



**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERICAL COURT
GROUP PROCEEDINGS LIST**

Case: S ECI 2023 05208

Filed on: 08/02/2024 05:43 PM

S ECI 2023 05208

B E T W E E N:

ROSS ANDREW GAWLER

Plaintiff

-and-

FLEETPARTNERS GROUP LTD (ACN 131 557 901)

Defendant

AMENDED STATEMENT OF CLAIM

Date of document: ~~6 November 2023~~ Solicitors Code: 110756
8 February 2024

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In this statement of claim (**Statement of Claim**):

- FY2017, FY2018, etc refer to the financial years ending 30 September 2017, 30 September 2018, etc;
- 1H17, 1H18, etc refer to the half years ending 31 March 2017, 31 March 2018, etc;
- all references to currency (including the symbol ‘\$’) are to Australian Dollars, unless stated otherwise; and
- references to ‘m’ after a \$ amount is to millions.

A. PARTIES

A.1 The plaintiff and group members

1 The plaintiff commences this proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) on his own behalf and on behalf of persons (**Group Members**) who or which:

- (a) acquired, or acquired an interest in, fully paid ordinary shares (**Shares**) in the defendant, FleetPartners Group Ltd, formerly known as Eclipx Group Ltd (**ECX**), at any time during the period from 8 November 2017 to 10:35 am AEDT on 20 March 2019 (inclusive) (**Relevant Period**);
- (b) are alleged to have suffered loss or damage because of, by or resulting from the contravening conduct of ECX alleged in this Statement of Claim; and
- (c) are not and were not during the Relevant Period:
 - (i) directors, officers, a close associate, a related party, a related body corporate or an associated entity of ECX, as those terms are defined in the *Corporations Act 2001* (Cth) (**Corporations Act**); or
 - (ii) a Justice, Registrar, Judicial Registrar, District Registrar, or Deputy District Registrar of the High Court of Australia or the Chief Justice, a Justice, Associate Justice or Judicial Registrar of the Supreme Court of Victoria.

2 As at the date of the commencement of this proceeding, there are seven or more Group Members.

3 The plaintiff acquired ECX Shares during the Relevant Period.

Particulars

- i. On 20 August 2018 the plaintiff acquired 4,950 Shares at an execution price of \$2.4716 per Share (inclusive of brokerage and GST);*

- ii. *On 26 February 2019 the plaintiff acquired 6,260 Shares at an execution price of \$1.9369 per Share (inclusive of brokerage and GST).*

A.2. ECX

4 At all material times, ECX:

- (a) was and is incorporated pursuant to the *Corporations Act* and capable of being sued;
- (b) had on issue Shares that were:
 - (i) financial products within the meaning of ss 763A(1)(a) and 764A(1)(a) of the *Corporations Act* and s 12BAA of the *Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act)*;
 - (ii) able to be and were traded on the Australian Securities Exchange (**ASX**) under the ticker 'ECX';
 - (iii) ED Securities within the meaning of s 111AE of the *Corporations Act*;
 - (iv) quoted ED Securities within the meaning of s 111AM of the *Corporations Act*; and
 - (v) able to be acquired and disposed of by investors and potential investors in ECX Shares by, amongst other ways, trading on the financial market operated by ASX;
- (c) was listed on the ASX;
- (d) was bound by the ASX Listing Rules;

- (e) was a listed disclosing entity within the meaning of s 111AL of the *Corporations Act*;
- (f) was subject to the requirements of s 674 of the *Corporations Act* as in force during the Relevant Period;
- (g) was a person for the purposes of s 1041H of the *Corporations Act* and s 12DA of the ASIC Act; and
- (h) was a person for the purposes of s 18 of the *Australian Consumer Law* as set out in Schedule 2 of the *Competition and Consumer Act 2010 (Cth) (ACL)*, as applicable pursuant to enabling legislation of the States and Territories of Australia.

5 During the Relevant Period, there existed a market of investors and potential investors in ECX Shares (**Affected Market**).

B. ECX'S BUSINESS

B.1 ECX's Business Segments

6 During the Relevant Period, ECX operated a business providing, inter alia, fleet car, equipment finance and management services to customers in Australia and New Zealand including fleet leasing, consumer finance, commercial equipment finance, online auction services and diversified financial services.

7 During the Relevant Period, ECX's business was organised into divisional **Segments** as follows:

- (a) for the year ending 30 September 2017 (**FY17**), ECX's business was divided into Australian Commercial (Fleet and Equipment), New Zealand Commercial, and Australian Consumer Segments;
- (b) for the year ending 30 September 2018 (**FY18**), ECX's business was divided into Australian Commercial, Australian Consumer, Grays (defined below), and New Zealand Commercial Segments; and
- (c) for the half-year ending 31 March 2019 (**1H19**), ECX's business was divided into Australian Commercial, Australian Consumer, Grays, and New Zealand Commercial Segments.

Particulars

- i. ECX, Annual Report 2017, 29 December 2017, p 15.*
- ii. ECX, Annual Report 2018, 10 January 2018, p 42.*
- iii. ECX, 1H19 Financial Report, 31 May 2019, p 5-6, 26.*

8 During 1H19, businesses within ECX's Segments were further characterised by ECX as Core and Non-Core, as follows:

- (a) Core – the fleet and novated businesses in Australia and New Zealand trading under the brands of FleetPartners, FleetPlus and FleetChoice; and
- (b) Non-Core – businesses trading in Australia and New Zealand under the brands of CarLoans.com.au, CarLoans.co.nz, Right2Drive (as defined below), Onyx, Eclix Commercial, GraysOnline.com and areyouselling.com.au.

Particulars

i. ECX, 1H19 Financial Report, 31 May 2019, p 3.

9 During the Relevant Period, the **ECX Group** comprised the businesses of ECX within all of the ECX Segments.

B.2 ECX's Reporting Requirements

10 At all material times, ECX operated using a financial year of 1 October to 30 September, with the half year ending 31 March, for reporting purposes.

11 During the Relevant Period, ECX's financial report for each financial year was required by s 296 of the *Corporations Act* to comply with accounting standards issued by the Australian Accounting Standards Board (**AASB**) from time to time (**AASB Standards**).

12 During the Relevant Period, ECX's financial report for each half-year was required by s 304 of the *Corporations Act* to comply with the AASB Standards.

13 Amongst other AASB Standards, ECX adopted and was required to comply with, during the Relevant Period:

- (a) AASB 118 "Revenue" at all material times up to 30 September 2018;
- (b) AASB 15 "Revenue from Contracts with Customers" on and from 1 October 2018;
- (c) AASB 139 "Financial Instruments: Recognition and Measurement" at all material times up to 30 September 2018; and

- (d) AASB 9 “Financial Instruments” on and from 1 October 2018 to the end of the Relevant Period.

(together and separately, the **Accounting Standards**).

Particulars

- i. ECX, FY15 Financial Report, 10 November 2015, p 37.*
- ii. ECX, FY17 Financial Report, 8 November 2017, p 42.*
- iii. ECX, FY19 Financial Report, 12 November 2019, pp 45, 48.*

B.3. ECX Directors, Executive and Management Team

14 Irwin (Doc) Klotz (**Klotz**) was:

- (a) the Managing Director and Chief Executive Officer of ECX from 27 March 2014 to 13 May 2019;
- (b) a director of ECX from 27 March 2014 to 16 April 2018;
- (c) a director of Grays eCommerce Group Limited (ACN 125 736 914) (**Grays**) from 11 August 2017 to 12 May 2019;
- (d) a director of Right2Drive Pty Ltd (ACN 159 590 986) (**Right2Drive**) from 19 May 2016 to 5 July 2019;
- (e) a member of ECX’s leadership team from 27 March 2014 to 13 May 2019; and
- (f) at all times during the Relevant Period, an officer of ECX within the meaning of s 9 of the *Corporations Act*.

15 Garry John McLennan (**McLennan**) was:

- (a) the Chief Financial Officer and Deputy Chief Executive Officer of ECX from 27 March 2014 to 5 July 2019;
- (b) a director of ECX from 27 March 2014 to 16 April 2018;
- (c) a director of Grays from 11 August 2017 to 12 May 2019;
- (d) a director of Right2Drive from 19 May 2016 to 5 July 2019;
- (e) a member of ECX's leadership team from 27 March 2014 to 5 July 2019; and
- (f) at all times during the Relevant Period, an officer of ECX within the meaning of s 9 of the *Corporations Act*.

16 Bevan Guest (**Guest**) was:

- (a) the Managing Director of ECX's Australian operations from August 2018 to May 2019;
- (b) a member of ECX's leadership team from August 2018 to May 2019; and
- (c) from August 2018 to the end of the Relevant Period, an officer of ECX within the meaning of s 9 of the *Corporations Act*.

17 Jeffrey William McLean (**McLean**) was:

- (a) the Chief Operating Officer of ECX from July 2014 to 31 July 2019;
- (b) an Executive Director of Grays from August 2019 to December 2022; and
- (c) at all times during the Relevant Period, an officer of ECX within the meaning of s 9 of the *Corporations Act*.

- 18 Christopher Mark Corbin (**Corbin**) was:
- (a) the Joint Managing Director of Grays from August 2017 to July 2019; and
 - (b) at all times during the Relevant Period, an officer of ECX within the meaning of s 9 of the *Corporations Act*.
- 19 Josh Sanders (**Sanders**) was:
- (a) the Executive General Manager – sales and operations of Grays from November 2016 to August 2017;
 - (b) the Joint Managing Director of Grays from August 2017 to August 2019; and
 - (c) at all times during the Relevant Period, an officer of ECX within the meaning of s 9 of the *Corporations Act*.
- 20 Timothy Francis Warren (**Warren**) was:
- (a) the Chief Financial Officer of Right2Drive from January 2014 to August 2020;
 - (b) the Company Secretary of Right2Drive from on or around 17 February 2014 to 19 May 2016; and
 - (c) at all times during the Relevant Period, an officer of ECX within the meaning of s 9 of the *Corporations Act*.
- 21 Damian Paul Mullins (**Mullins**) was:
- (a) the Founder and CEO of Right2Drive from on or around July 2012 to June 2019; and
 - (b) at all times during the Relevant Period, an officer of ECX within the meaning of s 9 of the *Corporations Act*.

Particulars to paragraphs 14-21

- i. *Each of Klotz, McLennan, Guest, McLean, Corbin, Sanders, Warren and Mullins were persons who made, or participated in making, decisions that affected the whole or a substantial part of the business of ECX and/or who had the capacity to affect significantly ECX's financial standing.*
- ii. *Klotz, McLennan, Guest, McLean, Corbin, Sanders, Warren, Mullins and the Directors (defined below) (together or separately) are referred to as the **ECX Officers**.*

22 At all times during the Relevant Period (except as alleged below), the following persons (**Directors**) were members of the Board of Directors of ECX:

- (a) Kerry Roxburgh was:
 - (i) the Chair of the Board of Directors; and
 - (ii) a member of the Audit and Risk Committee;
- (b) Gail Pemberton was:
 - (i) a Non-Executive Director; and
 - (ii) a member of the Remuneration and Nomination Committee;
- (c) Trevor Allen was:
 - (i) a Non-Executive Director; and
 - (ii) a member of the Audit and Risk Committee;
- (d) Linda Jenkinson was a Non-Executive Director and member of the Board from 4 January 2018 to the end of the Relevant Period;

- (e) Russell Shields was, from 26 March 2015 to the end of the Relevant Period:
 - (i) a Non-Executive Director; and
 - (ii) a member of the Audit and Risk Committee;
- (f) Gregory Ruddock was, until 31 March 2018:
 - (i) a Non-Executive Director; and
 - (ii) a member of the Audit and Risk Committee;
- (g) Klotz; and
- (h) McLennan.

B.4. ECX's Continuous Disclosure Obligations

23 During the Relevant Period, the ASX was a market operator of a listing market within the meaning of s 674(1) of the *Corporations Act*.

24 During the Relevant Period, s 674(2) of the *Corporations Act* applied to ECX by reason of:

- (a) the matters set out in paragraph 4 above; and
- (b) ss 111AP(1) and/or 674(1) of the *Corporations Act*.

25 During the Relevant Period, the ASX Listing Rules relevantly provided:

- (a) by Rule 3.1, that once an entity is aware or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of its securities then the entity must immediately tell ASX of that information; and

(b) by Rule 19.12, that an entity becomes aware of information if, and as soon as, an officer has, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer of that entity.

26 During the Relevant Period, s 677 of the *Corporations Act* provided that, for the purposes of ss 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of an entity's securities if the information would or would be likely to influence persons who commonly invest in securities in deciding whether to acquire or dispose of the entity's securities.

27 By reason of the matters alleged in paragraphs 23 to 26 above, during the Relevant Period, if ECX had or became aware of information that was not generally available and that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ECX's Shares, ECX was required to immediately notify the ASX of that information.

28 By reason of the matters pleaded at paragraphs 4 and 23 to 27 above, any information of which any of the ECX Officers became aware, or which ought reasonably to have come into their possession in the course of their performance of their respective duties as an officer of ECX, was information of which ECX was aware for the purposes of rule 3.1 of the ASX Listing Rules and which ECX had for the purposes of s 674(2) of the *Corporations Act*.

C CHRONOLOGY OF MATERIAL FACTS

C.1 Significant Events Prior to the Relevant Period

Right2 Drive Announcement

- 29 On 6 May 2016, ECX published and lodged with the ASX an announcement entitled “1H16 Results & ECX acquires Right2Drive” (**Right2Drive Announcement**).

Particulars

- i. ECX, ASX media release entitled “Eclipx Group Reports Half Year 2016 NPATA of \$26.0m, up 9% over 1H15 & announces the acquisition of Right2Drive” published and lodged with the ASX on at 8:52 am on 6 May 2016.*
- 30 By the Right2Drive Announcement, ECX made the following statements to the Affected Market:
- (a) ECX had entered into an agreement to acquire 100% of the share capital of Right2Drive for a net consideration of \$67.0m;
 - (b) Right2Drive provided rental replacement vehicles to “not at fault” drivers that have accident damaged cars requiring repair;
 - (c) the acquisition was expected to be high single digit percentage earnings per share accretive in FY17;
 - (d) ECX had forecast that Right2Drive would generate \$12m to \$14m EBITDA in FY17, which estimate was said to be “including estimated synergies”; and
 - (e) the acquisition was expected to complete on or about 19 May 2016.

31 On or about 19 May 2016, ECX acquired Right2Drive.

Particulars

- i. *ECX, ASX announcement entitled “Completion of the acquisition of Right2Drive” published and lodged with the ASX on 19 May 2016.*

32 Following the acquisition by ECX, Right2Drive’s business expanded rapidly such that, as at May 2016, it had 16 branches across Australia and New Zealand, and as at May 2018, it had 35 branches across Australia and New Zealand.

Particulars

- i. *ECX, 1H16 Results Presentation, 6 May 2016, p 6.*
- ii. *ECX, FY17 Annual Report, 8 November 2017, p 13.*
- iii. *ECX, 1H18 Results Presentation, 8 May 2018, p 5.*

33 During the Relevant Period, Right2Drive fell within the Australian Consumer Segment of the ECX Group.

Particulars

- i. *~~ECX, FY18 Results and ECX acquires Right2Drive Appendix 4E and FY18 Financial Report, 13~~14~~ November 2018, p 11.~~*

Grays Acquisition Announcement

34 On 4 May 2017, ECX published and lodged with the ASX an announcement entitled “1H17 Results & ECX acquires Grays eCommerce” (**Grays Acquisition Announcement**).

35 By the Grays Acquisition Announcement, ECX made the following statements to the Affected Market:

- (a) ECX had entered into a scheme implementation deed under which ECX would acquire 100% of the shares in Grays by way of a scheme of arrangement whereby Grays shareholders would receive ECX shares for each Grays share held;
- (b) the transaction had an implied value of \$178.9m and was expected to complete in August 2017 subject to shareholder and Court approval;
- (c) ECX was targeting \$20m per annum full run-rate synergies (excluding one-off transaction and integration costs) which were anticipated to be achieved within 12-24 months;
- (d) the Grays acquisition was targeting high single digit percentage EPS accretion for ECX shareholders at full run-rate synergies;
- (e) ECX was targeting approximately \$23m to \$25m EBITDA from Grays in FY18, including phasing of 70-80% run-rate synergies in FY18; and
- (f) the implementation plan and quantum of targeted synergies had been independently reviewed.

Grays Scheme Booklet

36 On 21 June 2017, ECX published and lodged with the ASX an announcement entitled “Grays eCommerce Group Scheme Booklet” (**Grays Scheme Booklet**).

37 By the Grays Scheme Booklet, ECX made the following statements to the Affected Market on and from 21 June 2017:

- (a) ECX estimated \$20m in full run-rate synergies per financial year as a result of integration, excluding one-off costs, implementation costs and the revenue impact of exiting certain Grays consumer product segments deemed non-core to ECX (**Grays Expected Synergies Statement**);
- (b) ECX anticipated that the Combined Group (ECX and Grays) would achieve its full estimated run-rate synergies within 12-24 months of the implementation date, with 70-80% of the estimated run-rate synergies anticipated by ECX to be achieved during FY18 (**Grays Expected Synergies Timing Statement**); and
- (c) ECX estimated approximately \$23m to \$25m EBITDA contribution from Grays during FY18 (**Grays Expected FY18 EBITDA Statement**).

Particulars

- i. ECX, Grays Scheme Booklet, 21 June 2017, p 67.*

Grays - Integration

38 On 31 July 2017 ECX confirmed that it was targeting EBITDA from Grays of \$23m to \$25m for FY18 (**Repeated Grays Expected FY18 EBITDA Statement**).

Particulars

- i. ECX, Update on Grays eCommerce Scheme, 31 July 2017.*

39 On 11 August 2017:

- (a) the Grays Scheme of Arrangement was implemented and ECX acquired Grays;

- (b) ECX issued an ASX announcement confirming that the Grays Scheme of Arrangement had been implemented on 11 August 2017.

Particulars

- i. ECX, Grays Scheme Implemented, 11 August 2017.*

40 On 26 September 2017, ECX announced the integration of Grays was progressing well and on schedule and that Grays remained on track to deliver \$23m to \$25m EBITDA in FY18 (**Further Repeated Grays Expected FY18 EBITDA Statement**).

Particulars

- i. ECX, ECX Investor Day Presentation, 26 September 2017, pp 4, 27, 28.*

C.2 During the Relevant Period – to the FY18 Guidance Downgrade

Compliance Representations

41 On and from the date that each of ECX’s half year financial reports and full year financial reports were published and lodged with the ASX during the Relevant Period and commencing with ECX’s FY17 financial report, ECX represented to the Affected Market that its half year financial reports and full year financial reports, respectively:

- (a) were in accordance with the *Corporations Act* and relevant AASB Standards;
~~and~~
- (b) gave a true and fair view of the financial position and performance of ECX and the ECX Group; and

- (c) further or alternatively, that it had reasonable grounds for the representations alleged in subparagraphs (a) and (b)

(Compliance Representations).

Particulars

- i. The Compliance Representations were partly express and partly implied.*
- ii. Insofar as they were express and recorded in writing, the plaintiff refers to:*
 - a. ECX, FY17 Financial Report, Directors' Declaration, 8 November 2017, p 90.*
 - b. ECX, FY17 Annual Report, Directors' Declaration, 10 November 2017, p 114.*
 - c. ECX, 1H18 Financial Report, Directors' Declaration, 8 May 2018, p 27.*
 - d. ECX, FY18 Financial Report, Directors' Declaration, 14 November 2018, p 90.*
 - e. ECX, FY18 Annual Report, Directors' Declaration, 10 January 2019, p 123.*
 - f. Note 1 to the ECX Annual Reports and the statement that: "these general-purpose financial statements of the consolidated results of Eclipx Group Limited (ACN 131 557 901) have been prepared in accordance with*

the Accounting Standards and Interpretations issued by the Australian Accounting Standards Board and the Corporations Act 2001.”

- g. Note 1 to the ECX Half-Year financial reports and the statement that: “these consolidated half-year financial statements represent the consolidated results of ECX. The financial statements are general purpose financial statements prepared in accordance with AASB 134 Interim Financial report and the Corporations Act, and with IAS 34 Interim Financial Reporting.”*
- iii. Insofar as they were implied, they were implied by the particulars at (ii) above, ss 296, 297, 304 and 305 of the Corporations Act, and the absence of any qualification in any of the reports particularised at (ii) about the truth and correctness of the ECX financial position.*
- iv. Further, the representation alleged in subparagraph 41(c) was implied from the fact that the representations in subparagraphs 41(a) and (b) were made in ECX’s financial reports and half yearly reports which were published and lodged with the ASX in circumstances where ECX was subject to the obligations alleged in paragraphs 11, 12, 24 and 27-28 above and 113 below.*

- 42 The Compliance Representations were:
- (a) continuing representations from the time that they were made up until the end of the Relevant Period;
 - (b) made in trade and commerce;
 - (c) made in relation to a financial product, ECX Shares; and
 - (d) made in relation to financial services within the meaning of s 766A of the *Corporations Act* and s 12BAB of the *ASIC Act*.

November 2017 – FY17 Results and Representations

- 43 On 8 November 2017, ECX published and lodged with the ASX announcements relating to its FY17 financial report and results (**FY17 Results Announcement**).

Particulars

- i. ECX, FY17 Financial Report, 8 November 2017.*
- ii. ECX, FY17 Results Media Release, 8 November 2017.*
- iii. ECX, FY17 Results Presentation, 8 November 2017.*

- 44 By the FY17 Results Announcement, ECX made the following statements:
- (a) that FY17 statutory net profit after tax (**NPAT**) and cash net profit after tax (**Cash NPAT**) were \$54.2m and \$68.3m respectively;
 - (b) that FY17 statutory NPAT and Cash NPAT in the Australian Consumer Segment were \$13.7m and \$15.9m respectively;

- (c) Grays remained on track to deliver \$23m to \$25m EBITDA (NPATA \$14.0 to \$15.4m) in FY18, which amounted to approximately 16-17% contribution to ECX's expected \$86.7m to \$88.8m NPATA guidance;
- (d) Right2Drive and Grays would deliver an "increased contribution" in FY18 from the \$8m and \$1m net profit after tax and amortisation (NPATA) respectively achieved in FY17;
- (e) ECX expected to deliver growth in NPATA of 27-30% in FY18;
- (f) the Grays integration was on track, with the previously announced cost rationalisation program substantially completed;
- (g) Grays had successfully integrated its corporate functions within ECX's head office;
- (h) cost synergies had been largely realised, with growth and revenue synergies at various stages of realisation; and
- (i) Right2Drive had been successfully integrated into ECX.

Particulars

- i. ECX, FY17 Results Presentation, 8 November 2017, pp 5, 10, 14, 15, 16 and 18.*
- ii. ECX, FY17 Media Release, 8 November 2017, p 1.*
- iii. ECX, FY17 Financial Report, 8 November 2017, p 8.*

45 By the statements made in the FY17 Results Announcement, ECX represented to the Affected Market on and from 8 November 2017 that:

- (a) its FY17 statutory NPAT and Cash NPAT were \$54.2m and \$68.3m respectively; ~~and~~
- (b) its FY17 statutory NPAT and Cash NPAT in the Australian Consumer Segment were \$13.7m and \$15.9m respectively; and
- (c) further or alternatively, that it had reasonable grounds for the representations alleged in subparagraphs (a) and (b)

(the **FY17 Results Representations**).

Particulars

- i. *The FY17 Results Representations alleged in subparagraphs 45(a) and (b) were express and recorded in writing in the ECX FY17 Results Announcement.*
- ii. *The representation alleged in subparagraph 45(c) was implied from the fact that the representations alleged in subparagraphs 45(a) and (b) were made in a formal company announcement which was published and lodged with the ASX in circumstances where ECX was subject to the obligations alleged in paragraphs 11, 12, 24 and 27-28 above and 113 below.*

46 By the statements made in the FY17 Results Announcement, ECX represented to the Affected Market on and from 8 November 2017 that:

(i) the integration of the Grays business was on track and consistent with the:

- (a) Grays Expected Synergies Statement;
- (b) Grays Expected Synergies Timing Statement;
- (c) Grays Expected FY18 EBITDA Statement;
- (d) Repeated Grays Expected FY18 EBITDA Statement; ~~and~~
- (e) Further Repeated Grays Expected FY18 EBITDA Statement; and

(ii) further or alternatively, that it had reasonable grounds for the representations in subparagraph (i)

(the **Grays Integration Representations**).

Particulars

- i. The Grays Integration Representations were express and recorded in writing in the ECX FY17 Results Announcement.*
- ii. The representation alleged in subparagraph 46(ii) was implied from the fact that the representations alleged in subparagraph 46(i) were made in a formal company announcement which was published and lodged with the ASX in circumstances where ECX was subject to the obligations alleged in paragraphs 11, 12, 24 and 27-28 above and 113 below.*

47 By the statements made in the FY17 Results Announcement, ECX represented to the Affected Market on and from 8 November 2017 that:

- (a) Right2Drive had been successfully integrated into ECX; and
- (b) further or alternatively, that it had reasonable grounds for the representation alleged in subparagraph (a)
- (the **Right2Drive Integration Representations**).

Particulars

- i. *The Right2Drive Integration Representation in subparagraph 47(a) was express and recorded in writing in the ECX FY17 Results Announcement.*
- ii. *The representation alleged in subparagraph 47(b) was implied from the fact that the representation alleged in subparagraph 47(a) was made in a formal company announcement which was published and lodged with the ASX in circumstances where ECX was subject to the obligations alleged in paragraphs 11, 12, 24 and 27-28 above and 113 below.*

48 By the statement made in the FY17 Results Announcement, ECX represented to the Affected Market on and from 8 November 2017 that for FY18:

- (a) Grays remained on track to deliver \$23m to \$25m EBITDA (NPATA \$14.0m to \$15.4m);
- (b) the Right2Drive business would deliver a contribution higher than the \$8m NPATA achieved by it in FY17; and

(c) it expected ECX's NPATA to grow by 27-30%, 75% of which was to come from Grays,

(the **FY18 Guidance Representations**).

Particulars

i. The FY18 Guidance Representations were express and recorded in writing in the ECX FY17 Results Announcement.

49 Each of the FY17 Results Representations, the Grays Integration Representations, the Right2Drive Integration Representations and the FY18 Guidance Representations were:

- (a) continuing representations from the time that they were made up until:
 - (i) 13 November 2019 (following the Relevant Period), in respect of the FY17 Results Representation;
 - (ii) the end of the Relevant Period, in respect of the Grays Integration Representations;
 - (iii) the end of the Relevant Period, in respect of the Right2Drive Integration Representations; and
 - (iv) 6 August 2018, being the date of the FY18 Guidance Downgrade (defined below), in respect of the FY18 Guidance Representations;
- (b) made in trade and commerce;
- (c) made in relation to a financial product, namely ECX Shares;
- (d) made in relation to financial services within the meaning of s 766A of the *Corporations Act* and s 12BAB of the *ASIC Act*; and

- (e) ~~insofar as the~~ with respect to the Grays Integration Representations and the FY18 Guidance Representations, were representations ~~were~~ with respect to a future matter or matters, and the plaintiff relies on s 769C of the *Corporations Act* and s 12BB of the ASIC Act in relation to them.

May 2018 – 1H18 Results and Repeated FY18 Guidance Representations

- 50 On 8 May 2018, ECX published and lodged with the ASX announcements relating to its 1H18 financial report and results (**1H18 Results Announcement**).

Particulars

- i. *ECX, Appendix 4D and 1H18 Financial Report, 8 May 2018.*
- ii. *ECX, 1H18 Results – Presentation, 8 May 2018.*
- iii. *ECX, 1H18 Results – Media Release, 8 May 2018.*

- 51 By the 1H18 Results Announcement, ECX made the following statements:

- (a) Grays was exceeding expectations, with NPATA of \$5.9m, and was on track to earn \$23m to \$25m EBITDA and \$14.0m to \$15.4m NPATA for the full year;
- (b) the industrial auction business (within Grays) was well positioned to capitalise on large infrastructure projects;
- (c) for Grays, total auction volume split was expected to be 47%/53% from 1H/2H seasonally on a relatively fixed cost base; and
- (d) ECX expected to grow NPATA by 27-30% in FY18.

52 By the statements made in the 1H18 Results Announcement, ECX represented to the Affected Market on and from 8 May 2018 that:

- (a) Grays was performing above expectations with NPATA of \$5.9m already achieved and was on track to earn \$23m to \$25m EBITDA and \$14.0m to \$15.4m NPATA for FY18; ~~and~~
- (b) it had affirmed the FY18 Guidance such that ECX was expected to grow NPATA by 27-30% in FY18; and
- (c) further or alternatively, that it had reasonable grounds for the representations alleged in subparagraphs (a) and (b)

(the **Repeated FY18 Guidance Representations**).

Particulars

- i. The Repeated FY18 Guidance Representations alleged in subparagraphs 52(a) and (b) were express and in writing in the documents comprising the 1H18 Results Announcement.*
- ii. The representation alleged in subparagraph 52(c) was implied from the fact that the representations alleged in subparagraphs 52(a) and (b) were made in a formal company announcement which was published and lodged with the ASX in circumstances where ECX was subject to the obligations alleged in paragraphs 11, 12, 24 and 27-28 above and 113 below.*

53 Each of the Repeated FY18 Guidance Representations were:

- (a) continuing representations from the time they were made until 6 August 2018, being the date of the FY18 Guidance Downgrade (defined below);
- (b) made in trade and commerce;
- (c) made in relation to a financial product, namely ECX Shares;
- (d) made in relation to financial services within the meaning of s 766A of the *Corporations Act* and s 12BAB of the ASIC Act; and
- (e) in so far as the representations were with respect to a future matter or matters, the plaintiff relies on s 769C of the *Corporations Act* and s 12BB of the ASIC Act in relation to them.

C.3 FY18 Guidance Downgrade

54 On 6 August 2018, ECX published and lodged with the ASX an announcement entitled “Revised FY18 NPATA Guidance and Market Update” (**FY18 Guidance Downgrade**).

55 By the FY18 Guidance Downgrade, ECX made the following statements:

- (a) following completion of a review of its most recent trading performance, ECX now expected to report FY18 NPATA in the range of \$77m to \$80m (+13% to +17% on FY17 NPATA), compared with the previous expectation of +27% to +30% growth;
- (b) Grays auction activity was being affected both by a ten-year low in bank-initiated insolvencies in Australia and the current buoyant construction sector

where large plant and equipment is being deployed for longer periods in infrastructure projects, resulting in reduced auction equipment disposals;

- (c) Right2Drive's results would be more moderate than ECX's previous expectation, reflecting a more challenging environment from new competitor offerings by some auto insurers;
- (d) Grays was now forecast to deliver an approximately 30%-40% NPATA increase (like for like) on its pre-acquisition full year NPATA of approximately \$8m; and
- (e) ECX expected to deliver mid-single digit NPATA growth from Right2Drive and continued to see a significant opportunity in the relatively underpenetrated accident replacement vehicle market.

56 By the statements made in the FY18 Guidance Downgrade, ECX represented to the Affected Market on and from 6 August 2018 that:

- (a) it was revising the FY18 Guidance and now expected FY18 NPATA in the range of \$77m to \$80m (or +13% to +17% on FY17 NPATA);
- (b) Grays was now forecast to deliver an approximately 30%-40% NPATA increase (like for like) in FY18 on its pre-acquisition full year NPATA of approximately \$8m; and
- (c) ECX expected to deliver mid-single digit NPATA growth from Right2Drive in FY18

(the **Revised FY18 Guidance Representations**).

Particulars

- i. *The Revised FY18 Guidance Representations were express and in writing in the document comprising the FY18 Guidance Downgrade.*

57 Each of the Revised FY18 Guidance Representations was:

- (a) a continuing representation from the time that it was made up until the end of the Relevant Period;
- (b) made in trade and commerce;
- (c) made in relation to a financial product, namely ECX Shares;
- (d) made in relation to financial services within the meaning of s 766A of the *Corporations Act* and s 12BAB of the ASIC Act; and
- (e) a representation with respect to a future matter or matters and the plaintiff relies on s 769C of the *Corporations Act* and s 12BB of the ASIC Act in relation to it.

Effect of FY18 Guidance Downgrade

58 Following the release of the FY18 Guidance Downgrade, the market price of ECX Shares fell substantially.

Particulars

- i. *The trading price of the Shares on the ASX fell by \$1.14 from a closing price of \$3.04 on 6 August 2018 to a closing price of \$1.90 on 9 August 2018.*

ii. *Further particulars will be provided after discovery and service of expert evidence.*

59 The FY18 Guidance Downgrade:

- (a) related to the subject matter of the:
 - (i) FY17 Results Representations;
 - (ii) Grays Integration Representations;
 - (iii) Right2Drive Integration Representation;
 - (iv) FY18 Guidance Representations;
 - (v) Repeated FY18 Guidance Representations; and
- (b) was information that, prior to the FY18 Guidance Downgrade, was not generally available;
- (c) operated to qualify, supplement or partly correct the information available to the Affected Market relating to the subject matter of ~~some or all of the~~ representations referred to in subparagraphs (a)(ii) and (iv)-(v) above.

Particulars

- i. *The FY18 Guidance Downgrade qualified, supplemented or partially corrected the information available to the Affected Market relating to the subject matter of the Grays Integration Representations, the FY18 Guidance Representation and the Repeated FY18 Guidance Representations by:*
 - a. *forecasting lower FY18 Guidance than that which had been forecast on 8 November 2017 and affirmed on 8 May 2018;*

aa. projecting reduced NPATA attributable to Grays and Right2Drive; and

b. providing information to the Affected Market concerning ECX's financial performance and future financial performance.

60 In the circumstances alleged in paragraphs 58 and 59 above, the FY18 Guidance Downgrade caused the market price of ECX Shares to fall substantially.

FY19 Growth and McMillan Shakespeare Merger

FY18 Expected Results Representation

61 On 8 November 2018, ECX published and lodged with the ASX:

- (a) an announcement relating to its FY18 financial performance (**FY18 Expected Results Announcement**); and
- (b) an announcement relating to a proposed merger with listed competitor McMillan Shakespeare (**MMS**) (**Merger Announcement**).

Particulars

- i. ECX, Eclix Group Unaudited 2018 NPATA, 8 November 2018 12:18 pm.*
- ii. ECX, McMillan Shakespeare and Eclix merger, 8 November 2018 12:25 pm.*

62 By the FY18 Expected Results Announcement and the Merger Announcement, ECX made the following statements:

- (a) ECX confirmed its expected FY18 NPATA to be \$78.1m, which was said to be within the guidance range provided to the market on 6 August 2018;
- (b) FY18 net operating income was expected to be \$325.3m; and
- (c) MMS and ECX had agreed to merge pursuant to a Scheme Implementation Agreement whereby MMS will acquire all shares in ECX, implying a total value of \$2.85 per ECX share which represented a 33.2% premium to ECX's closing price of \$2.14 on Friday 17 August 2018.

63 By the statements made in the FY18 Results Announcement, ECX represented to the Affected Market on and from 8 November 2018 that it expected FY18 NPATA to be within the Revised FY18 Guidance given on 6 August 2018 (the **FY18 Expected Results Representation**).

Particulars

- i. The FY18 Expected Results Representation was express and in writing in the FY18 Expected Results Announcement.*

64 The FY18 Expected Results Representation was:

- (a) a continuing representation from the time that it was made until the end of the Relevant Period;
- (b) made in trade and commerce;
- (c) made in relation to a financial product, namely ECX Shares;

- (d) made in relation to financial services within the meaning of s 766A of the *Corporations Act* and s 12BAB of the ASIC Act; and
- (e) a representation with respect to a future matter or matters and the plaintiff relies on s 769C of the *Corporations Act* and s 12BB of the ASIC Act in relation to it.

FY19 Guidance Representations

65 On 14 November 2018, ECX published and lodged with the ASX announcements relating to its FY18 financial performance and FY19 forecast (**FY18 Results Announcement**).

Particulars

- i. ECX, Appendix 4E and FY18 Financial Report, 14 November 2018.*
- ii. ECX, FY18 Results Media Release, 14 November 2018.*
- iii. ECX, FY18 Results Presentation, 14 November 2018.*

66 By the FY18 Results Announcement, ECX made the following statements:

- (a) that FY18 statutory NPAT and cash NPATA were \$62.2m and \$78.1m respectively;
- (b) that FY17 statutory NPAT and cash NPATA in the Australian Consumer Segment were \$11.6m and \$16.5m respectively;
- (c) it confirmed FY18 financial performance of \$78.1m NPATA;
- (d) that the Grays Segment had reported Cash NPATA of \$10.4m whilst the contribution from its Australian Consumer Segment had been \$16.5m;

- (e) that ECX was well positioned with a strong pipeline of blue-chip new business opportunities to achieve top and bottom-line growth in each business segment; and
- (f) it predicted profitable future growth across all businesses, with strong performance in its core Australian commercial and fleet businesses.

Particulars

- i. ECX, Appendix 4E and FY18 Financial Report, 14 November 2018, p 8, 12, 45.*
- ii. ECX, FY18 Results Media Release, 14 November 2018, p 1.*
- iii. ECX, FY18 Results Presentation, 14 November 2018, p 4, 19.*

67 By the statements made in the FY18 Results Announcement, ECX represented to the Affected Market on and from 14 November 2018 that:

- (a) FY18 statutory NPAT and cash NPATA were \$62.2m and \$78.1m respectively;
- (b) FY17 statutory NPAT and cash NPATA in the Australian Consumer Segment were \$11.6m and \$16.5m respectively;
- (c) it had achieved the Revised FY18 Guidance;

- (d) Grays contribution to cash NPATA in FY18 had been \$10.4m;
- (e) Right2Drive contribution to cash NPATA in FY18 had been \$8.4m;
- (f) ~~whilst~~ the contribution from its Australian Consumer Segment ~~had been~~ \$16.5m; and
- (g) further or alternatively, that it had reasonable grounds for the representations alleged in subparagraphs 67(a)-(f)

(the **FY18 Results Representations**).

Particulars

- i. The FY19 Results Representations alleged in subparagraphs 67(a)-(f) were express and in writing as made in each of the documents referred to in the particulars to paragraph 66.*
- ii. The representation alleged in subparagraph 67(g) was implied from the fact that the representations alleged in subparagraphs 67(a)-(f) were made in formal company announcements which were published and lodged with the ASX in circumstances where ECX was subject to the obligations alleged in paragraphs 11, 12, 24 and 27-28 above and 113 below.*

68 By the statements made in the FY18 Results Announcement, ECX represented to the Affected Market on and from 14 November 2018 that for FY19:

- (a) ECX would achieve profitable growth across all businesses within the ECX Group and top line and bottom-line growth in each of its segments in FY19;
- (b) ECX would achieve FY19 NPATA of more than \$78.1m; and

- (c) Grays was expected to contribute equal to or greater than \$10.4m in NPATA in FY19

(the **FY19 Guidance Representations**).

Particulars

- i. The FY19 Guidance Representation in subparagraph (a) was express and in writing in the FY18 Results Announcement.*
- ii. The FY19 Guidance Representations in subparagraphs (b) and (c) were partly express and partly implied. Insofar as they were express they were found in the FY18 Results Announcement (and the statement at paragraph 66(f));*
- iii. Insofar as they were implied, they were to be implied from:*
 - a. the statement “top line and bottom-line growth in each of its segments in FY19” when compared with its FY18 stated results at that time, which was \$78.1m NPATA, implying that ECX would achieve FY19 NPATA of more than \$78.1m; and*
 - b. the statement “top line and bottom-line growth in each of its segments in FY19” when compared with the Grays Segment reported contribution of \$10.4m to NPATA in FY18.*

69 Each of the FY18 Results Representations and the FY19 Guidance Representations were:

- (a) a continuing representation from the time that they were made up until 29 January 2019;

- (b) made in trade and commerce;
- (c) made in relation to a financial product, namely ECX Shares;
- (d) made in relation to financial services within the meaning of s 766A of the *Corporations Act* and s 12BAB of the ASIC Act; and
- (e) with respect to the FY19 Guidance Representations, representations with respect to a future matter or matters and the plaintiff relies on s 769C of the *Corporations Act* and s 12BB of the ASIC Act in relation to them.

January 2019 – Revised FY19 Guidance Representations

70 On 29 January 2019, ECX published and lodged with the ASX an announcement entitled “ECX NPATA Performance and Expectations” (**Revised FY19 Guidance Announcement**).

71 By the Revised FY19 Guidance Announcement, ECX made the following statements:

- (a) it expected its NPATA for FY19 to be broadly in-line with reported FY18 NPATA; and
- (b) this represented single digit growth in FY19 NPATA over the ECX pro forma NPATA for FY18 (calculated after adjusting for the adverse effect of accounting standard changes).

Particulars

- i. ECX, NPATA Performance and Expectations, 29 January 2019, p 1.*

72 By the statements made in the FY19 NPATA Announcement, ECX represented to the Affected Market on and from 29 January 2019 that:

- (a) it was affirming the FY19 Guidance Representations; and
- (b) it expected FY19 NPATA to grow by single digits when compared against FY18 NPATA (after adjusting for the adverse effect of accounting standard changes)

(the **Revised FY19 Guidance Representations**).

Particulars

- i. The Revised FY19 Guidance Representations were express and in writing in the Revised FY19 Guidance Announcement.*

73 Each of the Revised FY19 Guidance Representations was:

- (a) a continuing representation from the time that they were made until the end of the Relevant Period;
- (b) made in trade and commerce;
- (c) made in relation to a financial product, namely ECX Shares;
- (d) made in relation to financial services within the meaning of s 766A of the *Corporations Act* and s 12BAB of the ASIC Act; and
- (e) a representation with respect to a future matter or matters and the plaintiff relies on s 769C of the *Corporations Act* and s 12BB of the ASIC Act in relation to it.

C.5 Right2Drive Systems Representation

74 Throughout the Relevant Period, ECX represented to the Affected Market that it had systems in place that enabled it to manage, and to accurately forecast, record and recognise recoveries and revenue in the Right2Drive business (the **Right2Drive Systems Representation**).

Particulars

i. The Right2Drive Systems Representation was implied by the making of each of the FY17 Results Representations, the Right2Drive Integration Representation, FY18 Guidance Representations, Repeated FY18 Guidance Representations, Revised FY18 Guidance Representations, FY18 Expected Results Representations, FY18 Results Representations, FY19 Guidance Representations and Revised FY19 Guidance Representations, being representations (and in some part representations with respect to future matters as pleaded) predicated on an ability to manage, accurately forecast, record and ~~recognise~~ recoveries and revenue in the Right2Drive business.

75 The Right2Drive Systems Representation was:

- (a) a continuing representation from the time that it was made until the end of the Relevant Period;
- (b) made in trade and commerce;
- (c) made in relation to a financial product, namely ECX Shares; and

(d) made in relation to financial services within the meaning of s 766A of the *Corporations Act* and s 12BAB of the ASIC Act; ~~and~~

~~(e) a representation with respect to a future matter or matters and the plaintiff relies on s 769C of the *Corporations Act* and s 12BB of the ASIC Act in relation to it.~~

76 Prior to the date until which each continuing representation subsisted (as alleged above), ECX did not make any statement which withdrew, qualified or corrected the:

- (a) Compliance Representations;
- (b) FY17 Results Representations;
- (c) Grays Integration Representations;
- (d) Right2Drive Integration Representation;
- (e) FY18 Guidance Representations;
- (f) Repeated FY18 Guidance Representations;
- (g) Revised FY18 Guidance Representations;
- (h) FY18 Expected Results Representations;
- (i) FY18 Results Representations;
- (j) FY19 Guidance Representations;
- (k) Revised FY19 Guidance Representations; or
- (l) Right2Drive Systems Representation

(collectively, the **Representations**).

C.6 Corrective Disclosure

77 On 20 March 2019, ECX published and lodged with the ASX an announcement entitled “Trading Update, Merger Update, Company Transformation and Cost Reduction Plan” (**Corrective Disclosure**).

78 By the Corrective Disclosure, ECX made the following statements:

- (a) ECX’s financial performance had softened since the update provided by ECX on 29 January 2019;
- (b) Right2Drive’s results for the last 2 months had been impacted by factors including a re-assessment of recovery rates on some debtor groups including its non-insurer based (individual) exposures, which resulted in the need for a higher level of provisioning, and the impact of process errors identified following queries arising from due diligence;
- (c) ECX Group NPATA was down 42.4% compared with the first 5 months of FY18;
- (d) ECX did not expect to achieve reported NPATA consistent with FY18 and would not be providing full year guidance for the ECX Group at that time;
- (e) ECX had reviewed its operations and identified two business units that may be “non-core” which were currently under review, being Grays and Right2Drive;
- (f) ECX had commenced a review of its ownership of both Right2Drive and Grays; and
- (g) ECX had not been able to reach agreement with MMS on the terms of the Scheme Booklet and that the merger with MMS was unlikely to proceed.

Particulars

- i. *ECX, Trading Update, Merger Update and Transformation Plan, 20 March 2019.*

Effect of Corrective Disclosure

- 79 Following the release of the Corrective Disclosure, the market price of ECX Shares fell substantially.

Particulars

- i. *The trading price of the Shares on the ASX fell by \$1.14 from a closing price of \$1.885 on 15 March 2019 (before a trading halt was announced) to a closing price of \$0.745 at the close of trading on 22 March 2019.*
- ii. *Further particulars will be provided following discovery and service of expert evidence.*

- 80 The Corrective Disclosure:

- (a) related to the subject matter of the Representations ~~(and each of them)~~;
- (b) was information that, prior to the Corrective Disclosure, was not generally available;
- (c) operated to qualify, supplement or partly correct the information available to the Affected Market relating to the subject matter of the following representations above-:
 - (i) Compliance Representations;
 - (ii) Grays Integration Representations;

- (iii) Right2Drive Integration Representation;
- (iv) Revised FY19 Guidance Representations; and
- (v) Right2Drive Systems Representation.

Particulars

- i. *The Corrective Disclosure qualified, supplemented or partially corrected the information available to the Affected Market relating to the subject matter of the representations referred to in subparagraph 80(c) by:*
 - a. *withdrawing the Revised FY19 Guidance Representations;*
 - b. *announcing that the MMS merger would not proceed;*
 - ba. providing information to the market in respect of the need for reassessment of Right2Drive's recovery rates, the need for a higher level of provisioning, and process errors;*
 - c. *providing information to the Affected Market concerning the current and future viability of Grays and Right2Drive; ~~and~~*
 - ca. providing information to the Affected Market which implied that Grays and Right2Drive had not been successfully integrated into ECX's business; and*
 - d. *providing information to the Affected Market concerning ECX's financial performance and future financial performance.*
- ii. *Further particulars may be provided after expert evidence.*

81 In the circumstances alleged in paragraphs 79 and 80 above, the Corrective Disclosure caused the market price of ECX Shares to fall substantially.

C.7 Events following the Corrective Disclosure

The MMS Break Fee

82 As part of the Merger Agreement, ECX and MMS had entered into a Scheme Implementation Agreement on or around 8 November 2018 (**SIA**).

Particulars

i. The SIA was in writing and annexed to the Merger Announcement.

83 It was a term of the SIA that ECX would pay to MMS a “Break Fee” in circumstances where the Merger did not proceed because, inter alia, MMS validly terminated the SIA in accordance with cll 14.1(c) or 14.2(a) of the SIA.

Particulars

i. The “Break Fee” was quantified in the SIA at cl 1.1 as a liquidated amount of \$7,255,753.

84 There were terms of the SIA that MMS could terminate the SIA:

- (a) for a material breach (other than a breach of an Elliot Representation and Warranty) in accordance with cl 14.1(c);
- (b) for a material breach of an Elliot [ie, ECX] Representation and Warranty (as defined in cl 13.1) in accordance with cl 14.2 of the SIA.

Particulars

i. SIA, cll 14.1(c), 14.2(a).

ii. *The term Elliot refers to ECX in the SIA.*

85 By cl 13.1 of the SIA, the “Elliot Representations and Warranties” included, inter alia, representations and warranties that:

- (a) the information contained in the Scheme Booklet will not contain any material statement which is materially misleading or deceptive nor any material omission and will comply with the *Corporations Act* and the Listing Rules;
- (b) ECX was not in breach of its continuous disclosure obligations under the Listing Rules in any material respect and was not relying on Listing Rule 3.1A to withhold any information from disclosure;
- (c) any forward-looking statements provided to MMS were based on assumptions which ECX believed to be reasonable;
- (d) ECX had complied in all material respects with all Australian laws applicable to it; and
- (e) any statement of opinion or belief by ECX contained in the Scheme Booklet was honestly held and there were reasonable grounds for it.

Particulars

i. *SIA, cl 1.1 (definition of “Elliot Representations and Warranties”) and 13.1.*

86 It was a further term of the SIA that, in addition to the right of termination under cl 14.1 and 14.2, the non-defaulting party was entitled to damages for losses suffered by it and expenses incurred by it as a result of a breach of the SIA.

Particulars

i. SIA, cl 14.5.

87 On 3 April 2019, ECX and MMS announced (via separate announcements) and it was the fact that:

- (a) an agreement had been reached to terminate the SIA with immediate effect;
- (b) ECX and MMS had agreed to release one another from any claims relating to the SIA and the proposed scheme; and
- (c) ECX and MMS had further agreed that ECX would reimburse MMS for costs that MMS had incurred to date in connection with the SIA and the proposed scheme, in the amount of \$8m.

Particulars

i. ECX, Mutual Scheme Implementation Agreement Termination, 3 April 2019.

ii. MMS, ASX Termination Announcement, 3 April 2019.

iii. The plaintiff does not currently have a copy of the agreement.

88 In the premises, ECX paid to MMS a Break Fee, or an amount referable to a Break Fee or to losses suffered and/or expenses incurred by MMS, for:

- (a) a material non-disclosure relating to the Merger;

- (b) further or alternatively, a material breach relating to any of the Elliot Representations and Warranties referred to in paragraph 85 above;
- (c) further or alternatively, a material breach or non-disclosure relating to the financial performance of ECX;
- (d) further or alternatively, a material breach or non-disclosure relating to the financial performance of Grays and/or Right2Drive; or
- (e) the release of any claims which MMS had against ECX in relation to any alleged breach of any clause of the SIA made by MMS against ECX (including any of the alleged breaches referred to in paragraphs (a)-(d) above).

Particulars

The payment of the Break Fee, or an amount referable to a Break Fee or to losses suffered and/or expenses incurred by MMS, and the circumstances surrounding the payment of the Break Fee, is inferred from:

- i. The ASX announcements referred to in the particulars to paragraph 87.*
- ii. The ASX announcement released by MMS on 20 March 2019 and the words: “given the issues raised in that announcement (as well as other matters), and despite every effort having been made by MMS to understand the issues facing ECX, we do not believe it will be possible to complete the proposed scheme. The issues announced by ECX include: a decline in ECX NPATA of 42.4% compared with the first five months of FY2018; significant issues*

in the Right2Drive and Grays divisions; the impact of process errors which ECX has identified on past financial years; a review of operations; ECX no longer expects to meet FY2019 earnings guidance provided to the market on 29 January 2019; and ECX not providing revised FY2019 guidance”.

- iii. ECX’s 20 March 2019 Corrective Disclosure, p 2, which referred to “process errors identified following queries arising from due diligence” (as alleged in paragraph 78(b) above).*
- iv. ECX’s 1H19 Half-Year Report, Appendix 4D, 31 May 2019, p 16, which described processing errors relating to Right2Drive as credit hire receivables deemed to no longer be collectible but which were not written off and were not made the subject of a doubtful debt provision.*
- v. The fact of payment of the amount of \$8m by ECX to MMS.*
- vi. The fact that but for a material breach, or an alleged material breach of the SIA by ECX, the SIA did not impose any obligation on ECX to pay MMS for costs incurred by it in connection with the SIA and the proposed scheme.*
- vii. The subsequent impairment to the Grays and Right2Drive business units (alleged below).*
- viii. Further particulars will be provided following discovery.*

Impairment of Grays and Right2Drive

89 On 13 May 2019, ECX published and lodged with the ASX an announcement entitled “Expected Non-Cash Impairment of Assets” (**Impairment Announcement**).

90 By the Impairment Announcement, ECX announced that:

- (a) it expected to recognise non-cash impairment charges of between \$110m to \$130m in its forthcoming interim 1H19 results;
- (b) the non-cash impairment charges related to the underperformance of Grays and Right2Drive;
- (c) the Board of Directors of ECX had come to the view that Grays and Right2Drive had not been effectively integrated; and
- (d) ECX was preparing the Grays and Right2Drive business units for sale.

Results, sale and further impairment

91 Following the Impairment Announcement:

- (a) on 31 May 2019, ECX announced its 1H19 Results and recorded NPATA of \$13.8m, down 62% on the prior corresponding period;
- (b) on 31 July 2019, ECX sold Grays at a loss and another business unit for \$60m; and
- (c) on 28 October 2019, ECX impaired the remaining goodwill in Right2Drive to nil.

Particulars

- i. ECX, 1H19 Results Presentation, 31 May 2019.*

- ii. *ECX, ECX completes the sale of Grays and areyou selling to Quadrant private equity, 31 July 2019.*
- iii. *ECX, Expected non-cash impairment, completion of corporate debt refinancing and change of registered address and principal place of business, 28 October 2019.*

C.8 FY18 and FY17 Restatement of Accounts

92 On 13 November 2019, ECX published and lodged with the ASX announcements relating to its FY19 financial performance, and prior period financial performance **(Restatement Announcement)**.

Particulars

- i. *ECX, Appendix 4E and FY19 Financial Report, 13 November 2019.*
- ii. *ECX, FY19 Results Media Release, 13 November 2019.*
- iii. *ECX, FY19 Results Presentation, 13 November 2019.*

93 By the Restatement Announcement, ECX announced, and it was the fact that:

- (a) ECX was required to restate its FY17 and FY18 accounts previously announced to the market on 8 November 2017 and 8 November 2018 **(Restatement)**; and
- (b) the Restatement adjusted the “trade receivables” across FY17 and FY18 downwards by \$20,690,000, of which \$9,513,000 was stated to be attributable to revenue recognition and “processing errors”.

Particulars

- i. *ECX, Appendix 4E and FY19 Financial Report, p 46.*
- ii. *The plaintiff refers to the footnote on p 46 to the FY19 Financial Report and the words “restatement comprises of \$6.4 million relating to 2018 and \$3.1 million relating to 2017. The restatement relates to adjustments to Right2Drive regarding judgments made in respect to the amount of revenue to recognise and processing errors”.*

C.9 The True Position

94 At all times during the Relevant Period, alternatively between the dates alleged below, it was the fact that:

- (a) ECX was recognising excessive amounts of recovery revenue within the Right2Drive business:
 - (i) that were not reasonably likely to be realised;
 - (ii) as a result of which, were inappropriate to recognise;
 - (iii) in some cases, had been deemed to no longer be collectible but had not been written off or been the subject of a doubtful debt provision; and
 - (iv) which provided an inappropriate basis upon which to forecast Right2Drive’s future performance

(the **Process and Recovery Issues**);
- (b) further or alternatively to (a), ECX was carrying as uncollected revenue, debts which were reasonably likely to become bad debts in the future based on

- Right2Drive's historical recovery experience or which had already been deemed uncollectable;
- (c) the Process and Recovery Issues and, further or alternatively, the issue referred to in subparagraph (b), were exacerbated by the rapid expansion of the Right2Drive business under ECX ownership;
 - (d) ECX had overstated its FY17 financial performance by a material amount;
 - (e) on and from 14 November 2018 to the end of the Relevant Period, ECX had overstated its FY18 financial performance by a material amount;
 - (f) by reason of the matters alleged in subparagraphs (d) and (e), the financial reports of ECX for FY17, 1H18 and FY18 as announced did not:
 - (i) give a true and fair view of the financial performance of ECX; and
 - (ii) comply with the Accounting Standards in all respects; and
 - (iii) comply with the *Corporations Act*;
 - (g) the FY18 Guidance (on and from the beginning of the Relevant Period until 6 August 2018) and the Revised FY18 Guidance (on and from 6 August 2018 to the end of the Relevant Period) were partly premised on ECX's overstated FY17 financial performance and on ECX recognising excessive amounts of recovery revenue within the Right2Drive business in FY18 and were not reasonably likely to be realised;
 - (h) approximately 75% (\$14m to \$15.4m NPATA) of the FY18 Guidance Representation of 27-30% NPATA growth was only expected to be achieved if

the stated revenue and cost-cutting “synergies” from Grays were realised by 70-80% (and sufficiently early) during FY18;

- (i) at the time of making the Grays Integration Representations, the FY18 Guidance Representations and the Revised FY18 Guidance Representations, the integration of Grays was not “on-track”;
- (j) the Grays cost rationalisation program was not producing the anticipated results within the anticipated timeframe such that the cost to earnings ratio was likely to exceed 75% in FY18;
- (k) Grays reduced its cost to earnings ratio for a short while, but it then increased from 75.4% on 1H18 to 94.2% by 1H19;
- (l) the integration of Grays had not proceeded as planned so as to give rise to the “synergies” which would partly drive ECX NPATA growth in accordance with the FY18 Guidance Representations and the Revised FY18 Guidance Representations;
- (m) the FY19 Guidance Representations (on and from 14 November 2018 until 29 January 2019) and the Revised FY19 Guidance Representations (on and from 29 January 2019 until the end of the Relevant Period) were partly premised on ECX’s overstated FY17 and FY18 financial performance and ECX recognising excessive amounts of recovery revenue within the Right2Drive business in FY19 and were not reasonably likely to be realised;
- (n) as a result of the matters alleged in subparagraphs (i), (j), (k) and (l), throughout FY18 70-80% of the expected run-rate synergies from Grays would

not be achieved in FY18, with the result that projected NPATA growth for FY18 would need to be revised down;

- (o) in circumstances where Grays had achieved statutory NPAT of \$4.0m in 1H17, a loss of \$20m in FY16 and a loss of \$1.2m in FY15, Grays needed to achieve a substantial growth in NPAT by 30 September 2018 in order to meet the FY18 Guidance and the Revised FY18 Guidance;
- (p) further to paragraph (o), on and from 1 April 2018 to 30 September 2018, and in circumstances where Grays had achieved Cash NPAT of \$5.9m in 1H18 (against a FY18 forecast of \$14.0m to \$15.4m), Grays needed to achieve a substantial growth in NPAT in 2H18 in order to meet the FY18 Guidance Representations and the Revised FY18 Guidance Representations;
- (q) further or alternatively, at all times throughout FY18 the FY18 Guidance Representations and the Revised FY18 Guidance Representations depended on the Banking Finance and Insolvency (**BFI**) and Commercial Equipment Segments of Grays contributing around or greater than 22% to NPAT in FY18 and assumed an unrealistic level of growth in the revenue contribution of the BFI Segment during FY18;
- (r) Grays' BFI revenue was variable during the Relevant Period and Grays was seeking alternative revenue streams to diversify;
- (s) the integration of Right2Drive had not proceeded as planned so as to give rise to the "synergies" which would partly drive ECX NPATA growth as represented in the FY18 Guidance Representations and the Revised FY18 Guidance Representations;

- (t) on and from 8 November 2018 until 3 April 2019 there was a real and appreciable risk that ECX would have to pay to MMS up to \$7,255,253 as a “Break Fee” and/or as damages for losses and expenses suffered by MMS as a result of a material breach of the SIA by ECX; and
- (u) there were deficiencies in the systems in place to manage, and to accurately forecast, record and/or recognise recoveries and revenue in the Right2Drive business which were such that ECX’s FY17 and FY18 Results and financial guidance would require revision,
- (together, or separately, the **True Position**).

Particulars

- i. As to subparagraphs (a) – (e), the plaintiff refers to the statements in the Corrective Disclosure and ECX’s 1H19 Half-Year Report, Appendix 4D, 31 May 2019, p 16, the Impairment Announcement and the Restatement Announcement.*
- ii. As to subparagraph (f), the plaintiff refers to the Restatement Announcement and to AASB 118 (including paragraphs 15 and 22), AASB 15 (including paragraph 9), AASB 139 (including paragraphs 55, 58-59) and AASB 9 (including paragraph 5.5.9) as at the times that those Standards were applicable to ECX (as alleged in paragraph 14). Further particulars will be provided after discovery and service of expert evidence.*
- iii. As to subparagraph (g), the plaintiff refers to subparagraphs (a)-(e).*

- iv. *As to subparagraphs (i), (l) and (s), the plaintiff refers to the fact that ECX admitted in the Impairment Announcement that the integration of Grays and Right2Drive had not been successful.*
- v. *As to subparagraph (m), the plaintiff refers to subparagraphs (a)-(e) and (g).*
- vi. *As to subparagraph (q), the unrealistic nature of the assumption of growth in the revenue contribution from the BFI Segment may be inferred from the fact that bank-initiated insolvencies had declined during FY17 and were not materially different in FY18, as to which the plaintiff refers to ASIC Insolvency Statistics, September 2022, p 2. Further particulars will be provided after service of expert evidence.*
- vii. *As to subparagraph (t), the plaintiff refers to paragraphs 83 to 88, the Impairment Announcement and the Restatement.*
- viii. *The plaintiff further refers to the ECX, Half Year 2019 Earnings Call, 31 May 2019, and the statements made therein by Julian Russell (CEO) concerning the underperformance of Grays and Right2Drive.*
- ix. *Further particulars will be given after discovery.*

C.10 The Information – up to the FY18 Guidance Downgrade

Right2Drive

95 On and from the ~~dated~~dates set out below, it was the fact that:

- (a) on and from 8 November 2017, ECX's FY17 financial results and, on and from 14 November 2018, FY18 financial results included recognition of recovery revenue within the Right2Drive business which ought not have been recognised in accordance with the applicable Accounting Standards or which ought to have been written off or made the subject of a doubtful debt provision;
- (b) on and from 8 November 2017, each of the FY17 Results Representations should have been lower, to take into account that ECX ought to have recognised a reduction in EBITDA of \$3.1m in FY17;
- (c) on and from 14 November 2018, each of the FY18 Expected Results Representations and FY18 Results Representations should have been lower, to take into account that ECX ought to have recognised a reduction in EBITDA of \$6.4m in FY18; ~~and~~
- (d) each of the NPAT and NPATA figures in the FY18 Guidance Representations (on and from 8 November 2017) and the Revised FY18 Guidance Representations (on and from 6 August 2018) should have been lower, to take into account that ECX ought to have recognised a reduction in EBITDA of \$3.1m in FY17; and/or
- (e) each of the NPAT and NPATA figures in the FY19 Guidance Representations (on and from 14 November 2018) and the Revised FY19 Guidance Representations (on and from 29 January 2019) should have been lower, to

take into account that ECX ought to have recognised a reduction in EBITDA of \$3.1m in FY17 and \$6.4m in FY18

(together and separately, the **Excessive Recognition Information**).

Particulars

- i. As at 30 September 2017 the excess revenue recognised by ECX for FY17 was \$3.1m or approximately 5.7% of statutory NPAT, as originally reported in the Appendix 4E and FY18 Financial Report, 14 November 2018, p 8;*
- ii. Within the Australian Consumer Segment (which contained Right2Drive) the excess revenue represented 19.5% of FY17 Cash NPAT of \$15.9m and 22.6% of FY17 reported statutory NPAT of \$13.7m;*
- iii. The plaintiff refers to the footnote on p 46 to the FY19 Financial Report and the words “restatement comprises of \$6.4 million relating to 2018 and \$3.1 million relating to 2017. The restatement relates to adjustments to Right2Drive regarding judgments made in respect to the amount of revenue to recognise and processing errors”.*
- iv. The plaintiff further refers to the particulars to paragraphs 88, 91, 92, 93 and the Impairment Announcement.*
- v. Further particulars will be provided following discovery and expert evidence.*

96 On and from 8 November 2017, it was the fact that there were deficiencies in the systems in place to manage, and to accurately forecast, record and/or recognise recoveries and revenue in the Right2Drive business which were such that ECX's FY17 and FY18 Results and financial guidance would require revision (**Right2Drive Inadequate Systems Information**).

97 The Excessive Recognition Information and the Right2Drive Inadequate Systems Information (together or separately) constituted the "**Right2Drive Material Information**".

Grays

98 On and from 8 November 2017, it was the fact that:

- (a) ECX's FY18 Guidance was premised on approximately \$23m to \$25m EBITDA (or 75% of the NPATA, \$14.0m to \$15.4m) being derived from Grays;
- (b) the contribution from Grays referred to in subparagraph (a) would only occur if a sufficient number of revenue and cost-cutting "synergies" from Grays were realised during FY18 (**Grays Contribution Material Information**); and
- (c) alternatively to subparagraph (b), the contribution from Grays referred to in subparagraph (a) would only occur if the BFI and Commercial Equipment business units of Grays contributed approximately 22% of the guided NPAT growth, less amortisation (\$4.09m to \$4.5m) (**Grays Segment Material Information**); and/or
- (d) there were deficiencies in the systems in place to monitor and accurately forecast the level of bank-initiated insolvencies and its impact on the level of

auctioned equipment disposals and on Grays' revenue (**Grays Inadequate Systems Information**)

(together or separately, the **Grays Material Information**).

Particulars

- i. The material fact in (a) is inferred from the statements made in the FY17 Results Announcement including that “ECX expects to deliver growth in NPATA of 27% to 30% in FY18” and “GraysOnline – Outlook highly accretive” ... “Grays remain on track to deliver NPATA \$14.0m to \$15.4m in FY18”.*
- ii. Further particulars will be provided following discovery and expert evidence.*

C.11 The Information – FY18 Guidance Downgrade to the Corrective Disclosure

99 On and from 6 August 2018, it was the fact that:

- (a) the Right2Drive Material Information and/or the Grays Material Information continued to be the case;
- (b) ECX had failed to realise the cost and revenue synergies from integration of the Right2Drive business units;
- (c) ECX had failed to realise the cost and revenue synergies from integration of the Grays business units; and/or

- (d) the amounts being carried as recoverable by Right2Drive which were not reasonably likely to be recovered were material to ECX's financial position and performance.

(together and separately, the **Cost and Revenue Information**).

Particulars

- i. *The plaintiff refers to the particulars to paragraphs 95 and 98, the fact of the Restatement and the materiality of the recoveries within the Right2Drive business unit as reflected against NPAT.*
- ii. *Further particulars will be provided following discovery and service of expert evidence.*

100 The financial reports of ECX as announced in the:

(i) FY17 Results Announcement (on and from 8 November 2017);

(ii) 1H18 Results Announcement (on and from 8 May 2018); and/or

(iii) FY18 Results Announcement (on and from 14 November 2018)

did not:

- (a) give a true and fair view of the financial performance of ECX;
- (b) comply with the Accounting Standards in all respects; and
- (c) comply with the *Corporations Act*

(the **Financial Performance Information**).

Particulars

- i. *The plaintiff refers to the particulars to paragraphs 95 and 98, the fact of the Restatement and the materiality of the recoveries within the Right2Drive business unit as reflected against NPAT.*
- ii. *The Financial Performance Information is to be inferred from:*
 - a. *the Restatement; and*
 - b. *the payment of the Break Fee and the circumstances surrounding the termination of the SIA as alleged in paragraphs 82 to 88 above.*
- iii. *The plaintiff also refers to the particulars to paragraph 93.*
- iv. *The plaintiff also refers to the Accounting Standards referred to at paragraph 13.*
- v. *Further particulars will be provided following discovery and the service of expert evidence.*

D CONTRAVENTIONS

D.1 Continuous Disclosure Contraventions

101 On and from 8 November 2017, ECX was aware (within the meaning of Rule 19.12 of the ASX Listing Rules) of the:

- (a) Right2Drive Material Information; and
- (b) Grays Material Information.

Particulars

- i. *Each of the Directors, Klotz, McLennan, Warren, in his capacity as CFO of Right2Drive, and Mullins, in his capacity as CEO of Right2Drive, ought reasonably to have been, or become, aware of the Right2Drive Material Information in the performance of their duties by reason that:*
 - a. *the Right2Drive business unit was a material business unit within the ECX business;*
 - b. *Warren and Mullins ought to have become aware of the recovery rates and revenue recognition mechanisms within Right2Drive; and*
 - c. *Klotz, McLennan, Warren and Mullins ought to have become aware of Right2Drive's increasing aged debtors' book and the level of non-insurer based (individual) exposure within the Right2Drive business as referred to in the Corrective Disclosure.*

- ii. *Each of the Directors, Klotz, McLennan, Guest, McLean, Corbin and Sanders ought reasonably to have been, or become, aware of the Grays Material Information in the performance of their duties by reason that:*
 - a. *the Grays business unit was a material business unit within the ECX business;*

- b. *the ability to achieve the FY18 Guidance (of which Grays was said to contribute \$23m to \$25m of the EBITDA) was stated to be inclusive of synergies in the Grays Acquisition Announcement and the Grays Scheme Booklet (amongst other places);*
 - c. *in the proper performance of their duties, each of them ought to have been familiar with the contents of the Grays Acquisition Announcement and the Grays Scheme Booklet (including the statements concerning synergies); and*
 - d. *had the synergies not been achieved, it would follow (a fortiori) and ought to have been apparent to each of them that the revenue attributable to Grays must have to come from the BFI and CE business units of Grays.*
- iii. *Further particulars will be provided after discovery.*

102 On and from 6 August 2018, ECX was aware (within the meaning of Rule 19.12 of the ASX Listing Rules) of the Cost and Revenue Information.

Particulars

- i. *The ECX Officers ought reasonably to have been, or become, aware of the Cost and Revenue Information in the performance of their duties by reason of:*
 - a. *the particulars to paragraph 101 (in relation to the continued awareness of the Right2Drive Material Information and the Grays Material Information);*

course of preparing their due-diligence for the merger with MMS;

b. the ECX Officers were already aware of the Right2Drive Material Information, Grays Material Information and Cost and Revenue Information, with such information directly concerning the financial performance of Grays, Right2Drive and ECX.

ii. That the ECX Officers ought reasonably to have been, or become, aware of the Financial Performance Information is also to be inferred by the fact of the later Restatement.

iii. Further particulars will be provided after discovery.

104 As at, and from:

(a) 8 November 2017, alternatively 6 August 2018, the Right2Drive Material Information and the Grays Material Information;

(b) 6 August 2018, alternatively 14 November 2018, the Cost and Revenue Information; and

(c) 14 November 2018, the Financial Performance Information,

was information that:

(d) ECX had for the purposes of s 674(2) of the *Corporations Act*;

(e) was not generally available within the meaning of s 674(2)(c)(i) of the *Corporations Act*; and

- (f) a reasonable person would expect to have a material effect on the price or value of ECX Shares within the meaning of ASX Listing Rule 3.1 and s 674(2)(c)(ii) of the *Corporations Act*.

105 By reason of the matters pleaded in section B.2 and paragraph 104 above, on and from:

- (a) 8 November 2017, alternatively 6 August 2018, ECX became obliged immediately to tell the ASX the Right2Drive Material Information and the Grays Material Information;
- (b) 6 August 2018, alternatively 14 November 2018, ECX became obliged immediately to tell the ASX the Cost and Revenue Information; and
- (c) 14 November 2018, ECX became obliged to tell the ASX the Financial Performance Information.

106 ECX did not inform the ASX of:

- (a) any of the Right2Drive Material Information;
- (b) any of the Grays Material Information;
- (c) any of the Cost and Revenue Information; or
- (d) the Financial Performance Information,

(individually or collectively, the **Material Information**) immediately on becoming “aware” of that information (within the meaning of ASX Listing Rule 19.12) or at all during the Relevant Period.

107 By reason of the matters pleaded in paragraphs 101 to 106 above, ECX contravened ASX Listing Rule 3.1 and s 674(2) of the *Corporations Act* (each being a **Continuous Disclosure Contravention**).

D.2 Misleading or Deceptive Conduct

108 In the circumstances alleged in paragraph 94 above as to the True Position during the Relevant Period, each of the:

- (a) Compliance Representations;
- (b) FY17 Results Representations;
- (c) Grays Integration Representations;
- (d) Right2Drive Integration Representations;
- (e) FY18 Guidance Representations;
- (f) Repeated FY18 Guidance Representations;
- (g) Revised FY18 Guidance Representations;
- (h) FY18 Expected Results Representations;
- (i) FY18 Results Representations;
- (j) FY19 Guidance Representations;
- (k) Revised FY19 Guidance Representations; and
- (l) Right2Drive Systems Representation

was false, ~~or~~ misleading or deceptive or likely to mislead or deceive.

Particulars

The plaintiff refers to and repeats the matters alleged in paragraph 94 as to the True Position. Specifically:

- a. in respect of the Compliance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(f) and (u) and the particulars thereto;*
- b. in respect of the FY17 Results Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f), (r) and (u) and the particulars thereto;*
- c. in respect of the Grays Integration Representations, the plaintiff refers to and relies upon sub-paragraphs 94(i)-(j), (l) and (u) and the particulars thereto;*
- d. in respect of the Right2Drive Integration Representation, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(c), (s) and (u) and the particulars thereto;*
- e. in respect of the FY18 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f)-(l), (n)-(s) and (u) and the particulars thereto;*
- f. in respect of the Repeated FY18 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f)-(l), (n)-(s) and (u) and the particulars thereto;*

- g. in respect of the Revised FY18 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f)-(l), (n)-(s) and (u) and the particulars thereto;
- h. in respect of the FY18 Expected Results Representation, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f), (g), (i)-(l), (n)-(s) and (u) and the particulars thereto;
- i. in respect of the FY18 Results Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(g), (t) and (u) and the particulars thereto;
- j. in respect of the FY19 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(g), (k), (m), (r), (t) and (u) and the particulars thereto;
- k. in respect of the Revised FY19 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(g),(k), (m), (r), (t) and (u) and the particulars thereto; and
- l. in respect of the Right2Drive Systems Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(f) and (u) and the particulars thereto.

109 Further or alternatively, during the Relevant Period, in so far as the Representations related to a future matter or matters or a matter of opinion, ECX did not have reasonable grounds for making or giving any or all of those Representations.

Particulars

i. The plaintiff refers to and repeats the matters alleged in paragraph 94 as to the True Position and paragraphs 101-103.

Specifically:

a. in respect of the Compliance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(f) and (u) and paragraphs 101(a), 102 and 103 and the particulars thereto;

b. in respect of the FY17 Results Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f), (r) and (u) and paragraphs 101(a), 102 and 103 and the particulars thereto;

c. in respect of the Grays Integration Representations, the plaintiff refers to and relies upon sub-paragraphs 94(i)-(j), (l) and (u) and paragraphs 101(b) and 102 and the particulars thereto;

d. in respect of the Right2Drive Integration Representation, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(c), (s) and (u) and paragraphs 101(a), 102 and 103 and the particulars thereto;

- e. in respect of the FY18 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f)-(l), (n)-(s) and (u) and paragraph 101 and the particulars thereto;
- f. in respect of the Repeated FY18 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f)-(l), (n)-(s) and (u) and paragraph 101 and the particulars thereto;
- g. in respect of the Revised FY18 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f)-(l), (n)-(s) and (u) and paragraphs 101-102 and the particulars thereto;
- h. in respect of the FY18 Expected Results Representation, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(d), (f), (g), (i)-(l), (n)-(s) and (u) and paragraphs 101-103 and the particulars thereto;
- i. in respect of the FY18 Results Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(g), (t) and (u) and paragraphs 101-103 and the particulars thereto;
- j. in respect of the FY19 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(g), (k), (m), (r), (t) and (u) and paragraphs 101-103 and the particulars thereto;

k. in respect of the Revised FY19 Guidance Representations, the plaintiff refers to and relies upon sub-paragraphs 94(a)-(g),(k), (m), (r), (t) and (u) and paragraphs 101-103 and the particulars thereto.

ii. In respect of the representations which are alleged to have related to a future matter or matters (namely the Grays Integration Representations, the FY18 Guidance Representations, the Repeated FY18 Guidance Representations, the Revised FY18 Guidance Representations, the FY18 Expected Results Representation, the FY19 Guidance Representations and the Revised FY19 Guidance Representations), the ~~The~~ plaintiff also refers to s 769C of the Corporations Act, s 12BB of the ASIC Act and s 4 of the ACL.

110 By reason of the matters alleged in paragraphs 108 to 109 above, in making and/or failing to withdraw, qualify or correct any of the Representations (except to the extent alleged herein), ECX;

- (a) during the Relevant Period, engaged in conduct that was misleading or deceptive or likely to mislead or deceive; and
- (b) contravened s 1041H of the *Corporations Act* and/or s 12DA of the ASIC Act and/or s 18 of the ACL (each being a **Misleading Conduct Contravention**).

E LOSS AND DAMAGE

E.1 Market Based Causation

111 During the Relevant Period, ECX Shares were traded in an efficient market.

Particulars

The plaintiff refers to:

- i. The presence of market analysts covering ECX including: CreditSuisse, Morgan Stanley, Deutsche Bank, Macquarie Research and UBS Equities.*
- ii. That, during the Relevant Period, ECX was in the ASX 200.*
- iii. The presence of institutional investors on the ECX share registry.*
- iv. The cause and effect relationship between:*
 - a. the FY18 Guidance Downgrade and the market price of ECX Shares as alleged in paragraphs 58 to 60 above; and*
 - b. the Corrective Disclosure and the market price of ECX Shares as alleged in paragraphs 79 to 81 above.*

Further particulars will be provided following service of expert evidence.

112 During the Relevant Period, the plaintiff and Group Members acquired, or acquired interests in, ECX Shares.

113 The plaintiff and Group Members each acquired, or acquired an interest in, the ECX Shares in a market of investors or potential investors in ECX Shares:

- (a) where ECX had the obligations under the ASX Listing Rules and s 674(2) of the *Corporations Act* alleged in section B.2 above;
- (b) where the price or value of ECX Shares would reasonably be expected to have been informed or affected by information disclosed in accordance with the ASX Listing Rules and s 674(2) of the *Corporations Act*; and
- (c) where ECX was subject to obligations under the *Corporations Act*, ASIC Act and the ACL not to engage in conduct that was misleading or deceptive or likely to mislead or deceive;

114 During the Relevant Period, the Continuous Disclosure Contraventions and the Misleading Conduct Contraventions (separately or together) (**Market Contraventions**) caused the market price for the ECX Shares to be, or materially contributed to the market price of the ECX Shares being, substantially greater than:

- (a) their true value; and/or
- (b) the market price that would have prevailed but for the Market Contraventions, from the respective dates that those Market Contraventions commenced (as alleged above) to:
- (c) the FY18 Guidance Downgrade; and
- (d) thereafter, to the end of the Relevant Period.

Particulars

iA. That each of the Continuous Disclosure Contraventions and the Misleading Conduct Contraventions had the effect alleged is to be inferred from the matters alleged in paragraphs 58-60, 79-81, 104(a)-(c) and (e)-(f), 111 and 113.

- i. By reason of the matters alleged in paragraphs 58 to 60 above, the effect of the FY18 Guidance Downgrade on 6 April 2018 was to remove part, but not all, of the artificial inflation in the market price of ECX Shares.
- ii. Further, by reason of the matters alleged in paragraphs 79 to 81 above, the effect of the Corrective Disclosure on 20 March 2019 was to remove further artificial inflation in the market price for ECX Shares.
- iii. Further particulars will be provided following discovery and the service of expert evidence.

E.2 Reliance

115 Further or alternatively to paragraphs 111 to 114, in making the decision to acquire, or acquire an interest in, ECX Shares:

- (a) the plaintiff and some Group Members would not have acquired, or acquired their interests in, the ECX Shares (at all or at the price or in the volumes acquired) if they had known the information the subject of one or more of the Continuous Disclosure Contraventions; and/or

- (b) the plaintiff and some Group Members relied directly on one or more of the Representations and/or ECX not having corrected or qualified such Representations (except to the extent alleged herein).

Particulars

- i. The plaintiff would not have acquired the ECX Shares as identified in the particulars to paragraph 3, at all or at the price or in the volume acquired, if he had known the information the subject of the Continuous Disclosure Contraventions;*
- ii. The plaintiff relied on one or more of the Representations and/or ECX not having corrected or qualified one or more of the Representations (except to the extent alleged herein).*
- iii. The identify of those Group Members which or who relied directly on any or all of the Representations is not and cannot be known as at the date of this Statement of Claim but will be obtained as and when it is necessary for the purposes of the proceeding.*

E.3 Loss and damage

- 116 The plaintiff and Group Members have suffered loss and damage by or resulting from one or more of the Market Contraventions.

Particulars

The loss suffered by the plaintiff and Group Members will be calculated by one of the following methodologies:

- i. the difference in price between the price of ECX Shares (or an interest in ECX Shares) as acquired and the price at which they would have been acquired but for any one or all of the Market Contraventions;*
- ii. alternatively, the difference between the price of the ECX Shares (or an interest in ECX Shares) as acquired and the true value of those Shares (or that interest);*
- iii. alternatively, the difference between the price at which the ECX Shares (or an interest in ECX Shares) were acquired by the plaintiff and Group Members and the price “left in hand”;*
- iv. alternatively, the quantum of the fall in the market price of ECX Shares in the days after the Relevant Period as a result of the disclosure of information which had not been precisely disclosed by reason of the Market Contraventions.*

COMMON QUESTIONS OF LAW OR FACT

117 The questions of law or fact common to the claims of the Group Members are as follows:

- (a) whether, during the Relevant Period, ECX made and failed to withdraw, qualify or correct (except as alleged herein):
 - (i) the Compliance Representations;
 - (ii) the FY17 Results Representations;
 - (iii) the Grays Integration Representations;

- (iv) the Right2Drive Integration Representation;
 - (v) the FY18 Guidance Representations;
 - (vi) the Repeated FY18 Guidance Representations;
 - (vii) the Revised FY18 Guidance Representations;
 - (viii) the FY18 Expected Results Representation;
 - (ix) the FY18 Results Representations;
 - (x) the FY19 Guidance Representations;
 - (xi) the Revised FY19 Guidance Representations; and/or
 - (xii) the Right2Drive Systems Representation;
- (b) whether the matters in paragraph (a) constituted conduct in relation to financial products or financial services within the meaning of s 1041H(1) of the *Corporations Act*, in trade or commerce in relation to financial services within the meaning of s 12DA of the ASIC Act, and/or in trade or commerce within the meaning of s 18 of the ACL;
- (c) whether any or all of the Representations were false, misleading or deceptive or likely to mislead or deceive;
- (d) whether ECX committed any or all of the Misleading Conduct Contraventions;
- (e) whether, during the Relevant Period, and for the purposes of ASX Listing Rule 3.1:
- (i) ECX was aware of the Material Information (within the meaning of ASX Listing Rule 19.2); and

- (ii) the Material Information was information that a reasonable person would expect to have a material effect on the price or value of ECX Shares;
- (f) whether, during the Relevant Period, and for the purposes of s 674(2) of the *Corporations Act*:
 - (i) ECX had the Material Information;
 - (ii) the Material Information was not generally available;
 - (iii) the Material Information was information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ECX Shares;
 - (iv) whether ECX committed the Continuous Disclosure Contraventions;
and
- (g) whether, during the Relevant Period, any or all of the Misleading Conduct Contraventions and/or the Continuous Disclosure Contraventions caused the market price for the ECX Shares to be, or materially contributed to the market price of the ECX Shares being, substantially greater than their true value and/or the market price that would have prevailed but for those Contraventions; and
- (h) whether the plaintiff and Group Members have suffered loss or damage by, because of or resulting from the Continuous Disclosure Contraventions and/or the Misleading Conduct Contraventions and are entitled to compensation for that loss or damage and, if so, how that loss or damage should be measured.

AND THE PLAINTIFF CLAIMS FOR HIMSELF AND ON BEHALF OF THE GROUP MEMBERS:

- A. A declaration that ECX engaged in conduct in contravention of:
 - a. s 674 of the *Corporations Act*;
 - b. s 1041H(1) of the *Corporations Act*;
 - c. s 12DA(1) of the ASIC Act; and
 - d. s 18 of the ACL.
- B. An order pursuant to s 1317HA(1) of the *Corporations Act* that ECX pay compensation to the plaintiff and Group Members for loss or damage resulting from the conduct of ECX in contravention of s 674(2) of the *Corporations Act*.
- C. An order pursuant to s 1041I of the *Corporations Act* that ECX pay compensation to the plaintiff and Group Members for loss or damage caused by the conduct of ECX in contravention of s 1041H of the *Corporations Act*.
- D. An order pursuant to s 12GF of the ASIC Act that ECX pay compensation to the plaintiff and Group Members for loss or damage caused by the conduct of ECX in contravention of s 12DA(1) of the ASIC Act.
- E. An order pursuant to s 236 of the ACL that ECX pay compensation to the plaintiff and Group Members for loss or damage suffered by reason of the conduct of ECX in contravention of s 18 of the ACL.
- F. Interest pursuant to statute.
- G. Costs.
- H. Such further or other orders as the Court deems fit.

Dated: ~~6 November 2023~~ 8 February 2024

A D POUND

B A O'CONNOR

Phi Finney McDonald

Solicitors for the plaintiff