

**AMENDED DEFENCE TO SECOND FURTHER AMENDED  
STATEMENT OF FIRST CROSS CLAIM**

**(Filed pursuant to orders made by Ball J on 25 May 2018)**

**COURT DETAILS**

Court	Supreme Court of New South Wales
Division	Equity
Registry	Sydney
Case number	2015/306222

**TITLE OF PROCEEDINGS**

Plaintiff	<b>Innes Creighton</b>
Defendant	<b>Australian Executor Trustees Limited (ACN 007 869 794)</b>

**TITLE OF CROSS CLAIM**

First Cross-Claimant	<b>Australian Executor Trustees Limited</b>
Second Cross-Claimant	<b>IOOF Holdings Limited</b>
First Cross-Defendant	<b>Swiss Re International SE ABN 38 138 873 211</b>
Second Cross-Defendant	<b>Willis Australia Limited</b>

**FILING DETAILS**

Filed for	<b>Swiss Re International SE</b>
Legal representative	Patrick Boardman, Wotton + Kearney
Legal representative reference	PJB 6154 RJS
Contact name and telephone	Richard Shankland, (02) 8273 9863

**PLEADINGS AND PARTICULARS**

In answer to the Pleadings and Particulars contained in the First Cross-Claim Second Further Amended Statement of Cross Claim filed on 25 May 2017 (**First Cross Claim**) the First cross defendant (**Swiss Re**) relies on the following facts and assertions:

**Parties**

- 1 Swiss Re admits paragraph 1 of the First Cross Claim.
- 2 Swiss Re admits paragraph 2 of the First Cross Claim.
- 3 Swiss Re admits paragraph 3 of the First Cross Claim.
- 4 Swiss Re admits paragraphs 4 of the First Cross Claim.

- 4A Swiss Re admits paragraph 4A of the First Cross Claim.
- 4B Swiss Re admits paragraph 4B of the First Cross Claim.
- 4C Swiss Re admits paragraph 4C of the First Cross Claim.
- 4D Swiss Re admits paragraph 4D of the First Cross Claim.
- 4E Swiss Re admits paragraph 4E of the First Cross Claim.
- 4F Swiss Re admits paragraph 4F of the First Cross Claim.

**Professional indemnity policies of insurance**

- 5 Swiss Re admits paragraph 5 of the First Cross Claim.
- 6 Swiss Re admits paragraph 6 of the First Cross Claim.
- 7 As to paragraph 7 of the First Cross Claim, Swiss Re also relies on the terms of the 2011/2012 AXIS policy as if they were set out in full herein.
- 8 As to paragraph 8 of the First Cross Claim, Swiss Re:
  - a. says that the 2014/2015 AXIS policy was issued by AXIS Speciality Europe SE (**AXIS**) and Chubb Insurance Company of Australia Ltd (**Chubb**) in the following proportions:
    - i. AXIS – 90%; and
    - ii. Chubb – 10%;
  - b. says that its limit of liability under the 2014/2015 AXIS policy is limited to 90%; and
  - c. otherwise admits paragraph 8.
- 9 Swiss Re admits paragraph 9 of the First Cross Claim.
- 10 As to paragraph 10 of the First Cross Claim, Swiss Re also relies on the terms of the 2014/2015 AXIS policy as if they were set out in full herein.
- 11 Swiss Re admits paragraph 11 of the First Cross Claim.
- 12 Swiss Re admits paragraph 12 of the First Cross Claim.

13 Swiss Re admits paragraph 13 of the First Cross Claim.

14 Swiss Re admits paragraph 14 of the First Cross Claim.

15 Swiss Re admits paragraph 15 of the First Cross Claim.

16 Swiss Re admits paragraph 16 of the First Cross Claim.

17 Swiss Re admits paragraph 17 of the First Cross Claim.

18 Swiss Re admits paragraph 18 of the First Cross Claim.

19 Not used.

20 Not used.

#### **Provident Capital Limited**

21 Swiss Re admits paragraph 21 of the First Cross Claim.

22 Swiss Re admits paragraph 22 of the First Cross Claim.

23 Swiss Re admits paragraph 23 of the First Cross Claim.

23A In further answer to paragraphs 21 to 23 of the First Cross Claim, Swiss Re says that by reason of the fact that Provident is insolvent within the meaning given by section 95A of the Corporations Act 2001 (Cth) (**the Act**):

- a. The holders of debentures issued by Provident under the Trust Deed, which were unpaid as at 18 September 2012, have not received a full return on their investments in the administration of Provident.
- b. On or about 16 April 2015, the receivers of Provident estimated that the likely return of principal to debenture holders of Provident would be in the region of 12 cents of every dollar invested.

24 Swiss Re admits paragraph 24 of the First Cross Claim.

25 Swiss Re admits paragraph 25 of the First Cross Claim.

25A In further answer to paragraph 25 of the First Cross Claim, prior to the transfer of the Creighton proceeding which is referred to in paragraph 25, on or about 26 June 2015 the applicant/plaintiff (**Creighton**) filed an Amended Statement of Claim in Federal Court of Australia proceeding VID790/2014 (**ASOC**).

26 Swiss Re admits paragraph 26 of the First Cross Claim~~As to paragraph 26 of the First Cross Claim, Swiss Re:~~

- a. ~~will rely on the whole of ASOC for its full terms and effect; and~~
- b. ~~otherwise admits paragraph 26.~~

26A In further answer to paragraph 26 of the First Cross Claim, the following matters are pleaded in the ASOC:

- a. on or about 16 November 2011, Creighton was issued with \$100,000 in debentures by Provident, pursuant to an application made on a form contained in Debenture Prospectus 2011 issued by Provident;

**Particulars**

- i. Para. 2 of the ASOC.
- b. Australian Executor Trustees Limited (AETL) was at all relevant times the trustee for debenture holders of debentures issued by Provident under the provisions of Chapter 2L of the Act and under the Trust Deed;

**Particulars**

- i. Para. 3 of the ASOC.
- c. group members to whom the Creighton proceeding relates are all persons who were on 18 September 2012 when Provident entered voluntary administration, holders of debentures issued by Provident;

**Particulars**

- ii. Para. 4.1 of the ASOC.
- d. at all relevant times Provident's business activities involved, as AETL knew, borrowing money from investors by issuing debentures and loaning the funds raised to third-party borrowers, primarily for property investment, on a first-mortgage basis;

**Particulars**

- iii. Para. 10 of the ASOC.

- e. at all relevant time from at least 24 December 2008, AETL knew that Provident did not satisfy the benchmark stated by ASIC in Regulatory Guide 69 as to equity ratio (benchmark 1) and credit rating (benchmark 4);

**Particulars**

- iv. Para. 19 of the ASOC.
- f. Creighton and each group member has suffered loss and damage;

**Particulars**

- v. Paras. 24AV and 50 of the ASOC.
- g. by no later than 22 October 2010 AETL knew, or ought to have known that from time to time, Provident should have measured its performance against benchmark 1 in ASIC's Regulatory Guide 69 on the basis that it should maintain a minimum equity ratio of 20%;

**Particulars**

- vi. Para. 33.2 of the ASOC.

**Claims for indemnity and damages against Swiss Re, Liberty and CIAL**

2011/2012 AXIS policy

27 As to paragraph 27 of the First Cross Claim, Swiss Re:

- a. admits that on 27 June 2012 AETL (through Willis) notified AXIS of certain circumstances (**the Notification**);
- b. says that the Notification consisted of:
  - i. an email from Pegah Vaghaye of Willis to Olympia Samolis of AXIS (**27 June Email**) which forwarded an email from Michael Stanelos, the Commercial Manager and Assistant Company Secretary of IOOF Holdings Pty Limited, to Pegah Vaghaye of Willis (**the Stanelos Email**); and
  - ii. the documents that were attached to the Stanelos Email;
- c. will rely on the whole of 27 June Email for its full terms and effect; and

d. otherwise does not admit paragraph 27 that:

- i. ~~the circumstances in the notification constituted facts that might give rise to the claim made against AETL in these proceedings; or~~
- ii. ~~AETL gave notice of such facts as soon as was reasonably practicable after AETL became aware of them.~~

27A As to paragraph 27A of the First Cross Claim, Swiss Re:

- (a) admits that on 25 July 2012 at 10.52am Andrew Dawson of Willis sent an email to Olympia Samolis of AXIS (**25 July Email**) which forwarded an email dated 24 July 2012 at 1.37pm from Michael Stanelos, the Commercial Manager and Assistant Company Secretary of IOOF Holdings Pty Limited, to Andrew Dawson of Willis (**the 24 July Email**); and
- (b) will rely on the whole of the 24 July Email for its full terms and effect;
- (c) will rely on the whole of the 25 July Email for its full terms and effect;
- (d) ~~does not admit~~ that the matters set out in the 24 25 July Email constituted notice in writing of facts which might give rise to a professional indemnity claim against AETL, relating to AETL's role as trustee for debenture holders in Provident, and that might give rise to the claim made against AETL in these proceedings.
- (e) otherwise does not admit paragraph 27A.

27B As to paragraph 27B of the First Cross Claim, Swiss Re:

- (a) repeats paragraphs 27 and 27A of this Defence;
- (b) otherwise does not admit paragraph 27B.

27C. As to paragraph 27C of the First Cross Claim, Swiss Re:

- (a) admits that on 27 March 2014 at 11.57am Kelly Butler of Willis sent an email to Olympia Samolis of AXIS (**27 March Willis Email**) which forwarded an email dated 27 March 2014 at 10.43am from Michael Stanelos, the Commercial Manager and Assistant Company Secretary of IOOF Holdings Pty Limited, to Kelly Butler of Willis (**the 27 March IOOF Email**); and
- (b) will rely on the whole of the 27 March Willis Email for its full terms and effect;

- (c) will rely on the whole of the 27 March IOOF Email for its full terms and effect;
- (d) says that the contents of the 27 March IOOF Email concerned subject matter that was the subject of the Notification and the 25 July Email;-
- (e) otherwise admits paragraph 27C.

28 As to paragraph 28 of the First Cross Claim, Swiss Re:

- a. admits that on 4 August 2014 Kelly Butler of Willis sent an email to Robyn Fraser of AXIS (**4 August 2014 Email**);
- b. Says that the 4 August 2014 Email consisted of:
  - i. an email from Kelly Butler of Willis to Robyn Fraser of AXIS which forwarded an email dated 4 August 2014 from Michael Stanelos of IOOF Holdings Pty Limited to Kelly Butler of Willis (**the 4 August 2014 Stanelos Email**); and
  - ii. the documents that were attached to the 4 August 2014 Stanelos Email which included:
    - 1. a letter dated 28 July 2014 from Meridian Lawyers addressed to the "Debenture Holder, Provident Capital Debenture Scheme, Operated by Provident Capital Limited (Receivers & Managers Appointed) (in liquidation)"; and
    - 2. attached documents referred to in the letter from Meridian.
- c. will rely on the whole of 4 August 2014 Email for its full terms and effect;
- d. says that the contents of the 4 August 2014 Email concerned subject matter that was the subject of the Notification and the 25 July Email;
- e. otherwise admits denies para. 28.

29 As to paragraph 29 of the First Cross Claim, Swiss Re:

- a. admits that on 28 August 2014 Kelly Butler of Willis sent an email to Robyn Fraser of AXIS (**28 August 2014 Email**);
- b. Says that the 28 August 2014 Email consisted of:

- i. an email from Kelly Butler of Willis to Robyn Fraser of AXIS which forwarded an email dated 28 August 2014 from Michael Stanelos, the Commercial Manager and Assistant Company Secretary of IOOF Holdings Pty Limited, to Kelly Butler of Willis (**the 28 August 2014 Stanelos Email**); and
- ii. the document that was attached to the 28 August 2014 Stanelos Email being a letter dated 18 August 2014 from Slater + Gordon addressed to the "Dear Debenture Holder" and bearing the subject line "Provident Capital Limited (Receivers & Managers Appointed) (In Liquidation)";
- c. will rely on the whole of 28 August 2014 Email for its full terms and effect;
- d. says that the contents of the 28 August 2014 Email concerned subject matter that was the subject of the Notification and the 25 July Email;
- e. otherwise admits ~~denies~~ para. 29.

30 As to paragraph 30 of the First Cross Claim, Swiss Re:

- a. admits that AXIS sent a letter to Willis dated 16 March 2015 (**16 March 2015 Letter**);
- b. will rely on the whole of the 16 March 2015 Letter for its full terms and effect;
- c. otherwise admits para. 30.

31 As to paragraph 31 of the First Cross Claim, Swiss Re:

- a. admits that ~~Swiss Re~~ AXIS sent a letter to Willis dated 3 September 2015 (**3 September 2015 Letter**);
- b. will rely on the whole of the 3 September 2015 Letter for its full terms and effect;
- c. otherwise admits para. 31.

32 As to paragraph 32 of the First Cross Claim, Swiss Re ~~denies paragraph 32 of the First Cross Claim and says that:~~

- a. admits that the facts notified in the 25 July Email gave rise to the claim made against AETL in the Creighton proceeding; the claim was not first made against AETL during the term of the 2011/2012 AXIS policy;



- b. refers to and repeats the matters pleaded in paragraphs 22, 23 and 43 of the First Cross Claim and 23A, 26A and 32A of this Defence; on its proper construction, exclusion clause 3.16 of the 2011/2012 AXIS policy does apply with respect to the Creighton proceeding; and
- c. says that Provident was the issuer of unlisted and/or unrated debentures; it is not liable to indemnify AETL under the 2011/2012 AXIS policy with respect to the Creighton proceeding.
- d. says that the claim against AETL in the Creighton proceeding arises directly or indirectly from the insolvency or external administration of Provident;
- e. says that, in the premises, on its proper construction exclusion clause 3.16 of the 2011/2012 AXIS policy operates to exclude the claim against AETL in the Creighton proceeding from the scope of cover provided by the 2011/2012 AXIS policy; and
- f. otherwise denies paragraph 32.

32A In further answer to paragraph 32 of the First Cross Claim, Swiss Re repeats paras. 23A and 26A of this Defence and says as follows:

- a. Pursuant to clause 2.1 of the Trust Deed, Provident could at any time issue debentures to any person who applied for them under the Trust Deed.
- b. Prior to 18 September 2012 pursuant to the Trust Deed Provident had issued debentures to over approximately 3,000 Debenture holders, including the applicant in the Creighton proceeding (**Creighton**) and the group members described in paragraph 4 of the ASOC.
- c. At the time they were issued and at all times thereafter, all of the debentures that Provident issued pursuant to the Trust Deed were unlisted.

#### **Particulars**

- i. AETL has made this admission in para. 43 of the First Cross Claim.
- ii. The debentures were not listed or quoted on a market or exchange.
- iii. The debentures were not listed or quoted on a securities market or exchange.

- iv. The debentures were not listed or quoted on the Australian Securities Exchange (**ASX**).
  - v. The debentures were not traded on a secondary market or exchange.
  - vi. The debentures could not be traded on a secondary market or exchange.
  - vii. The debentures were not and could not be traded on the ASX.
- d. Further or in the alternative to sub-para. 32A(c), at the time they were issued and at all times thereafter the debentures that were issued by Provident pursuant to each debenture prospectus that was issued by Provident on and after 19 November 2004, were unlisted.

#### **Particulars**

- i. Debenture Prospectus 7 dated 19 November 2004 at page 7;
  - ii. Debenture Prospectus 8 dated 25 November 2005 at page 8;
  - iii. Debenture Prospectus 9 issued in 2006 (precise date not known);
  - iv. Debenture Prospectus 10 dated 18 December 2007;
  - v. Supplementary Prospectus for Prospectus 10 dated 29 February 2008.
  - vi. Debenture Prospectus 11 dated 23 December 2008 pages 8, 21;
  - vii. Debenture Prospectus 12 dated December 2009 pages 6, 21;
  - viii. Provident Capital Prospectus 2011 dated 22 December 2010 pages 4, 20;
  - ix. Provident Capital Prospectus 14 dated 16 December 2011 page 4, 20;
  - x. Swiss Re also repeats the particulars to para. 32A(c).
- e. Further or in the alternative to sub-paras. 32A(c) and (d), at the time they were issued and at all times thereafter the debentures that are referred to in para. 2 the ASOC were unlisted.

#### **Particulars**

- xi. Swiss Re repeats the particulars to para. 32A(c) and (d).

- f. Further or in the alternative to paras. 32A(c), (d) and (e), at the time they were issued and at all times thereafter the debentures that are referred to in para. 4.1 of the ASOC were unlisted.

**Particulars**

- i. Swiss Re repeats the particulars to paras. 32A(c) and (d).
- g. At the time they were issued and at all times thereafter, all of the debentures that Provident issued pursuant to the Trust Deed were unrated.

**Particulars**

- i. AETL has made this admission in para. 43 of the First Cross Claim.
- ii. The debentures had not received a credit rating from a credit rating agency or an organisation that provides a credit rating (**CRA**).
- iii. The debentures had not received a credit rating from a CRA which at the relevant times held an exemption for their credit rating services under ASIC Class Order [CO 03/1093] *Credit rating Agencies* as amended by ASIC Class Order [CO 05/415]
- iv. The debentures had not received a credit rating from a CRA a credit rating agency operating in Australia which held an Australian Financial Services (**AFS**) license.
- h. Further or in the alternative to sub-para. 32A(g), at the time they were issued and at all times thereafter the debentures that were issued by Provident pursuant to every debenture prospectus that was issued by Provident on and after 19 November 2004, were unrated.

**Particulars**

- i. Swiss Re repeats the particulars to para. 32A(d) and (g).
- i. Further or in the alternative to sub-para. 32A(g) and (h), at the time they were issued and at all times thereafter the debentures that are referred to in para. 2 the ASOC were unrated.

**Particulars**

- i. Swiss Re repeats the particulars to sub-para. 32A (d) and (g).

- j. Further or in the alternative to paras. 32A(g), (h) and (i), at the time they were issued and at all times thereafter the debentures that are referred to in para. 4.1 of the ASOC were unrated;

### Particulars

- i. Swiss Re repeats the particulars to sub-para. 32A(d) and (g).

33 Swiss Re admits paragraph 33 of the First Cross Claim.

34 As to paragraph 34 of the First Cross Claim, Swiss Re:

- a. denies that the withdrawal of indemnity that is referred to was wrongful;
- b. otherwise denies paragraph 34.

### *2014/2015 Axis Policy*

35 Swiss Re denies paragraph 35 of the First Cross Claim.

35A In further answer to paragraph 35 of the First Cross Claim, Swiss Re:

- a. ~~says that on its proper construction, exclusion clause 3.11 of the 2014/2015 AXIS policy applies with respect to the Creighton proceedings; and~~
- b. says that Swiss Re is not liable to indemnify AETL under the 2014/2015 AXIS policy with respect to the Creighton proceedings;
- c. says that further, Swiss Re is not liable to indemnify AETL under the 2014/2015 AXIS policy with respect to the Creighton proceeding for the reasons set out in paragraph 36(e) of this Defence;
- d. repeats paragraphs 32(b) and 32(c) of this Defence;
- e. says that the claim against AETL in the Creighton proceeding arises directly from the insolvency or external administration of Provident; and
- f. says that, in the premises, on its proper construction exclusion clause 3.11 of the 2014/2015 AXIS policy operates to exclude the claim against AETL in the Creighton proceeding from the scope of cover provided by the 2014/2015 AXIS policy.

36 As to paragraph 36 of the First Cross Claim, Swiss Re:

- a. A admits that on 30 November 2015 Andrew Dawson of Willis sent an email to Heather Ballantyne and Tony Hynes of AXIS (**the 30 November 2015 Email**);
- b. S says that attached to the 30 November 2015 Email was a letter dated 30 November 2015 from AETL (Stanelos) to Willis (Dawson) concerning the Creighton proceeding (**30 November 2015 Letter**);
- c. Says that that the 30 November 2015 Letter said in part:

~~"I refer to the Financial Institution's Professional Indemnity policy of insurance in force for the period of insurance from 30 November 2014 to 30 November 2015 insuring IOOF Holdings Ltd (IOOF) and its subsidiaries (**the policy**).~~

~~Australian Executor Trustees Ltd (**AET**) a subsidiary of IOOF and is therefore an Insured pursuant to the policy.~~

~~...~~

~~This notification is without prejudice to any notifications made by AET under earlier policies of insurance with respect to the facts and matters recorded in this notification.~~

## **~~2 Background~~**

~~In the period from about 7 December 2004 to 18 September 2012, AET was the trustee appointed under a Debenture Trust Deed between AET and Provident Capital Limited (**Provident**).~~

~~The Debenture Trust Deed was governed by Chapter 2L of the Corporations Act 2001 (Cth) (**Act**).~~

~~Provident issued debentures to members of the public.~~

~~On 18 September 2012, Provident entered voluntary administration.~~

~~The holders of debentures issued by Provident, which were unpaid as at the date of administration, have not received a full return on their investments in the administration of Provident."~~

- d. ~~will rely on the whole of the 30 November 2015 Email and the 30 November 2015 Letter for their full terms and effect;~~
- e. ~~says that the contents of the 30 November 2015 Letter concerned subject matter that was the subject of the Notification and in the circumstances did not constitute the giving by AETL of written notice to AXIS of a "Claim" (as defined) under clause 5.1 of the 2014/2015 AXIS policy;~~
- f. ~~says that the Creighton proceeding arose from facts and circumstances that were notified to AXIS in the Notification and the 25 July Email;~~
- g. ~~otherwise denies para. 36.~~

37 As to paragraph 37 of the First Cross Claim, Swiss Re:

- a. ~~repeats paragraph 27 of this Defence;~~
- b. ~~denies that AETL is entitled to be indemnified under both the 2011/2012 AXIS policy and ~~or~~ the 2014/2015 AXIS policy with respect to the Creighton proceeding as alleged or at all;~~
- c. ~~says that, by reason of the matters pleaded in paragraphs 27A, 32(a) and 36(f) of this Defence the claim made in the Creighton proceeding is a claim first made against AETL during the 2011/2012 AXIS policy; repeats paragraphs and 36(e) of this Defence;~~
- d. says further that:
  - i. the claim made against AETL in the Creighton proceeding arises directly from the facts and circumstances notified by AETL in the 25 July Email;
  - ii. the notification of facts and circumstances made by the 25 July Email was made under the 2011/2012 AXIS policy; and
  - iii. in the premises, clause 3.10 of the 2014/2015 AXIS policy operates to exclude the claim against AETL in the Creighton proceeding from the scope of cover provided by the 2014/2015 AXIS policy;
- e. otherwise does not admit paragraph 37, otherwise admits paragraph 37.

38 Swiss Re admits paragraph 38 of the First Cross Claim ~~and repeats paragraphs 35A and 36 of this Defence.~~

39 As to paragraph 39 of the First Cross Claim, Swiss Re:

- a. repeats paragraphs 32(a), 32(b), 32(c), 35A and 36 of this Defence; and
- b. ~~denies that the 2014/2015 AXIS policy applies with respect to the Creighton proceeding as alleged or at all; and~~
- c. otherwise denies paragraph 39.

40 Swiss Re denies paragraph 40 of the First Cross Claim. As to paragraph 40 of the First Cross Claim, Swiss Re:

- a. ~~repeats paragraphs 35A and 36 of this Defence;~~
- b. ~~denies that the declinature of indemnity that is referred to was wrongful; and~~
- c. ~~otherwise denies paragraph 40.~~

2011/2012 Liberty policy

40A Swiss Re does not admit paragraph 40A of the First Cross Claim.

40B In answer to paragraph 40B of the First Cross Claim, Swiss Re:

- a. repeats its answer to paragraphs 27, 27A and 32 of the First Cross Claim;
- b. ~~does not admits~~ paragraph 40B(b) of the First Cross Claim;
- c. denies paragraphs 40B(c) and 40B(d) of the First Cross Claim;
- d. ~~denies paragraph 40B(d) of the First Cross Claim insofar as it asserts that AXIS was and Swiss Re now is liable to indemnify AETL under the 2011/2012 AXIS policy; and~~
- e. otherwise does not admit paragraph 40B of the First Cross Claim.

40C Swiss Re does not admit paragraph 40C of the First Cross Claim.

40D Swiss Re ~~does not admits~~ paragraph 40D of the First Cross Claim.

40E Swiss Re denies paragraph 40E of the First Cross Claim.

40F Swiss Re ~~does not~~ admits paragraph 40F of the First Cross Claim.

40G Swiss Re does not admit paragraph 40G of the First Cross Claim.

2014/2015 Liberty policy

40H Swiss Re does not admit paragraph 40H of the First Cross Claim.

40I Swiss Re does not admit paragraph 40I of the First Cross Claim.

40J Swiss Re does not admit paragraph 40J of the First Cross Claim.

40K Swiss Re ~~does not~~ admits paragraph 40K of the First Cross Claim.

40L Swiss Re denies paragraph 40L of the First Cross Claim.

40M Swiss Re does not admit paragraph 40M of the First Cross Claim.

2011/2012 Chubb policy

40N Swiss Re does not admit paragraph 40N of the First Cross Claim.

40O In answer to paragraph 40O of the First Cross Claim, Swiss Re:

- a. repeats its answer to paragraphs 27, 27A and 32 of the First Cross Claim;
- b. ~~does not~~ admits paragraph 40O(b) of the First Cross Claim;
- c. denies paragraphs 40O(c) and 40O(d) of the First Cross Claim;
- d. ~~denies paragraph 40O(d) of the First Cross Claim insofar as it asserts that AXIS was and Swiss Re now is liable to indemnify AETL under the 2011/2012 AXIS policy; and~~
- e. otherwise does not admit paragraph 40O of the First Cross Claim.

40P Swiss Re does not admit paragraph 40P of the First Cross Claim.

40Q Swiss Re ~~does not~~ admits paragraph 40Q of the First Cross Claim.

40R Swiss Re denies paragraph 40R of the First Cross Claim.

40S Swiss Re ~~does not~~ admits paragraph 40S of the First Cross Claim.

40T Swiss Re does not admit paragraph ~~40T~~ of the First Cross Claim.



2014/2015 Chubb/AXIS policy

40U Swiss Re denies paragraph 40U of the First Cross Claim.

40V ~~As to paragraph 40V of the First Cross Claim, Swiss Re does not admit paragraph 40V of the First Cross Claim.:~~

~~a. repeats paragraphs 36 and 37 of this Defence; and~~

~~b. otherwise denies paragraph 40V.~~

40W ~~As to paragraph 40W of the First Cross Claim, Swiss Re denies paragraph 40W of the First Cross Claim.:~~

~~a. repeats paragraph 37 of this Defence; and~~

~~b. otherwise denies paragraph 40W.~~

40X Swiss Re admits paragraph 40X of the First Cross Claim.

40Y Swiss Re denies paragraph 40Y of the First Cross Claim.

40Z Swiss Re denies paragraph 40Z of the First Cross Claim.

#### **Alternative basis of claim under Section 54**

41 ~~Swiss Re denies paragraph 41 of the First Cross Claim. As to paragraph 41 of the First Cross Claim, Swiss Re:~~

~~a. repeats paragraphs 23A, 26A and 32A of this Defence; and~~

~~b. Otherwise denies paragraph 41;~~

~~c. Says that:~~

~~i. On its proper construction, exclusion clause 3.16 of the 2011/2012 AXIS policy does apply with respect to the Creighton proceeding; and~~

~~ii. Swiss Re is not liable to indemnify AETL under the 2011/2012 AXIS policy with respect to the Creighton proceeding.~~

42 As to paragraph 42 of the First Cross Claim, Swiss Re:

- a. admits that the effect of exclusion 3.16 of the 2011/2012 AXIS policy is that Swiss Re will not indemnify AETL under the 2011/2012 AXIS policy for any "Claim" (as defined) directly or indirectly arising from the insolvency or external administration of any issuer of unlisted and / or unrated debentures or promissory notes;
- b. repeats paragraph 41(e) of the Defence;
- c. otherwise does not admit paragraph 42.

43 ~~As to paragraph 43 of the First Cross Claim, Swiss Re does not admit paragraph 43 of the First Cross Claim but says that:~~

- a. ~~it agrees admits that the debentures were not listed or rated; and~~
- b. ~~otherwise does not admit paragraph 43Provident did not omit to obtain a listed or rating of the debentures (as the term "omit" would be understood.~~

44 ~~Swiss Re denies paragraph 44 of the First Cross Claim and says that there was no such omission.~~

45 Swiss Re denies paragraph 45 of the First Cross Claim and says that:

- a. there was no such omission; and
- b. if (which is denied) there was such an omission as pleaded in paragraph 43, then such omission could reasonably be regarded as being capable of causing or contributing to the loss.

46 Swiss Re denies paragraph 46 of the First Cross Claim.

46A In answer to paragraph 46A of the First Cross Claim, Swiss Re:

- a. repeats its answers to paragraphs 41 to 46 of the First Cross Claim;
- b. otherwise does not admit paragraph 46A of the First Cross Claim.

### **Estoppel and Election**

47 Swiss Re denies paragraph 47 of the First Cross Claim.

48 As to paragraph 48 of the First Cross Claim, Swiss Re:

- a. repeats paragraphs 30 and 31 of this Defence;

b. otherwise denies paragraph 48.

49 Swiss Re admits paragraph 49 of the First Cross Claim.

50 As to paragraph 50 of the First Cross Claim, Swiss Re:

a. repeats paragraph 48 of this Defence; and

b. otherwise denies ~~does not admit~~ paragraph 50.

51 As to paragraph 51 of the First Cross Claim, Swiss Re:

a. repeats paragraphs 30 and 31 of this Defence; and

b. otherwise denies paragraph 51.

52 Swiss Re denies paragraph 52 of the First Cross Claim and further says that:

a. Other than that AETL does not have the benefit of indemnity under the 2011/2012 AXIS Policy, Swiss Re does not admit the matters set out as particulars;

b. AETL has not suffered detriment;

c. The matters identified in paragraph 52 of the First Cross Claim do not constitute detriment; or that

d. If any of the matters identified in paragraph 52 of the First Cross Claim do constitute detriment, the detriment is not substantial but minimal and/or speculative.

53 As to paragraph 53 of the First Cross Claim, Swiss Re:

a. repeats paragraphs 30 and 31 of this Defence;

b. otherwise denies paragraph 53.

54 As to paragraph 54 of the First Cross Claim, Swiss Re:

a. repeats paragraphs 30 and 31 of this Defence;

a. otherwise denies paragraph 54.

55 Swiss Re denies paragraph 55 of the First Cross Claim.

56 Swiss Re denies paragraph 56 of the First Cross Claim.

57 Swiss Re denies paragraph 57 of the First Cross Claim.

58 Swiss Re denies paragraph 58 of the First Cross Claim.

59A As to paragraph 59A of the First Cross Claim, Swiss Re:

(a) admits that between about 27 January 2015 and 3 September 2015 Gilchrist Connell was retained by AXIS, with AETL's consent, to conduct AET's defence of the Creighton proceeding; repeats paragraph 30 of this Defence;

(b) denies that the appointment of Gilchrist Connell occurred pursuant to the exercise of rights under clause 5.2.1 of the 2011/2012 AXIS policy; admits that between 16 March 2015 and 3 September 2015, AXIS exercised its right under clause 5.2.1 of the 2011/2012 AXIS policy to appoint Gilchrist Connell solicitors to conduct AETL's defence of the Creighton proceeding (as that term is defined in paragraph 24 of the First Cross Claim);

(c) otherwise does not admit paragraph 59A.

59B As to paragraph 59B of the First Cross Claim, Swiss Re:

(a) admits that between 16 March 2015 and 3 September 2015, AXIS when it exercised the right that is referred to in paragraph 59A(b) of this Defence, it knew that the debentures the subject of the Creighton proceeding were not listed or rated;

(b) otherwise does not admit paragraph 59B.

59C. Swiss Re denies paragraph 59C of the First Cross Claim.

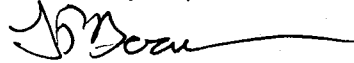
### **Claims against Willis**

59 Swiss Re does not plead to paragraphs 59 to 70 (inclusive) of the First Cross Claim as no allegations are made against it in those paragraphs.

**SIGNATURE OF LEGAL REPRESENTATIVE**

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the defence to the claim for damages in these proceedings has reasonable prospects of success.

Signature



Capacity

SOLICITOR ON THE RECORD

Date of signature

28 May June 2017- 2018

**AFFIDAVIT VERIFYING**

**Name** Georgina Haddad  
**Address** Level 36, Tower Two International Towers, 200 Barangaroo Avenue, Sydney NSW 2000  
**Occupation** Claims Expert  
**Date** 28 May 2018

I say on oath:

- 1 I am employed as a Claims Expert of the First Cross-Defendant and I am authorised to make this affidavit on its behalf.
- 2 As to any allegations of fact in this Amended Defence to Second Further Amended Statement of First Cross Claim (**Defence**), I believe that the allegations are true.
- 3 As to any allegations of fact that the Defence denies, I believe that the allegations are untrue.
- 4 As to any allegations of fact that the Defence does not admit, after reasonable inquiry I do not know whether or not the allegations are true.

SWORN AT SYDNEY

Signature of deponent *GH*

Name of witness ~~WITNESS~~ RICHARD JOHN SHANKLAND

Address of witness 26/85 CASTLE HAY ST, SYDNEY 2000

Capacity of witness SOLICITOR

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

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

*N/A.*

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

Signature of witness

*Richard John Shankland*

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