



IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
GROUP PROCEEDINGS LIST

Case: S ECI 2023 05208

Filed on: 18/11/2024 02:57 PM

No. S ECI 2023 05208

B E T W E E N

ROSS ANDREW GAWLER

Plaintiff

-and-

FLEETPARTNERS GROUP LTD (ACN 131 557 901)

Defendant

**FURTHER AMENDED DEFENCE**

(Filed pursuant to rule 36.04(1)(a) of the *Supreme Court (General Civil Procedure) Rules 2015*)

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Date of Document: ~~18 April 2024~~ 1 July 2024<sup>18</sup> Solicitor's Code: 420  
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Filed on behalf of: The Defendant Telephone: (02) 9225 5323  
Prepared by: Herbert Smith Freehills Ref: 82768245  
ANZ Tower Email: Jason.Betts@hsf.com  
161 Castlereagh St  
Sydney NSW 2000

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To the plaintiff's Further Amended Statement of Claim (**FASOC**) dated ~~8 February~~<sup>16</sup>  
October 2024, the defendant (**FleetPartners**) says as follows:

**Note:** Unless otherwise stated, or required by context, capitalised and abbreviated terms in this Further Amended Defence have the same meaning as those in the **FASOC**.

**A. PARTIES**

**A.1 The Plaintiffs and Group Members**

1. It does not plead to paragraph 1 on the basis that it does not make a material allegation against it.
2. It does not know and therefore cannot admit paragraph 2.
3. It does not plead to paragraph 3 on the basis that it does not make a material allegation against it. ~~and says further that, in this Amended Defence, it pleads on~~

~~the basis that the capitalised phrase “ECX Shares”, which is not defined in the ASOC, means Shares in ECX traded on the ASX during the Relevant Period.~~

## **A.2 ECX**

4. It admits paragraph 4 on the basis that the unparticularised phrase “at all material times” is intended to mean “at all material times during the Relevant Period”.
5. It admits paragraph 5.

## **B. ECX’S BUSINESS**

### **B.1 ECX’s Business Segments**

6. It admits paragraph 6.
7. It admits paragraph 7.
8. It admits paragraph 8.
9. It admits paragraph 9.

### **B.2 ECX’s Reporting Requirements**

10. It admits paragraph 10.
11. It admits paragraph 11.
12. It admits paragraph 12.
13. Subject to referring to the Accounting Standards at trial for their full force and effect, it admits paragraph 13.

### **B.3 ECX’s Directors, Executive and Management Team**

14. ~~It admits paragraph 14. To paragraph 14:~~
  - ~~(a) — as to sub-paragraph (b), it says that Klotz was a director of ECX from 27 March 2014 to 12 May 2019;~~
  - ~~(b) — as to sub-paragraph (d), it says that Klotz was a director of Right2Drive from 19 May 2016 to 10 May 2019; and~~
  - ~~(c) — otherwise admits the paragraph.~~
15. ~~It admits paragraph 15. To paragraph 15:~~
  - ~~(a) — as to sub-paragraph (b), it says McLennan was a director of ECX from 27 March 2014 to 16 April 2019;~~
  - ~~(b) — as to sub-paragraph (c), it says that McLennan was a director of Grays from 11 August 2017 to 5 July 2019; and~~

~~(c) otherwise admits the paragraph.~~

16. To paragraph 16:

(a) as to sub-paragraph (a), it says that Guest was:

- i. the Managing Director of one of ECX's businesses, FleetPlus, from 1 May 2015 until 19 August 2018;
- ii. the Managing Director of Fleet Australia from 19 August 2018 to 12 May 2019 with responsibilities for ECX businesses Fleet Partners AU and FleetPlus; and

(b) it denies sub-paragraphs (b) and (c).

17. To paragraph 17:

(a) as to sub-paragraph (a), it says that McLean was the Group Chief Operating Officer from 30 June 2014 to 31 January 2020, employed by Fleet Holdings (Australia) Pty Limited;

~~(b) it admits sub-paragraph (b); and as to sub-paragraph (b), it says that McLean was a director of Grays from 31 July 2019 to 9 December 2022; and~~

~~(c) it admits sub-paragraph (c).~~

~~17A. It admits paragraph 17A.~~

~~17B. To paragraph 17B, it:~~

~~(a) admits sub-paragraphs (a) to (d), save that it says Muhs was the Head of Business Strategy and Investor Relations of ECX from 22 April 2014 to 4 July 2019; and~~

~~(b) denies sub-paragraph (e).~~

~~17C. To paragraph 17C, it:~~

~~(a) admits sub-paragraph (a); and~~

~~(b) denies sub-paragraph (b).~~

~~17D. To paragraph 17D:~~

~~(a) it says, as to sub-paragraph (a), that Sandow was the General Manager, Finance from 25 August 2014 to 4 July 2019, and was promoted to Group Financial Director on 5 July 2019; and~~

~~(b) it denies sub-paragraph (b).~~

17E. To paragraph 17E:

(a) it says, as to sub-paragraph (a), that Verhoeven was the Managing Director (Group Transformation and Internal Partnerships) from 1 October 2018 to 30 September 2019;

(b) it says, as to sub-paragraph (b), that Verhoeven was the Managing Director, Fleet Partners Australia from 3 April 2017 to 30 September 2018;

(c) it says, as to sub-paragraph (c), that Verhoeven was the Managing Director of FleetPartners NZ from 31 March 2014 to 31 March 2017; and

(d) it denies sub-paragraph (d).

18. To paragraph 18, it:

(a) ~~it~~ admits subparagraph (a); and

(b) ~~it~~ denies sub-paragraph (b).

19. To paragraph 19:

(a) as to sub-paragraph (a), it says that Sanders was the Executive General Manager B2B of Grays from 1 November 2016 to 16 August 2017;

(b) as to sub-paragraph (b), it says that Sanders was the Joint Managing Director of Grays from 16 August 2017 to 19 July 2019; and

(c) it denies sub-paragraph (c).

20. To paragraph 20:

(a) it admits sub-paragraphs (a) and (b); and

(b) it denies sub-paragraph (c).

21. To paragraph 21:

(a) as to sub-paragraph (a), it says that Mullins was the Managing Director of Right2Drive from November 2012 to June 2019; ~~and~~

(aa) it admits sub-paragraph (aa); and

(b) it denies sub-paragraph (b).

22. It admits paragraph 22.

**B.4 ECX's Continuous Disclosure Obligations**

23. It admits paragraph 23.

24. It admits paragraph 24.

25. Subject to referring to the full terms of ASX Listing Rules 3.1, 3.1A, 19.12 and ASX Listing Rules Guidance Note 8 at trial, it admits paragraph 25.
26. It admits paragraph 26.
27. To paragraph 27:
- (a) it says that ECX could only become aware of information if:
    - i. ECX actually possessed the information; and
    - ii. an officer of the entity had, or ought reasonably to have, come into possession of the information in the course of the performance of their duties as an officer; and
  - (b) otherwise admits paragraph 27.
28. To paragraph 28:
- (a) it refers to and repeats paragraphs 14 to 22 and 27 above; and
  - (b) otherwise denies paragraph 28.

## **C. CHRONOLOGY OF MATERIAL FACTS**

### **C.1 Significant Events Prior to the Relevant Period**

#### *Right2Drive Announcement*

29. It admits paragraph 29, save that it says it published and lodged two separate documents with the ASX entitled “1H FY16 Results & ECX acquires Right2Drive - – Media Release” and “1H FY16 Results & ECX acquires Right2Drive – – Presentation”.

#### **Particulars**

- i. ECX, ASX media release entitled “1H FY16 Results & ECX acquires Right2Drive – Media Release”, 6 May 2016.*
  - ii. ECX, ASX presentation entitled “1H FY16 Results & ECX acquires Right2Drive – Presentation”, 6 May 2016.*
30. Subject to relying on the full terms and effect of the media release and presentation referred to at paragraph 29 above, it admits paragraph 30.
31. It admits paragraph 31.

32. It admits paragraph 32 and says further that the expansion of Right2Drive's branch network was accompanied by significant growth in the hire income generated by Right2Drive.

#### **Particulars**

- i. By 30 September 2017, Right2Drive had 30 branches in operation across Australia and New Zealand and its hire income had increased from \$19m in FY16 to \$76.5m in FY17: ECX, FY17 Results Presentation, 8 November 2017, p 14.*
- ii. By 8 May 2018, Right2Drive had 35 branches in operation across Australia and New Zealand and its hire income for 1H FY18 was \$37.9m, representing a 17% increase on 1H FY17: ECX, 1H18 Results Presentation, 8 May 2018, pp 5, 22.*
- iii. By 14 November 2018, Right2Drive had 35 branches in operation across Australia and New Zealand and its hire income for FY18 was \$82.2m, representing an 8% increase on FY17: ECX, FY18 Results Presentation, 14 November 2018, p 19.*

33. It admits paragraph 33.

#### Grays Acquisition Announcement

34. It admits paragraph 34.

35. Subject to relying on the full terms and effect of the Grays Acquisition Announcement, it admits paragraph 35.

#### Grays Scheme Booklet

36. It admits paragraph 36.

37. To paragraph 37:

- (a) as to sub-paragraph (a), it admits that the Grays Scheme Booklet stated:

*The potential synergies created by combining Eclipx and Grays are currently estimated to be approximately \$20 million per annum at full run-rate, excluding one-off costs, implementation costs, and the revenue impact from exiting certain of Grays' consumer product segments deemed non-core to Eclipx. The potential synergy number has been calculated by Eclipx on a pre-tax basis;*

- (b) it admits sub-paragraph (b);
- (c) as to subparagraph (c), it admits that the Grays Scheme Booklet stated:  
*Eclipx is targeting approximately \$23-25 million of EBITDA from Grays during the financial year ending 30 September 2018 (this takes into account the phasing of 70-80% of Eclipx's estimated run-rate synergies in that financial year);*

- (d) says further that the statements referred to in sub-paragraphs (a), (b) and (c) were prefaced by the following statement:

*The potential revenue and costs synergies are Eclipx's estimates and should be read together with Section 8.3(b) of this Scheme Booklet, which outlines the risks relating to the integration of the Eclipx and Grays businesses and the realisation of potential synergies.*

#### **Particulars**

*i. ECX, Grays Scheme Booklet, 21 June 2017, p 66.*

- (e) says further that the statements at sub-paragraphs (a), (b) and (c) were followed by statements to the following effect:

*The nature and extent of these potential synergies are still being explored by Eclipx and the realisation of any synergies is subject to a number of risks and uncertainties and risks which, in broad terms, relate to the success of management in integrating the respective businesses of Eclipx and Grays, and further analysis and refinement of how to optimise the restructuring and integration of Gray's business.*

*There is no guarantee that all or any of these potential synergies will in fact be realised. For further information regarding risks relating to the integration of the Eclipx and Grays businesses and the realisation of potential synergies, refer to Section 8.3(b) of this Scheme Booklet. Section 8 sets out other risk factors that may impact on the ability to realise the potential synergies.*

#### **Particulars**

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

- (f) says further that section 8.3(b) of the Scheme Booklet included the following statements:

#### **8.3 Risks relating to the Combined Group**

...

***b. Integration risks and realisation of anticipated synergies***

*The performance of the Combined Group will be affected by, among other factors, the successful integration of the businesses of Eclipx and Grays. There is no guarantee that the businesses of the Combined Group will be able to be integrated successfully without any unexpected delays or incurring additional costs. There is a risk that the operating and financial performance and future prospects of the Combined Group could be adversely impacted if the businesses of Eclipx and Grays are not integrated effectively. Additionally, such integration may take longer than expected and anticipated efficiencies, benefits and potential synergies of that integration may be less than targeted.*

*Further, as discussed in Section 7.2, there is a risk that implementation of the Scheme may not result in realisation of the estimated potential synergies (either on time or at all) due to, a variety of possible factors including:*

- *possible differences in the management culture of the two groups and the potential loss of key personnel, employees or customers;*
- *higher than anticipated integration costs;*
- *lower than expected cost savings; or*
- *unforeseen costs relating to the integration of IT systems and platforms, financial and accounting systems and other operating and management systems.*

*If the integration of the businesses of Eclipx and Grays is not achieved in an effective manner and within a reasonable time, the full benefits of the potential synergies may be achieved only in part, or not at all.*

**Particulars**

- i. ECX, Grays Scheme Booklet, 21 June 2017, p 76.*

**Grays - Integration**

38. It admits paragraph 38 and otherwise relies on the full terms and effect of the media release titled "Update on Grays eCommerce Scheme" (**Grays Scheme Update**).

**Particulars**

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



39. It admits paragraph 39.
40. It admits paragraph 40 and otherwise relies on the full terms and effect of the investor day briefing titled “ECX Investor Day Presentation” (**Grays Integration Update**).

#### **Particulars**

- i. ECX, ECX Investor Day Presentation, 26 September 2017.*

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

##### Compliance Representations

41. To paragraph 41:
- (a) it admits sub-paragraphs (a) and (b); and
  - (b) it does not admit that it made the representation alleged at sub-paragraph (c), but says that it did have reasonable grounds for the representations alleged in sub-paragraphs (a) and (b), and refers to sub-paragraph 109(a) below.
42. It refers to and repeats paragraph 41 above, and otherwise admits paragraph 42.

##### November 2017 – FY17 Results and Representations

43. It admits paragraph 43.
44. To paragraph 44:
- (a) subject to relying on the full terms and effect of the FY17 Results Announcement, including statements to the effect that:
    - i. the information contained in the FY17 Results Announcement was a summary only, did not purport to be complete, and should be read in conjunction with ECX’s other periodic and continuous disclosure announcements lodged with the ASX;
    - ii. to the extent permitted by law, ECX and its related bodies corporate or its directors, officers, employees, professional advisors and agents (Related Parties) do not accept any responsibility for any loss arising in any way from anyone acting or refraining from acting as a result of the FY17 Results Announcement; and

- iii. no representation or warranty, express or implied, is made as to the fairness, accuracy, completeness or correctness of the information, opinions and conclusions contained therein,

**Particulars**

- i. ECX, FY17 Results Presentation, 8 November 2017, p 2.*

it admits sub-paragraphs (a), (b) and (f) to (i);

- (b) as to sub-paragraphs (c) and (d), it:

- i. relies on the full terms and effect of the FY17 Results Announcement, including the statements to the effect set out at sub-paragraph (a)(i) to (iii) above;
- ii. refers to and repeats sub-paragraph 48(a) below; and
- iii. otherwise admits the sub-paragraphs;

- (c) as to sub-paragraph (e), it:

- i. relies on the full terms and effect of the FY17 Results Announcement, including the statements to the effect set out at sub-paragraph (a)(i) to (iii) above;
- ii. says its expectation of growth in NPATA of 27-30% as set out in the FY17 Results Announcement was expressly stated to be subject to the possibility of “unforeseen circumstances”;
- iii. refers to and repeats sub-paragraph 48(a) below; and
- iv. otherwise admits the sub-paragraph.

**Particulars**

- i. ECX, FY17 Results Media Release, 8 November 2017, p 2.*

- 45. To paragraph 45, it:

- (a) refers to and repeats paragraph 44 above;
- (b) otherwise admits sub-paragraphs (a) and (b); and
- (c) does not admit that it made the representation alleged at sub-paragraph (c), but says that it did have reasonable grounds for the representations alleged in sub-paragraphs (a) and (b), and refers to sub-paragraph 109(b) below.

46. To paragraph 46, it:
- (a) refers to paragraph 37 above;
  - (b) admits sub-paragraph (i); and
  - (c) does not admit that it made the representation alleged at sub-paragraph (ii), but says that it did have reasonable grounds for the representations alleged in sub-paragraph (i), and refers to sub-paragraph 109(c) below.
47. To paragraph 47, it:
- (a) admits sub-paragraph (a); and
  - (b) does not admit that it made the representation alleged at sub-paragraph (b), but says that it did have reasonable grounds for the representation alleged in sub-paragraph (a), and refers to sub-paragraph 109(d) below.
48. To paragraph 48:
- (a) it says that:
    - i. earnings guidance involves:
      - 1. an estimate of the future financial performance and results of a company; and
      - 2. the use of historical and current information and data to predict future events and the financial performance and results of a company;
    - ii. the preparation of earnings guidance is a forward-looking exercise based on a range of assumptions about, among other things, macro-economic and market-specific conditions, including the interaction of those conditions on consumer demand;
    - iii. there is uncertainty and risk regarding whether earnings guidance will be achieved due to, among other things, unexpected events or circumstances arising during the period of the guidance, or anticipated events or circumstances not arising, and upon which reasonable assumptions have been made;
    - iv. by reason of the matters in (i) to (iii) above, the preparation of earnings guidance involves an exercise of judgement;
    - v. earnings guidance prepared by ECX in relation to FY18 was attended by additional uncertainty and risk because it was

contingent on the performance of Grays and Right2Drive as recently acquired businesses;

- vi. the uncertainty and risk associated with providing earnings guidance, identified at (i) to (v) above, were matters which would have been, and ECX reasonably expected would be, well understood by the Affected Market;
- vii. at the time it provided its earnings guidance, ECX also variously warned the Affected Market that:
  - 1. an investment in ECX was subject to known and unknown risks, some of which were beyond the control of ECX or its directors, and ECX did not guarantee any particular rate of return or the performance;
  - 2. the FY18 Guidance Representations contained forward-looking statements with respect to the financial condition, results of operations and business of ECX;
  - 3. such forward-looking statements involved known and unknown risks, uncertainties and other factors which because of their nature may cause the actual results or performance of ECX to be materially different from the results or performance expressed or implied by such forward-looking statements;
  - 4. such forward-looking statements were based on numerous assumptions regarding ECX's present and future business strategies and the political, regulatory and economic environment in which ECX would operate in the future, which may not be reasonable, and were not guarantees or predictions of future performance; and
  - 5. no representation or warranty was made that any of these statements or forecasts (express or implied) would come to pass or that any forecast result would be achieved,

**(the Guidance Warnings);**

#### **Particulars**

- i. *ECX, FY17 Results Presentation, 8 November 2017, p 2.*

- viii. when providing earnings guidance, ECX did not represent or promise that it would achieve the financial performance and results within the parameters of its guidance;
  - ix. the plaintiff and any group members knew or ought to have known of the matters in sub-paragraphs (i) to (viii) above, by reason of statements made by ECX, including the Guidance Warnings; and
- (b) says that ECX represented that, subject to the uncertainties and risks which necessarily attended forward-looking earnings guidance, some of which had been expressly identified by way of the Guidance Warnings, it:
- i. considered that Grays remained on track to deliver \$23m to \$25m EBITDA (NPATA \$14.0m to \$15.4m);
  - ii. expected that the Right2Drive business would deliver a contribution higher than the \$8m NPATA achieved by it in FY17; and
  - iii. expected its NPATA to grow by 27-30%, 75% of which it expected to come from Grays.

49. To paragraph 49:

- (a) it refers to and repeats paragraphs 45 to 48 above;
- (b) as to sub-paragraph (a)(ii), it denies that the Grays Integration Representations were continuing representations from the time they were made until the end of the Relevant Period;

#### **Particulars**

- i. ECX informed the Affected Market on 6 August 2018 that GraysOnline 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 was being deployed or longer periods in infrastructure projects, resulting in reduced auctioned equipment disposals.*
- ii. ECX further informed the Affected Market on 6 August 2018 that GraysOnline was now forecast to deliver approximately 30%-40% NPATA increase (like for like) on its preacquisition full year NPATA of*

*approximately \$8m: ECX, Revised FY18 NPATA  
Guidance and Market Update, 6 August 2018, p 1.*

- (c) as to sub-paragraph (a)(iii), it denies that the Right2Drive Integration Representations were continuing representations from the time they were made until the end of the Relevant Period, and says further that the representations were made as at 8 November 2017 and were subject to change;
- (d) as to sub-paragraph (a)(iv), it denies that the FY18 Guidance Representations were continuing representations from the time they were made until the FY18 Guidance Downgrade; and

#### **Particulars**

- i. ECX informed the Affected Market that forward-looking statements speak only as at the date of the Presentation and to the full extent permitted by law, ECX and its Related Parties disclaim any obligation or undertaking to release any updates or revisions to information to reflect any change in any of the information contained in the Presentation: ECX, FY17 Results Presentation, 8 November 2017, p 2.*

- (e) otherwise admits the paragraph.

#### May 2018 – 1H18 Results and Repeated FY18 Guidance Representations

- 50. It admits paragraph 50.
- 51. Subject to relying on the full terms and effect of the 1H18 Results Announcement, it admits paragraph 51.
- 52. To paragraph 52:
  - (a) it refers to and repeats sub-paragraphs 48(a) and 49(d) above;
  - (b) it does not admit that it made the representation alleged at sub-paragraph (c), but says that it did have reasonable grounds for the representations alleged in sub-paragraphs (a) and (b), and refers to sub-paragraph 109(f) below; ~~and~~
  - (c) ~~otherwise~~ says that ECX represented that, subject to the uncertainties and risks which necessarily attended forward-looking earnings guidance, some of which had been expressly identified by way of the Guidance Warnings, it:

- i. considered that 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~~
  - ii. expected that its NPATA would grow NPATA by 27-30% in FY18; and
- (d) otherwise does not admit paragraph 52.

53. To paragraph 53:

- (a) it refers to and repeats paragraph 52 above;
- (b) it denies sub-paragraph (a); and

#### **Particulars**

- i. *ECX informed the Affected Market that forward-looking statements speak only as at the date of the Presentation and to the full extent permitted by law, ECX and its Related Parties disclaim any obligation or undertaking to release any updates or revisions to information to reflect any change in any of the information contained in the Presentation: ECX, 1H18 Results – Presentation, 8 May 2018, p 37.*

- (c) otherwise admits the paragraph.

### **C.3 FY18 Guidance Downgrade**

54. It admits paragraph 54.

55. Subject to relying on the full terms and effect of the FY18 Guidance Downgrade, it admits paragraph 55: ~~(on the basis that the word “section” in sub-paragraph (b) should be “sector”)~~.

56. To paragraph 56:

- (a) it refers to and repeats sub-paragraph 48(a) above; and
- (b) otherwise says that ECX represented that, subject to the uncertainties and risks which necessarily attended forward-looking earnings guidance, some of which had been expressly identified by way of the Guidance Warnings:
  - i. it now expected to report FY18 NPATA in the range of \$77m to \$80m (+13% to +17% on FY17 NPATA);

- ii. 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
- iii. it now expected to deliver mid-single digit NPATA growth from Right2Drive in FY18.

57. To paragraph 57:

- (a) it refers to and repeats paragraph 56 above;
- (b) it denies sub-paragraph (a) and says further that each of the Revised FY18 Guidance Representations were qualified, supplemented or partly corrected by the FY18 Expected Results Announcement; and
- (c) otherwise admits the paragraph.

Effect of FY18 Guidance Downgrade

58. To paragraph 58, it:

- (a) admits that it published the FY18 Guidance Downgrade on 6 August 2018 and the market price of ECX Shares fell substantially;
- (b) refers to the price at which ECX Shares traded before, during and after the Relevant Period; and
- (c) refers to paragraph 59 below and says further that the FY18 Guidance Downgrade did not operate to qualify, supplement or partly correct the representations referred to in 59(a)(ii) and (iv) to (v) of the FASOC.

59. To paragraph 59:

- (a) as to sub-paragraphs (a) and (c), it:
  - i. says that the allegations are vague and embarrassing; and
  - ii. under cover of that objection, denies the sub-paragraphs; and
- (b) it does not admit sub-paragraph (b).

60. To paragraph 60:

- (a) it admits that the FY18 Guidance Downgrade caused the market price of ECX Shares to fall substantially; and
- (b) otherwise refers to and repeats paragraphs 58 and 59 above.



#### C.4 FY19 Growth and McMillan Shakespeare Merger

##### FY18 Expected Results Representation

61. It admits paragraph 61.
62. To paragraph 62:
- (a) it admits that the FY18 Expected Results Announcement stated that:
    - i. subject to finalisation of the audit, ECX's FY18 NPATA was expected to be \$78.1m (FY17 \$68.3m) within the guidance range provided to the market on 6 August 2018; and
    - ii. Net Operating Income was expected to be \$325.3m (FY17 \$255.3m);
  - (b) it says further that the FY18 Expected Results Announcement stated that ECX expected to declare a final dividend of 8 cents per share; and
  - (c) it admits that the Merger Announcement contained statements to the effect alleged at sub-paragraph (c);
  - (d) it says further that the Merger Announcement stated that the proposed merger was subject to conditions, including approval by ECX shareholders of the scheme of arrangement, receipt of certain regulatory approvals, no material adverse change and prescribed occurrences, and an independent expert concluding that the scheme was in the best interests of shareholders; and
  - (e) otherwise relies on the full terms and effect of the FY18 Expected Results Announcement and Merger Announcement.
63. To paragraph 63, it:
- (a) ~~it~~ refers to and repeats sub-paragraphs 48(a) and 62(a) above; and
  - (b) ~~otherwise, on the assumption that the reference in paragraph 63 to the FY18 Results Announcement is intended to be a reference to the FY18 Expected Results Announcement, it~~ admits the paragraph.
- 63A. To paragraph 63A:
- (a) As to sub-paragraph (a), it:
    - i. says that the Merger Announcement included statements to the effect that:

1. MMS and ECX proposed to merge pursuant to a Scheme Implementation Agreement (SIA), which was subject to conditions;
2. the SIA contained customary terms and conditions on which MMS and ECX would implement the merger;
3. the merger was proposed to be put to ECX shareholders in early 2019; and
4. the merger was unanimously recommended by the ECX Board, in the absence of a superior proposal and subject to an independent expert concluding that the merger was in the best interests of ECX's shareholders;

- ii. relies on the Merger Announcement for its full terms and effect; and
- iii. otherwise denies the sub-paragraph.

(b) As to sub-paragraph (b), it:

- i. denies sub-paragraph (b); and
- ii. says further that if, which is denied, it made the representation alleged in sub-paragraph (a), it did so on reasonable grounds and refers to sub-paragraph 109(m) below.

64. To paragraph 64:

(a) it refers to and repeats paragraphs 63 and 63A above;

(b) says further that if, which is denied, the MMS Merger Representation was made, then it denies it was a continuing representation from the time it was made until the end of the Relevant Period; denies sub-paragraph (a) and says further that the FY18 Expected Results Representation was only a continuing representation from the time it was made until the FY18 Results Announcements; and

#### **Particulars**

i. On 29 January 2019, ECX informed the Affected Market as follows:

a. that MMS had made, and ECX had responded to, extensive information requests in relation to the ECX FY19 year to date financial performance, outlook expectations and other matters;

- b. that ECX had sought confirmation from MMS as to whether it intended to proceed in accordance with the scheme timetable, in response to which MMS had advised that it intended to fully comply with its obligations under the SIA but needed time to consider next steps, including appropriate disclosure, additional risks and any impact on the future Combined Group, and scheme timetable, and had reserved its rights. ECX, NPATA Performance and Expectations, 29 January 2019 (ECX.0005.0001.8255), p 3.
- ii. On 29 January 2019, MMS informed the Affected Market as follows:
- a. that it was considering the announcement made by ECX on the same date and the further work required;
- b. this was likely to take time and the parties had agreed the date for the first Court hearing of 1 February 2019 would be rescheduled. MMS, ECX NPATA Announcement, 29 January 2019 (ECX.0005.0001.8255), p 1.
- iii. On 11 February 2019, ECX informed the Affected Market that its exchange of information with MMS continued, it remained committed to agreeing the content of and finalising the Scheme Book for presentation to its shareholders, and its objective was to announce a revised timetable as soon as the contents of the Scheme Book were agreed with MMS. ECX, ECX AGM: Chairman's Speech, 11 February 2019, p 1.
- iv. On 18 March 2019, MMS informed the Affected Market that:
- a. noting the trading halt request made by ECX pending a trading update, MMS would consider its position in respect of the proposal to acquire ECX after reviewing that trading update;
- b. it continued to reserve all rights and would provide a further update when appropriate. MMS, ASX Announcement, 18 March 2019, p

(b)(c) otherwise admits the paragraph.

FY19 Guidance Representations

65. It admits paragraph 65.
66. To paragraph 66:

(a) as to sub-paragraph (a), it says that the FY18 Results Announcement stated that ECX's FY18 NPATA of \$78.1m was +14% on FY17;

~~(b)~~ as to sub-paragraph (b):

~~i. it says that the FY18 Results Announcement referred to FY18 statutory NPAT and cash NPAT in the Australia Consumer Segment, not FY17; and~~

~~ii. denies the sub-paragraph;~~

~~(e)(b)~~ it admits sub-paragraph (f), save that it says that the FY18 Results Announcement also referred to headwinds in the Grays and Right2Drive businesses, such that:

- i. ECX restructured and repositioned R2D during the latter half of FY18 to provide diversification of hires from the consumer and corporate markets, reduced overheads and improved fleet utilisation; and
- ii. Grays was well placed to benefit when the insolvency markets recover and asset turnover increases in the industrial market segment;

~~(d)(c)~~ it refers to the full terms and effect of the FY18 Results Announcement, including statements to the effect that:

- i. the information contained in the FY18 Results Announcement was a summary only, did not purport to be complete, and should be read in conjunction with ECX's other periodic and continuous disclosure announcements lodged with the ASX;
- ii. to the extent permitted by law, ECX and its related bodies corporate or its Related Parties do not accept any responsibility for any loss arising in any way from anyone acting or refraining from acting as a result of the FY18 Results Announcement;
- iii. no representation or warranty, express or implied, is made as to the fairness, accuracy, completeness or correctness of the information, opinions and conclusions contained therein; and

#### **Particulars**

- i. *ECX, FY18 Results Presentation, 14 November 2018, p 27.*

~~(e)(d)~~ otherwise admits the paragraph.

67. To paragraph 67:

~~(a)~~ as to sub-paragraph (b), it:

~~i.~~ refers to and repeats paragraph 66(b) above; and

~~ii.~~ denies the sub-paragraph;

~~(b)(a)~~ it does not admit that it made the representation alleged at sub-paragraph (g), but says that it did have reasonable grounds for the representations alleged in sub-paragraphs (a) to (f), and refers to sub-paragraph 109(j) below; and

~~(e)(b)~~ it refers to and repeats paragraph 66 above and otherwise admits the paragraph.

68. To paragraph 68:

(a) it refers to and repeats sub-paragraph 48(a) above; and

(b) otherwise says that ECX represented that, subject to the uncertainties and risks which necessarily attended forward-looking earnings guidance, some of which had been expressly identified by way of the Guidance Warnings, it was well positioned to achieve top and bottom line growth in each business segment in FY19.

#### **Particulars**

*i. ECX, FY18 Results Presentation, 14 November 2018, p 27.*

69. It refers to and repeats paragraph 68 above and otherwise admits paragraph 69.

#### January 2019 – Revised FY19 Guidance Representations

70. It admits paragraph 70.

71. To paragraph 71:

(a) it says that the Revised FY19 Guidance Announcement included the following statements:

i. 1H FY19 NPATA is expected to be approximately 40% of the full FY19 NPATA due to softer performance in the Consumer segment and continued softness in Insolvency/Industrial auction market conditions experienced in the first quarter of FY19;

ii. responding to this expectation of a softer 1H FY19 performance, ECX has already commenced the implementation of a further cost reduction program, details of which are set out thereafter; and

- iii. MMS has made, and ECX has responded to, extensive information requests in relation to the ECX FY19 year to date financial performance, outlook expectations and other matters. While MMS has advised that it intends to comply with its obligations under the SIA, it requires time to consider next steps including appropriate disclosure, additional risks and any impact on the future Combined Group, and scheme timetable, and has reserved its rights;
  - (b) it refers to the full terms and effect of Revised FY19 Guidance Announcement; and
  - (c) otherwise admits the paragraph.
72. To paragraph 72:
- (a) it denies sub-paragraph (a);
  - (b) it refers to and repeats sub-paragraph 48(a) above; and
  - (c) otherwise says that ECX represented that, subject to the uncertainties and risks which necessarily attended forward-looking earnings guidance, some of which had been expressly identified by way of the Guidance Warnings:
    - i. it expected single digit growth in FY19 NPATA over the Eclix pro forma NPATA for FY18 (calculated after adjusting for the adverse effect of accounting standard changes); and
    - ii. when combined, applying AASB15 and AASB9 to FY18 represented a pro forma \$5m after tax reduction in FY18 NPATA to \$73.1m.
73. To paragraph 73, it:
- (a) refers to and repeats paragraph 72;
  - (b) denies the paragraph to the extent it concerns the representation alleged at sub-paragraph 72(a) above; and
  - (c) says, if (which is denied) it made the representation alleged at sub-paragraph 72(a) above, and as to the allegations made in respect of the representation alleged at sub-paragraph 72(b) above, it otherwise admits paragraph 73.

#### **C.5 Right2Drive Systems Representation**

74. It denies paragraph 74.

75. It refers to and repeats paragraph 74 above, and otherwise denies paragraph 75.
76. To paragraph 76:
- (a) save that it refers to and repeats paragraph 41 above, it admits sub-paragraph (a);
  - (b) save that it refers to and repeats paragraph 45 above, it admits sub-paragraph (b);
  - (c) it denies sub-paragraph (c) and refers to and repeats sub-paragraph 49(b) above;
  - (d) it denies sub-paragraph (d) and refers to and repeats sub-paragraph 49(c) above;
  - (e) it denies sub-paragraph (e) and refers to and repeats sub-paragraph 49(d) above;
  - (f) it denies sub-paragraph (f) and refers to and repeats sub-paragraph 53(b) above;
  - (g) it denies sub-paragraph (g) and refers to and repeats sub-paragraph 57(b) above;
  - (h) save that it refers to and repeats paragraphs 62 and 63 above, it admits  
~~it denies~~ sub-paragraph (h) ~~and refers to and repeats sub-paragraph~~  
~~64(b) above;~~
  - (i) save that it refers to and repeats paragraphs 66 and 67 above, it admits sub-paragraph (i);
  - (j) save that it refers to and repeats paragraphs 66 and 68 above, it admits sub-paragraph (j);
  - (k) save that it refers to and repeats paragraphs 72 and 73 above, it admits sub-paragraph (k); ~~and~~
  - (l) \_\_\_\_\_ it denies sub-paragraph (l) and refers to and repeats paragraph 74 above; ~~and-~~
  - (m) \_\_\_\_\_ it denies sub-paragraph (m) and refers to and repeats sub-paragraph 64(b) above.

#### **C.6 Corrective Disclosure**

77. It admits paragraph 77.
78. Subject to relying on the full terms and effect of the Corrective Disclosure, it admits paragraph 78.

### Effect of Corrective Disclosure

79. To paragraph 79, it:
- (a) admits it published the Corrective Disclosure on 20 March 2019 and the market price of ECX Shares fell substantially;
  - (b) refers to the price at which ECX Shares traded before, during and after the Relevant Period; and
  - (c) refers to paragraph 80 below and says further that the Corrective Disclosure did not operate to qualify, supplement or partly correct the representations referred to in sub-paragraph 80(c)(i) to (v) of the **EASOC**.
80. To paragraph 80:
- (a) as to sub-paragraphs (a) and (c), it:
    - i. says that the allegations are vague and embarrassing; and
    - ii. under cover of that objection, denies the sub-paragraphs; and
  - (b) it does not admit sub-paragraph (b).
81. To paragraph 81, it:
- (a) admits that the Corrective Disclosure caused the market price of ECX Shares to fall substantially; and
  - (b) otherwise refers to and repeats paragraphs 79 and 80 above.

### **C.7 Events following the Corrective Disclosure**

#### The MMS Break Fee

82. It admits paragraph 82.
83. It admits paragraph 83.
84. It admits paragraph 84.
85. To paragraph 85:
- (a) as to sub-paragraph (a), it says that whether there was any material omission was to be assessed having regard to the applicable disclosure requirements (including that any statement of belief or opinion was formed on a reasonable basis); and
  - (b) otherwise admits the paragraph.



86. To paragraph 86:
- (a) it says the maximum liability of ECX to MMS under or in connection with the SIA was the Break Fee; and
  - (b) otherwise admits the paragraph.

**Particulars**

*i. SIA, cl 11.6.*

87. It admits paragraph 87.

88. To paragraph 88, it:

- (a) says it paid a reimbursement of \$8,000,000 to MMS for the expenses it incurred in connection with the SIA but denies that the Reimbursement Payment was referable to a Break Fee or to losses suffered and/or expenses incurred by MMS for any of the matters alleged in sub-paragraphs 88(a) to 88(e) that no Break Fee or Reverse Break Fee was paid under the settlement deed dated 3 April 2019;
- (b) says further that MMS and ECX expressly agreed to terminate the SIA without any admission of liability; and
- (c) otherwise says that the paragraph is vague and embarrassing and, under cover of that objection, denies the paragraph.

**Particulars**

*i. ECX and MMS, Settlement Deed, 3 April 2019, cl 2 and 3.*

*Impairment of Grays and Right2Drive*

89. It admits paragraph 89.

90. Subject to relying on the full terms and effect of the Impairment Announcement, it admits paragraph 90.

*Results, sale and further impairment*

91. To paragraph 91:

- (a) it admits sub-paragraphs (a) and (c); and
- (b) it does not admit sub-paragraph (b) and says further that the implied transaction value at which ECX acquired Grays on 4 May 2017 (being \$178.9m) was the equity value, whereas the value at which Grays was sold (along with another business unit) on 31 July 2019 (being \$60m) was the enterprise value.

## C.8 FY18 and FY17 Restatement of Accounts

92. It admits paragraph 92.

93. To paragraph 93:

(a) as to sub-paragraph (a):

- i. it does not admit that it was required to restate its FY17 and FY18 accounts previously announced to the market; and
- ii. says further that it made a decision to apply AASB 15 and AASB 9 retrospectively.

### Particulars

*i. AASB 9, AASB 15 and AASB 108.*

(b) as to sub-paragraph (b), it says that it:

- i. adjusted the trade receivables and other assets for the FY18 accounts from \$208.9m to \$188.2m to reflect the retrospective adoption of AASB 15 and a prior period restatement, \$6.4m of which was attributable to adjustments made to Right2Drive regarding judgements in relation to the amount of revenue to recognise and processing errors;
- ii. adjusted the trade receivables and other assets for the FY17 accounts from \$138.5m to \$129.3m to reflect the retrospective adoption of AASB 15 and a prior period restatement, \$3.1m of which was attributable to adjustments made to Right2Drive regarding judgements in relation to the amount of revenue to recognise and processing errors;
- iii. applied AASB 15 retrospectively to the FY17 and FY18 accounts in accordance with the transition provisions of AASB 15, which involved an adjustment of trade receivables and other assets of ~~\$5.6m~~ \$6.15m in FY17 and \$11.2m in FY18;
- iv. relies on the full terms and effect of the Restatement Announcement; and
- v. otherwise does not admit the sub-paragraph.

### Particulars

*i. ECX, 1H19 Financial Report, 31 May 2019, pp 21, 24.*

- ii. ECX, FY19 Financial Report, 13 November 2019, pp 45-46, 93.

## **C.9 The True Position**

94. To paragraph 94:

- (a) it denies sub-paragraph (a) and says further that:
  - i. in FY17 and FY18, it:
    - 1. recognised revenue from its Right2Drive business on a gross basis (based on the amount invoiced or the amount to be invoiced to the not-at-fault party with whom R2D had an agreement) less a provision; and
    - 2. calculated the provision to apply to Right2Drive account receivables as an estimate which reflected the historical proportion of account receivables not recovered as revenue;
  - ii. its approach to recognising revenue within the Right2Drive business, including the provisioning methodology it applied:
    - 1. was a key accounting and audit matter identified by KPMG in its audit of ECX's financial statements in each of FY17 and FY18;
    - 2. was specifically reviewed by Deloitte under a separate engagement in September 2018; and
  - iii. neither KPMG nor Deloitte concluded that ECX was recognising excessive amounts of recovery revenue within the Right2Drive business;

### **Particulars**

- i. *KPMG, Report to the Audit and Risk Committee (ARC) for FY17, 27 October 2017.*
- ii. *ECX, Memorandum to the ARC, "Account Receivable R2D", 30 April 2018.*
- iii. *Deloitte, Right2Drive Review – Deloitte Report, 19 September 2018.*
- iv. *KPMG, Report to the ARC for FY18, 5 November 2018.*

- (b) it denies sub-paragraph (b) and refers to and repeats sub-paragraph (a) above;
- (c) it denies sub-paragraph (c) and refers to and repeats sub-paragraphs (a) and (b) above;
- (d) it denies sub-paragraph (d);
- (e) it denies sub-paragraph (e);
- (f) it denies sub-paragraph (f);
- (g) it denies sub-paragraph (g) and refers to and repeats sub-paragraphs (a) to (d) above;
- (h) it denies sub-paragraph (h) and refers to and repeats paragraph 37 above;
- (i) it denies sub-paragraph (i) and says that:
  - i. as at 8 November 2017, being the date of the Grays Integration Representations and FY18 Guidance Representations:
    - 1. Grays corporate functions had been integrated within the ECX head office;
    - 2. Grays had scoped and deployed detailed financial reporting against the FY18 financial plan;
    - 3. Grays recorded revenue of \$16.868m and a profit before tax of \$1.724m for the period from 11 August 2017 to 30 September 2017;
    - 4. the industrial division within Grays had recorded an increase in net operating income from \$362.2m in FY16 to 427.5m in FY17; and
    - 5. the auto division within Grays had recorded an increase in net operating income from \$120.9m in FY16 to \$176.5m in FY17; and

#### **Particulars**

- i. ECX, Board Meeting Pack – Grays Update, 23 October 2017, pp 26, 29.*
- ii. ECX, FY17 Financial Report, 8 November 2017, p 49.*

- iii. *ECX, FY17 Results Presentation, 8 November 2017, p 15.*
- ii. as at 6 August 2018, being the date of the Revised FY18 Guidance Representations:
  - 1. ECX had achieved synergies of \$16.5m in relation to Grays, outperforming the budgeted synergies forecast in the KPMG Synergy Assessment (\$15.7m) prior to the Grays Acquisition Announcement; and
  - 2. the net operating income and profit contribution from the auto division within Grays was continuing to grow on a favourable trajectory, notwithstanding historically low insolvency rates and record infrastructure projects creating a shortfall in the supply of industrial equipment for auction.

#### **Particulars**

- i. *ECX, Board Meeting Pack: CFO Report, 31 July 2018, pp 24, 45.*
  - ii. *ECX, Board Meeting Pack – Project Paris: KPMG Synergy Assessment, 3 May 2017, p 12.*
  - iii. *ECX, Group Board Meeting: Grays Update, 15 August 2018, pp 44-45.*
- (j) it denies sub-paragraph (j);
  - (k) it says that the allegations in sub-paragraph (k) are vague and embarrassing and, under cover of that objection, denies the sub-paragraph;
  - (l) it denies sub-paragraph (l) and refers to and repeats sub-paragraph (i) above;
  - (m) it denies sub-paragraph (m) and refers to and repeats sub-paragraphs (a) to (e) above;
  - (n) it denies sub-paragraph (n) and refers to and repeats sub-paragraphs (i), (j), (k) and (l) above;
  - (o) to sub-paragraph (o):
    - i. it admits that Grays had a statutory NPAT of \$4.0m in 1H17, a loss of \$20m in FY16 and a loss of \$1.2m in FY15;

- ii. it admits that it forecast for Grays to deliver NPATA of \$14.0-\$15.4m in the FY18 Guidance and \$10.4-\$11.2m in the Revised FY18 Guidance; and
  - iii. otherwise denies the sub-paragraph.
- (p) it denies sub-paragraph (p);
- (q) it denies sub-paragraph (q); ~~and says further that the ASOC does not sufficiently particularise the basis for this allegation;~~

### Particulars

- i. Sub-paragraph (q) alleges that the FY18 Guidance Representations and the Revised FY18 Guidance Representations depended on the Banking, Insolvency and Finance (BIF) and Commercial Equipment (Mining & Civil) Segments of Grays contributing around or greater than 22% to NPAT in FY18, but the particulars relied on for sub-paragraph (q) are based on the BIF and Commercial Equipment Segments of Grays contributing approximately 22% of the predicted total NPATA growth.
- ii. Further, the allegations in sub-paragraph (q) are based on an assumption that the BIF and Commercial Equipment (Mining & Civil) Segments would contribute to FY18 NPATA in the same proportions as previous financial years, but the basis for that assumption is not pleaded nor particularised.
- iii. Rather than assuming an unrealistic level of growth in the revenue contribution in the BIF and/or Commercial Equipment Segments, the Guidance Representations and Revised FY18 Guidance Representations, at least insofar as they concerned Grays, were based on expected synergies from:
  - a. Vertical integration of Grays' auto platform to retail ECX's end-of-lease vehicles and to capture revenue from growing its vehicle auction channel;
  - b. Leveraging ECX's consumer brands to increase finance penetration in the auto auction channel;
  - c. Leveraging ECX's insurance relationships to bundle complementary insurance products to auction customers;

d. Providing equipment financing products to auction buyers of equipment; and

e. Leveraging ECX's business intelligence and infrastructure, and reductions in corporate overheads.

ECX, Grays e-Commerce (GEG) acquisition overview and discussion pack, 3 May 2017 (ECX.0008.0087.1069), pp 2, 6-7, 9; ECX, 1H17 Results Presentation, 4 May 2017 (ECX.0007.0011.8562), pp 6, 8, 25, 26.

- (r) it ~~does not admit~~ admits sub-paragraph (r) and says further that it did in fact implement a number of initiatives to diversify its revenue streams; ~~that the ASOC does not sufficiently particularise the basis for this allegation;~~

#### Particulars

Among other things, ECX implemented the following measures to diversify Grays' revenue:

i. increasing the share of ECX vehicles sold through Grays;

ii. leveraging digital expertise within the ECX Group to sell more vehicles through Grays; and

iii. implementing a sales customer relationship management platform to improve sales force effectiveness

ECX, Board Update, FY19 Budget, 20 September 2018 (ECX.0001.0001.8642 012), p 31; ECX, FY19 GraysOnline Analysis (ECX.0001.0002.2117 015), pp 2-4, 6-8, 11.

- (s) it denies sub-paragraph (s);
- (t) it denies sub-paragraph (t); ~~and~~
- (u) it denies sub-paragraph (u) and says further that ECX had in place adequate systems and processes to accurately forecast, record and/or recognise the recovery of revenue within Right2Drive, including through:
- i. the matters referred to in sub-paragraph 94(a) above;
  - ii. senior management and board oversight in relation to the recovery of revenue within Right2Drive;
  - iii. developing an internal audit plan in December 2017 to re-prioritise the review into Right2Drive accounts receivables;

- iv. recruiting staff to monitor and report on aged receivables in Right2Drive and to facilitate the recovery of unpaid invoices; and
- v. implementing operational or strategic changes to facilitate the recovery of revenue, such as policies to litigate and pursue outstanding claims or, alternatively, to negotiate discounts with insurers; ~~and-~~

#### **Particulars**

- i. *As to sub-paragraph (u)(ii), it refers to minutes of the board and ARC throughout the Relevant Period, including minutes of board meetings held on 1 May 2018, 6 August 2018, 31 August 2018, 20 September 2018, 8 February 2019, 22 February 2019, 24 February 2019, 1 March 2019, 6 March 2019, 8 March 2019, 15 March 2019 and 17 March 2019, and minutes of ARC meetings held on 1 November 2017, 15 August 2018 and 1 November 2018, among others.*
- ii. *As to sub-paragraph (u)(iii), it refers to a memorandum authored by Edward Ho, Chief Risk Officer, to the ARC dated 8 December 2017 titled "Internal Audit Plan 2018-2020".*
- iii. *As to sub-paragraph (u)(iv), it refers to the fact that, among other things:*
  - a. *from July 2017 to October 2017, Right2Drive expanded its integrity team from 1 full-time equivalent employee to 4 full-time equivalent full time employees;*
  - b. *in March 2018, Right2Drive hired a new collections manager with extensive experience to oversee its debtor management;*
  - c. *throughout the Relevant Period, Right2Drive hired and trained an in-house paralegal team to deal directly with lawyers and insurers to expedite claims recovery process; and*
  - d. *throughout late 2018 and early 2019, Right2Drive recruited and trained a significant number of collections staff.*



- iv. *As to sub-paragraph (u)(v), it refers to:*
  - a. *steps taken in or around 2018 to persevere with the resolution of unpaid files, rather than take a discount and settle an invoice earlier, in light of favourable court judgments; and*
  - b. *the transition in or around early 2019 to focusing on collecting unpaid revenue, including by progressing negotiations and agreeing discounts with insurers.*
- v. *Further particulars will be provided by way of discovery and evidence.*

(v) as to sub-paragraph (v), it:

- i. refers to and repeats sub-paragraphs (a), (b), (e), (g), (m) and (u) above;
- ii. says that to the extent that the plaintiff relies on particularised facts or circumstances which pre-date the MMS Merger Announcement to support an “increasing risk” that MMS would not proceed with the merger as announced on and from 8 November 2018, the paragraph is embarrassing and the particulars are liable to be struck out; and
- iii. otherwise denies the sub-paragraph.

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

### Right2Drive

- 95. It denies paragraph 95 and refers to and repeats sub-paragraphs 93(b) and 94(a) above.
- 96. It denies paragraph 96 and refers to and repeats the matters in sub-paragraphs 94(a) and 94(u) above.
- 97. It does not plead to paragraph 97 as that paragraph does not make a material allegation against it.

### Grays

- 98. To paragraph 98:
  - (a) as to sub-paragraph (a), it:
    - i. # admits that in the FY17 Results Announcement it said that:

*“Grays remain on track to deliver \$23-\$25m EBITDA (NPATA \$14.0-15.4m) in FY18 representing a highly accretive EPS contribution of 29.7-32.7cps”;* ~~and~~

- ii. ~~otherwise it~~ refers to paragraph 48 above; and
  - iii. otherwise does not admit sub-paragraph (a).
- (b) it denies sub-paragraph (b) and refers to and repeats sub-paragraphs 94(h) to 94(l) and 94(m) to 94(p) above;
  - (c) it denies sub-paragraph (c) and refers to and repeats sub-paragraphs 94(q) and 94(r) above; and
  - (d) it denies sub-paragraph (d) and says further that:
    - i. it informed the Affected Market on 21 June 2017 that Grays was a “lumpy” business because revenue fluctuated depending on the level of liquidation activity in the economy and was therefore irregular and difficult to predict; and

#### **Particulars**

- i. *ECX, Grays Scheme Booklet – Independent Expert’s Report, 21 June 2017, pp 38-39, 42-43.*
- ii. throughout the Relevant Period, it acted promptly to recognise that challenging market conditions in the insolvency and industrial segments of Grays were expected to continue and provided guidance to the Affected Market accordingly.

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

99. To paragraph 99:

- (a) it denies sub-paragraph (a) and refers to and repeats paragraphs 95, 96 and 98 above;
- (b) it denies sub-paragraph (b) and refers to and repeats sub-paragraph 94(s) above;
- (c) it denies sub-paragraph (c) and refers to and repeats sub-paragraphs 94(h)-(i) above; and
- (d) it denies sub-paragraph (d) and says further particulars will be provided by way of expert evidence.

100. It denies paragraph 100.

100A. To paragraph 100A:

(a) it denies 100A(a)(i) and refers to and repeats paragraphs 95 and 96 above;

(b) it denies 100A(a)(ii) and refers to and repeats paragraph 100 above; and

(c) it denies 100A(b) on the basis that it denies the matters in sub-paragraph 100A(a)(i) and (ii) above.

## **D. CONTRAVENTIONS**

### **D.1 Continuous Disclosure Contraventions**

101. It denies paragraph 101 and refers to and repeats paragraphs 25, 27, 28, 95, 96 and 98 above.

102. It denies paragraph 102 and refers to and repeats paragraphs 25, 27, 28 and 99 above.

102A. It denies paragraph 102A and refers to and repeats paragraphs 25, 27, 28 and 100A above.

103. It denies paragraph 103 and refers to and repeats paragraphs 25, 27, 28 and 100 above.

104. It denies paragraph 104 and says further that:

- (a) none of the Right2Drive Material Information, Grays Material Information, Cost and Revenue Information, MMS Merger Unlikely Information and Financial Performance Information, as defined, was information that ECX had for the purposes of s 674 of the Corporations Act, and refers to and repeats paragraphs 27, 95, 96 and 98 to ~~100~~ 100A above; and
- (b) further or alternatively, the Right2Drive Material Information, Grays Material Information, ~~and~~ Cost and Revenue Information and MMS Merger Unlikely Information, as defined, was not information that 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 of the *Corporations Act*.

105. It denies paragraph 105 and refers to and repeats paragraph 104 above.

106. To paragraph 106, it refers to and repeats paragraphs 95 to 96 and 98 to 105 above and says further that:

- (a) as to sub-paragraphs (a), (c) and (d), it admits that it did not inform the ASX of the Right2Drive Material Information, Cost and Revenue

Information and Financial Performance Information (as defined) during the Relevant Period, but says it was not under an obligation to do so because it denies that information existed on and from the dates specified in paragraphs 95 to 96 and 99 to 100A above; ~~and~~

(b) as to sub-paragraph (b):

i. it was not under an obligation to inform the ASX of the Grays Material Information (as defined) because it denies that it was information that existed during the Relevant Period; further or alternatively

ii. it does not admit that it did not inform the ASX of any of the Grays Material Information (as defined), as to which it refers to paragraph 98 above; ~~and, and says further, in any event, it was not under an obligation to inform the ASX of that information because it denies that it was information that existed during the Relevant Period.~~

(c) as to sub-paragraph (c):

i. it was not under an obligation to inform the ASX of the MMS Merger Unlikely Information (as defined) because it denies that it was information that existed during the Relevant Period; further or alternatively

ii. it was not under an obligation to inform the ASX of the MMS Merger Unlikely Information (as defined) because the information was subject to the exception in ASX Listing Rule 3.1A, on the basis that:

1. the information concerned an incomplete proposal or negotiation, or comprised matters of supposition or was insufficiently definite to warrant disclosure;
2. the information was confidential; and
3. a reasonable person would not expect the information to be disclosed; further or alternatively

iii. it does not admit that it did not inform the ASX of the MMS Merger Unlikely Information (as defined), as to which it refers to paragraph 100A above; and

~~(b)(d)~~ otherwise denies the paragraph.

107. It denies paragraph 107.

## **D.2 Misleading or Deceptive Conduct**

108. It denies paragraph 108 and refers to and repeats paragraph 94 above.
109. It denies paragraph 109 and says further (without admitting that it made the Representations alleged) that insofar as the Representations related to a future matter or matters or a matter of opinion, ECX did have reasonable grounds for making or giving the Representations:
- (a) as to the Compliance Representations, it refers to and repeats sub-paragraphs 94(a) to 94(f) and 94(u) above;
  - (b) as to the FY17 Results Representations, it says that:
    - i. prior to making the FY17 Results Representations, ECX had a structured process for collating, testing and verifying the information in its FY17 Full Year Financial Statements, including with the assistance of its external auditors, KPMG;
    - ii. prior to making the FY17 Results Representations, the ARC and board considered and approved the FY17 Full Year Financial Statements;
    - iii. the FY17 Financial Report included the Independent Auditor's Report by which KPMG reported that, in KPMG's opinion, the financial report of the Group was in accordance with the *Corporations Act*, including:
      - 1. giving a true and fair view of the Group's financial position as at 30 September 2017 and of its performance for the year ended on that date; and
      - 2. complying with Australian Accounting Standards and the *Corporations Regulations 2001*; and

### **Particulars**

- i. ECX, Minutes of ARC Meeting, 1 November 2017, pp 2-4.*
- ii. ECX, Minutes of Board Meeting, 1 November 2017, pp 2-4.*
- iii. ECX, FY17 Financial Report, 8 November 2017, p 19.*
- iv. otherwise refers to and repeats sub-paragraphs 94(a) to 94(d), 94(f), 94(s) and 94(u) above.

- (c) as to the Grays Integration Representations, it;
  - i. says it carried out extensive due diligence prior to the acquisition of Grays, which supported the Grays Integration Representations;
  - ii. says it actively monitored the integration status of Grays and realisation of synergies within the business throughout the Relevant Period;
  - iii. says the underperformance of Grays during the Relevant Period was driven by external factors, such as a downturn in the insolvency market, rather than the failure to realise expected synergies; and
  - iv. otherwise refers to and repeats sub-paragraphs 94(h) to 94(j) and 94(l) above.
- (d) as to the Right2Drive Integration Representations, it says:
  - i. it carried out extensive due diligence prior to the acquisition of Right2Drive, which supported the Right2Drive Integration Representations;
  - ii. it actively monitored the integration status of Right2Drive and realisation of synergies within the business throughout the Relevant Period; and
  - iii. otherwise refers to and repeats sub-paragraphs 94(a) to 94(c), 94(s) and 94(u) above.
- (e) as to the FY18 Guidance Representations, it says that:
  - i. the process of providing guidance to the Affected Market was informed by a detailed and rigorous budgeting process;

#### **Particulars**

- i. The process of providing and revising guidance variously included:*
  - a. directional discussions within the business and business units;*
  - b. preparation and reporting of internal yearly budgets in or around July to August of the relevant financial year by different business units, which were then consolidated by the Forecasting*

*and Budgeting Manager and Group Financial Director;*

- c. preparation and reporting of monthly financial results by relevant business units to the strategy and investment team who would then prepare forecasting information for each respective business unit;*
  - d. discussing monthly results with the business unit heads before finalising at month-end and sharing those with the CEO, CFO and the strategy and investment team after month-end close;*
  - e. presentations to the CFO and CEO by relevant business units, during which projections and forecasts were tested, explained and adjusted as necessary;*
  - f. periodic reporting of budget and forecasting information to the board through CEO and CFO reports;*
  - g. re-evaluation of forecast based on actual and historical performance during half-yearly (May) and yearly (November) financial results, and on an as-needs basis where it became aware of material information;*
  - h. towards the end of the Relevant Period, rolling 12-month financial results; and*
  - i. board approval and audit opinion in respect of half-year (May) and full year (November) financial reports.*
- ii. the representations were based on a reasonable expectation of increased NOI and NPATA margins due to the increased contribution of Right2Drive and Grays;
  - iii. the representations were based on the strong performance and growth of the ~~fleet~~Fleet businesses throughout FY17; and
  - iv. otherwise refers to and repeats sub-paragraphs 94(a) to 94(d), 94(f) to 94(l), 94(n) to 94(s) and 94(u).

#### **Particulars**

*i. ECX, FY17 Results Presentation, 8 November 2017, pp 11, 14-15, 18, 23.*

- (f) as to the Repeated FY18 Guidance Representations, it refers to and repeats sub-paragraph (e)(i) above and says further that the representations were made having regard to the fact that:
- i. throughout 1H FY18, ECX recorded 10% growth in Fleet NPATA as it continued to take market share from competitors;
  - ii. there was an all-time record level of car hires in Right2Drive in March 2018, providing positive momentum for 2H FY18;
  - iii. Grays had delivered a standout 1H FY18 with organic growth and the successful launch of revenue synergy initiatives, and was well positioned to meet outlook having regard to, inter alia, seasonality in earnings being skewed to 2H FY18 and significant growth in the Grays auto business; and
  - iv. otherwise refers to and repeats sub-paragraphs 94(a) to 94(d), 94(f) to 94(l), 94(n) to 94(s) and 94(u);

#### **Particulars**

- i. ECX, 1H18 Results Presentation, 8 May 2018, pp 5-6, 22-23.*
- ii. ECX, Board Meeting Pack: FY18 Balance of Year Forecast Commentary, 1 May 2018 and 4 May 2018, pp 1-2.*

- (g) as to the Revised FY18 Guidance Representations, it refers to and repeats sub-paragraph (e)(i) above and says further that the representations were made having regard to the fact that:
- i. ECX had implemented a number of initiatives to improve the performance of the business and meet the Revised FY18 Guidance Representations, including:
    - 1. in respect of Fleet AU and NZ, optimising end of lease income by leasing selected stock to channel partners (including Right2Drive) and sale of vehicle in inertia within Fleet Partners AU;
    - 2. in respect of Grays, new sales opportunities and favourable seasonality in FY18 Q4, increased Grays auto



volume from ECX and continued organic growth of Grays auto;

3. in respect of Right2Drive, the introduction of a new sales initiative for referral partners and a new referral program for existing customers, ECX staff and ECX corporate partners; and improved management of Right2Drive in order to optimise vehicle fleet;
  4. in respect of the ECX Group generally, reductions in operating expenditure including through the elimination of roles in certain business units, reductions in discretionary and non-essential spending on travel and entertainment, and reductions in employee benefits due to the elimination of the Group's executive bonus provision, and lower headcount; and
- ii. otherwise refers to and repeats sub-paragraphs 94(a) to 94(d), 94(f) to 94(l), 94(n) to 94(s) and 94(u);

#### **Particulars**

- i. ECX, Board Meeting Pack: CFO Report, 31 July 2018, pp 1-3.*

(h) as to the FY18 Expected Results Representation, it refers to and repeats sub-paragraph (e)(i) above and says further that the representations were made having regard to the fact that:

- i. ECX's NPATA for August 2018 was \$9.2m, which was only modestly below the forecast amount of \$9.6m;
- ii. ECX's NPATA for September 2018 was \$10.5m, which was consistent with its forecast and the expected FY18 NPATA of \$78.1m; and
- iii. otherwise refers to and repeats sub-paragraphs 94(a) to 94(d), 94(f), 94(g), 94(i) to 94(l), 94(n) to 94(s) and 94(u).

#### **Particulars**

- i. ECX, Board Meeting Pack: ECX Update – August 2018 Results, 14 September 2018, p 110.*

(i) as to the FY18 Results Representations, it says that:

- i. prior to making the FY18 Results Representations, ECX had a structured process for collating, testing and verifying the information in its FY18 Full Year Financial Statements, including with the assistance of its external auditors;
- ii. prior to making the FY18 Results Representation, the ARC and board considered and approved the FY18 Full Year Financial Statements;
- iii. the FY18 Financial Report included the Independent Auditor's Report by which KPMG reported that, in KPMG's opinion, the financial report of the Group was in accordance with the *Corporations Act*, including:
  - 1. giving a true and fair view of the Group's financial position as at 30 September 2018 and of its performance for the year ended on that date;
  - 2. complying with Australian Accounting Standards and the *Corporations Regulations 2001*; and

#### **Particulars**

- i. *ECX, Minutes of ARC Meeting, 1 November 2018, pp 1-2.*
  - ii. *ECX, Minutes of Board Meeting, 7 November 2018, pp 2-3.*
  - iii. *ECX, FY18 Financial Report, Independent Auditor's Report, 14 November 2018, p 91.*
  - iv. otherwise refers to and repeats sub-paragraphs 94(a) to 94(g), 94(t) and 94(u).
- (j) as to the FY19 Guidance Representations, it refers to and repeats sub-paragraph (e)(i) above and says further that the representations were made having regard to the fact that:
- i. the Core Fleet and Novated business units were performing well and in-line with ECX's expectations;
  - ii. there was positive momentum within Right2Drive, including through the pivot to direct hire (leisure and corporate travel);
  - iii. weakness in Grays insolvency and industrial divisions was being offset by significant growth in the Grays auto division;

- iv. projects to decrease operating expenditure (including via budgeted redundancies) were progressing well; and
- v. otherwise refers to and repeats sub-paragraphs 94(a) to 94(g), 94(k), 94(m), 94(r), 94(t) and 94(u).

**Particulars**

- i. *ECX, Board Meeting Pack: CEO Report, 13 December 2018, p 1.*
- ii. *ECX, Board Meeting Pack: FY19 Outlook – Working Draft, 9 January 2019, pp 2-3.*

(k) as to the Revised FY19 Guidance Representations:

~~i. it says (which is denied in respect of sub-paragraph 72(a)), if the representations were made, it had reasonable grounds for the representations;~~

~~ii.~~ i. it refers to and repeats sub-paragraph (e)(i) above; and

~~iii.~~ ii. it says further that:

1. ECX was experiencing steady growth across the Fleet businesses, partly due to reduced operating expenditure resulting from integration of leadership and sales staff;
2. Right2Drive was showing positive growth as a result of pivot initiatives, including diversification of hire car volumes to rental car markets, new partnerships and alliances, favourable weather conditions and improved cash flow from insurers;
3. despite Grays generating less revenue from the industrial and insolvency markets, growth would be driven through Grays auto, an improving sales pipeline and operating expenditure savings; and

~~iv.~~ iii. otherwise refers to and repeats sub-paragraphs 94(a) to 94(g), 94(k), 94(m), 94(r), 94(t) and 94(u); ~~and~~

**Particulars**

- i. *ECX, Board Meeting Pack: FY19 Outlook Update, 18 January 2019, pp 4-5, 7.*
- ii. *ECX, Board Meeting Pack: CFO Report, 18 January 2019, p 1.*

- iii. *ECX, Board Meeting Pack: Appendix, Q1 BU Narrative Update Provided to MMS, 21 January 2019, pp 7-8.*
- iv. *ECX, Board Meeting Pack: FY19 Outlook Update – Draft, 22 January 2019, pp 2, 11.*
- v. *ECX, Board Meeting Pack: FY19 Grays Divisional Analysis – Draft, 25 January 2019, p 2.*

(l) as to the Right2Drive Systems Representations, it ~~says (which is denied), if the representation was made, it had reasonable grounds for the representation, as to which it~~ refers to and repeats the matters in sub-paragraphs 94(a) and 94(u) above; ~~and-~~

(m) as to the MMS Merger Representation, it says that:

- i. both ECX and MMS had reviewed and considered the due diligence reports in relation to proposed merger, and assessed the risks, opportunities and benefits associated with the merger, prior to the Merger Announcement;
- ii. the merger was anticipated to deliver a number of benefits to shareholders of both companies;
- iii. MMS represented in the months preceding the merger that it supported the strategic rationale of the proposed merger, which was based on unlocking material synergies;
- iv. the merger was unanimously recommended by the Board of ECX, in the absence of a superior proposal and subject to an independent expert concluding that the Merger was in the best interests of the ECX shareholders. Subject to those same qualifications, the directors of ECX intended to vote all ECX shares held or controlled by them in favour of the merger;
- v. it executed a legally enforceable SIA with MMS, with the intention of seeking court approval of the proposed Scheme of Arrangement.

#### Particulars

- i. MMS, Confidential non-binding indicative offer to combine MMS and ECX by way of a scrip based merger, 10 September 2018 (ECX.0008.0129.1293), p 2.
- ii. MMS, Project Playwright: Revised Confidential Non-Binding Proposal, 30 October 2018 (ECX.0008.0130.6834), pp 1-2.
- iii. ECX, Minutes of Board Meeting, 7 November 2018 (ECX.0026.0001.0199), p 4.

iv. ECX, McMillan Shakespeare and Eclipx Merger, 8 November 2018 (ECX.0008.0002.8903).

110. It denies paragraph 110 and refers to and repeats paragraphs 108 and 109 above.

**E. LOSS AND DAMAGE**

**E.1 Market Based Causation**

111. It does not admit paragraph 111.

112. It does not admit paragraph 112.

113. It does not admit paragraph 113.

114. It denies paragraph 114 and says further that if (which is denied) it committed (separately or together) the Market Contraventions, the matters pleaded at paragraphs 113 and 114 of the FASOC would not, even if established, constitute any causal nexus sufficient to support a claim for compensation pursuant to s 1317HA of the *Corporations Act*, 1041I of the *Corporations Act*, s 12GF of the ASIC Act or s 236 of the ACL.

**E.2 Reliance**

115. It denies paragraph 115.

**E.3 Loss and damage**

116. It denies paragraph 116.

**F. COMMON QUESTIONS OF LAW OR FACT**

117. It does not admit that the questions in paragraph 117 of the FASOC involve common issues of fact or law or that, insofar as those questions are common, they are common to both the plaintiff and group members and it otherwise refers to and repeats paragraphs 1 to 116 above.

**G. REDUCTION OF DAMAGES RECOVERABLE**

118. Further, as to the whole of the FASOC, it says that:

- (a) insofar as the plaintiff and any group members makes a claim pursuant to:

- i. s 1041I of the *Corporations Act* in relation to economic loss allegedly caused by ECX's conduct allegedly done in contravention of s 1041H of the *Corporations Act*;
  - ii. s 12GF of the *ASIC Act* in relation to economic loss allegedly caused by ECX's conduct allegedly done in contravention of s 12DA of the *ASIC Act*; or
  - iii. s 236 of the *ACL* in relation to economic loss allegedly caused by ECX's conduct that was allegedly done in contravention of s 18 of the *ACL*;
- (b) if and to the extent that the plaintiff or any group members failed to have adequate regard to any of the documents referred to or otherwise admitted at paragraphs 29, 34, 36, 38, 40, 43, 50, 54, 61, 65, 70 or 77 above, or any of the:
- i. Compliance Representations;
  - ii. FY17 Results Representations;
  - iii. Grays Integration Representations;
  - iv. Right2Drive Integration Representations;
  - v. FY18 Guidance Representations;
  - vi. Repeated FY18 Guidance Representations;
  - vii. Revised FY18 Guidance Representations;
  - viii. FY18 Expected Results Representations;
  - ix. FY18 Results Representations;
  - x. FY19 Guidance Representations;
  - xi. Revised FY19 Guidance Representations; ~~or~~
  - xii. Right2Drive Systems Representation; or
  - ~~xii.~~ xiii. MMS Merger Representation.
- then, if the plaintiff or any group members suffered the loss claimed or any loss at all (which is denied), the plaintiff or group members did so as a result wholly or partly of the plaintiff's or group member's failure to take reasonable care;
- (c) it did not intend to cause the loss claimed by the plaintiff or any group member or any loss at all and, if it caused that loss (which is denied), it did not do so fraudulently; and

- (d) in the premises, if the plaintiff or any group members suffered the loss claimed or any loss at all (which is denied), the damages which the plaintiff or any group member may recover in relation to the loss are to be reduced to the extent to which the Court thinks just and equitable having regard to the plaintiff's or group member's responsibility for the loss.

**Particulars**

- i. Section 1041I(1B) of the Corporations Act,  
s 12GF(1B) of the ASIC Act, s 137B of the  
Competition and Consumer Act.*

**H. RELIEF FROM LIABILITY**

119. Further, or in the alternative, as to the whole of the FASOC, ECX says that if it is liable to the plaintiff or any group members by reason of the facts and matters alleged in the FASOC (which is denied), then it acted honestly and having regard to all of the circumstances of the case, ought fairly be excused from any such liability (in whole, or in the alternative, in part) pursuant to s 1317S (by reason of s 1041I(4)) and/or s 1318 of the *Corporations Act*.

Dated: ~~18 April 2024~~ 1 July 2024 ~~18 November 2024~~

**W A HARRIS KC**

**K A LOXLEY**

**T P DIAZ**



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**Herbert Smith Freehills**

Solicitors for the Defendant