board in which he stated:

*"I have read the paragraphs of Section 9 of the Scheme Booklet containing the Risks Factors allocated to me in Schedule 1 of this Letter [which included "Section 9.3(h) Financing Risks"] ('Relevant Sections').*

*In my opinion, in respect of the Risks Factors as they relate to Oxiana and, based on my enquiries and knowledge as at the date of this Letter in respect of the Risks Factors as they relate to the Merged Group, as at the date of this Letter:*

- (a) *the Risk Factors are true and accurate and are not false, misleading or deceptive or likely to mislead or deceive; and*
- (b) *there are no material risks relating to Oxiana or the Merged Group or the impact of the proposed Merger on Oxiana or the Merged Group which are not fairly described in section 9 of the Scheme Booklet."*;
- (g) was the responsible party for verifying section 7.8 in the Scheme Booklet entitled *"Material Changes in the Financial Position of Oxiana"*; and

- (h) on 11 April 2008, signed a Verification Certificate addressed to the Oxiana Due Diligence Committee members verifying that:
- (i) the part or parts of the Oxiana Provided Information which were material and for which Sells had been allocated responsibility (which included section 7.8 of the Scheme Booklet) were true and accurate;
- (ii) there were no matters which were required to be included in the Oxiana Provided Information by the *Corporations Act* which had been omitted from the statements that Sells was responsible for verifying (which included the statements in section 7.8 of the Scheme Booklet); and
- (iii) the statements which Sells was responsible for verifying (which included the statements in section 7.8 of the Scheme Booklet) were not false, misleading or deceptive or likely to mislead or deceive.

297 If the Respondent contravened section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC and contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage as alleged in paragraph 95 of the ~~FASOC~~ SFASOC (all of which is denied), then:

- (a) by reason of the matters alleged in paragraphs 277 and 290 to 294 above and (in the case of Jamieson) also paragraphs 280 and 282 to 286 above, each of the Oxiana Directors was involved in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC in so far as those contraventions are based on any one or more of the "Fair Market Price Representation", the "Relative Market Value Representation", the "First Balance Sheet Representation", the "Implied First Balance Sheet Representation", the "Continuous Disclosure Representation", the "No Material Change Representation", the "Current Liabilities Representation", the "Planned Refinance Representation", the "No Material Change Statement" and the "Continuous Disclosure Statement" (alternatively each of the Oxiana Directors was involved in one or more of those contraventions) within the meaning of sections 79 and 1041I of the *Corporations Act*, section 12GF of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;

- (b) further or alternatively, by reason of the matters alleged in paragraphs 277 and 290 to 295 above, Hegarty was involved in the contraventions alleged in paragraphs 77 and 77C of the FASOC SFASOC in so far as those contraventions are based on one or more of the “Fair Market Price Representation”, the “First 16 April Debt Representation”, the “Debt Under Control Opinion Representation”, the “Second 16 April Debt Representation”, the “Third 16 April Debt Representation”, the “Comfortable Debt Position Opinion Representation”, the “AGM Representation”, the “AGM Debt Opinion Representation”, the “First 16 April Debt Position Exchange”, the “Second 16 April Debt Position Exchange” and the “AGM Statement” (alternatively Hegarty was involved in one or more of those contraventions) within the meaning of sections 79 and 1041I of the *Corporations Act*, section 12GF of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (c) further or alternatively, by reason of the matters alleged in paragraphs 277 and 287 to 294 above and (in the case of Jamieson) also paragraphs 280 and 282 to 286 above, each of the Oxiana Directors was involved in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the FASOC SFASOC (alternatively each of the Oxiana Directors was involved in one or more of those contraventions) within the meaning of sections 79 and 674(2A) of the *Corporations Act*, and thereby contravened section 674(2A) of the *Corporations Act*;
- (d) the Oxiana Directors’ involvement in the contraventions alleged in paragraphs 77 and 77C of the FASOC SFASOC (alternatively their involvement in one or more of those contraventions), as alleged in subparagraphs (a),(b) (in the case of Hegarty) and (c) above, caused or contributed to the Applicant and Group Members’ loss and damage, and each of the Oxiana Directors is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (e) further or alternatively the Oxiana Directors’ involvement in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the

~~FASOC~~ SFASOC (alternatively their involvement in one or more of those contraventions) and their resultant contravention of section 674(2A) of the *Corporations Act*, as alleged in sub-paragraph (c) above, caused or contributed to the Applicant and Group Members' loss and damage, and each of the Oxiana Directors is liable to the Applicant and Group Members for that loss and damage pursuant to section 1317HA of the *Corporations Act*;

- (f) further or alternatively, by reason of the matters alleged in paragraphs 277, 281 to 290 and 296 above, Sells was involved in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively Sells was involved in one or more of those contraventions) within the meaning of sections 79 and 674(2A) of the *Corporations Act*, and thereby contravened section 674(2A) of the *Corporations Act*;
- (g) further or alternatively, by reason of the matters alleged in paragraphs 277, 281 to 290 and 296 above, Sells was involved in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC in so far as those contraventions are based on one or more of the "Planned Refinance Representation", the "Financing Risks Statement", the "No Material Change Statement", the "No Material Change Representation", the "Current Liabilities Representation", the "Continuous Disclosure Representation" and the "Continuous Disclosure Statement", (alternatively Sells was involved in one or more of those contraventions) within the meaning of sections 79 and 1041I of the *Corporations Act*, section 12GF of the *ASIC Act* and/or section 159 of the *Fair Trading Act*;
- (h) Sells' involvement in the contraventions alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC (alternatively his involvement in one or more of those contraventions) and his resultant contravention of section 674(2A) of the *Corporations Act*, as alleged in sub-paragraph (f) above, caused or contributed to the Applicant and Group Members' loss and damage, and Sells is liable to the Applicant and Group Members for that loss and damage pursuant to section 1317HA of the *Corporations Act*;
- (i) further or alternatively, Sells' involvement in the contraventions alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC, in so far as those

contraventions are based on one or more of the “Planned Refinance Representation”, the “Financing Risks Statement”, the “No Material Change Statement”, the “No Material Change Representation”, the “Current Liabilities Representation”, the “Continuous Disclosure Representation” and the “Continuous Disclosure Statement” (alternatively his involvement in one or more of those contraventions), as alleged in subparagraph (g) above, caused or contributed to the Applicant and Group Members' loss and damage, and Sells is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*.

298 Further or in the alternative, if the Respondent contravened section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the ~~FASOG~~ SFASOC and contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOG~~ SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage (all of which is denied), then:

- (a) by making each of the Hegarty Representations, Hegarty engaged in conduct in contravention of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act* (the **Hegarty Contraventions**);
- (b) the Hegarty Contraventions caused or contributed to the Applicant and Group Members' loss and damage, and Hegarty is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act*.

299 By reason of the matters alleged in paragraphs 297 and/or 298 above, if the Respondent is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage as alleged in the ~~FASOG~~ SFASOC (which is denied), then:

- (a) the Oxiana Directors and Sells are also liable to the Applicant and Group Members for the same loss and damage; and

- (b) the Oxiana Directors and Sells are concurrent wrongdoers within the meaning of section 1041L(3) of the *Corporations Act*, section 12GP(3) of the *ASIC Act* and section 24AH(1) of the *Wrongs Act*.

300 Further, the Respondent repeats paragraphs 134-135 above.

301 By reason of the matters alleged in paragraphs 297 to 300 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the FASOC SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of those claims and each of them (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) is limited by section 1041N of the *Corporations Act* and/or section 12GR of the *ASIC Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of the responsibility of the Oxiana Directors and Sells for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

302 Alternatively to paragraph 301 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the FASOC SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of such of those claims as are apportionable claims within the meaning of section 1041L(1) of the *Corporations Act*, section 12GP(1) of the *ASIC Act* or section 24AF of the *Wrongs Act* is limited (respectively) by section 1041N of the *Corporations Act*, section 12GR of the *ASIC Act* and section 24AI(1) of the *Wrongs Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of the responsibility of the Oxiana Directors and Sells for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

## VII ALLENS

303 Allens (ABN 47 702 595 758):

- (a) is and was at all material times a partnership conducting business, inter alia, within Victoria as solicitors;

- (b) during the period 24 August 2001 to 19 June 2012 conducted business under the registered business name Allens Arthur Robinson; and
- (c) is and was at all material times a person within the meaning of section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act 2001* and section 9 of the *Fair Trading Act*.

304 At all relevant times:

- (a) Allens was a member of the Zinifex Due Diligence Committee, and was represented on that committee by Mr Craig Henderson, a partner of Allens, with Mr Paul Washington, a solicitor employed by Allens, as his alternate; and
- (b) KPMG Transaction was also a member of the Zinifex Due Diligence Committee.

305 During March and April 2008 the Zinifex Due Diligence Committee held regular meetings, which were attended by Mr Henderson and/or Mr Washington as representatives of Allens.

306 The role and function of Allens in respect of the Proposed Merger included:

- (a) to perform legal due diligence for Zinifex in respect of the Proposed Merger, including with respect to information provided by Oxiana, including the Financing Documents;
- (b) to review the Oxiana Board minutes;
- (c) to prepare legal due diligence reports for Zinifex and Zinifex's directors, including in respect of information provided by Oxiana, including the Financing Documents and the Oxiana Board minutes;
- (d) to consider key issues identified by Allens during the course of the legal due diligence and give advice and make recommendations to Zinifex, its directors and the Zinifex Due Diligence Committee in respect of those key issues;
- (e) to prepare a Zinifex Due Diligence Planning Memorandum for the Zinifex Due Diligence Committee and its members;
- (f) to prepare a Zinifex Due Diligence Work Plan, including a Legal Zinifex Due Diligence Work Plan, for the Zinifex Due Diligence Committee and



its members, and then carry out the work required by the Legal Zinifex Due Diligence Work Plan; and

- (g) to prepare and provide to Zinifex, its directors and the Zinifex Due Diligence Committee, a Legal Due Diligence Report,

(the **Legal Due Diligence Services**).

307 By no later than February 2008, Allens commenced the Legal Due Diligence Services.

308 For the purpose of carrying out the Legal Due Diligence Services, Allens had access to, and reviewed, inter alia:

- (a) each of the Financing Documents; and
- (b) the Oxiana Board minutes.

309 On or about 1 March 2008 Allens issued a Legal Due Diligence Report dated 1 March 2008 to Zinifex and its directors (the **First Legal Due Diligence Report**).

310 In the First Legal Due Diligence Report, Allens stated that:

- (a) it had been instructed to conduct legal due diligence investigations in connection with a proposed transaction whereby Oxiana (referred to in the report as Alpha) and Zinifex (referred to in the report as Sigma) would merge by way of a scheme of arrangement between Zinifex and its members pursuant to Part 5.1 of the *Corporations Act* (paragraph 1.1);
- (b) the report had been prepared based on information provided by or on behalf of Oxiana and reviewed by Allens, as listed in the Due Diligence Documentation (paragraph 2.1(a));
- (c) the Due Diligence Documentation (set out in Schedule 2 to the report) included the Mezzanine Facility (described in the report as the "Oxiana Facility Agreement"), the Intercreditor Deed and the LNSA;
- (d) in respect of Oxiana's finance and loan facilities (including the Financing Documents), "[w]e have not identified any material or potentially material issues. We understand that Alpha [Oxiana] is investigating the possibility of refinancing" (Part 2 - Executive Summary, Section 3).

311 The Intercreditor Deed (referred to in the First Legal Due Diligence Report) had been drafted by Allens.

312 Accordingly, by no later than 1 March 2008, Allens was aware of all of the Financing Documents and their terms, and knew:

- (a) of the Refinancing Obligation; and
- (b) that failure to comply with the Refinancing Obligation would trigger a default under the LNSA and the Mezzanine Agreement, which would lead to an Event of Default under those agreements if not cured within the relevant cure periods.

313 On or about 8 April 2008 the Zinifex Due Diligence Committee approved the Zinifex Due Diligence Planning Memorandum, which included the following (in addition to the extracts set out in paragraph 145 above):

*“the DDC should be responsible for the systematic examination of all relevant material in the Scheme Booklet with a view to ensuring that when finalised:*

- (i) the Scheme Booklet contains no statements which are misleading or deceptive or likely to mislead or deceive in any material respect; and*
- (ii) there are no omissions from the Scheme Booklet of information that is required to ensure that it is not misleading or deceptive and not likely to mislead or deceive in any material respect.*

...

*AAR will undertake due diligence in relation to Australian legal matters (other than taxation matters) arising in connection with the due diligence process and the Scheme Booklet. AAR will provide an opinion on the due diligence process and the Scheme Booklet, in so far as they relate to Australian legal matters (other than taxation matters).*

...

*Prior to approval of the Scheme Booklet by the Zinifex Board, the DDC will meet to consider a final draft of the relevant document and will, subject to no objections being raised at that meeting in relation to the relevant document, resolve to advise the Zinifex Board that, subject to a Member's area of expertise and accepted areas of responsibility and Zinifex's and Oxiana's obligations in this Planning Memorandum, nothing has come to the DDC's attention that causes it to believe that:*

- (a) *the Scheme Booklet contains a statement that is misleading or deceptive, or likely to mislead or deceive, in any material respect; or*
- (b) *there is an omission from the Scheme Booklet of material which would be required to be included in the explanatory statement in connection with the Scheme by section 412 of the Corporations Act or Regulation 5.1.01 of and Schedule 8 to the Corporations Regulations.*

*In relation to a representative of a Member who is an advisor to Zinifex, that resolution will be premised on the advisor's belief, and information in their possession, being limited to their belief formed because of their engagement as an adviser to Zinifex and information in their possession because of that engagement."*

314 On or about 1 April 2008, the Zinifex Due Diligence Committee approved the Zinifex Due Diligence Work Plan.

315 The Zinifex Due Diligence Work Plan included a legal due diligence plan, which listed various due diligence matters, and further stated that the legal due diligence would include *"follow up enquiries, supplementary questions and document review, depending on the matters raised in the above due diligence enquiries"*.

316 On or about 4 April 2008 Allens issued the Supplementary Due Diligence Report.

317 In the Supplementary Due Diligence Report, Allens stated that:

- (a) the Supplementary Report had been prepared based on selected additional due diligence information that had been made available by Oxiana since Allens finalised the First Legal Due Diligence Report (paragraph 2.1); and
- (b) Allens had been asked to review the Oxiana Board minutes and papers for the period from the beginning of 2006 to March 2008 to identify any material issues that have been considered by the Oxiana Board during that period, and that may not have been previously disclosed to Zinifex (either in whole or in part) (page 3).

318 Schedule 2 to the Supplementary Due Diligence Report set out Allens' findings and observations arising out of its review of the Oxiana Board minutes (the **Allens Oxiana Board Minutes Summary**), which included in respect of the minutes of the Oxiana Board meeting held on 19 February 2008 the following:

***"Prominent Hill Financing***

- *Most of the documentation for the financing of the US\$140 m facility is complete.*
- *The facility expires in Q4 2008 and together with the initial US\$500 m facility needs to be refinanced by 8 August 2008 (this may be extended to 30 November 2008 - subject to lenders approval).*
- *The Board decided to execute further documents in relation to the financing."*

319 On 8 April 2008 Allens tabled the Allens Oxiana Board Minutes Summary at a meeting of the Zinifex Due Diligence Committee held that day, attended by Mr Henderson of Allens.

320 On 28 April 2008 Mr Henderson in his capacity as a partner of Allens and on behalf of Allens signed a "Verification of Scheme Booklet" certificate (the **Verification Certificate**), in which he stated that:

- (a) he had read the Scheme Booklet;
- (b) he was the appropriate person to verify or confirm his agreement with the statements in the Scheme Booklet allocated to him as set out in the Verification Notes (the **Statements**);
- (c) having read the Scheme Booklet, he believed that there were no other statements in the Scheme Booklet requiring verification for which he was the most appropriate person;
- (d) at the date of the Verification Certificate, having regard to his area of responsibility , as far as he was aware, after making reasonable enquiries:
  - (i) each Statement was true, not misleading or deceptive and there was no omission of material information from the Scheme Booklet; and
  - (ii) each Statement of a forward-looking nature, in the context in which it appeared was based on reasonable grounds;
- (e) he would bring to the attention of the Chairman of the Zinifex Due Diligence Committee any misleading statement in, or material omission from the Scheme Booklet.

321 On or about 29 April 2008, KPMG Transaction issued the KPMG Transaction Due Diligence Report to the directors of Zinifex and the members of the Zinifex Due Diligence Committee, including Allens.

322 In the KPMG Transaction Due Diligence Report:

- (a) KPMG Transaction recorded, as one of the key issues identified and considered by it during the course of the Financial Due Diligence, the Financing Documents and the refinancing risk associated with them;

**Particulars**

*Page 14 of the KPMG Transaction Due Diligence Report.*

- (b) KPMG Transaction stated in respect of this key issue, under the heading “Resolution/Recommendation” that “[t]he plans to refinance these facilities is appropriately disclosed in the risk section of the Explanatory Memorandum [ie the Scheme Booklet]”;

**Particulars**

*Page 14 of the KPMG Transaction Due Diligence Report.*

323 On or about 29 April 2008 Allens read the KPMG Transaction Due Diligence Report.

**Particulars**

*Allens letter dated 29 April 2008 to Zinifex and its directors, pages 1 and 4.*

324 On 29 April 2008:

- (a) Allens wrote to Zinifex and its directors (the **29 April 2008 letter**); and
- (b) Allens issued a report entitled “Project Venice Legal Due Diligence Report” dated 29 April 2008 to Zinifex and the Zinifex Due Diligence Committee.

325 In the 29 April 2008 letter Allens stated that:

- (a) it had reviewed the KPMG Transaction Due Diligence Report; and
- (b) “[h]aving regard to our area of responsibility and relying, in the case of matters falling outside our area of expertise and responsibility, on those members of the Due Diligence Committee and other reporting persons with the appropriate expertise, and also relying on those persons to whom

*a particular investigation was assigned, nothing has come to our attention that causes us to believe that:*

- (a) the Scheme Booklet contains a statement that is misleading or deceptive, or likely to mislead or deceive, in any material respect; or*
- (b) there is an omission in the Scheme Booklet of material directly relating to Zinifex and its subsidiaries which would be required to be included in the explanatory statement in connection with the Scheme ...".*

326 At the time it made the statements in the Verification Certificate and the 29 April 2008 letter, Allens was aware that the proposed Scheme Booklet included the following (in Section 9.3(h)):

*"Financing risks*

*...*

*Oxiana and the Merged Group*

*To fund the Prominent Hill and Golden Grove projects, Oxiana has secured financing under a loan note facility with a consortium of financial institutions of US\$500 million and a US\$140 facility with the Royal Bank of Scotland and Australia and New Zealand Banking Group Limited. Refinancing of these facilities is planned to be completed by November 2008; but there can be no assurance that this will occur within that timeframe."*

#### **Particulars**

*Mr Henderson of Allens was present at the sixth meeting of the Zinifex Due Diligence Committee held on 10 April 2008, during which the wording in the Scheme Booklet regarding the Oxiana debt refinancing risk was discussed, and at which the committee noted that the proposed wording was adequate to address the refinancing risk. Further, on 28 April 2008 Mr Henderson signed the Verification Certificate in which he stated inter alia that "I have read the Scheme Booklet to which this Certificate relates".*

327 In or by the 29 April 2008 letter and the Verification Certificate:

- (a) Allens represented that in so far as the Scheme Booklet related to matters which Allens had considered or reviewed as part of its legal due diligence, the Scheme Booklet did not contain any statement that was misleading or deceptive or likely to mislead or deceive, in any material respect, or have any material omission (the **First Allens Representation**).

#### Particulars

*The First Allens Representation was partly in writing and partly to be implied.*

*In so far as it was in writing, it was contained in 29 April 2008 letter and the Verification Certificate.*

*In so far as it was to be implied, the implication arose from:*

- *the fact that one of the purposes of Allens conducting the legal due diligence was to bring to the attention of Zinifex and its directors and the Zinifex Due Diligence Committee any matters relating to Oxiana which Allens had reviewed as part of its legal due diligence and which were material and ought to have been included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet;*
- *the fact that Allens had reviewed the Financing Documents, and was aware of their material terms, including the refinancing obligations and cross-default provisions contained in them, as part of its legal due diligence;*
- *the fact that Allens was aware of the terms of the Financing Risks section of the proposed Scheme Booklet and was also aware that one of the matters the Zinifex Due Diligence Committee was considering was whether the financing risk associated with the Oxiana Financing Documents was adequately disclosed in the Scheme Booklet;*

- *the failure by Allens to include in the 29 April 2008 letter or the Verification Certificate any statement to the effect that there were matters in relation to Oxiana which Allens had reviewed as part of its legal due diligence which were material and ought to have been included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet, or otherwise to bring this to the attention of Zinifex or its directors or the Zinifex Due Diligence Committee; and*
  - *the fact that the Verification Certificate stated that Allens would bring to the attention of the Chairman of the Zinifex Due Diligence Committee any misleading statement in, or material omission from, the Scheme Booklet, and that Allens did not do this in the Verification Certificate or otherwise;*
- (b) Allens further represented that the refinancing risk in relation to the Oxiana Financing Documents was appropriately disclosed in the risk section of the proposed Scheme Booklet (the **Second Allens Representation**);

#### **Particulars**

*The Second Allens Representation was partly in writing and partly to be implied.*

*In so far as it was in writing, it was contained in 29 April 2008 letter and the Verification Certificate.*

*In so far as it was to be implied, the implication arose from:*

- *the fact that one of the purposes of Allens conducting the legal due diligence was to bring to the attention of Zinifex and its directors and the Zinifex Due Diligence Committee any matters relating to Oxiana which Allens had reviewed as part of its legal due diligence and which were material and ought to have been included in the proposed Scheme*



*Booklet, and which were not already included in the proposed Scheme Booklet;*

- *the fact that Allens had reviewed the Financing Documents, and was aware of their material terms, including the refinancing obligations and cross-default provisions contained in them, as part of its legal due diligence;*
- *the fact that Allens was aware of the terms of the Financing Risks section of the proposed Scheme Booklet and was also aware that one of the matters the Zinifex Due Diligence Committee was considering was whether the financing risk associated with the Oxiana Financing Documents was adequately disclosed in the Scheme Booklet;*
- *the failure by Allens to include in the 29 April 2008 letter or the Verification Certificate any statement to the effect that there were matters in relation to Oxiana which Allens had reviewed as part of its legal due diligence, including the Financing Documents and Oxiana's refinancing obligations thereunder, which were material and ought to have been included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet, or otherwise to bring this to the attention of Zinifex or its directors or the Zinifex Due Diligence Committee; and*
- *the fact that the Verification Certificate stated that Allens would bring to the attention of the Chairman of the Zinifex Due Diligence Committee any misleading statement in, or material omission from, the Scheme Booklet, and that Allens did not do this in the Verification Certificate or otherwise.*

(c) Allens further represented (the **Third Allens Representations**) that:

- (i) it had exercised reasonable skill and care in preparing and issuing the 29 April 2009 letter and the Verification Certificate and in making the First and Second Allens Representations; and
- (ii) it had reasonable grounds for making the First and Second Allens Representations.

### Particulars

*The Third Allens Representations were to be implied from:*

- *the conduct of Allens in making the First and Second Allens Representations, coupled with the absence of any or any adequate reservation or qualification to the First and Second Allens Representations; and*
- *the fact that the First and Second Allens Representations were made by Allens as part of the provision by it to Zinifex and its directors of professional legal services for reward.*

328 By making each of the First Allens Representation, the Second Allens Representation and the Third Allens Representations, Allens engaged in conduct:

- (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 section 12DA of the *ASIC Act*; and/or
- (c) in trade or commerce, within the meaning of section 9 of the *Fair Trading Act*.

329 The First Allens Representation, the Second Allens Representation and the Third Allens Representations were continuing representations from the dates on which they were initially made throughout the period to at least the Scheme Implementation Date.

330 If, as alleged by the Applicant in the ~~FASOC~~ SFASOC:

- (a) there were matters with respect to the Financing Documents which were material and ought to have been disclosed in the Scheme Booklet, but had not been disclosed in the Scheme Booklet;

- (b) the Scheme Book contained misleading or deceptive statements relating to the financial position of Oxiana and its refinancing obligations under the Financing Documents and its current liability position and its refinancing risk;
  - (c) Oxiana contravened section 1041H of the *Corporations Act*, section 12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act*; and
  - (d) Oxiana contravened section 674 of the *Corporations Act*,
- (all of which is denied), then:
- (i) the First Allens Representation was false and untrue;

#### **Particulars**

*The First Allens Representation was false and untrue because the Scheme Booklet, in so far as it related to matters which Allens had considered or reviewed as part of its legal due diligence (including the Financing Documents and the terms of those documents and Oxiana's refinancing obligations thereunder), did contain statements that were misleading or deceptive or likely to mislead or deceive, in material respects, and did have material omissions.*

- (ii) further or alternatively, in so far as the First Allens Representation constituted statements of opinion by Allens, Allens had no proper or reasonable basis for expressing those opinions;
- (iii) the Second Allens Representation was false and untrue;

#### **Particulars**

*The refinancing risk in relation to the Oxiana Financing Documents was not appropriately disclosed in the risk section of the proposed Scheme Booklet.*

- (iv) further or alternatively, in so far as the Second Allens Representation constituted statements of opinion by Allens, Allens had no proper or reasonable basis for expressing those opinions;

(v) further or alternatively, the Third Allens Representations were false and untrue in that:

(A) Allens had not exercised reasonable skill and care in preparing and issuing the 29 April 2008 letter and the Verification Certificate and in making the First and Second Allens Representations;

#### **Particulars**

*Had Allens used reasonable skill and care it:*

- *would not have made the First and Second Allens Representations;*
- *would have included in the 29 April 2008 letter and the Verification Certificate a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the Application and ~~FASOC~~ SFASOC were material and ought to have been disclosed in the Scheme Booklet, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk as defined in the ~~FASOC~~ SFASOC) which were material and ought to have been included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet, or otherwise advised Zinifex and its directors and the Zinifex Due Diligence Committee of this; and*
- *would have recommended to Zinifex and its directors and the Zinifex Due Diligence Committee that those matters be included in the Scheme Booklet.*

(B) Allens did not have reasonable grounds for making the First and Second Allens Representations;

(vi) in the premises, the making of the First Allens Representation, the Second Allens Representation and the Third Allens Representations constituted conduct which was misleading or deceptive or likely to mislead or deceive in contravention of:

- (A) section 1041H of the *Corporations Act*;
- (B) section 12DA(1) of the *ASIC Act*; and/or
- (C) section 9 of the *Fair Trading Act*;

331 Further or in the alternative, in providing the Legal Due Diligence Services to Zinifex and its directors and to the Zinifex Due Diligence Committee, Allens held itself out as having special skill, knowledge and expertise in relation to such services.

332 Further, at the time of providing the Legal Due Diligence Services, Allens knew or ought to have known that:

- (a) Zinifex's shareholders would rely upon Allens providing those services with reasonable skill and care; and
- (b) Zinifex's shareholders would be likely to suffer economic loss if Allens did not provide those services with reasonable skill and care.

333 By reason of the above, Allens owed Zinifex's shareholders (including the Applicant and Group Members) a duty to exercise reasonable skill and care in providing the Legal Due Diligence Services.

334 If, as alleged by the Applicant in the ~~FASOC~~ SFASOC:

- (a) there were matters with respect to the Financing Documents which were material and ought to have been disclosed in the Scheme Booklet, but had not been disclosed in the Scheme Booklet;
- (b) the Scheme Book contained misleading or deceptive statements relating to the financial position of Oxiana and its refinancing obligations under the Financing Documents and its current liability position and its refinancing risk;
- (c) Oxiana contravened section 1041H of the *Corporations Act*, section 12DA(1) of the *ASIC Act* and/or section 9 of the *Fair Trading Act*; and
- (d) Oxiana contravened section 674 of the *Corporations Act*,

(all of which is denied), then Allens, in providing the Legal Due Diligence Services, breached its duty of care owed to Zinifex Shareholders as alleged in paragraph 333 above.

### Particulars

*Had Allens exercised reasonable skill and care in providing the Legal Due Diligence Services, it:*

- *would not have made the First or Second Allens Representations;*
- *would have included in the 29 April 2008 letter and the Verification Certificate a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the Application and ~~FASOC~~ SFASOC were material and ought to have been included in the Scheme Booklet, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk) which were material and ought to have been included in the Scheme Booklet, or otherwise advised Zinifex and its directors and the Zinifex Due Diligence Committee of this; and*
- *would have recommended the inclusion of those matters in the Scheme Booklet.*

335 If the Respondent contravened section 1041H of the *Corporations Act*, section 12DA of the *ASIC Act* and/or section 9 of the *Fair Trading Act* as alleged in paragraphs 77 and 77C of the ~~FASOC~~ SFASOC and contravened section 674(2) of the *Corporations Act* as alleged in paragraphs 44, 48, 52, 56, 60 and 64 of the ~~FASOC~~ SFASOC, and if those contraventions caused the Applicant and Group Members' loss and damage as alleged in paragraph 95 of the ~~FASOC~~ SFASOC (all of which is denied), then:

- (a) Allens' contraventions of:
  - (i) section 1041H of the *Corporations Act*;
  - (ii) section 12DA(1) of the *ASIC Act*; and/or
  - (iii) section 9 of the *Fair Trading Act*,
 as alleged in sub-paragraph 330(vi) above; and
- (b) Allens' breach of its duty of care, as alleged in paragraph 334 above,

caused or contributed to the Applicant and Group Members' loss and damage, and Allens (and each partner of Allens at the relevant time) is liable to the Applicant and Group Members for that loss and damage pursuant to sections 1041I and/or 1325 of the *Corporations Act*, sections 12GF and/or 12GM of the *ASIC Act* and/or section 159 of the *Fair Trading Act* and/or at common law.

### Particulars

*But for Allens' contravening conduct and breach of duty of care:*

- *Allens would not have made the First or Second Representations;*
- *Allens would have included in the 29 April 2008 letter and the Verification Certificate a statement to the effect that there were matters in relation to the Financing Documents (which the Applicant alleges in the Application and ~~FASOC~~ SFASOC were material and ought to have been included in the Scheme Booklet, including the 8 August Refinancing Deadline, the Current Liability Position and the Cross Default Risk) which were material and ought to have been included in the Scheme Booklet, or otherwise advised Zinifex and its directors and the Zinifex Due Diligence Committee of this;*
- *Zinifex would then have taken steps to include those matters in the Scheme Booklet; and*
- *the contraventions alleged in the ~~FASOC~~ SFASOC would not have occurred and/or would not have caused the Applicant and Group Members to suffer any loss or damage.*

336 By reason of the matters alleged in paragraph 335 above, if the Respondent is liable to the Applicant and Group Members for the Applicant and Group Members' loss and damage as alleged in the ~~FASOC~~ SFASOC (which is denied), then:

- (a) Allens (and each partner of Allens at the relevant time) is also liable to the Applicant and Group Members for the same loss and damage; and

- (b) Allens (and each partner of Allens at the relevant time) is a concurrent wrongdoer within the meaning of section 1041L(3) of the *Corporations Act*, section 12GP(3) of the *ASIC Act* and section 24AH(1) of the *Wrongs Act 1958* (Vic) (the *Wrongs Act*).

337 Further, the Respondent repeats paragraphs 134-135 above.

338 By reason of the matters alleged in paragraphs 335 to 337 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of those claims and each of them (including the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*) is limited by section 1041N of the *Corporations Act* and/or section 12GR of the *ASIC Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of Allens' responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

339 Alternatively to paragraph 338 above, if the Respondent is liable in respect of the claims made by the Applicant and Group Members in the ~~FASOC~~ SFASOC (or any one or more of those claims), which is denied, then the liability of the Respondent in respect of such of those claims as are apportionable claims within the meaning of section 1041L(1) of the *Corporations Act*, section 12GP(1) of the *ASIC Act* or section 24AF of the *Wrongs Act* is limited (respectively) by section 1041N of the *Corporations Act*, section 12GR of the *ASIC Act* and section 24AI(1) of the *Wrongs Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of Allens' responsibility for that damage or loss and the extent of the responsibility of the other Concurrent Wrongdoers, and the Court may give judgment against the Respondent for no more than that amount.

#### **I. RELIEF FROM LIABILITY UNDER SECTION 1317 OF THE CORPORATIONS ACT**

340 Further, as the Applicant's and Group Members' claims include claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*, this



proceeding is an eligible proceeding within the meaning of section 1317S of the *Corporations Act*.

341 By reason of the matters set out in sections A to H above:

- (a) the Respondent has acted honestly; and
- (b) having regard to all of the circumstances of the case, including that any damage or loss suffered by the Applicant and Group Members caused by the Respondent's alleged contraventions of section 674(2) of the *Corporations Act* (which is denied) was caused or contributed to by the conduct of the Concurrent Wrongdoers as alleged in Section H above, the Respondent ought fairly be excused for any contravention of section 674(2) of the *Corporations Act* (the existence of which is denied).

342 In the premises and alternatively to paragraphs 136, 137, 167, 168, 203, 204, 224, 225, 271, 272, 301, 302, 338 and 339 above, if the claims founded on alleged contraventions by the Respondent of section 674(2) of the *Corporations Act*:

- (a) are not limited by section 1041N of the *Corporations Act* and/or section 12GR of the *ASIC Act* to an amount reflecting the proportion of the damage or loss claimed as the Court considers just having regard to the extent of the Respondent's responsibility for that damage or loss, taking into account the extent of responsibility for that damage or loss of the Concurrent Wrongdoers; and/or
- (b) are not apportionable claims within the meaning of section 1041L(1) of the *Corporations Act*, section 12GP(1) of the *ASIC Act* or section 24AF of the *Wrongs Act*;

then, by reason of the matters set out in paragraphs 340 and 341 above, pursuant to section 1317S of the *Corporations Act*, the Court ought relieve the Respondent wholly or partly from any liability to which the Respondent would otherwise be subject, or that might otherwise be imposed on the Respondent, because of the contravention of section 674(2) of the *Corporations Act* (the existence of which is denied).

*New Face*  
\_\_\_\_\_  
Signed by Jason Betts  
Lawyer for the Respondent

This pleading was prepared by Robert Craig of Counsel and settled by Michael Garner of Counsel.

## Glossary

This is a glossary of terms which appear for the first time in the Defence and/or are not defined in the FASOC SFASOC or the subject of the same definition in the FASOC SFASOC.

<b>19 February 2008 Board Minutes</b>	the minutes of the Oxiana Board meeting held on 19 February 2008 (as defined in paragraph 186 of the Defence).
<b>2 March 2008 Report</b>	the due diligence report circulated by Lee on 2 March 2008 to amongst others, each of the Directors and Barnes for the purpose of a teleconference of the Zinifex Board to be held at noon that day (as defined in paragraph 234 of the Defence).
<b>29 April 2008 Board Meeting</b>	the board meeting of the Board of Zinifex conducted on 29 April 2008 (as defined in paragraph 251 of the Defence).
<b>29 April 2008 DDC Meeting</b>	the meeting of the Zinifex Due Diligence Committee on 29 April 2008 (as defined in paragraph 247 of the Defence).
<b>29 April 2008 letter</b>	the letter from Allens to Zinifex and its directors dated 29 April 2008 (as defined in paragraph 324 of the Defence).
<b>8 April 2008 DDC Meeting</b>	the meeting of the Zinifex Due Diligence Committee on 8 April 2008 (as defined in paragraph 244 of the Defence).
<b>AAR (or Allens)</b>	the solicitors retained by Zinifex to conduct legal due diligence investigations in connection with the proposed merger (as defined in paragraph 231 of the Defence).
<b>Allens (or AAR)</b>	the solicitors retained by Zinifex to conduct legal due diligence investigations in connection with the proposed merger (as defined in paragraph 231 of the Defence).
<b>Allens Legal Due Diligence Report</b>	the Legal Due Diligence Report dated 1 March 2008 provided by Allens to Zinifex and the Board of Zinifex on or about 1 March 2008 (as defined in paragraph 232 of the Defence).
<b>Allens Oxiana Board Minutes Summary</b>	Schedule 2 to the Supplementary Legal Due Diligence Report which set out Allens' findings and observations arising out of its review of the Oxiana Board minutes (as defined in paragraph 318 of the Defence).
<b>Barnes</b>	Anthony Barnes, at all material times, the chief financial officer of Zinifex (as defined in paragraph 227 of the Defence).
<b>Beevor</b>	Ronald Beevor, a director of Oxiana at all relevant times (as defined in paragraph 274 of the Defence).
<b>Circular Resolution</b>	the circular resolution signed by Jamieson, Beevor and Cusack on 28 April 2008, approving the Oxiana Provided Information for inclusion in the Scheme

	Booklet (as defined in paragraph 293 of the Defence).
<b>Clayton Utz</b>	Clayton Utz (a firm) (ABN 35 740 217 343) a partnership which at all material times was conducting business, inter alia, within Victoria as solicitors (as defined in paragraph 169 of the Defence).
<b>Clayton Utz Engagement</b>	the engagement of Clayton Utz to provide legal services to Oxiana, including the Due Diligence Legal Services in the period from about February 2008 (as defined in paragraph 178 of the Defence).
<b>Clayton Utz Facility Overview Project Document</b>	the document entitled "Facility Overview Project Venice" prepared by Clayton Utz as part of the Legal Due Diligence work and/or the Clayton Utz Engagement undertaken by Clayton Utz, in late February 2008 (as defined in paragraph 183 of the Defence).
<b>Clayton Utz team</b>	the representatives of Clayton Utz who attended meetings of the Oxiana Due Diligence Committee (as defined in paragraph 171 of the Defence).
<b>Coles</b>	Andrew Coles, the Group Treasurer of Zinifex and a representative of Zinifex on the Zinifex Due Diligence Committee (as defined in paragraph 239 of the Defence).
<b>Concurrent Wrongdoers</b>	the concurrent wrongdoers referred to in Sections H.(I) to H.(VII) of the Defence (as defined in paragraph 136 of the Defence).
<b>Continuous Disclosure Policy</b>	Oxiana's Continuous Disclosure Policy (as defined in paragraph 288 of the Defence).
<b>Cusack</b>	Barry Cusack, a director of Oxiana at all relevant times (as defined in paragraph 274 of the Defence).
<b>DDC Report</b>	the final Due Diligence Committee Report, issued and signed by the Zinifex Due Diligence Committee on 29 April 2008 (as defined in paragraph 250 of the Defence).
<b>Due Diligence Legal Services</b>	the role and function of Clayton Utz in respect of the Proposed Merger (as defined in paragraph 172 of the Defence).
<b>Fifth KPMG Transaction Representation</b>	the representation by KPMG Transaction that it: had exercised reasonable skill and care in undertaking the Investigating Accountant Services and in making the Fourth KPMG Transaction Representation in the Investigating Accountant's Report; and, had reasonable grounds for making the Fourth KPMG Transaction Representation in the Investigating Accountant's Report (as defined in paragraph 159(b) of the Defence).
<b>Final Scheme Booklet</b>	the Zinifex Scheme Booklet in the form proposed to be provided to the Court for approval at the First Court

	Hearing (as defined in paragraph 248 of the Defence).
<b>Financing Documents</b>	the relevant financing documents of Oxiana, including the LNSA, the Mezzanine Facility and the Intercreditor Deed (as defined in paragraph 115 of the Defence).
<b>First Allens Representation</b>	the representation by Allens that in so far as the Scheme Booklet related to matters which Allens had considered or reviewed as part of its legal due diligence, the Scheme Booklet did not contain any statement that was misleading or deceptive or likely to mislead or deceive, in any material respect, or have any material omission (as defined in paragraph 327(a) of the Defence).
<b>First Clayton Utz Representation</b>	the representation by Clayton Utz that there were no matters in relation to the Financing Documents or their terms which were material and which ought to be disclosed to the ASX in accordance with Oxiana's continuous disclosure obligations under the <i>Corporations Act</i> and the ASX Listing Rules, and which had not previously been disclosed by Oxiana to the ASX (as defined in paragraph 195(a) of the Defence).
<b>First Grant Samuel Representation</b>	the representation by Grant Samuel that upon completion of the merger, the merged entity would have a strong balance sheet (as defined in paragraph 216(a) of the Defence).
<b>First KPMG Representation</b>	the representation by KPMG that that there were no matters in relation to the Financing Documents or their terms which were material and which ought to be included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented, or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it (as defined in paragraph 120(a) of the Defence).
<b>First KPMG Transaction Representation</b>	the representation by KPMG Transaction that there were no matters in relation to the Financing Documents or their terms which were material and which ought to be included in the proposed Scheme Booklet, and which were not already included in the proposed Scheme Booklet (as defined in paragraph 155 of the Defence).
<b>First Legal Due Diligence Report</b>	the Legal Due Diligence Report issued by Allens to Zinifex and its directors on or about 1 March 2008 (as defined in paragraph 309 of the Defence).
<b>First Zinifex Contravention</b>	the contraventions by Zinifex pleaded in paragraph 264(e) of the Defence.

**Fourth Grant Samuel Representation**

the representation by Grant Samuel that Grant Samuel had exercised reasonable skill and care in preparing the Independent Expert's Report and in making each of the First, Second and Third Grant Samuel Representations, and that it had reasonable grounds for making each of those representations (as defined in paragraph 216(d) of the Defence).

**Fourth KPMG Representation**

the representation by KPMG that it: had exercised reasonable skill and care in undertaking the KPMG Financial Due Diligence and in making the Third KPMG Representation in the KPMG Due Diligence Report; and had reasonable grounds for making the Third KPMG Representation in the KPMG Due Diligence Report (as defined in paragraph 126(b) of the Defence).

**Fourth KPMG Transaction Representation**

the representation by KPMG Transaction that there were no matters in relation to the Financing Documents or their terms which were material and/or which meant that the financial position of the Merged Group was not presented fairly in the proposed Scheme Booklet (as defined in paragraph 159(a) of the Defence).

**Further Clayton Utz Representations**

the representations by Clayton Utz that it: had exercised reasonable skill and care in undertaking the Legal Due Diligence and in making the Representation in the Legal Due Diligence Report; and, had reasonable grounds for making the Representation in the Legal Due Diligence Report (as defined in paragraph 195(b) of the Defence).

**Grant Samuel**

Grant Samuel & Associates Pty Ltd (ACN: 050 036 372) (Grant Samuel) a company which at all material times was conducting business, inter alia, within Victoria as a financial product adviser on securities and interests in managed investment schemes to wholesale and retail clients (as defined in paragraph 205 of the Defence).

**Grant Samuel Engagement**

the engagement of Grant Samuel by Zinifex to prepare an independent expert's report for inclusion in the Scheme documentation to be sent by Zinifex to its shareholders (as defined in paragraph 206 of the Defence).

**Hegarty**

Owen Hegarty, the Managing Director and chief executive officer of Oxiana at all relevant times (as defined in paragraph 273 of the Defence).

**Hegarty Contraventions**

the contraventions by Hegarty pleaded in paragraph 298(a) of the Defence.

**Hegarty Representations**

the Representations that the Applicant alleges were made by Hegarty on behalf of Oxiana as set out in paragraph 295 of the Defence.

<b>Higgins</b>	Sue-Ann Higgins, Oxiana Group General Counsel at all material times (as defined in paragraph 296 of the Defence).
<b>Independent Expert's Report</b>	the independent expert's report prepared by Grant Samuel for inclusion in the Scheme documentation to be sent by Zinifex to its shareholders (as defined in paragraph 207(a) of the Defence).
<b>Intercreditor Deed</b>	the agreement made on 28 February 2008 for the regulation of certain intercreditor issues (as defined in paragraph 12(a) of the Defence).
<b>Investigating Accountant's Engagement</b>	the engagement of KPMG Transaction to prepare and provide an Investigating Accountant's report to Oxiana and Zinifex (as defined in paragraph 142 of the Defence).
<b>Investigating Accountant's Services</b>	the services to be provided by KPMG Transaction pursuant to the Investigating Accountant's Engagement (as defined in paragraph 143 of the Defence).
<b>Jamieson</b>	Brian Jamieson, a director of Oxiana at all relevant times (as defined in paragraph 274 of the Defence).
<b>Knight</b>	Richard Knight, a director at all material times of Zinifex (as defined in paragraph 226 of the Defence).
<b>KPMG</b>	a partnership conducting business, inter alia, within Victoria as auditors and accountants (as defined in paragraph 98 of the Defence).
<b>KPMG Due Diligence Financial Services</b>	the roles and functions performed by KPMG in respect of the Proposed Merger, as defined in paragraph 104 of the Defence.
<b>KPMG Due Diligence Report</b>	the final KPMG Financial Due Diligence Report issued by KPMG to Oxiana and the Oxiana Due Diligence Committee on or about 8 May 2008 (as defined in paragraph 123 of the Defence).
<b>KPMG Due Diligence Sign Off</b>	the "Due Diligence Sign Off" issued by KPMG to Oxiana and the Oxiana Due Diligence Committee on or about 24 April 2008 (as defined in paragraph 117 of the Defence).
<b>KPMG Engagement</b>	the engagement of KPMG by Oxiana to provide accounting services including the KPMG Due Diligence Financial Services (as defined in paragraph 110 of the Defence).
<b>KPMG Financial Matters</b>	the due diligence sign-off on the Oxiana historical financial information, the Oxiana pro-forma historical information and the Merged Group pro forma historical information by KPMG (as defined in paragraph 111(j)(i) of the Defence).
<b>KPMG team</b>	the KPMG representatives who attended the Oxiana

	Due Diligence Committee meeting (as defined in paragraph 101 of the Defence).
<b>KPMG Transaction</b>	KPMG TS Pty Limited (ACN 003 891 718) a company which at all relevant times was conducting business, inter alia, within Victoria as accountants (as defined in paragraph 138 of the Defence).
<b>KPMG Transaction Due Diligence Engagement</b>	the engagement of KPMG Transaction to provide accounting services to Zinifex, including the KPMG Transaction Due Diligence Financial Services (as defined in paragraph 148 of the Defence).
<b>KPMG Transaction Due Diligence Financial Services</b>	the role of KPMG Transaction in respect of the Proposed Merger in addition to the provision of the Investigating Accountant Services (as defined in paragraph 144 of the Defence).
<b>KPMG Transaction Due Diligence Sign Off</b>	the report to be prepared and provided to Zinifex by KPMG Transaction on the adequacy of the due diligence system so far as it applies to KPMG Transaction Financial Matters contained in the proposed scheme document (as defined in paragraph 144 of the Defence).
<b>KPMG Transaction Financial Due Diligence</b>	the review and examination of the financial information to be included in the proposed Scheme Booklet by KPMG Transaction (as defined in paragraph 144(a) of the Defence).
<b>KPMG Transaction Due Diligence Report</b>	the KPMG Transaction Due Diligence report to Zinifex dated 29 April 2008 (as defined in paragraph 148 of the Defence).
<b>KPMG Transaction Financial Matters</b>	the work to work carried out by KPMG Transaction in accordance with the KPMG Transaction Financial Work Plan agreed with Zinifex and the Zinifex Due Diligence Committee including due diligence sign-off on the Oxiana historical financial information, the Oxiana pro forma historical information and the Merged Group pro forma historical information (as defined in paragraph 149(k) of the Defence).
<b>KPMG Transaction Financial Work Plan</b>	the Due Diligence Financial Work Plan to be prepared by KPMG Transaction as part of the KPMG Transaction Financial Due Diligence (as defined in paragraph 144 of the Defence).
<b>Larkin</b>	Anthony Larkin, a director at all material times of Zinifex (as defined in paragraph 226 of the Defence).
<b>Lee</b>	Francesca Lee, Zinifex's Group General Counsel (as defined in paragraph 234 of the Defence).
<b>Legal Due Diligence</b>	the legal due diligence to be performed by Clayton Utz in respect of the Proposed Merger (as defined in paragraph 172(a) of the Defence).



<b>Legal Due Diligence Report</b>	the report to be prepared and provided to Oxiana by Clayton Utz (as defined in paragraph 172(e) of the Defence).
<b>Legal Due Diligence Services</b>	the role and function of Allens in respect of the Proposed Merger, including the matters referred to in paragraph 306 of the Defence (as defined in paragraph 306 of the Defence).
<b>Legal Work Plan</b>	the Due Diligence Legal Work Plan to be prepared by Clayton Utz as part of the Legal Due Diligence (as defined in paragraph 172(d) of the Defence).
<b>LNSA Lenders</b>	the lenders under the LNSA (as defined in paragraph 12(a)).
<b>Merged Group</b>	the combined group established by the merger of Zinifex and Oxiana (as defined in paragraph 143(a) of the Defence).
<b>Merged Group Information</b>	Information regarding the combined Oxiana/Zinifex group after the merger and risk factors associated with the merger of Oxiana with Zinifex included in the Scheme Booklet (as defined in paragraph 279 of the Defence).
<b>Merged Group Pro Forma Historical Financial Information</b>	the Merged Group's: pro forma historical balance sheet as at 31 December 2007; pro forma historical condensed income statement for the year ended 31 December 2007; and pro forma historical operating cash flows before financing activities and tax for the year ended 31 December 2007 (as defined in paragraph 143(a) of the Defence).
<b>Mezzanine Facility</b>	the agreement made on 28 February 2008 pursuant to which the Mezzanine Lenders agreed to provide the Respondent with facilities for cash up to a maximum amount of US\$140 million (as defined in paragraph 9(a) of the Defence).
<b>Mezzanine Lenders</b>	RBS and ANZ (as defined in paragraph 9(a) of the Defence).
<b>Oxiana DDC Final Report</b>	the "Final Report of the Due Diligence Committee" issued by the Oxiana Due Diligence Committee on 24 April 2008 and addressed to the Board of Oxiana and each member and member representative of the Oxiana Due Diligence Committee (as defined in paragraph 284 of the Defence).
<b>Oxiana Directors</b>	Hegarty, Jamieson, Beavor and Cusack collectively (as defined in paragraph 275 of the Defence).
<b>Oxiana Due Diligence Committee</b>	The Due Diligence Committee established in early March 2008 (as defined in paragraph 99 of the Defence).
<b>Oxiana Due Diligence Planning</b>	the Due Diligence Planning Memorandum signed on or

<b>Memorandum</b>	about 3 April 2008 (as defined in paragraph 105 of the Defence).
<b>Oxiana Due Diligence Work Plan</b>	the due diligence work plan attached (as Attachment 3) to the Oxiana Due Diligence Planning Memorandum, as defined in paragraph 108 of the Defence.
<b>Oxiana Information</b>	Certain information provided by Oxiana to Zinifex for inclusion in the Scheme Booklet, which was defined in the Scheme Booklet as the "Oxiana Information" (as defined in paragraph 278 of the Defence).
<b>Oxiana Provided Financial Information</b>	the Oxiana Provided Information (as defined in the Oxiana Due Diligence Planning Memorandum) to be reviewed and examined by KPMG, as defined in paragraph 111(b) of the Defence.
<b>Oxiana Provided Information</b>	Certain information provided by Oxiana to Zinifex for inclusion in the Scheme Booklet, which was defined in the Scheme Booklet as the "Oxiana Information" (as defined in paragraph 278 of the Defence).
<b>Pre-Merger Due Diligence</b>	the pre-merger due diligence of Oxiana conducted by Zinifex prior to the announcement of the Proposed Merger (as defined in paragraph 230 of the Defence).
<b>Pritchard</b>	Dean Pritchard, a director at all material times of Zinifex (as defined in paragraph 226 of the Defence).
<b>Proposed Capital Outlays</b>	the capital outlays it was proposed would be made by Oxiana in the fourth quarter of FY 2008 and first half of 2009 in respect of a number of mining development projects it had in contemplation (as defined in paragraph 34(e) of the Defence).
<b>Proposed Merger</b>	the proposed merger between Oxiana and Zinifex (as defined in paragraph 99 of the Defence).
<b>Refinancing Obligation</b>	the obligation under the Intercreditor Deed that both the LNSA and Mezzanine Facility were required to be fully refinanced by 8 August 2008 or by such later date as the Security Trustee (acting on the instructions of all of the senior financiers and mezzanine financiers) may agree (as defined in paragraph 116(a) of the Defence).
<b>Required Information</b>	the information required to be included in the Scheme Booklet by sub-section 412(1)(a) of the <i>Corporations Act</i> and/or by any other provision of the <i>Corporations Act</i> or by any <i>ASIC Regulatory Guide</i> (as defined in paragraph 265 of the Defence).
<b>Required Legal Work</b>	the work required by the Legal Work Plan (as defined in paragraph 172 of the Defence).
<b>Scheme Booklet</b>	the document entitled " <i>Explanatory Memorandum for the Scheme of Arrangement in relation to the proposed merger of Zinifex Limited and Oxiana Limited</i> " dated 9 May 2008 and lodged by Zinifex with the ASX and

	distributed or made available to its shareholders, on or about 12 May 2008 (as defined in paragraph 129(a) of the Defence).
<b>Scheme Booklet Contravention</b>	the contraventions by Zinifex pleaded in paragraph 264(l) of the Defence.
<b>Scheme Booklet Supplement</b>	the document entitled "Scheme Booklet Supplement for the Scheme of Arrangement in relation to the proposed merger of Zinifex Limited and Oxiana Limited" lodged by Zinifex with the ASX and distributed or made available to its shareholders, on or about 12 May 2008 (as defined in paragraph 129(b) of the Defence).
<b>Scheme Implementation Date</b>	1 July 2008, being the Implementation Date for the Scheme by which the Proposed Merger was effected (as defined in paragraph 122 of the Defence).
<b>Second Allens Representation</b>	the representation by Allens that the refinancing risk in relation to the Oxiana Financing Documents was appropriately disclosed in the risk section of the proposed Scheme Booklet (as defined in paragraph 327(b) of the Defence).
<b>Second Grant Samuel Representation</b>	the representation by Grant Samuel that the terms of the merger were fair to Zinifex shareholders (as defined in paragraph 216(b) of the Defence).
<b>Second KPMG Representation</b>	the representation by KPMG that: it had exercised reasonable skill and care in undertaking the KPMG Financial Due Diligence and in making the First KPMG Representation in the KPMG Due Diligence Sign Off; and, it had reasonable grounds for making the First KPMG Representation in the KPMG Due Diligence Sign Off (as defined in paragraph 120(b) of the Defence).
<b>Second KPMG Transaction Representation</b>	the representation by KPMG Transaction that the refinancing risk in relation to the LNSA and Mezzanine Facility was appropriately disclosed in the risk section of the proposed Scheme Booklet (as defined in paragraph 155(b) of the Defence).
<b>Second Zinifex Contravention</b>	the contraventions by Zinifex pleaded in paragraph 264(h) of the Defence.
<b>Sells</b>	Jeffrey Sells, the Chief Financial Officer of Oxiana at all material times (as defined in paragraph 276 of the Defence).
<b>Supplementary Due Diligence Report</b>	the Supplementary Due Diligence report sent by Allens to Lee of Zinifex on 4 April 2008 (as defined in paragraph 242 of the Defence).
<b>Third Grant Samuel Representation</b>	the representation by Grant Samuel that based on the share market values and Grant Samuel's assessment of the full underlying values of Zinifex and Oxiana,

	Zinifex shareholders' collective interest in the proposed merged entity would be approximately proportionate to Zinifex's contribution of value to the proposed merged entity (as defined in paragraph 216(c) of the Defence).
<b>Third KPMG Representation</b>	the representation by KPMG that there were no matters in relation to the Financing Documents or their terms which were material and which ought to be included in the proposed Scheme Booklet, or the sections of the proposed Scheme Booklet in which financial information relating to Oxiana was to be presented or the sections of the proposed Scheme Booklet which were the responsibility of Oxiana (whether separately or jointly with Zinifex), including Sections 7 and 9.3(h), and which were not already included in the proposed Scheme Booklet or those sections of it (as defined in paragraph 126(a) of the Defence).
<b>Third KPMG Transaction Representation</b>	the representation by KPMG Transaction that it: had exercised reasonable skill and care in preparing and presenting the KPMG Transaction Due Diligence Report and in making the First and Second KPMG Transaction Representations in the KPMG Transaction Due Diligence Report; and had reasonable grounds for making the First and Second KPMG Transaction Representations in the KPMG Transaction Due Diligence Report (as defined in paragraph 155(c) of the Defence).
<b>Verification Certificate</b>	the "Verification of Scheme Booklet" certificate signed by Mr Henderson on 28 April 2008 in his capacity as a partner of Allens and on behalf of Allens (as defined in paragraph 320 of the Defence).
<b>Zinifex Directors</b>	Larkin, Pritchard and Knight collectively (as defined in paragraph 226 of the Defence).
<b>Zinifex Due Diligence Committee</b>	the Due Diligence Committee established by Zinifex as part of the Proposed Merger process in early March 2008 (as defined in paragraph 139 of the Defence).
<b>Zinifex Due Diligence Planning Memorandum</b>	the Due Diligence Planning Memorandum approved by the Zinifex Due Diligence Committee on or about 8 April 2008 (as defined in paragraph 145 of the Defence).
<b>Zinifex Due Diligence Work Plan</b>	the Due Diligence Work Plan approved by the Zinifex Due Diligence Committee on or about 1 April 2008 (as defined in paragraph 147 of the Defence).
<b>Zinifex Representation</b>	the representation by Zinifex that the Scheme Booklet contained all information that was material to the making of a decision by a shareholder of Zinifex whether or not to agree to the Scheme that was within the knowledge of the directors of Zinifex and had not

previously been disclosed to Zinifex shareholders (as defined in paragraph 264 of the Defence).

## SCHEDULE A

- (i) Prior to the merger between the Respondent and Zinifex, effected by the Scheme, the Respondent progressed work in relation to, amongst other things, a proposed refinancing of the US Debt Facilities to be completed by 8 August 2008.
- (ii) In late February 2008, the Respondent appointed ANZ and RBS as Joint Lead Arrangers (**JLAs**) to arrange and underwrite a secured financing which would, among other things, provide for a refinancing of the LNSA and of the Mezzanine Facility.
- (iii) On 17 March 2008, ANZ on behalf of the JLAs circulated the first draft term sheet to the Respondent.
- (iv) A further draft of the indicative term sheet was circulated by ANZ on behalf of the JLAs on 28 May 2008.
- (v) On 30 May 2008, the Respondent's Board of Directors considered a paper co-authored by the Executive General Manager Business Development and the Chief Financial Officer which, among other things, advised the Board of the progress of refinancing activities as follows:

[The Respondent] has mandated ANZ and RBS (the Mezzanine de[b]t providers) to arrange and initially underwrite this refinance with subsequent sell down to core relationship banks. Within the mandate for the ANZ and RBS refinance, there is also some additional debt to be arranged for the Sepon Copper Expansion and general working capital requirements.

A term sheet is close to finalisation, and financial modelling and due diligence is well advanced. Therefore a full refinance of these two facilities is on track for August 2008. In finalising this term sheet however, ANZ and RBS will request that [the Respondent] agree to an equity raising of at least A\$350 million in the second half of 2008.

- (vi) On 23 June 2008, RBS on behalf of the JLAs circulated a further draft of the indicative term sheet.

- (vii) By late June 2008, the Respondent had negotiated a near final term sheet with ANZ and RBS as mandated JLAs to arrange a debt facility for the purpose of refinancing the LNSA and the Mezzanine Facility.

**SCHEDULE B**

- (i) Prior to the merger between the Respondent and Zinifex, effected by the Scheme, the Respondent progressed work in relation to:
  - (1) a proposed refinancing of an existing debt facility for its Sepon mine in Laos (**Sepon Facility**) and proposed funding to assist with proposed expansion and other capital programmes at its Sepon mine; and
  - (2) a proposed financing for the development of its Martabe Project in Indonesia.
- (ii) In late February 2008, the Respondent appointed ANZ and RBS as mandated Joint Lead Arrangers (**JLAs**) to arrange and underwrite a secured financing of up to US\$950 million which would, among other things, provide for a project finance facility for Sepon.
- (iii) On 17 March 2008, ANZ on behalf of the JLAs circulated the first draft term sheet to the Respondent. The indicative term sheet provided for a US\$237 million facility to refinance the Sepon Facility and funding for the costs of expansion and capital works at the Sepon Mine.
- (iv) By 27 March 2008, the Respondent had engaged Gryphon Partners to assist it with the Sepon financing.
- (v) By 9 April 2008, the Respondent had engaged Gryphon Partners to assist it with the Martabe financing.
- (vi) Initial discussions commenced with UniCredit (HVB), BNP and ANZ and progressed in April and May 2008.
- (vii) A further draft of the indicative term sheet (referred to at (iii) above) was circulated by ANZ on behalf of the JLAs on 28 May 2008. It also provided for a US\$237 million facility to refinance the Sepon Facility and funding for the costs of expansion and capital works at the Sepon Mine.
- (viii) On 30 May 2008, the Respondent's Board of Directors considered a paper co-authored by the Executive General Manager Business Development and Sells which, among other things, advised the Board of the progress of refinancing activities as follows:



*[The Respondent] has mandated ANZ and RBS (the Mezzanine de[b]t providers) to arrange and initially underwrite this refinance with subsequent sell down to core relationship banks. Within the mandate for the ANZ and RBS refinance, there is also some additional debt to be arranged for the Sepon Copper Expansion and general working capital requirements.*

*A term sheet is close to finalisation, and financial modelling and due diligence is well advanced. Therefore a full refinance of these two facilities is on track for August 2008. In finalising this term sheet however, ANZ and RBS will request that [the Respondent] agree to an equity raising of at least A\$350 million in the second half of 2008.*

- (ix) On 13 June 2008 UniCredit on behalf of the ANZ, UniCredit Group and BNP (Martabe JLAs) circulated a draft engagement letter and draft indicative terms and conditions for the appointment of the Martabe JLAs for the provision of a US\$200 million facility for the financing of the Martabe Project.
- (x) On 17-19 June 2008, the Martabe JLAs visited the Martabe Project site in Indonesia.
- (xi) On 23 June 2008, RBS on behalf of the JLAs circulated a further draft of the indicative term sheet for, amongst other things, a US\$237 million facility to refinance the Sepon Facility and fund the costs of expansion and capital works at the Sepon Mine.
- (xii) By late June 2008, the Respondent had:
  - (1) negotiated a near final term sheet with the JLAs to arrange a debt facility for the purpose of refinancing the Sepon facility and providing a proposed facility for expansion and other capital programmes at Sepon; and
  - (2) progressed towards the appointment of the Martabe JLAs to arrange a US\$200 million facility for the design and construction of its Martabe Project.

**Certificate of lawyer**

I ~~Jason Betts~~ Neil Jack certify to the Court that, in relation to the Further Amended Defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 24 March 2015 ~~12 September 2014~~



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Signed by ~~Jason Betts~~ Neil Jack

Lawyer for the Respondent

