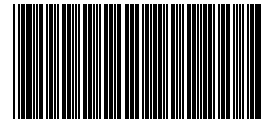




Filed: 17 November 2017 3:51 PM



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Form 3A/B  
Rule 6.2

## AMENDED STATEMENT OF CLAIM

### COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Equity General
Registry	Supreme Court Sydney
Case number	2017/00234966

### FILING DETAILS

Filed for	Plaintiff[s]
Legal representative	Simon Jacob Morris
Legal representative reference	
Telephone	02 9253 9999
Your reference	SJM.401622

### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Amended Statement of Claim (e-Services), along with any other documents listed below, were filed by the Court.

Amended Statement of Claim (Further Amended Statement of Claim - Smith V KPMG.pdf)

[attach.]

Plaintiff form 3A (version 5)  
UCPR 6.2

## FURTHER AMENDED STATEMENT OF CLAIM

### COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity Division
Registry	Sydney
Case number	2017/00234966

### TITLE OF PROCEEDINGS

Plaintiff	<b>Alan Smith</b>
Defendant	<b>KPMG Financial Advisory Services (Australia) Pty Ltd</b> (ACN 007 363 215)

### FILING DETAILS

Filed for	<b>Alan Smith, Plaintiff.</b>
Legal representative	Simon Morris Piper Alderman
Legal representative reference	SJM.401622
Contact name and telephone	Simon Morris Tel: +61 2 9253 9999
Contact email	smorris@piperalderman.com.au

### TYPE OF CLAIM

Commercially misleading conduct

### RELIEF CLAIMED

1. Damages.
2. Compensation pursuant to section 670B of the *Corporations Act 2001* (Cth).
3. Interest pursuant to section 100 of the *Civil Procedure Act 2005* (NSW).
4. Costs, and interest on costs.
5. Such other orders as this Court deems fit.

## PLEADINGS AND PARTICULARS

### Parties

1. The plaintiff is a natural person capable of suing in his own name.
2. The plaintiff brings this proceeding as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW).
3. This proceeding is commenced by the plaintiff on his own behalf and on behalf of those persons who:
  - 3.1            held shares in Discovery Metals Limited (**DML**) in the period between 23 November 2012 and 15 February 2013 (**Relevant Period**) and continued to hold shares in DML after 15 February 2013 for a period of time;
  - 3.13.2            have suffered loss or damage by or resulting from the conduct of the defendant pleaded in this Further Amended Statement of Claim;
  - 3.23.3            are not those persons listed in s 159(2) of the *Civil Procedure Act 2005* (NSW);
  - 3.33.4            are not Cathay Fortune Corporation, China-Africa Development Fund or CF Fortune Investment Limited, and are not related entities of those companies, within the meaning of section 9 of the *Corporations Act 2001* (Cth); and
  - 3.43.5            were not directors of DML in the Relevant Period, or companies related to any director of DML during the Relevant Period,

**(Group Members).**
4. As at the date of commencement of this proceeding there are seven or more Group Members.
5. In 2012 and 2013, DML:
  - 5.1            was a base and precious metals production and exploration company;
  - 5.2            was listed on the Australian Stock Exchange and the Botswana Stock Exchange; and

- 5.3 owned 100% of the Boseto Copper Project located in the Kalahari Copperbelt in the north-west of Botswana (**Boseto Project**), which was its principal asset.
6. The Defendant, KPMG Financial Advisory Services (Australia) Pty Ltd (**KPMG Advisory**):
- 6.1 is a company registered in Victoria and is able to be sued;
- 6.2 carried on business (and held itself out as carrying on business) as corporate advisors, including producing independent expert reports for the benefit of shareholders of companies subject to takeovers and similar reports.
7. In the Relevant Period, the following persons held the following positions at DML:
- 7.1 Mr Gordon Galt - Non-Executive Chairman;
- 7.2 Mr Stuart Bradley Sampson - Managing Director;
- 7.3 Mr Morrice Cordiner - Non-Executive Director;
- 7.4 Mr Ribson Gabonowe - Non-Executive Director;
- 7.5 Mr Niall Lenahan - Non-Executive Director;
- 7.6 Mr Jeremy Read, - Non-Executive Director;
- 7.7 Mr John Shaw- Non-Executive Director,
- (together **Directors**).

#### **Non-binding, Indicative Take-Over Offer**

8. On 21 September 2012, DML received a non-binding, indicative proposal from Cathay Fortune Corporation (**CFC**) and China-Africa Development Fund (**CAD Fund**) (**Indicative Offer**).

**Particular**

Letter from Mr Zhang Zhenhao, Director and Chief Financial Officer of CFC, to Mr Galt, dated 21 September 2012.

9. The Indicative Offer provided that CFC and CAD Fund would pay A\$1.70 per share for all of the shares in DML not already owned by CFC or CAD Fund, subject to certain conditions being met.
10. The volume-weighted average price of DML's shares for the twenty trading day period ended 21 September 2012 was \$1.089.
11. On 4 October 2012, DML announced to the market that it had received the Indicative Offer.

**Particular**

ASX Announcement titled "*Discovery Metals Limited: Indicative, Non-Binding Proposal for All Discovery Metals' Shares*", dated 4 October 2012.

12. On 4 October 2012, DML was placed on a trading halt as a result of the Indicative Offer.

**Particular**

ASX Announcement titled "*Discovery Metals Limited: Trading Halt*", dated 4 October 2012.

13. On 11 October 2012, DML announced to the market that (*inter alia*):
  - 13.1 The Directors had considered the Indicative Offer and its terms and had taken advice from DML's financial advisor, UBS Group AG;
  - 13.2 The Directors met that day with representatives of, and advisors to, CFC and the CAD Fund to discuss the Indicative Offer;
  - 13.3 The Directors had advised the representatives of CFC and the CAD Fund that:

*"the price proposed by CFC and CAD Fund is inadequate and does not reflect, in the context of a change of control, the value of the Company's operations and expansion plans, the potential to increase*

*the resources on the Company's tenements through further exploration, the strategic value of the Company with an operating project and management team in Botswana, and the scarcity value of the Company."*

#### **Particular**

ASX Announcement titled "*Discovery Metals Limited: Update on indicative, non-binding proposal*", dated 11 October 2012.

#### **Intention to Make Binding Take Over Bid**

14. On 23 October 2012, CFC and CAD Fund notified DML that it was intended that Cathay Fortune Investment Limited (**CF Investment**), being a joint venture company owned by CFC and CAD Fund, would make an off-market takeover offer to acquire all of the ordinary shares of DML.
15. On 23 October 2012, DML announced to the market that it had been notified of the matters outlined in 14 above, and stated:

*"On 4 October 2012, the Directors advised representatives of CFC and CAD Fund that the proposal was inadequate and did not reflect, in the context of a change of control:*

- *the value of the Company's operations and expansion plans;*
- *the potential to increase the resources and the Company's tenements through further exploration;*
- *the strategic value to the Company with an operating project and management team in Botswana; and*
- *the scarcity value of the Company."*

#### **Particular**

ASX Announcement titled "*Discovery Metals Limited: Receipt of Notice of Intention to Make a Takeover Offer*", dated 23 October 2012.

## Bidder's Statement

16. On 25 October 2012, CF Investment submitted a bidder's statement (**Bidder's Statement**) to DML, which contained an offer to purchase all of the ordinary shares in DML for A\$1.70 per share (**Offer**).

### Particular

#### Bidder's Statement

17. The Offer was initially open until 7.00pm (EST) on 13 December 2012 and was subject to various conditions, including that CF Investment acquired sufficient DML shares to own more than 51% of DML shares (**Minimum Acceptance Condition**).
18. The Bidder's Statement expressed seven reasons why shareholders should have accepted the Offer, being that:
- 18.1 the Offer represented a significant premium to recent trading levels in DML's shares;
  - 18.2 there were significant operating, development and funding risks associated with DML;
  - 18.3 the DML board of Directors recently issued DML shares at A\$1.20 per share;
  - 18.4 the Offer represented a 40% premium to the current, average equity analyst net asset values;
  - 18.5 the Offer provided shareholders with certainty of value, amid volatile markets;
  - 18.6 there were no alternative offers for DML's shares; and
  - 18.7 if shareholders did not accept the Offer, they would be exposed to share market and liquidity risks.
19. On 30 October 2012 DML released a presentation to the market in which it was noted that "DML Directors believe \$1.70/ share is inadequate for a change in control and recommend shareholders do nothing at this point and wait for DML's Target Statement".

**Particular**

ASX Announcement titled "*Pre AGM Investor Update*", dated 30 October 2012.

20. Also on 30 October 2012, CF Investment sent a notice of fulfilment of conditions to DML and ASX Limited, indicating that the conditions set out in:

20.1 Section 10(b) (relating to approval under the Australian Foreign Investment Policy); and

20.2 Section 10(e)(i) (relating to approval of MOFCOM),

of the Bidder's Statement had been satisfied.

21. On 8 November 2012, the Bidder's Statement was released to the market.

**Particular**

ASX Announcement titled "*Bidders Statement – Off-Market Bid*", dated 8 November 2012.

**KPMG Advisory Report**

22. Some time prior to 19 November 2012, the Directors engaged KPMG Advisory to provide an "independent expert report" "to ensure that Discovery's shareholders are fully informed in reaching a decision as to whether to accept or reject the Offer".

**Particular**

KPMG Advisory Report (as defined at 25 below), page 3.

23. KPMG Advisory prepared the KPMG Advisory Report for inclusion in DML's Target Statement, "*as if it was required for the purposes of Section 640*" of the *Corporations Act 2001* (Cth).

**Particular**

KPMG Advisory Report, page 3.

24. At the time of preparing the KPMG Advisory Report, KPMG Advisory was aware that the Directors had expressed the view that the Offer was below market value.



**Particular**

KPMG Advisory Report, pages 1 and 2.

25. On 19 November 2012, KPMG Advisory provided to the Directors a report titled "*Discovery Metals Limited Independent Expert Report*" (**KPMG Advisory Report**), in which KPMG Advisory expressed the opinion that:

25.1 the range of fair market value for a DML share was between A\$1.74 and A\$2.11 (**Range**); and

25.2 given the Offer was \$0.04 below the Range, the Offer was not fair or reasonable,

(**KPMG Advisory Opinion**).

**Particular**

KPMG Advisory Report.

26. KPMG Advisory stated that "[t]he sole purpose of this report is an expression of the opinion of KPMG Corporate Finance as to whether the Offer is fair or reasonable to non-associated shareholders".

**Particular**

KPMG Advisory Report, page 3.

27. The plaintiff and the Group Members were non-associated shareholders within the meaning of the phrase used in the KPMG Advisory Report.

40% Uplift for bottom of the Range

28. The KPMG Advisory Report stated that the Boseto Project was DML's principal asset.

**Particular**

KPMG Advisory Report, page 2.

29. KPMG Advisory relied upon the report dated 20 November 2012 (**Technical Valuation Report**) prepared by SRK Consulting (Australasia) Pty Ltd (**SRK**), which contained an opinion, based on assumptions including those made by SRK on the

instructions of KPMG Advisory, as to the technical value of DML's mineral assets, including the Boseto Project.

30. The Technical Valuation Report indicated that the technical value of the DML's mineral assets was between US\$738m and US\$1181m (**Technical Valuation Range**), comprising:
  - 30.1 the Boseto Project, which was valued at between US\$671m (**Boseto Project Low Valuation**) and US\$1022m (**Boseto Project High Valuation**); and
  - 30.2 DML's other mineral assets, which were valued at between US\$67m and US\$159m (**Other Mineral Assets Valuation**).
31. In determining the fair market value of DML, KPMG Advisory adopted SRK's Technical Valuation Range.
32. KPMG Advisory applied a 40% uplift "*for market and strategic related factors*" to the Boseto Project Low Valuation.

#### **Particular**

KPMG Advisory Report, pages 6, 7, 32, 33.

33. KPMG Advisory did not apply any uplift to the Boseto Project High Valuation.
34. KPMG Advisory did not apply any uplift to the Other Mineral Assets Valuation.

#### *Inconsistent inflation and risk-free rates*

35. In preparing the Technical Valuation Report, SRK was instructed by KPMG Advisory to assume that:
  - 35.1 inflation would be 2.3% per annum in 2015 and subsequently; and
  - 35.2 after 2017, copper and silver prices would increase by 2.3% per annum in nominal terms.

**Particular**

Technical Valuation Report, pages 20, KPMG Advisory Report pages 35 and 36.

36. This assumption affected SRK's Technical Valuation Range.
37. In preparing the KPMG Advisory Report, KPMG Advisory adopted a risk-free rate "*in the order of 1.8% percent [sic] per annum*".

**Particular**

KPMG Advisory Report, page 54.

Risks Associated with "ramping up" copper production

38. As at the valuation date, being 19 November 2012 (**Valuation Date**), the Boseto Project was in the "commissioning and ramp up" stage, meaning that the Project had not yet achieved the milling rate of 3.5 mega-tonnes per annum which formed the basis of the Boseto Project Low Valuation (**Full Production**).

**Particular**

KPMG Advisory Report, page 19.

39. The first copper concentrate was sold from the Boseto Project in June 2012.
40. The Boseto Project was officially opened in September 2012.
41. As at the Valuation Date, there was a risk that the ramp up to Full Production might have been delayed.
42. In preparing the KPMG Advisory Report and in reaching the KPMG Advisory Opinion, KPMG Advisory applied an "alpha factor" for sovereign and development risk of 0.5% per annum.

**Target's Statement**

43. On 23 November 2012, DML released a Target's Statement, recommending shareholders reject the Offer (**Target's Statement**).

**Particular**

ASX Announcement titled *"Discovery Metals Limited: DML Board recommends Shareholders REJECT Takeover Offer"*, dated 23 November 2012.

44. The Target's Statement had been unanimously approved by the Directors of DML.
45. The Target's Statement included the KPMG Advisory Report and the Technical Valuation Report.
46. KPMG Advisory knew that the KPMG Advisory Report and the Technical Valuation Report would be included in the Target's Statement and KPMG Advisory consented to the KPMG Advisory Report and the Technical Valuation Report being included in the Target's Statement.
47. The Target's Statement stated that the first key reason the Directors believed that shareholders should "**REJECT THE OFFER**" was that *"The Independent Expert has concluded that the offer is neither fair nor reasonable"*.

**Particular**

Target's Statement, Chairman's letter, page 10.

- 47A. The Target's Statement indicated that the negative condition set out in section 10(I) of the Offer (relating to change of control in Financial Arrangements) may have been breached by DML's "Debt Financing" (as defined in the Target's Statement) (**Potential Breach**).

**Particular**

Target's Statement, pages 33, 37 and 55.

**Supplementary Statements and Satisfaction of Conditions**

48. On 29 November 2012, CF Investment released a Supplementary Bidder's Statement to the market, responding to the Target's Statement.
- 48A. The Supplementary Bidder's Statement noted CF Investment had undertaken a detailed review of the Target's Statement, but did not mention the Potential Breach.

- 48B. On 5 December 2012, CF Investment extended the Offer until 7.00pm (EST) on 11 January 2013.
49. On 5 December 2012, CF Investment released a Second Supplementary Bidder's Statement to the market, which relevantly ~~extended the Offer until 7.00pm (EST) on 11 January 2013~~ noted the Potential Breach and indicated that CF Investment was considering its position in relation to it.
50. On 5 December 2012, CF Investment sent a Notice of Satisfaction of Offer Conditions to DML and the ASX Limited, indicating that the conditions set out in:
- 50.1 section 10(c)(iii) (relating to BSE Listing Committee);
  - 50.2 section 10(e)(ii) (relating to SAFE approval); and
  - 50.3 section 10(m) (relating to DML's announcement concerning change of control),
- of the Bidder's Statement had been satisfied.
51. On 12 December 2012, DML released a Supplementary Target's Statement to the market, which stated that "***THE DIRECTORS CONTINUE TO UNANIMOUSLY RECOMMEND THAT YOU...REJECT THE OFFER***" (ellipses in original) and referred to the KPMG Advisory Opinion as a reason to reject the Offer.
52. On 24 December 2012, CF Investment released a Third Supplementary Bidder's Statement to the market, which provided an update of the status of some of the conditions of the Offer.
53. On 24 December 2012, CF Investment sent a Notice of Satisfaction and Waiver of Offer Conditions to DML and the ASX Limited, indicating that:
- 53.1 the condition set out in section 10(c)(i) (relating to the approval of the Minister for Mines for the transfer of a controlling interest in the holders of the Mineral Interest) of the Bidder's Statement had been satisfied;
  - 53.2 the condition set out in section 10(d) (relating to the Boseto Copper Project) of the Bidder's Statement had been waived; and
  - 53.3 as at the date of the Notice, CF Investment's voting power in DML was 14.1%.

54. On 3 January 2013, CF Investment extended the Offer period until 7.00pm (EST) on 8 February 2013.
55. On 9 January 2013, CF Investment released a Fourth Supplementary Bidder's Statement to the market, which expressed concern about the actual reserves and grades to be mined from the Boseto Project.
56. On 23 January 2013, DML released a Second Supplementary Target's Statement to the market, which provided further information and commentary on the "ramp-up" of the Boseto Project.
57. On 29 January 2013, CF Investment sent a Notice of Satisfaction of Offer Conditions to DML and the ASX Limited, indicating that:
- 57.1 the conditions set out in section 10(c)(ii) of the Bidder's Statement had been satisfied; and
- 57.2 as at the date of the notice, CF Investment's voting power in DML was 15.8%.
58. On 30 January 2013, CF Investment released a Fifth Supplementary Bidder's Statement to the market, which relevantly extended the Offer until 7.00pm (EST) on 15 February 2013.
59. On 1 February 2013, DML released a Third Supplementary Target's Statement to the market, which responded to CF Investment's Fifth Supplementary Bidder's Statement.
- 59A. On 1 February 2013, CF Investment released a Sixth Supplementary Bidder's Statement to the market, which relevantly noted that certain conditions of the Offer would not be satisfied, and that the Offer would terminate on 15 February 2013.
60. On 8 February 2013, CF Investment sent a Notice of Status of Conditions to DML and the ASX Limited:
- 60.1 confirming that the conditions in paragraphs (b), (c), (e) and (m) of section 10 of the Bidder's Statement had been satisfied;
- 60.2 confirming that the condition in paragraph (d) of section 10 of the Bidder's Statement had been waived; ~~and~~

- 60.3 indicating that as of the date of the notice, CF Investment's voting power in DML was 16.2%-, and
- 60.4 indicating, in accordance with s 630 of the Corporations Act 2001, that the Offer remained subject to unsatisfied conditions and would lapse on 15 February 2013.
61. Between 25 October 2012, when the Offer was made, and 15 February 2013 when the Offer expired, no event occurred which would have triggered the negative conditions in paragraphs (f), (g), (h), (i), (j), (k), (l), (m) or (n) of section 10 of the Bidder's Statement.
62. ~~Between 25 October 2012, when the Offer was made, and 15 February 2013 when the Offer expired, there was nothing preventing DML from making the announcement referred to in paragraph (k) of section 10 of the Bidder's Statement. If the Minimum Acceptance Condition had been met, CF Investment would have waived the conditions in paragraphs (k) and (l) of section 10 of the Bidder's Statement.~~
63. ~~Acting properly, DML would have made that announcement before 15 February 2013.~~  
Not used

#### **Offer Lapses**

64. On 15 February 2013, the Offer lapsed, with insufficient numbers of shareholders accepting the Offer to meet the Minimum Acceptance Condition.

#### **Trading Halt and Administration**

65. On 18 April 2013, DML's average share price was \$0.34.
66. Between 18 April 2013 and 21 May 2013, DML went into a trading halt whilst it attempted to obtain finance.
67. On 26 April 2013, CF Investment made a new proposal to acquire all the shares in DML for \$0.35 to \$0.40 per share (**New Proposal**).
68. On 21 May 2013, DML released the New Proposal to the market, and indicated that it was inviting other bids from interested parties, with a closing date of 10 June 2013.
69. On 21 May 2013, the average share price for DML was \$0.20.

70. By 10 June 2013 no other bids had been made for DML's shares and the New Proposal had lapsed.
71. On 27 February 2015, DML entered into voluntary administration.
72. On 10 June 2015, DML went into liquidation.
73. That day, the liquidators declared that they had reasonable grounds to believe that there is no likelihood that DML's shareholders, of any class, would receive any distributions in the course of the winding up.

### Particular

ASX Announcement titled "*Amended Header: Declaration by Liquidators about shares*" dated 12 June 2015.

74. Between 21 May 2013 and 27 February 2015, the average daily share price of DML did not rise above \$0.235 and did not drop below \$0.016.
75. The shareholders of DML, including the plaintiff and the Group Members, have received and will receive no dividend in the liquidation.

## NEGLIGENCE

### A. Duty of Care

#### Risk of Harm

76. At all material times, there was a risk that non-associated shareholders of DML would, in reliance on the KPMG Advisory Report or the opinions expressed in that report or in the Target's Statement reproducing those opinions, reject the Offer or decide not to sell their DML shares, and suffer financial harm from doing so (**Risk of Financial Harm**).
77. That risk was not remote.
78. That risk was not insignificant.

#### KPMG Advisory's Duty of Care

79. At all material times, the Risk of Financial Harm was reasonably foreseeable by KPMG Advisory.



80. KPMG Advisory had been engaged for the purpose of preparing an independent expert report that would be used by DML's shareholders in reaching a decision as whether to accept or reject the Offer.

**Particular**

KPMG Advisory Report, page 3.

81. KPMG Advisory knew that many of DML's shareholders would use or rely on the KPMG Advisory Report and the opinions contained in that report for that purpose.
82. KPMG Advisory undertook to prepare the KPMG Advisory Report, applying its expertise as a valuer of shares.
83. KPMG Advisory had complete control over the KPMG Advisory Opinion contained in the KPMG Advisory Report which it could have exercised so as to avoid or minimise the Risk of Financial Harm.
84. DML's non-associated shareholders could not direct, control or influence the contents of the KPMG Advisory Report or the KPMG Advisory Opinion contained in it.
85. DML's non-associated shareholders were dependent upon KPMG Advisory to prepare the KPMG Advisory Report in a manner that would avoid or minimise the Risk of Financial Harm.
86. DML's non-associated shareholders were vulnerable to harm if the KPMG Advisory Opinion was not reliable.
87. In light of the facts and matters pleaded in paragraphs 3, 22 to 27 and 79 to 86, KPMG Advisory owed a duty to the plaintiff and to Group Members to take reasonable care in reaching the opinions stated in, and preparing, the KPMG Advisory Report to avoid or minimise the Risk of Financial Harm.

**B. Breaches of Duty**

40% Uplift

88. A reasonably prudent valuer in KPMG Advisory's position would not have applied a 40% uplift for "market and strategic related factors" to the Boseto Project Low Valuation, as there was no justification for applying any such uplift, or alternatively, for applying an uplift of that magnitude.

89. In the circumstances pleaded at paragraphs 28 to 34, KPMG Advisory breached its duty of care by applying a 40% uplift for “market and strategic related factors” on the Boseto Project Low Valuation.
90. If this breach had not occurred, and KPMG Advisory had not applied the uplift, then:
- 90.1 KPMG Advisory would have attributed a low valuation per share of approximately \$1.21; and
- 90.2 KPMG Advisory would have formed and expressed the opinion that the Offer was fair and reasonable, as it would have been in the Range.

*Inconsistent inflation and risk-free rates*

91. A reasonably prudent valuer in KPMG Advisory's position would have provided a valuation opinion based upon inflation and risk-free rate assumptions that were consistent, namely that the risk free rate adopted for the purposes of assessing an appropriate discount rate to apply in valuing the Boseto Project was not less than the inflation rate assumption which underpinned the forecast revenues in the cash flow projections adopted for the purposes of valuing the Boseto Project.
92. A reasonably prudent valuer in KPMG Advisory's position, would have instructed SRK to adopt inflation assumptions that were consistent with the risk-free rate the reasonably prudent valuer intended to apply.
93. In the circumstances pleaded at paragraphs 35 to 37, KPMG Advisory breached its duty of care by instructing SRK to adopt a long term inflation rate assumption of 2.3% per annum which is inconsistent with the risk free rate of 1.8% per annum KPMG Advisory adopted for the purposes of assessing an appropriate range of discount rates for the Boseto Project.
94. If this breach had not occurred, and the inflation assumption KPMG Advisory instructed SRK to adopt was consistent with the risk-free rate KPMG Advisory applied in the KPMG Advisory Report, then:
- 94.1 the low end value per share would have been significantly lower than the low end value per share assessed by KPMG of \$1.74 (including uplift) or \$1.21 (without uplift); and

- 94.2 KPMG Advisory would have formed and expressed the opinion that the Offer was fair and reasonable, as it would have been in the Range.

Risk of prolonged ramp up period

95. A reasonably prudent valuer in KPMG Advisory's position would have accounted in its valuation for the risk of delay in the ramp up to Full Production by:
- 95.1 analysing the value impact of an assumed delay in the ramp up to Full Production in the SRK models; and
- 95.2 retaining an "alpha factor" in the discount rate to reflect sovereign risk and development risk that was sufficient to capture both the sovereign risk associated with mining activities in Botswana and the risk of delays in the ramp up to Full Production.
96. KPMG Advisory applied an "alpha factor" discount of 0.5%.

**Particular**

KPMG Advisory Report, page 59.

97. Around the time the KPMG Advisory Report was prepared, the standard sovereign risk rate for Botswana was between 1% and 1.5%.

**Particular**

Professor Aswath Damodaran, New York University, Stern School of Business, annual paper on sovereign risk.

98. In the premises, the 0.5% alpha factor discount applied by KPMG Advisory was insufficient to account for both:
- 98.1 the sovereign risk associated with mining activities in Botswana; and
- 98.2 the development risk, including the risk associated with delays in the ramp up to Full Production.
99. In the premises, KPMG Advisory breached its duty of care by failing properly to account for sovereign risk and development risk, including the risk of delay in the ramp up to Full Production.

100. If this breach had not occurred, and KPMG Advisory had appropriately accounted for both sovereign risk and development risk, including the risk of delay in the ramp-up to Full Production, then:

100.1 the low end value per share would have been significantly lower than the low end value per share assessed by KPMG of \$1.74 (including uplift) or \$1.21 (without uplift); and

100.2 KPMG Advisory would have formed and expressed the opinion that the Offer was fair and reasonable, as it would have been in the Range.

**C. Loss and Damage**

101. During the Relevant Period, the plaintiff and each of the Group Members held or acquired shares in DML.

**Particular**

(a) On 28 September 2010, the plaintiff purchased 7,000 shares in DML for a total sum of \$8,295.00; and

(b) On 10 December 2010, the plaintiff received 1,750 shares in DML under DML's non-renounceable rights issue and institutional placement announced to the market on 4 November 2010.

102. In reliance on the KPMG Advisory Report, the plaintiff and each of the Group Members did not:

102.1 accept the Offer; or

102.2 sell their shares in DML on the market during the Relevant Period.

103. Further or alternatively, the KPMG Advisory Report materially contributed to the decision of the plaintiff and each of the Group Members not to:

103.1 accept the Offer; or

103.2 sell their shares in DML on the market during the Relevant Period.

104. If KPMG Advisory had not committed breaches of its duty of care in one or more of the ways pleaded above at 89, 93 and 99, then:

- 104.1 the KPMG Advisory Report would have contained an opinion that the Offer was fair and reasonable (as is detailed in respect of each breach at 90, 94 and 100); and
- 104.2 the Target's Statement would have reproduced that opinion.
105. If the KPMG Advisory Report had contained an opinion that the Offer was fair and reasonable, or had it not contained an opinion that the Offer was not fair and reasonable, then;
- 105.1 the plaintiff and each of the Group Members would have accepted the Offer; and
- 105.2 the Minimum Acceptance Condition would have been satisfied.
106. Alternatively, if the KPMG Advisory Report had contained an opinion that the Offer was fair and reasonable, or had it not contained an opinion that the Offer was not fair and reasonable, then the plaintiff and each of the Group Members would have sold their shares on the market during the Relevant Period.
107. In the premises, the breaches of duty pleaded above at 89, 93 and 99, caused the plaintiff and each of the Group Members loss or damage.

### **Particulars**

- (a) As to the plaintiff:
- (1) the difference between the Offer price of \$1.70 for each share held by the plaintiff during the Relevant Period and :
- (A) the actual sale price of those shares; or
- (B) nil in respect of those shares held by the Plaintiff during the Relevant Period and still held by him on the appointment of voluntary administrators to DML; or
- (C) the true value of those shares once the misleading conduct had ceased to have effect, particulars of which will be provided after service of expert evidence;

- (2) alternatively, the difference between \$1.69 per share, being the price for which the plaintiff could have sold his shares in DML during the Relevant Period and:
    - (A) the actual sale price of those shares; or
    - (B) nil in respect of those shares held by the Plaintiff during the Relevant Period and still held by him on the appointment of voluntary administrators to DML; or
    - (C) the true value of those shares once the misleading conduct had ceased to have effect, particulars of which will be provided after service of expert evidence;
  - (3) alternatively, the plaintiff lost the chance to avoid that loss.
- (b) As to each Group Member:
- (1) the difference between the Offer price of \$1.70 per share and:
    - (A) the actual sale price of the shares held by each of the Group Members during the Relevant Period; or
    - (B) nil in respect of those shares held by each of the Group Members during the Relevant Period and still held by them on the appointment of voluntary administrators to DML; or
    - (C) the true value of the shares held by each of the Group Members during the Relevant Period once the misleading conduct had ceased to have effect, particulars of which will be provided after service of expert evidence;
  - (2) alternatively, the difference between \$1.69 per share, being the price for which the Group Members could have sold their shares in DML in the Relevant Period, and:
    - (A) the actual sale price of the shares held by each of the Group Members; or

- (B) nil in respect of those shares still held on the appointment of voluntary administrators to DML; or
- (C) the true value of each share once the misleading conduct had ceased to have effect, particulars of which will be provided after service of expert evidence;

(c) alternatively, each of the Group Members lost the chance to avoid that loss.

108. In the premises, the plaintiff and each of the Group Members is entitled to recover damages from KPMG Advisory, being the amount of that person's loss pleaded in paragraph 107.

#### **CONTRAVENTIONS OF SECTION 670A OF THE CORPORATIONS ACT 2001 (Cth)**

109. The KPMG Advisory Report was included in the Target's Statement.

110. As such, the KPMG Advisory Report was a report within the meaning of section 670A(1)(g) of the *Corporations Act 2001* (Cth).

111. The KPMG Advisory Opinion was based upon a valuation of DML that applied the 40% uplift on the Boseto Project Low Valuation, as pleaded above at 28 to 34 and 88 to 89.

112. The KPMG Advisory Opinion was based upon a valuation of DML that:

112.1 relied upon the Technical Valuation Report in circumstances where SRK had been instructed to assume an inflation rate of 2.3% from January 2015; and

112.2 adopted a risk-free rate of 1.8%,

when that inflation rate and that risk free-rate were inconsistent, as pleaded above at 35 to 37 and 91 to 94.

113. The KPMG Advisory Opinion was based upon a valuation of DML that failed to adequately account for the sovereign risk associated with mining activities in Botswana or the risk that the ramp up to Full Production would take longer than anticipated, as pleaded above at 38 to 42 and 95 to 99.

114. In the premises, the KPMG Advisory Opinion was not based on reasonable grounds.
115. In the premises, the KPMG Advisory Opinion was misleading or deceptive within the meaning of section 670A(1)(h) of the *Corporations Act 2001* (Cth) (**Contravention**).
116. If KPMG Advisory had not based the KPMG Advisory Opinion on one or more of the matters pleaded in 111, 112 or 113:
- 116.1 the KPMG Advisory Report would have contained an opinion that the Offer was fair and reasonable (as is detailed above at 90, 94 and 100); and
- 116.2 the Minimum Acceptance Condition would have been met.
117. In reliance on the KPMG Advisory Opinion, the plaintiff and each of the Group Members did not:
- 117.1 accept the Offer; or
- 117.2 sell their shares in DML on the market during the Relevant Period.
118. Further or alternatively, the KPMG Advisory Opinion materially contributed to the decision of the plaintiff and each of the Group Members not to:
- 118.1 accept the Offer; or
- 118.2 sell their shares in DML on the market during the Relevant Period.
119. In the premises, the plaintiff and the Group Members have suffered loss or damage as a result of the Contravention.

### Particulars

The particulars to paragraph 107 are repeated.

120. KPMG Advisory is named as a person in the KPMG Advisory Report as having made the KPMG Advisory Opinion.
121. In the premises, KPMG is a person within the meaning of item 10 of the table contained in section 670B of the *Corporations Act 2001* (Cth).
122. In the circumstances pleaded at 109 to 121, KPMG Advisory is liable to compensate the plaintiff and each of the Group Members pursuant to section 670B of the



*Corporations Act 2001* (Cth) for the loss or damage the plaintiff and each of the Group Members suffered, as pleaded above at 119.

**COMMON QUESTIONS OF FACT OR LAW**

123. The questions of law or fact common to the claims of the plaintiff and the Group Members are:
- 123.1 Whether KPMG Advisory owed the plaintiff and each of the Group Members a duty of care;
- 123.2 Whether KPMG Advisory breached its duty of care in the manner pleaded at 89;
- 123.3 If so, but for that breach, would KPMG Advisory have expressed the opinion that the Offer was fair and reasonable, as alleged at 90;
- 123.4 Whether KPMG Advisory breached its duty of care in the manner pleaded at 93;
- 123.5 If so, but for that breach, would KPMG Advisory have expressed the opinion that the Offer was fair and reasonable, as alleged at 94;
- 123.6 Whether KPMG Advisory breached its duty of care in the manner pleaded at 99;
- 123.7 If so, but for that breach, would KPMG Advisory have expressed the opinion that the Offer was fair and reasonable, as alleged at 100;
- 123.7A If any of the three breaches alleged in paragraphs 89, 93 and 99 had not occurred:
- (a) would the Minimum Acceptance Condition have been satisfied; and
- (b) would the takeover have completed;
- 123.8 The principles for assessing whether any breaches of duty committed by KPMG Advisory caused loss or damage to the plaintiff and each Group Member;
- 123.9 The principles for assessing the losses caused to the plaintiff and each Group Member by the breaches of duty;

123.10 Whether the KPMG Advisory Report was included in the Target's Statement;

123.11 Whether the KPMG Advisory Opinion was misleading or deceptive, within the meaning of section 670A(1)(h) of the *Corporations Act 2001* (Cth);

123.12 The principles for assessing whether the Contravention by KPMG Advisory caused loss or damage to the plaintiff and each Group Member;

123.13 Whether KPMG Advisory was a person referred to in item 10 of the table in section 670B(1); and

123.14 The principles for assessing the losses caused to the plaintiff and each Group Member by the Contravention.

#### SIGNATURE OF LEGAL REPRESENTATIVE

I certify under section 347 of the Legal Profession Act 2004 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor on Record

Date of signature

17 November 2017

## NOTICE TO DEFENDANT

**If you do not file a defence within 28 days of being served with this statement of claim:**

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiffs' costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

## HOW TO RESPOND

**Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.**

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au).
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim, by filing a defence and/or making a cross-claim.**
- 2 If money is claimed, and you believe you owe the money claimed, by:**
  - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
  - Filing an acknowledgement of the claim.
  - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed, by:**
  - Paying the plaintiff that part of the money that is claimed.
  - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at [www.lawlink.nsw.gov.au/ucpr](http://www.lawlink.nsw.gov.au/ucpr) or at any NSW court registry.

**REGISTRY ADDRESS**

Street address	Law Courts Building, 184 Phillip Street, Sydney NSW 2000
Postal address	Supreme Court of NSW, GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

**AFFIDAVIT VERIFYING**

Name Alan Smith  
 Address 26 Howarth Street, Colac VIC 3250  
 Occupation Retired  
 Date

I say on oath:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.

SWORN at

Signature of deponent \_\_\_\_\_

Name of witness

Address of witness

Capacity of witness [#Justice of the peace #Solicitor #Barrister #Commissioner for affidavits #Notary public]

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 #I saw the face of the deponent. [OR, delete whichever option is inapplicable]  
 #I did not see the face of the deponent because the deponent was wearing a face covering, but I am satisfied that the deponent had a special justification for not removing the covering.\*
- 2 #I have known the deponent for at least 12 months. [OR, delete whichever option is inapplicable]  
 #I have confirmed the deponent's identity using the following identification document:

\_\_\_\_\_  
 Identification document relied on (may be original or certified copy) †

Signature of witness \_\_\_\_\_

Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

[\* The only "special justification" for not removing a face covering is a legitimate medical reason (at April 2012).]

[† "Identification documents" include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011.]

## PARTY DETAILS

### PARTIES TO THE PROCEEDINGS

**Plaintiff**

Alan Smith

**Defendant**

 KPMG Financial Advisory Services (Australia)  
 Pty Ltd (ACN 007 363 215)

### FURTHER DETAILS ABOUT PLAINTIFF

**Plaintiff**

Name	Alan Smith
Address	26 Howarth Street COLAC VIC 3250

**Legal representative for plaintiff**

Name	Simon Morris
Practising certificate number	30490
Firm	Piper Alderman
Address	Level 23 Governor Macquarie Tower 1 Farrer Place Sydney NSW 2000
DX address	DX 10216 Sydney Stock Exchange
Telephone	+61 2 9253 9999
Fax	+61 2 9253 9900
Email	smorris@piperalderman.com.au
Electronic service address	smorris@piperalderman.com.au

### DETAILS ABOUT DEFENDANT

**First defendant**

Name	<b>KPMG Financial Advisory Services (Australia) Pty Ltd</b> (ACN 007 363 215)
Address	235 St Georges Terrace Perth Western Australia 6000