

## Commencement of Federal Court proceedings against the ASX

**Melbourne, 5th December 2019:** iSignthis Limited (ASX: ISX | FRA: TA8) (“the Company”) has commenced legal proceedings against ASX Limited in the Federal Court of Australia to challenge the decisions made by the Australian Securities Exchange (“ASX” or “the exchange”) to suspend, and not reinstate, the Company’s shares for quotation on the exchange.

The Company is seeking, among other things, orders which require the ASX Ltd to lift the suspension and reinstate ISX’s shares for quotation on the exchange.

ISX is concerned that investors are being denied the opportunity to trade their shares.

ISX is also concerned that the continuing suspension could harm the Company’s standing with investors, customers and suppliers.

The Company regrets that it has been necessary to seek judicial intervention.

“We have taken this step in order to lift the suspension of ISX’s shares. We are acting in the interest of our shareholders, as they have been denied the basic right to trade our shares for too long,” said the Company’s Chairman, Tim Hart.

The Company’s Chief Executive Officer, John Karantzis, said “the company has responded promptly to each request for information from the ASX.”

“We have answered scores of questions and provided more than 2000 pages of confidential documents dating back almost three years,” said Mr Karantzis. “We have been patient and acted in good faith, but the Company’s shares have been suspended for nine weeks.”

Since the Company’s shares were suspended, ISX has answered diverse questions from the ASX such as:

- Why a bundled service is billed on a bundled basis;
- Why it selected a particular European bank to hold client funds;
- How much did a change to Apple’s privacy settings last year affect revenue;
- What website names are used by a customer;
- How its revenue is broken down by country; and
- Whether or not it offers services for initial coin offerings (ISX does not).

The Company believes that the interactions with the ASX during the last nine weeks raise issue of procedural fairness and good faith, as well as a substantive question about the actual reason for the suspension.

A copy of the Company’s Statement of Claim is attached in the Appendix.

### Investor Relations

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## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 4/12/2019 5:14:18 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
File Number: VID1315/2019  
File Title: ISIGNTHIS LIMITED v ASX LIMITED  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 4/12/2019 5:39:09 PM AEDT

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

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

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



## Statement of Claim

Federal Court of Australia  
District Registry: Victoria  
Division: General

No.

**ISIGNTHIS LIMITED** (ACN 075 419 715)

Applicant

**ASX LIMITED** (ACN 008 624 691)

Respondent

### A. Background

1. The Applicant (**ISX**):

- (a) is, and was at all material times, a company incorporated pursuant to the provisions of the *Corporations Act 2001* (Cth) (**Corporations Act**);
- (b) is, and has been since 22 December 2014, known as iSignthis Limited;
- (c) was until about March 2015 allocated ASX Code "OTE";
- (d) is, and has been since March 2015, listed on the Australian Securities Exchange under the ASX Code "ISX";
- (e) is, and at all material times has been, a leading eMoney, payments and identity technology company listed on the Australian Securities Exchange and the Frankfurt Stock Exchange; and
- (f) predominantly provides services in Europe which include remote identity verification, payment processing, card acquiring, settlement, IBAN bank accounts, SEPA transfers and eMoney issuance services.

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Filed on behalf of (name & role of party)	iSignthis Limited, Applicant		
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[Form approved 01/08/2011]

2. The Respondent (**ASX**):

- (a) is, and was at all material times, a company incorporated pursuant to the provisions of the Corporations Act;
- (b) is, and has been since 8 March 2002, the holder of the Australian Market Licence (Australian Stock Exchange Limited) 2002, as varied on 11 March 2004 and 4 December 2006 (**Market Licence**);
- (c) is, pursuant to the Market Licence, permitted to operate the financial market that:
  - (i) is a continuation of the market that, immediately before 5 December 2006, was operated in accordance with the operating rules of Australian Stock Exchange Limited; and
  - (ii) is operated in accordance with the operating rules of ASX Limited;
- (d) is, and at all material times has been, by reason of the matters in paragraphs (b) and (c) above, a market licensee for the purposes of Part 7.2, Division 3, of the Corporations Act; and
- (e) is, pursuant to section 792A(a) of the Corporations Act, to the extent that it is reasonably practicable to do so, required to do all things necessary to ensure that the market is a fair, orderly and transparent market.

**B. Agreement between ASX and ISX**

3. By an agreement entered into between ASX and ISX, it was agreed that ISX would comply with ASX's Listing Rules in force from time to time (**Listing Rules**) and ASX would quote the shares of ISX on the Australian Securities Exchange in accordance with the Listing Rules.

4. There were terms of the agreement, among others, that:

- (a) in exercising its powers under the Listing Rules, ASX would act:
  - (i) in good faith;
  - (ii) honestly and fairly; and/or
  - (iii) reasonably,
 including, in exercising its power to suspend from quotation the shares of ISX and/or to compel ISX to produce confidential information and documents;
- (b) in exercising its powers under the Listing Rules, ASX would accord procedural fairness to ISX, including in exercising its power to suspend from quotation the shares of ISX; and

- (c) ASX would do all that is necessary to enable ISX to have the benefit of the agreement.

### **PARTICULARS**

The terms were implied by operation of law.

5. Further, by reason of the matters set out in paragraph 4 above, ASX's power to suspend the shares of ISX from quotation on the Australian Securities Exchange:
- (a) was, and is, to be exercised for the purpose of ensuring current compliance with the Listing Rules so that the market is being operated in accordance with its operating rules; and
  - (b) was, and is, not to be exercised for the purpose of punishing ISX in respect of alleged historical compliance issues.

### **C. Suspension of ISX's shares from quotation**

6. At 9:53am on 2 October 2019, ASX suspended the shares of ISX from quotation on the Australian Securities Exchange with immediate effect under listing rule 17.3, pending the outcome of enquiries said to be made by the Australian Securities & Investments Commission (**ASIC**) and ASX into a number of issues concerning ISX.

### **PARTICULARS**

The suspension was recorded in writing. It was contained in a market announcement dated 2 October 2019. A copy of the market announcement is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

7. ASX exercised its power to suspend the quotation of ISX's shares without first giving ISX any:
- (a) notice of ASX's intention to do so;
  - (b) particulars of the alleged issues concerning ISX; or
  - (c) opportunity to address the alleged issues concerning ISX so that the company could avoid having its shares suspended from quotation.
8. In the circumstances set out in paragraphs 6 and 7 above, ASX failed to:
- (a) accord procedural fairness to ISX; and
  - (b) act in good faith and/or honestly and fairly and/or reasonably,
- before suspending the quotation of ISX's shares from the Australian Securities Exchange.

**D. Failure to lift the suspension from quotation***(i) First failure to lift the suspension*

9. At 12:38pm on 2 October 2019, ISX received a five page Query Letter from the ASX which contained 15 questions, primarily directed to:

- (a) ISX's customers which were currently operating, or had previously operated, cryptocurrency exchanges; and
- (b) loans to the subsidiary of Etherstack plc;

**(First Query Letter).**

**PARTICULARS**

The First Query Letter was in writing. It was attached to an email sent by Mr James Gerraty, Senior Manager Listings Compliance (Melbourne) of the ASX, to Mr Todd Richards, Company Secretary of ISX. A copy of the email and First Query Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

10. At 7:20pm on 2 October 2019, ISX informed the market that it was responding to separate queries from ASX and the ASIC, which it believed had been triggered by recent share price movements in the company.

**PARTICULARS**

The statement was in writing. It was contained in a media release which was made on 2 October 2019. A copy of the media release is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

11. When it made the media release, ISX did not know, and therefore could not and did not tell the market, the particular reasons for the suspension of its shares from quotation by ASX because:

- (a) ISX had not been given any notice by ASX of its intention to suspend the quotation of ISX's shares;
- (b) ISX had not been given particulars of the alleged issues concerning ISX;
- (c) ISX had not been given the opportunity to address the alleged issues concerning ISX so that it could avoid having its shares suspended from quotation; and

- (d) the questions in the First Query Letter related to historical matters which had no apparent connection to the ISX share price movements which:
  - (i) immediately followed the publication of a report by Ownership Matters Pty Ltd on 10 September 2019, to which ISX had responded on 17 September 2019; and
  - (ii) preceded ISX's shares being suspended from quotation.

12. On 10 October 2019, ISX provided ASX with:

- (a) a four page detailed written response to the First Query Letter for release to the market (**First Market Release**);
- (b) five annexures marked A to E, which contained confidential information not to be released to the market; and
- (c) 79 documents, comprising 670 pages, which were not to be released to the market as they also contained confidential information,

(together, the **First Response**).

#### **PARTICULARS**

A copy of the First Response is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment. ISX maintains that the information in the five annexures and 79 documents is confidential. By referring to that information, ISX does not waive its confidentiality therein or its right to protect that confidentiality.

13. Notwithstanding the First Response, ASX failed to lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.

(ii) *Second failure to lift the suspension*

14. On 15 October 2019, ISX received a twenty-one page Query Letter from the ASX which contained 17 questions (**Second Query Letter**).

#### **PARTICULARS**

A copy of the Second Query Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

15. On 25 October 2019, ISX provided ASX with:
- (a) a twelve page detailed written response to the Second Query Letter which was for release to the market (**Second Market Release**); and
  - (b) a further 135 documents, comprising 1721 pages, which were not to be released to the market as they contained confidential information,
- (together, the **Second Response**).

### PARTICULARS

A copy of the Second Response is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment. ISX maintains that the 135 documents contain confidential information. By referring to those documents, ISX does not waive its confidentiality therein or its right to protect that confidentiality.

16. On 28 October 2019, Mr Tim Hart, the Chairman of ISX, sent a letter to, among others, Mr Dominic Stevens, the Managing Director and Chief Executive Officer of ASX, (**28 October Letter**) which:
- (a) said that the First Query Letter and the Second Query Letter had sought production of a bewildering miscellaneous array of unrelated historical information, much of it immaterial to the price or value of ISX's shares, including:
    - (i) how many clients were referred by a technology business in 2016; and
    - (ii) a publicly verifiable licence issued in 2017 by a European Central Bank;
  - (b) said that the diversity and disjunctive nature of the information sought gave rise to a reasonable inference that ASX was looking to find a problem, rather than acting on a suspected problem and that at least some of the information was not being sought for the purpose of satisfying ASX that ISX was complying with the Listing Rules;
  - (c) asked whether ASIC had given ASX written advice of an opinion under section 794D(1) of the Corporations Act and/or a written direction under section 794D(2) of the Corporations Act;
  - (d) said that ISX was concerned that ASX was making decisions to continue the suspension of quotation of its shares that took into account irrelevant considerations or were being exercised for an improper purpose;



- (e) expressed concern that information requests had been leaked and received by a short-seller in ISX shares;
- (f) said that ISX was concerned about the security of confidential information, including customer information, which it had supplied to ASX;
- (g) said that ISX was concerned that quotation of its shares was needlessly suspended;
- (h) said that ISX was concerned that a lengthy period of suspension was having reputational damage on the company; and
- (i) asked ASX to immediately lift the suspension of ISX shares.

#### **PARTICULARS**

The 28 October Letter was attached to an email sent at 2:26pm by Mr Hart of ISX to Mr Stevens of ASX. A copy of the email and 28 October Letter was also sent to Mr Gerraty of ASX. A copy of the emails and 28 October Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

17. At least by 29 October 2019 and continuing thereafter, the position taken by ASX was that the suspension would not be lifted any time soon and not until ASIC agreed.

#### **PARTICULARS**

Statements to the effect alleged were made during a telephone conversation between Mr Anthony Seyfort of HWL Ebsworth Lawyers (**HWL**) and Mr Dean Litis, a Principal Advisor, Listing Compliance (Melbourne), of ASX assigned to monitor and liaise with ISX. Further and better particulars may be provided following discovery.

18. On 30 October 2019:
- (a) Mr Hart of ISX had not received a substantive response to the 28 October Letter; and
  - (b) sent an email to Mr Rick Holliday-Smith, the Chairman of ASX, expressing significant concerns about, among other things, ASX's apparent lack of:
    - (i) due process and procedural fairness; and

(ii) understanding of ISX's business sector and technology,

**(30 October Email).**

#### **PARTICULARS**

A copy of the 30 October Email is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

19. Notwithstanding the First Response, Second Response, 28 October Letter and 30 October Email, ASX failed to lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.

(iii) *Third failure to lift the suspension*

20. At 3:17pm on 31 October 2019, ISX received a further fifteen page Query Letter from ASX which contained 28 questions and improperly referred to confidential information that ISX had given to ASX (**Third Query Letter**).

#### **PARTICULARS**

The Third Query Letter was attached to an email sent by Mr Gerraty of ASX to Mr Richards of ISX. A copy of the email and Third Query Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment

21. At 3:21pm on 31 October 2019, HWL sent a letter to Mr Stevens of ASX (**31 October HWL Letter**) which referred to the 28 October Letter and said that ISX:

- (a) was concerned that the ongoing suspension of its shares from quotation (by now its 21<sup>st</sup> trading day) was detrimental to the interests of investors and to the efficacy of the market operated by the ASX;
- (b) was concerned about the procedural unfairness of the process;
- (c) was concerned that quotation of its shares was needlessly suspended;
- (d) had not receive a coherent written explanation as to whether the daily decisions not to lift the suspension from quotation were founded in listing rules 17.3.1 or 17.3.2 or 17.3.3 or 17.3.4, nor the reasons for such decisions;
- (e) had not been advised whether ASIC has given ASX an opinion under section 794D(1) of the Corporations Act and/or a written direction under section 794D(2) of the Corporations Act;

- (f) was concerned that the ASX was making decisions that take into account irrelevant considerations or are being exercised for an improper purpose;
- (g) was concerned that a lengthy period of suspension was having reputational damage on the company; and
- (h) demanded that the ASX immediately lift the suspension on quotation of ISX's shares given that there is no direction under section 794D(2) of the Corporations Act or an identified current, material, operative breach of the Listing Rules by ISX.

22. Further, the 31 October HWL Letter:

- (a) observed that many listed companies on the Australian Securities Exchange had faced, and many currently face, enquiries by ASIC and other regulatory bodies while their securities continued to be quoted and traded on the Australian Securities Exchange; and
- (b) said that no valid reason had been given why ISX should be treated differently.

#### **PARTICULARS**

The 31 October Letter was attached to an email sent by Mr Seyfort of HWL to Mr Stevens of ASX. A copy of the email and 31 October Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

23. At 5:16pm on 31 October 2019, ISX received a letter from Mr Stevens in response to the 28 October Letter and 30 October Email (**31 October ASX Letter**).

#### **PARTICULARS**

The 31 October ASX Letter was attached to an email sent by Mr Stevens of ASX to Mr Karantzis of ISX. A copy of the email and the 31 October ASX Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

24. At 6:34pm on 31 October 2019, HWL received an email from Mr Daniel Moran, the Group General Counsel and Company Secretary of ASX, (**31 October ASX Email**) which:

- (a) attached a copy of the Third Query Letter and 31 October ASX Letter; and
- (b) said that he would respond to the substance of the 31 October HWL Letter; and

- (c) asked that any further correspondence be directed to him.

#### **PARTICULARS**

The 31 October ASX Email is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

25. The Third Query Letter required a response by 15 November 2019.
26. Between 5:26pm and 6:30pm on 1 November 2019, ISX provided ASX with:
- (a) an eight page written response to the Third Query Letter; and
  - (b) a further 23 documents, comprising 49 pages, that were not to be released to the market as they contained confidential information,
- (together, the **1 November Response**).

#### **PARTICULARS**

The 1 November Response was communicated in four separate emails sent by Mr Karantzis of ISX to Mr Gerraty of ASX, and a copy to Mr Litis of ASX. A copy of the 1 November Response is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment. ISX maintains that the 23 documents contain confidential information. By referring to those documents, ISX does not waive its confidentiality therein or its right to protect that confidentiality.

27. At 12:03pm on 5 November 2019, HWL received a letter from Mr Moran which said that the decision to suspend the shares was not made at the direction of ASIC.

#### **PARTICULARS**

The letter was attached to an email sent by Mr Moran of ASX to Mr Seyfort and Mr Colin Almond of HWL. A copy of the letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

28. At 3:31pm on 5 November 2019, ISX received an email from Mr Kevin Lewis, the Chief Compliance Officer of ASX, which:
- (a) made various observations about the 1 November Response;

- (b) said that ISX could either provide an amended response to the Third Query Letter which addressed his observations or elect to have the 1 November Response released to the market; and
  - (c) said that if ISX elected not to provide an amended response the suspension of its shares from quotation would not be lifted.
29. By at least 6 November 2019 and continuing thereafter, the position of ASX was that, even if ISX satisfied ASX's queries, it would not necessarily lift the suspension while an ASIC investigation was underway.
30. On 7 November 2019, HWL received an email from Mr Colin Luxford of ASIC which said that the decision by ASX to suspend ISX from trading on 2 October 2019 was not made with a direction from ASIC.

#### PARTICULARS

The email was received at 4:59pm on 7 November 2019 by Mr David Clarke of HWL. A copy of the email is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

31. At 9:02am on 11 November 2019, Mr Karantzis told Mr Gerraty that ISX would be providing an updated response to the Third Query Letter by the morning of 15 November 2019.

#### PARTICULARS

The communication was in writing. It was contained in an email sent by Mr Karantzis of ISX to Mr Gerraty of ASX. It was acknowledged in an email sent at 10:13am on 11 November 2019 by Mr Gerraty to Mr Karantzis, as well as Mr Seyfort of HWL and Mr Litis of ASX. A copy of the emails is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

32. Between 3:27pm and 3:39pm on 15 November 2019, ISX:
- (a) provided ASX with an eighteen page detailed written response to the Third Query Letter which was for release to the market (**Third Market Release**);
  - (b) provided ASX with a one page annexure, which was not for release to the market;
  - (c) told ASX that the requisite documents had already been provided as part of the 1 November Response; and

- (d) told ASX that in relation to question 25 of the Third Query Letter:
- (i) it was concerned to protect the confidentiality of its sensitive commercial information;
  - (ii) it was also concerned to comply with its obligations under the Listing Rules and placate any concerns which the ASX may have; and
  - (iii) given the leak of information from the ASX, it would provide the information upon ASX giving an undertaking to keep the information confidential,
- (together, the **Third Response**).

### PARTICULARS

The Third Response was attached and contained in two emails sent by Mr Karantzis of ISX to Mr Gerraty of ASX. A copy of the emails and Third Response is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment. ISX maintains that the one page annexure contains confidential information. By referring to that document, ISX does not waive its confidentiality therein or its right to protect that confidentiality.

33. At 4:05pm on 15 November 2019, HWL sent a letter to Mr Moran (**15 November HWL Letter**) which said, as was the fact, that:
- (a) in light of ISX's comprehensive 19 page reply to the Third Query Letter, ASX ought to lift the suspension of ISX shares from quotation; and
  - (b) if ASX decided to continue the suspension, it would have failed to act honestly and fairly, and therefore reasonably, in exercising its power to suspend ISX's shares from quotation, in the sense that no reasonable person could possibly act in that particular way.
34. Further, the 15 November HWL Letter asked Mr Moran to confirm by 4:00pm on 19 November 2019 that ASX would immediately lift the suspension of ISX's shares.

### PARTICULARS

The 15 November HWL Letter was attached to an email sent by Mr Almond of HWL to Mr Moran of ASX. A copy of the 15 November HWL Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

35. Notwithstanding the First Response, Second Response, 28 October HWL Letter, 30 October Email, 31 October HWL Letter, 1 November Response, Third Response and 15 November HWL Letter, ASX failed to lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.
- (iv) *Fourth failure to lift the suspension and unreasonable exercise of power to compel confidential information*
36. At 3:23pm on 19 November 2019 Mr Moran sent an email to HWL (**19 November ASX Email**) which:
- (a) alleged that ISX had refused to provide the information requested in question 25 of the Third Query Letter;
  - (b) effectively said that ASX would not give the undertaking sought by ISX to keep the sensitive commercial information confidential;
  - (c) asserted that the failure to provide that information was a breach of listing rule 18.7 and that this provided ASX with a further basis to maintain the suspension of ISX's shares; and
  - (d) effectively compelled ISX to produce to ASX sensitive commercial information without any assurance that it would be kept confidential.

#### **PARTICULARS**

The 19 November ASX Email was sent by Mr Moran of ASX to Mr Almond of HWL. A copy of the email was also sent to Ms Katharine Allen and Mr Seyfort of HWL. A copy of the 19 November ASX Email is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

37. At 4:48pm on 22 November 2019 ISX received a further three page Query Letter from ASX which contained 9 questions and required a response by 9:00am on Monday, 2 December 2019 (**Fourth Query Letter**).

**PARTICULARS**

The Fourth Query Letter was attached to an email sent by Mr Gerraty of ASX to Mr Richards of ISX, and a copy to Mr Karantzis, Ms Elizabeth Warrell and Mr Hart of ISX as well as Mr Litis of ASX. A copy of the email and Fourth Query Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment

38. At 5:00pm on 22 November 2019, HWL sent a letter to Mr Moran (**22 November HWL Letter**) which attached the confidential information in response to question 25 of the Third Query Letter and said, as was the fact, that:
- (a) ISX had not refused to provide information in response to question 25 of the Third Query Letter;
  - (b) ISX had sought to first put in place a regime to protect the confidential information in circumstances where information previously given by it to ASX had been leaked to third parties, including the media;
  - (c) in the circumstances, the position adopted by ISX was justified and reasonable whereas the position adopted by ASX in relation to the undertaking sought by ISX was unjustified and unreasonable;
  - (d) ISX was concerned to have its shares returned to quotation forthwith;
  - (e) ISX therefore had no option but to accede to the illegitimate pressure being applied to it by ASX and provide the confidential information in response to question 25 without the undertaking; and
  - (f) that he and ASX were on notice that if any of the sensitive commercial information is either released to the market without the written consent of ISX or disseminated to any third party, including the media, ISX would suffer irreparable loss and damage and would hold him and ASX liable for that loss and damage.
39. The 22 November HWL Letter further:
- (a) asked ASX to confirm that it would now lift the suspension of ISX's shares from quotation without any further delay; and
  - (b) observed that, notwithstanding the APRA investigation into Westpac Banking Corporation Limited and the subsequent media reports earlier in that week, ASX had not suspended or threatened to suspend trading in that company's shares.



### PARTICULARS

The 22 November HWL Letter and the confidential attachment is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment. ISX maintains that the information in the attachment is confidential. By referring to the attachment, ISX does not waive its confidentiality therein or its right to protect that confidentiality.

40. At 1:24pm on 25 November 2019, HWL received an email from Mr Moran (**25 November ASX Email**) which confirmed receipt of the 22 November HWL Letter and said that he had provided it to the ASX's Listing Compliance team for their review.

### PARTICULARS

The 25 November ASX Email is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

41. At 5:14pm on 25 November 2019, HWL sent a letter to Mr Moran (**25 November HWL Letter**) which:
- (a) observed, as was the fact, that the 25 November ASX Email failed to confirm that Mr Moran had communicated the confidential information to the Listings Compliance team on a confidential basis or that appropriate safeguards had been put in place to protect its confidentiality;
  - (b) reiterated that ISX would hold him and ASX liable for the irreparable loss and damage that it would suffer if any of the commercially sensitive information was either released to the market or disseminated to any third party, including the media; and
  - (c) provided further confidential information in order to update one figure in the confidential attachment to the 22 November HWL Letter.

### PARTICULARS

The 25 November HWL Letter was attached to an email sent on behalf of Mr Almond of HWL to Mr Moran of ASX. A copy of the email and the 25 November HWL Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment. ISX maintains that the further information provided in the letter is confidential. By referring to this information, ISX does not waive its confidentiality or its right to protect that confidentiality.

42. At 4:37pm on 26 November 2019, ISX:
- (a) provided ASX with a four page written response to the Fourth Query Letter which was for release to the market (**Fourth Market Release**); and
  - (b) a further 34 documents, comprising 177 pages, which were not to be released to the market as they contained confidential information,
- (together, the **Fourth Response**).
43. Notwithstanding the First Response, Second Response, 28 October HWL Letter, 30 October Email, 31 October HWL Letter, 1 November Response, Third Response, 15 November HWL Letter, 22 November HWL Letter and Fourth Response, ASX failed to lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.
- (v) *Failure to respond within a reasonable period of time and unfounded allegations made by ASX*
44. At 10:05am on 27 November 2019, HWL received a letter from Mr Moran (**First 27 November ASX Letter**) which wrongly suggested by implication that ISX had sought to avoid its obligations under the Listing Rules by providing him with the confidential information.

#### **PARTICULARS**

The First 27 November ASX Letter was attached to an email sent by Mr Moran of ASX to Mr Almond and Mr Seyfort of HWL. The First 27 November ASX Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

45. At 10:06am on 27 November 2019 HWL received a second letter from Mr Moran (**Second 27 November ASX Letter**) which said that:
- (a) ASX anticipated providing its draft findings to ISX by the end of the next week;
  - (b) if those findings were adverse, then ISX would be given a reasonable opportunity to respond to them;
  - (c) ASX would have regard to any relevant information that ISX provided in response, and would also consider any proposal put by ISX in order to address matters raised in the draft findings;
  - (d) ASX would then make its findings; and

- (e) whether this resulted in the reinstatement of ISX's shares to quotation would depend on matters including the nature of ASX's findings and any proposals put by ISX to address such matters to ASX's satisfaction.

#### **PARTICULARS**

The Second 27 November ASX Letter was attached to an email sent by Mr Moran of ASX to Mr Almond and Mr Seyfort of HWL. The Second 27 November ASX Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

46. At 9:13am on 28 November 2019, HWL sent a letter to Mr Moran (**First 28 November HWL Letter**) which said, as was the fact, that:
- (a) by now ASX had had more than a reasonable opportunity to consider the documents and information which had been given to it by ISX;
  - (b) ISX did not accept that ASX making findings about past compliance with the Listing Rules was relevant to ISX's request to have the suspension of its shares from quotation lifted;
  - (c) the leisurely timetable indicated in the Second 27 November ASX Letter was unreasonable and detrimental to ISX as it failed to:
    - (i) accord the appropriate degree of urgency to this matter, particularly given that ISX's shares had now been suspended from quotation for almost two months;
    - (ii) acknowledge that the ASX had been in possession of most of the requested information and documents since at least 15 November 2019; and
    - (iii) acknowledge that at the end of the following week there would only be two working weeks left before the Christmas break, when most offices would close for at least three weeks;
  - (d) in the circumstances, ISX required ASX to provide its draft findings by 1:00pm on Monday, 1 December 2019, so that it would have a reasonable opportunity to consider them with a view to having the protracted suspension of its shares from quotation lifted well before the Christmas break.

**PARTICULARS**

The First 28 November HWL Letter was attached to an email sent by Mr Almond of HWL to Mr Moran of ASX and Mr Seyfort of HWL. A copy of the email and First 28 November HWL Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

47. At 10:19am on 28 November 2019, HWL sent a second letter to Mr Moran (**Second 28 November HWL Letter**) which:
- (a) observed (as was the fact) that his veiled suggestion that ISX was seeking to avoid its obligations under the rules by providing him with its response to question 25 of the Third Query Letter was extraordinary, unfounded and disingenuous given the recent correspondence concerning the leak of information from the ASX;
  - (b) detailed the recent correspondence in relation to the leak of information;
  - (c) observed (as was the fact) that the First 27 November ASX Letter ignored that context and ISX's legitimate concern to protect its sensitive commercial information, which he had effectively compelled ISX to provide in response to question 25 of the Third Query Letter;
  - (d) rejected his attempt to obscure ISX's legitimate concern to protect its sensitive commercial information;
  - (e) rejected his attempt to evade any responsibility to ensure that appropriate safeguards were in place to protect the confidentiality of the sensitive commercial information which had been given to him; and
  - (f) again reiterated that ISX would hold him and ASX liable for the irreparable loss and damage that it would suffer if any of the sensitive commercial information was either released to the market or disseminated to any third party, including the media.

**PARTICULARS**

The Second 28 November HWL Letter was attached to an email sent by Mr Almond of HWL to Mr Moran of ASX. A copy of the email and Second 28 November HWL Letter is in the possession of the solicitors acting for ISX and may be inspected during business hours by appointment.

48. Notwithstanding the First 28 November HWL Letter, ASX:
- (a) did not provide its draft findings by 1:00pm on Monday, 1 December 2019, so that ISX would have a reasonable opportunity to consider them with a view to having the suspension of its shares from quotation lifted well before the Christmas break; and
  - (b) has failed to lift the suspension and permit the quotation of ISX's shares on the Australian Securities Exchange.
49. In the circumstances set out in paragraphs 9 to 48 above, ASX has failed to act in good faith and/or honestly and fairly and/or reasonably in exercising its powers under the Listing Rules as it has:
- (a) failed to forthwith tell ISX the precise steps it needs to take in order to have the suspension lifted and its shares reinstated for quotation;
  - (b) failed to lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange notwithstanding:
    - (i) the First Market Release, Second Market Release, Third Market Release and Fourth Market Release; and
    - (ii) all of the confidential information and documents given by ISX to ASX in response to the First Query Letter, Second Query Letter, Third Query Letter and Fourth Query Letter;
  - (c) failed to ensure that ISX was treated in a like manner as other participants who have been, or are presently, the subject of a regulatory investigation; and
  - (d) compelled ISX, against its will, to produce to ASX sensitive commercial information without first:
    - (i) undertaking to keep that information confidential; or
    - (ii) giving ISX an assurance that it had implemented appropriate safeguards to protect ISX's confidentiality so that it would not be released to the market or leaked to third parties, including the media.
50. By reason of the matters set out in paragraphs 9 to 49 above, ASX has breached its implied obligations to:
- (a) act in good faith and/or honestly and fairly and/or reasonably in exercising its powers under the Listing Rules; and
  - (b) do all that is necessary to enable ISX to have the benefit of the agreement.

51. In the circumstances set out in paragraphs 9 to 50 above, ISX has suffered, and continues to suffer, loss and damage.

### **PARTICULARS**

Particulars of the loss and damage will be provided after discovery and/or the filing of expert evidence.

*ASX has failed to meet its obligation under its operating rules: Order pursuant to sections 793C(2) and/or 1101B(1)(d) of the Corporations Act*

52. Further, by reason of the matters set out in paragraphs 6 to 51 above, ASX has failed to meet its obligations under its operating rules and ISX is aggrieved by the contravention.
53. In the circumstances set out in paragraphs 6 to 52 above, ISX is entitled to an order pursuant to sections 793C(2) and/or 1101B(1)(d) of the Corporations Act directing ASX to forthwith lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.

*ASX has contravened section 792A(a) of the Corporations Act: Order pursuant to section 1324(1)*

54. Further, by reason of the matters set out in paragraphs 9 to 51 above, ASX has failed to:
- (a) apply its operating rules (which, by reason of section 761A of the Corporations Act, include the listing rules made by ASX) in a fair manner; and
  - (b) ensure that ISX is treated in a like manner as other participants who have been, or are presently, the subject of a regulatory investigation.
55. By reason of the matters set out in paragraph 54 above, ASX has contravened section 792A(a) of the Corporations Act.
56. In the circumstances set out in paragraphs 9 to 51 and 54 to 55 above, ISX is entitled to an order pursuant to section 1324(1) of the Corporations Act requiring ASX to forthwith lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.

### **E. Judicial review of the decisions to suspend and not lift the suspension**

(i) *Amenability of ASX to judicial review: Datafin principle*

57. Further, in the circumstances set out in:
- (a) paragraphs 6 to 8 above, ASX decided to suspend the quotation of ISX's shares on the Australian Securities Exchange; and

- (b) paragraphs 9 to 48 above, ASX decided to not lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.

58. Each of the decisions was made pursuant to the Listing Rules:

- (a) purportedly in the performance of a public duty to ensure that the market is fair, orderly and transparent as required by section 792A(a) of the Corporations Act; or
- (b) in the exercise of a power which has a public element.

### **PARTICULARS**

The exercise of the power under the Listing Rules, including the power to suspend quotation of ISX's shares, refuse to reinstate quotation of ISX's shares and compel the production of confidential information and documents has a public element by reason of the following:

- A. The ASX is permitted to operate the Australian Securities Exchange by reason of the Market Licence granted to it by the Minister who can:
  - a) pursuant to section 794A(1) of the Corporations Act, give the ASX a written direction to do specified things that the Minister believes will promote compliance by ASX if the Minister considers that the ASX is not complying with its obligations as a market licensee; and
  - b) pursuant to section 794B(1) of the Corporations Act, give ASX a written notice requiring it to give ASIC a special report on specified matters.
- B. In granting the Market Licence and in disallowing a change to the operating rules of the ASX, the Minister must have regard to whether it would be in the public interest to do so: sections 798A(1)(a), 798A(1)(b) and 798A(2)(g) of the Corporations Act.
- C. The Listing Rules are supervised by the ASIC and the Minister by reason of, inter alia:

- a) section 793C of the Corporations Act, which provides a statutory means for enforcing compliance with the Listing Rules;
- b) section 793D of the Corporations Act, which requires ASX to lodge with ASIC written notice any of changes to the Listing Rules; and
- c) section 793E of the Corporations Act, which requires ASIC to send a copy of the notice to the Minister, who may disallow all or a specified part of the change.

59. By reason of the matters set out in paragraphs 2 and 57 to 58 above, the decisions of ASX are amenable to judicial review by this Court.

*(ii) Decision to suspend ISX's shares from quotation*

60. By reason of the matters set out in paragraphs 6 to 8 above:

- (a) a breach of natural justice occurred in connection with the decision to suspend the quotation of ISX's shares on the Australian Securities Exchange;
- (b) there was no evidence or other material to justify the making of the decision to suspend the quotation of ISX's shares on the Australian Securities Exchange; and
- (c) the making of the decision to suspend the quotation of ISX's securities on the Australian Securities Exchange was an improper exercise of power as it took into account irrelevant considerations.

*(iii) Decisions to not reinstate ISX's shares to quotation*

61. By reason of the matters set out in paragraphs 9 to 48 above, there was no evidence or other material to justify the making of each decision to not lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.

62. Further, by reason of the matters set out in paragraphs 9 to 48 above, each decision to not lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange was an improper exercise of power because it:

- (a) was an exercise of power that was so unreasonable that no reasonable person could have so exercised the power; and/or



- (b) took into account irrelevant considerations being:
  - (i) past conduct of ISX; and/or
  - (ii) the fact that ASIC is presently conducting an investigation in relation to ISX;and/or
- (c) failed to take into account relevant considerations being:
  - (i) the First Market Release, Second Market Release, Third Market Release and Fourth Market Release, after each had been made; and
  - (ii) the confidential information and documents after it had been given by ISX to ASX in response to the First Query Letter, Second Query Letter, Third Query Letter and Fourth Query Letter;and/or
- (d) constituted an exercise of power for a purpose other than a purpose for which the power was conferred in circumstances where ASIC had not given ASX written advice of an opinion under section 794D(1) of the Corporations Act and/or a written direction under section 794D(2) of the Corporations Act.

#### **AND ISX CLAIMS AGAINST ASX**

- A. A declaration that ASX failed, in breach of the agreement, to accord procedural fairness to ISX and act in good faith and/or honestly and fairly and/or reasonably before suspending the quotation of its shares on the Australian Securities Exchange.
- B. A declaration that ASX failed, in breach of the agreement, to act in good faith and/or honestly and fairly and/or reasonably by not lifting the suspension and reinstating ISX's shares for quotation on the Australian Securities Exchange.
- C. A declaration that ASX failed to meet its obligations under its operating rules.
- D. An order pursuant to sections 793C(2) and/or 1101B(1)(d) of the Corporations Act directing ASX to forthwith lift the suspension and reinstate ISX's shares for quotation on the Australian Securities Exchange.
- E. A declaration that ASX contravened section 792A(a) of the Corporations Act.
- F. Further or alternatively to paragraph D above, an order pursuant to section 1324(1) of the Corporations Act requiring ASX to forthwith lift the suspension and reinstate the quotation of ISX's shares on the Australian Securities Exchange.

- G. Further or alternatively to paragraphs D and F above, an order:
- (i) setting aside the decisions not to lift the suspension and reinstate ISX's shares for quotation on the Australian Securities Exchange, with effect from the date of the order; and
  - (ii) directing ASX to forthwith reinstate ISX's shares for quotation on the Australian Securities Exchange.
- H. Damages.
- I. Such other relief as the Court considers to be appropriate.
- J. Costs.

**Dated: 4 December 2019**

**P W Collinson**

**J S Mereine**

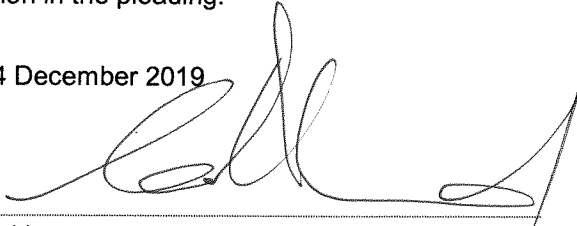
*HWL Ebsworth*

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**HWL Ebsworth Lawyers**  
Solicitors for the Applicant

**Certificate of lawyer**

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

Date: 4 December 2019



Signed by  
Lawyer for the Applicant

Colin Michael Almond  
Level 26, 530 Collins Street Melbourne  
An Australian Legal Practitioner  
within the meaning of the  
Legal Profession Uniform Law (Victoria)