

**DEFENCE OF THE SECOND CROSS-DEFENDANT
TO FIRST CROSS-CLAIM THIRD FURTHER AMENDED STATEMENT
OF CROSS-CLAIM**

COURT DETAILS

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

TITLE OF PROCEEDINGS

Plaintiff	Innes Creighton
Defendant	Australian Executor Trustees Limited ACN 007 869 794

TITLE OF CROSS-CLAIM

First Cross-Claimant	Australian Executor Trustees Limited
Second Cross-Claimant	IOOF Holdings Limited
First Cross-Defendant	Swiss Re International SE
Second Cross-Defendant	Willis Australia Limited

FILING DETAILS

Filed for	Willis Australia Limited, Second Cross-Defendant
Filed in relation to	First Cross-Claimant and Second Cross-Claimant, First Cross-Claim Statement
Legal representative	Chern Tan, Minter Ellison
Legal representative reference	SCXT:SKZR 1136331
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HEARING DETAILS

If the proceedings do not already have a listing date, they are to be listed at

PLEADINGS AND PARTICULARS

The Second Cross-Defendant (**Willis**) pleads as follows to the allegations made by the first cross-claimant (**AET**) and the second cross-claimant (**IOOF**) in the First Cross-Claim Third Further Amended Statement of Cross-Claim (**First Cross-Claim Statement**):

1. Paragraphs 1 to 4F of the First Cross-Claim Statement are admitted.
2. In answer to paragraph 60 of the First Cross-Claim Statement Willis says that:
 - (a) it admits that it was retained by IOOF as its financial lines insurance broker;
 - (b) it admits that it received from IOOF a request for tender dated 17 May 2010;
 - (c) it admits that it provided IOOF with a tender response dated 9 July 2010;
 - (d) it admits that Mr Riordan of IOOF was sent the email dated 25 August 2010 from Mr Grant of Willis referred to in paragraph 60(c) of the First Cross-Claim Statement;
 - (e) by the express terms of that email, IOOF informed Willis that it had determined that it did not wish to pay for or receive the services that Willis had set out in its tender response, and that it had determined instead to limit the scope of Willis' retainer in the manner set out in that email;
 - (f) in addition to the limitations on the scope of its retainer referred to in (e) above, on or about 9 January 2013 the terms of Willis' retainer as IOOF's broker were varied such that:
 - (i) Willis' aggregate liability for any:
 - (A) breach of contract;
 - (B) negligence;
 - (C) breach of statutory duty; or
 - (D) other claim arising out of or in connection with Willis' retainer or services provided under it,

was limited to AUD10 million; and further,

- (ii) Willis had no liability in any circumstance in respect of loss of revenue, loss of opportunity, loss of reputation, loss of profits, loss of anticipated savings, increased costs of doing business, or any indirect or consequential loss; and
- (g) otherwise denies the allegation as particularised.

Particulars

A document headed "Terms of Business Agreement", containing the term referred to in (f), was sent by email dated 9 January 2013 from Nick Slessor of Willis to Michael Stanelos of IOOF, again on 12 July 2013 from Andrew Dawson of Willis to Michael Stanelos of IOOF, and yet again by email dated 11 November 2014 in an email from Nick Slessor of Willis to Michael Stanelos of IOOF, subject "Willis Financial Services Guide & TOBA 2014". The cross-claimant accepted the terms by its conduct in continuing to retain the services of Willis, and further or alternatively by its direction to bind cover and payment relating to its insurance placement.

3. Paragraph 61 of the First Cross-Claim Statement is denied.
4. In answer to paragraph 61A, Willis says that:
 - (a) it admits that Willis sent the letter dated 7 November 2012 to IOOF, and that IOOF sent the letter dated 7 November 2012;
 - (b) through that correspondence Willis indicated that, upon expiry of the express three year term of its tenure as IOOF's broker in 2013 (that expiry date being 25 August 2013), it wished to continue to act as IOOF's broker for a further period of 2 years;
 - (c) through that correspondence, IOOF indicated it wished to continue to have Willis act as its broker for that further period;
 - (d) it repeats the particulars to paragraph 2 above as to the terms and conditions that Willis indicated in early and mid 2013 would apply in respect of its retainer as IOOF's broker, and IOOF's acceptance of those terms;
 - (e) says that in consequence of the above matters, Willis was retained by IOOF to act as its broker for a two year term commencing on or about 25 August 2013 on the terms and conditions set out in the Terms of Business Agreement; and

- (f) otherwise repeats paragraph 2 above and denies paragraph 61A.
5. In answer to paragraph 62 of the First Cross-Claim Statement Willis admits that it was an implied term of the retainer referred to in paragraph 2 above that it would exercise reasonable care in performing its functions under that retainer, and otherwise denies paragraph 62.
 6. In answer to paragraph 63 of the First Cross-Claim Statement Willis admits that it owed IOOF a duty of care at common law co-extensive with that pleaded in paragraph 62 above, and otherwise denies paragraph 63.
 7. In answer to paragraph 64 of the First Cross-Claim Statement Willis admits that in the course of undertaking the retainer referred to in paragraph 2(a) above it sourced offers of insurance from the identified insurers for the stated policy years and undertook various negotiations with those insurers on instruction from IOOF which culminated in the creation of the policies referred to, and otherwise denies paragraph 64.
 8. Paragraph 65 of the First Cross-Claim Statement is admitted.
 9. Paragraph 66 of the First Cross-Claim Statement is admitted.
 10. Paragraph 68 of the First Cross-Claim Statement is denied.
 11. Willis denies the allegation of breach in paragraph 68A of the First-Cross Claim Statement and says further that:
 - (a) a new form of financial institutions modular wording was prepared by AXIS in about 2014;
 - (b) that form of modular wording was prepared by AXIS having regard to its own commercial interests, and was prepared by it without reference to the circumstances of IOOF or any other actual or potential insured;
 - (c) that form of modular wording did not adopt and follow the language of the policies which had been negotiated and agreed as between AXIS and IOOF across the preceding policy periods;
 - (d) a representative of AXIS provided Willis with a copy of that new modular wording on or about 11 November 2014;

- (e) the quotation for the new modular wording included an endorsement which replaced Exclusion 3.9 headed "Prior Circumstances" with an exclusion that AXIS would not pay any amounts under the professional indemnity clause for or arising out of or in connection with:
 - (i) any written demand, legal proceedings or Inquiry made, threatened, intimated against or involving the Insured before 14 November 2010;
 - (ii) any facts that, before 14 November 2010, the Insured was aware, or a reasonable person in the Insured's profession would have been aware, might give rise to a claim under the Policy;
 - (iii) any facts that might give rise to a claim under the Policy which have been reported, or which can be or could have been reported, to an insurer under any insurance policy entered into before 14 November 2010; and
 - (iv) any facts that might give rise to a claim under the Policy which were disclosed to AXIS in the proposal;
 - (f) the proposal submitted by IOOF to AXIS included a disclosure, by means of incorporation and cross-reference, of facts or circumstances that might give rise to claims against AET of the kind presently made;
 - (g) in the premises, a policy of insurance on the terms of the modular wording entered into with AXIS in or after November 2014 would not have responded to the claims made in these proceedings, as they would have fallen within the scope of Exclusion 3.9.
12. Paragraph 69 of the First Cross-Claim Statement is denied.
13. Paragraph 69A of the First Cross-Claim Statement is denied.
14. In further answer to paragraphs 68 and 69A Willis says that:
- (a) even if Willis failed to give notice to Liberty under the 2011/2012 Liberty policy as soon as practicable (and before the expiry of the 2011/2012 Liberty policy) that the notice pleaded in paragraph 27 of the First Cross-Claim Statement had been given to AXIS under the 2011/2012 AXIS policy (which is denied), that does not affect the validity of the claim on the 2011/2012 Liberty policy by reason of the

matters pleaded in paragraph 40B or, in the further alternative, paragraph 40C of the First Cross-Claim Statement; and

- (b) even if Willis failed to give notice to Chubb under the 2011/2012 Chubb policy as soon as practicable (and before the expiry of the 2011/2012 Chubb policy) that the notice pleaded in paragraph 27 of the First Cross-Claim Statement had been given to AXIS under the 2011/2012 AXIS policy (which is denied), that does not affect the validity of the claim on the 2011/2012 Chubb policy by reason of the matters pleaded in paragraph 40O or, in the further alternative, paragraph 40P of the First Cross-Claim Statement.

15. Willis denies paragraph 70 of the First Cross-Claim Statement and says further that:

- (a) it repeats and relies on paragraphs 1 to 14 above;
- (b) it denies the allegation made by AET that it would not otherwise have entered into the policies, and says that an assessment as to whether AET would have acted differently as it alleges depends upon an analysis of, inter alia:
 - (i) what AET itself thought the exclusion provided for;
 - (ii) AET's own assessment of the risk of the circumstances in the exclusion coming to pass;
 - (iii) whether AET instructed lawyers to undertake a legal review of the policy;
 - (iv) whether AET obtained a legal review of the policy;
 - (v) the content of any legal review of the policy received by AET;
 - (vi) the alternative policy or policies then on offer to AET, and the suitability or otherwise of their terms from AET's perspective;
- (c) even if Willis is liable for any loss and damage suffered by AET (which is also denied), and on the proper construction of the term pleaded in subparagraph 2(f) herein, Willis' liability is limited in the manner described in that term.

Professional services defence

16. Further, in response to paragraphs 67 to 70 of the First Cross-Claim Statement:

- (a) in:

- (i) negotiating and procuring on behalf of IOOF and its subsidiaries the professional indemnity policies of insurance referred to in paragraph 64 of the First Cross-Claim Statement; and
- (ii) the provision of insurance brokering, insurance advisory and claims management services to IOOF and its subsidiaries at all material times on and from 25 August 2010,

Willis was acting as a professional;

- (b) the conduct of Willis undertaken while acting as broker was the provision of a professional service; and
 - (c) in engaging in that conduct, Willis acted in a manner that, as at the time in which the conduct was engaged, was widely accepted in Australia by peer professional opinion of Willis as competent professional practice.
17. In the premises, Willis should not be found to have incurred a liability in negligence pursuant to s 50(1) of the *Civil Liability Act 2002* (NSW) and s 59 of the *Wrongs Act 1958* (Vic), respectively.

Contributory Negligence

18. In the alternative, in the event Willis is liable as is alleged (which is denied, and without admitting the allegations from the cross claimants' affidavits that are repeated below), Willis says that:
- (a) any loss suffered by AET was caused or contributed to by AETs' failure to take reasonable care; and
 - (b) Willis' liability is to be reduced to the extent that it is just and equitable having regard to AET's share in the responsibility for that loss.

Particulars

AET has asserted, and admitted for the purposes of this defence, that the conduct of Mr Riordan and Mr Stanelos may be treated as the conduct of AET.

- A) AET failed to instruct Willis that its business activities extended to the particular task of holding on trust unlisted or unrated debentures issued by Provident, or ensure that Willis was so instructed.

B) Further to but without limiting (A), upon reviewing and observing the policy wording for the AXIS policies, including the Insolvent Issuer Exclusion now complained of by AET (being clause 3.16 of the 2011/2012 AXIS policy and clause 3.11 of the 2014/2015 AXIS policy), and prior to accepting that policy wording, AET failed to:

- 1) consider whether it had instructed Willis that AET's business activities extended to the particular task of holding on trust unlisted or unrated debentures issued by Provident;
- 2) instruct Willis that AET's business activities did extend in this way, or ensure Willis was so instructed;
- 3) seek Willis' advice as to the impact of the Insolvent Issuer Exclusion in circumstances where AET's business activities did extend to the particular task of holding on trust unlisted or unrated debentures issued by Provident;

C) Notwithstanding that:

- 1) AET had experienced internal representatives who were invested with responsibility for procuring insurance for AET and, as an aspect of that, assessing for themselves the extent to which any policy offer submitted by an insurer was suitable having regard to the nature and extent of AET's business activities and the risks they generated (namely Michael Stanelos and Gary Riordan);
- 2) AET (through at least Michael Stanelos) knew of the policy wording offered by AXIS, including the Insolvent Issuer Exclusion; and
- 3) AET knew that its own business activities extended to the particular task of holding on trust unlisted or unrated debentures issued by Provident,

AET did not itself give any or any proper consideration to the extent to which the Insolvent Issuer Exclusion might operate such that a claim of the kind the subject of these proceedings would not be covered under the AXIS policies.

D) Further to but without limiting (C):

- 1) Mr Stanelos did not himself consider and assess whether the Insolvent Issuer Exclusion may operate such that a claim of the kind the subject of the present proceedings would not be covered under the AXIS policies;
 - 2) Mr Stanelos did not identify that as an issue for Mr Riordan, his superior, to consider and determine or seek advice in respect of whether the Insolvent Issuer Exclusion may operate such that a claim of the kind the subject of the present proceedings would not be covered under the AXIS policies;
 - 3) Mr Riordan did not read the AXIS policies and assess for himself the extent to which any of their terms were or may be unsuitable having regard to the nature and extent of AET's business operations;
 - 4) neither Mr Stanelos nor Mr Riordan sought or obtained the input or advice from AET's management in relation to the suitability or otherwise of the AXIS policies' terms;
 - 5) neither Mr Stanelos nor Mr Riordan sought or obtained advice from anyone from AET as to whether its business extended to holding unlisted or unrated debentures;
 - 6) AET did not have in place any systems for ensuring that the above internal steps, or any of them, were carried out within AET.
- E) Further and without limiting the above, AET failed to take reasonable care in relation to the 2010/2011 AXIS Policy by reason of:
- 1) Mr Stanelos:
 - A. recommending to Mr Riordan, his superior, that IOOF accept the terms of the 2010/2011 AXIS Policy without first reviewing the terms of the policy in detail and relying only on the recommendation of Mr Sean Cray of Willis (affidavit of Gary Riordan sworn 4 July 2017, para 63); and
 - B. failing to turn his mind to whether exclusion 3.16 of the 2010/2011 AXIS Policy might apply to claims made by debenture holders of the kind made against AET in the present proceedings).

2) Mr Riordan relying upon:

- A. the recommendation (made to Mr Stanelos) by Mr Cray that IOOF accept the terms of the 2010/2011 AXIS Policy in circumstances where Mr Riordan had not reviewed the terms of the policy himself and he knew that Mr Stanelos had not reviewed the terms of the policy in detail (affidavit of Gary Riordan sworn 4 July 2016, para 63); and
- B. the observations made by Willis in the Renewal Report [AET.601.002.0098], page 12, which concerned the scope of the AXIS coverage in comparison to the expiring QBE coverage, in satisfying himself that the scope of coverage that AXIS was offering was acceptable to IOOF (affidavit of Gary Riordan sworn 4 July 2017, para 68).

F) Further and without limiting the above, AET failed to take reasonable care in relation to the 2011/2012 AXIS Policy by reason of:

1) Mr Michael Stanelos:

- A. failing to read the 2011/2012 AXIS Policy, except to the extent that it included any new or amended clauses as compared to the 2010/2011 AXIS Policy, rather than all clauses afresh (affidavit of Michael Stanelos sworn 29 June 2017 para 79);
- B. only reading the renewal reports and oral and written communications from Willis about the 2011/2012 AXIS Policy, as opposed to the policy wording itself (affidavit of Michael Stanelos sworn 29 June 2017, paras 79, 92);
- C. failing to turn his mind to whether exclusion 3.16 of the 2011/2012 AXIS Policy might apply to claims made by debenture holders of the kind made against AET in the present proceedings, but instead:
 - i. relying on Willis to advise IOOF if the coverage provided under the 2011/2012 AXIS Policy may or may not be adequate to meet IOOF's needs, including in respect of

its subsidiaries such as AET (affidavit of Michael Stanelos sworn 29 June 2017, para 79);

- ii. relying on Willis' analysis in its Preliminary Renewal Report [AET.600.006.0263], Further Preliminary Renewal Report [AET.600.002.011] and Supplementary Renewal Report [AET.600.006.0225] in respect of the adequacy of the proposed insurance coverage and the fact that Willis had not drawn to his attention any inadequacies in coverage (affidavit of Michael Stanelos sworn 29 June 2017, paras 86 to 92);
 - iii. expecting that, had Willis identified any significant gaps in cover during the period, they would have been drawn to IOOF's attention in the context of the 2011/2012 renewal (affidavit of Michael Stanelos sworn 29 June 2017, para 92); and
 - iv. relying on Willis to raise exclusion 3.16 of the 2011/2012 AXIS Policy, and its potential operation, with him (affidavit of Michael Stanelos sworn 29 June 2017, para 102); and
- 2) Mr Gary Riordan relying upon what he was told by Willis in respect of the 2010/2011 renewal of IOOF's professional indemnity insurance about the scope of coverage AXIS was providing to IOOF (including its subsidiaries such as AET), and resultantly only focussing on changes either to the nature of IOOF's businesses or to the wordings of AXIS' policies rather than considering the adequacy of AXIS' coverage from scratch (affidavit of Gary Riordan sworn 4 July 2017, para 68).
- G) Further and without limiting the above, AET failed to take reasonable care in relation to the 2012/2013 AXIS Policy by reason of the following:
- 1) Mr Michael Stanelos:
 - A. failing to read the 2012/2013 AXIS Policy, except to the extent that it included any new or amended clauses as compared to the 2011/2012 AXIS Policy, rather than all clauses afresh (affidavit of Michael Stanelos sworn 29 June 2017 para 79);

- B. only reading the renewal reports and oral and written communications from Willis about the 2012/2013 AXIS Policy, as opposed to the policy wording itself (affidavit of Michael Stanelos sworn 29 June 2017, para 79);
 - C. failing to turn his mind to whether exclusion 3.16 of the 2012/2013 AXIS Policy might apply to claims made by debenture holders of the kind made against AET in the present proceedings, but instead:
 - i. relying on Willis to advise IOOF if the coverage provided under the 2012/2013 AXIS Policy may or may not be adequate to meet IOOF's needs, including in respect of its subsidiaries such as AET (affidavit of Michael Stanelos sworn 29 June 2017, para 79);
 - ii. relying on Willis' analysis in its Client Advocacy Report [AET.600.003.0067], and Renewal Report [AET.600.003.0030] in respect of the adequacy of the proposed insurance coverage and the fact that Willis had not drawn to his attention any inadequacies in coverage (affidavit of Michael Stanelos sworn 29 June 2017, paras 101-110);
 - iii. expecting that, had Willis identified any significant gaps in cover during the period, they would have been drawn to IOOF's attention in the context of the 2012/2013 renewal (affidavit of Michael Stanelos sworn 29 June 2017, para 110); and
 - iv. relying on Willis to raise exclusion 3.16 of the 2012/2013 AXIS Policy, and its potential operation, with him (affidavit of Michael Stanelos sworn 29 June 2017, para 110); and
- 2) Mr Gary Riordan relying upon what he was told by Willis in respect of the 2010/2011 renewal of IOOF's professional indemnity insurance about the scope of coverage AXIS was providing to IOOF (including its subsidiaries such as AET), and resultantly only focussing on changes either to the nature of IOOF's businesses or to the wordings of AXIS'

policies rather than considering the adequacy of AXIS' coverage from scratch (affidavit of Gary Riordan sworn 4 July 2017, para 68).

H) Further and without limiting the above, AET failed to take reasonable care in relation to the 2013/2014 AXIS Policy by reason of the following:

1) Mr Michael Stanelos:

A. failing to read the 2013/2014 AXIS Policy, except to the extent that it included any new or amended clauses as compared to the 2012/2013 AXIS Policy, rather than all clauses afresh (affidavit of Michael Stanelos sworn 29 June 2017, para 79);

B. only reading the renewal reports and oral and written communications from Willis about the 2013/2014 AXIS Policy, as opposed to the policy wording itself (affidavit of Michael Stanelos sworn 29 June 2017, para 79);

C. failing to turn his mind to whether exclusion 3.11 of the 2013/2014 AXIS Policy might apply to claims made by debenture holders of the kind made against AET in the present proceedings, but instead:

i. relying on Willis to advise IOOF if the coverage provided under the 2013/2014 AXIS Policy may or may not be adequate to meet IOOF's needs, including in respect of its subsidiaries such as AET (affidavit of Michael Stanelos sworn 29 June 2017, para 79);

ii. relying on Willis' analysis in communications from it as well as the Renewal Report [AET.601.007.0051] and Updated Renewal Report [AET.604.001.0394] in respect of the adequacy of the proposed insurance coverage and the fact that Willis had not drawn to his attention any inadequacies in coverage (affidavit of Michael Stanelos sworn 29 June 2017, paras 116-136);

iii. expecting that, had Willis identified any significant gaps in cover during the period, they would have been drawn to IOOF's attention in the context of the 2013/2014

renewal (affidavit of Michael Stanelos sworn 29 June 2017, para 136); and

- iv. relying on Willis to raise exclusion 3.11 of the 2013/2014 AXIS Policy, and its potential operation, with him (affidavit of Michael Stanelos sworn 29 June 2017, para 136); and

- 2) Mr Gary Riordan relying upon what he was told by Willis in respect of the 2010/2011 renewal of IOOF's professional indemnity insurance about the scope of coverage AXIS was providing to IOOF (including its subsidiaries such as AET), and resultantly only focussing on changes either to the nature of IOOF's businesses or to the wordings of AXIS' policies rather than considering the adequacy of AXIS' coverage from scratch (affidavit of Gary Riordan sworn 4 July 2017, para 68).
- l) Further and without limiting the above, AET failed to take reasonable care in relation to the 2014/2015 AXIS Policy by reason of the following:

- 1) Mr Michael Stanelos:

- A. failing to read the 2014/2015 AXIS Policy, except to the extent that it included any new or amended clauses as compared to the 2013/2014 AXIS Policy, rather than all clauses afresh (affidavit of Michael Stanelos sworn 29 June 2017, para 79);

- B. only reading the renewal reports and oral and written communications from Willis about the 2014/2015 AXIS Policy, as opposed to the policy wording itself (affidavit of Michael Stanelos sworn 29 June 2017, para 79);

- C. failing to turn his mind to whether exclusion 3.11 of the 2014/2015 AXIS Policy might apply to claims made by debenture holders of the kind made against AET in the present proceedings, but instead:

- i. relying on Willis to advise IOOF if the coverage provided under the 2014/2015 AXIS Policy may or may not be adequate to meet IOOF's needs, including in respect of its subsidiaries such as AET (affidavit of Michael Stanelos sworn 29 June 2017, para 79);

- ii. relying on Willis' analysis in communications from it as well as the Renewal Report [WIL.500.005.1841] and the updated Renewal Report [WIL.500.005.1938] in respect of the adequacy of the proposed insurance coverage and the fact that Willis had not drawn to his attention any inadequacies in coverage (affidavit of Michael Stanelos sworn 29 June 2017, paras 143-145);
 - iii. expecting that, had Willis identified any significant gaps in cover during the period, they would have been drawn to IOOF's attention in the context of the 2014/2015 renewal (affidavit of Michael Stanelos sworn 29 June 2017, para 152); and
 - iv. relying on Willis to raise exclusion 3.11 of the 2014/2015 AXIS Policy, and its potential operation, with him (affidavit of Michael Stanelos sworn 29 June 2017, para 152); and
- 2) Mr Gary Riordan relying upon what he was told by Willis in respect of the 2010/2011 renewal of IOOF's professional indemnity insurance about the scope of coverage AXIS was providing to IOOF (including its subsidiaries such as AET), and resultantly only focussing on changes either to the nature of IOOF's businesses or to the wordings of AXIS' policies rather than considering the adequacy of AXIS' coverage from scratch (affidavit of Gary Riordan sworn 4 July 2017, para 68).
- J) Not arranging for Willis or some other broker to be retained to provide the full scope of services set out in its tender, including the insurable risk review service and related consequential services referred to in the Willis tender.
 - K) Not ensuring that its own risk identification and reporting systems were sufficiently comprehensive, reliable and utilised for the purposes of identifying insurable risks at insurance renewal time.
 - L) Instructing Willis to proceed to place or renew insurance with AXIS without having taken the above steps.
 - M) Instructing Willis that IOOF had undertaken an internal review of the policy wording for the AXIS policy and had satisfied itself that the policy wording was

suitable for the needs of IOOF and its subsidiaries, save for the terms and exclusions that IOOF listed for Willis and instructed it to raise with AXIS.

Proportionate liability

19. Further or in the alternative, in the event Willis is liable as is alleged (which is denied), Willis says that:
 - (a) the proceedings involve apportionable claims under s 34(1) of the *Civil Liability Act 2002* (NSW), those claims being the claims brought by AET against Willis in the First Cross Claim Statement;
 - (b) Swiss Re International SE, or alternatively AXIS Speciality Europe SE, is a concurrent wrongdoer in relation to the claims in the circumstances described below; and
 - (c) pursuant to section 35(1) of the *Civil Liability Act 2002* (NSW), the liability of Willis in relation to the claims is therefore limited to such amount which reflects that proportion of the damage or loss as the Court considers just.
20. For the purposes of this proportionate liability defence only, and without making any admission as to the correctness of any one or more of those matters beyond the admissions made earlier in this document, Willis repeats paragraphs 1 to 40Z of the First Cross-Claim Statement.
21. Further, AET's cross-claim against Willis proceeds on the assumed basis that clause 3.16 of the 2011/2012 AXIS policy (**Insolvent Issuer Exclusion**) and clause 3.11 of the 2014/2015 AXIS policy operate as AXIS now contends, that these matters were material to IOOF's decision about whether to enter into the insurance contracts it entered into, and that had IOOF known the true position in terms of the operation of these clauses, it could and would have been able to secure alternative insurance cover on terms which would have provided cover in respect of the plaintiff's claims. Willis denies each of these contentions but, necessarily for the purposes of this proportionate liability defence only, and without prejudice to its primary position, assumes these contentions to be correct (**assumed basis**).
22. In between the time AXIS issued the 2011/2012 AXIS policy and the time AXIS issued the 2014/2015 AXIS policy pleaded in paragraphs 5 and 8 of the First Cross-Claim Statement:

- (a) AXIS issued a financial institutions professional indemnity policy of insurance in favour of IOOF and various related parties, which policy operated in respect of a period of insurance from 4pm on 31 October 2012 to 4pm on 31 October 2013 (**2012/2013 AXIS policy**);
- (b) AXIS issued a financial institutions professional indemnity policy of insurance in favour of IOOF and various related parties, which policy operated in respect of a period of insurance from 31 October 2013 to 31 October 2014, and subsequently extended to 30 November 2014 (**2013/2014 AXIS policy**); and
- (c) various excess layer insurers wrote policies of insurance in favour of IOOF and various related parties, which policies sat in a tower above the 2012/2013 AXIS policy and 2013/2014 AXIS policy.

Particulars

The excess layer insurers above AXIS during the 2013/2014 AXIS policy period were Liberty (with a limit of \$20 million in excess of \$20 million), and Chubb (with a limit of \$10 million in excess of \$40 million).

23. In the period leading up to 30 November 2014, and to the knowledge of each of IOOF, AET and AXIS:
- (a) IOOF had notified AXIS of circumstances relating to the financial collapse of Provident and AET's position as trustee of the unlisted debentures issued by Provident, as described in paragraph 9 above and in the First Cross-Claim Statement;
 - (b) receivers and managers had been appointed to Provident;
 - (c) there existed a possibility that Provident debenture holders may bring claims against AET for the loss of sums invested;
 - (d) two firms of solicitors, Slater & Gordon and Meridian, had written to Provident debenture holders referring to potential proceedings by or on behalf of debenture holders against AET for the loss of sums invested;
 - (e) two Provident debenture holders, John and Rosemary Smith, had been granted authority to act as eligible applicants for the purposes of Division 1 of Part 5.9 of the *Corporations Act 2001* (Cth) by the Australian Securities and Investment Commission with respect to Provident, with the intention of applying to the Court

for the issue of examination summons for the purpose of obtaining evidence to support claims against AET;

- (f) the Smiths had commenced proceedings in the Supreme Court of New South Wales in the matter of Provident in receivership (being proceedings numbered 2014/247085), pursuant to which they sought and obtained orders for the examination of Mr Stuart Howard of AET (**examination**);
- (g) a summons for the examination of Mr Howard was issued by the Supreme Court of New South Wales on 9 September 2014;
- (h) the nature and extent of claims by Provident debenture holders against AET were matters which would be explored in the examination;
- (i) IOOF had notified AXIS of each of the above matters;
- (j) AET had sought indemnity from AXIS in relation to its costs of the examination under the 2011/2012 AXIS policy (as described further below);
- (k) at the same time as the matters pleaded in subparagraphs (a) to (j) above were occurring, IOOF was in the process of considering a renewal of the 2013/2014 AXIS policy, other related policies held with AXIS, and associated excess layer policies, for a further period of 12 months commencing on 30 November 2014;
- (l) to that end, discussions were ensuing and communications were made between Willis (on behalf of IOOF) and AXIS in relation to the provision of financial institutions professional indemnity cover from AXIS to IOOF and various related parties for a policy period of 12 months to commence on 30 November 2014, together with the provision of other policies of insurance (directors and officers liability and crime cover) for the same period (**2014/2015 policy**);
- (m) if the discussions and communications led to IOOF entering into a 2014/2015 policy with AXIS, the latter would be paid total premiums of the order of \$3 million; and
- (n) on the assumed basis:
 - (i) the extent to which the language of the existing policy regime and any renewal thereof provided coverage to AET in respect of AET's costs of the examination and future claims by Provident debenture holders; and thus

- (ii) the extent to which the Insolvent Issuer Exclusion or any variation of it under a renewal operated, such that AET was not indemnified in respect of such costs and claims,

were material to IOOF's decision about whether to enter into a 2014/2015 policy with AXIS, and if so, on what terms.

- 24. In or about late September and early October 2014, and prior to any decision having been made by IOOF about entering into and the terms of a 2014/2015 policy, IOOF (through Willis):
 - (a) notified AXIS of the fact of the examination; and
 - (b) sought confirmation from AXIS that AET was covered under the 2011/2012 AXIS policy in respect of the costs incurred or to be incurred by it in respect of the examination.

Particulars

Emails dated 30 September 2014, 1 October 2014 and 2 October 2014 passing between Robyn Fraser of AXIS and Andrew Dawson of Willis.

- 25. In fact, if the Insolvent Issuer Exclusion operates as AXIS presently contends in relation to the plaintiff's claims against AET, the Insolvent Issuer Exclusion would also have operated so as to take AET's claim for cover in respect of its costs of the examination outside the scope of cover under the financial institutions professional indemnity insurance that IOOF held with AXIS.
- 26. Notwithstanding the matter described in the previous paragraph, on or about 8 October 2014, AXIS confirmed to IOOF (through Willis) that AET was covered under the financial institutions professional indemnity insurance that IOOF held with AXIS in relation to its costs of the examination.

Particulars

Email dated 8 October 2014 from Robyn Fraser of AXIS to Kelly Butler of Willis. Having initially confirmed cover under the 2011/2012 AXIS policy, AXIS subsequently confirmed, by letter dated 16 March 2015, that the relevant policy year in respect of which that confirmation had been given was the 2013/2014 year.

27. On or about 11 November 2014, AXIS provided Willis, on behalf of IOOF, with a quotation for a 2014/2015 policy based on AXIS' new modular wording, which wording did not contain, in express terms, the Insolvent Issuer Exclusion.

Particulars

The quotation was written, and sent under cover of an email dated 11 November 2014 from AXIS to Willis.

28. On or about 14 November 2014 AXIS provided Willis, on behalf of IOOF, with a quotation for a 2014/2015 policy based on policy wording drawn from the 2013/2014 AXIS policy. The 2013/2014 AXIS policy contained various changes in wording for IOOF's benefit as compared to the 2011/2012 AXIS policy and 2012/2013 AXIS policy, including amongst other things the removal of the words "or indirectly" in the chapeau to Insolvent Issuer Exclusion (clause 3.11 in the 2013/2014 AXIS policy).

Particulars

The quotation was written, and sent under cover of an email dated 14 November 2014 from AXIS to Willis.

29. The stated premium in each quote was the same.
30. On or about 30 November 2014 IOOF decided to renew its financial institutions professional indemnity insurance with AXIS for a further period of 12 months, and to do so on the basis that the policy wording would be based upon the 2013/2014 AXIS policy.
31. At no time in the period up to and including 30 November 2014 did AXIS place or purport to place any reliance upon the Insolvent Issuer Exclusion by way of response to AET's claim for cover in respect of its costs of the examination, or in answer to the notifications to AXIS referred to above.
32. At no time in the period up to and including 30 November 2014 did AXIS withdraw the confirmation described in paragraph 26, or decline to indemnify AET in respect of its costs of the examination by reason of the Insolvent Issuer Exclusion or otherwise.
33. Notwithstanding the following matters and each of them:
- (a) the fact that AXIS had received notifications of Provident's external administration, Provident's issue of unlisted debentures, and the prospect of claims by debenture holders against AET as described in paragraph 16 above;

- (b) the fact that the examination formed part of an investigation into the nature and extent of such claims by Provident debenture holders against AET;
- (c) the fact that, if the Insolvent Issuer Exclusion operated such that AET had no cover in respect of such claims by Provident debenture holders, it would equally have operated so as to take AET's claim for cover in respect of its costs of the examination outside the scope of cover;
- (d) AXIS' positive confirmation of cover in respect of AET's costs of the examination described above;
- (e) the materiality, in the context of the potential policy renewal, of whether AET had cover in respect of the costs of the examination and claims by Provident debenture holders under the terms of its existing policies with AXIS, or under any renewed policy which adopted the same or similar policy wording;
- (f) the potential, known to each of AXIS and IOOF, for Provident debenture holders to make such claims in the renewed policy period;
- (g) the fact that AXIS offered to renew cover with IOOF as described above on terms which contained not just the same Insolvent Issuer Exclusion that had not been applied by AXIS in respect of AET's accepted claim for cover for the examination, but a more narrowly expressed version of that exclusion;
- (h) the fact that AXIS had, alternatively, quoted on a renewal of cover with IOOF as described above, on the basis of new modular wording which did not contain the Insolvent Issuer Exclusion in its terms, but for precisely the same premium,

at no time in the period up to and including 30 November 2014 did AXIS make any one or more of the following assertions to IOOF or AET (or Willis on their behalf):

- (i) that the Insolvent Issuer Exclusion operated such that AET had no cover, and would have no cover under any renewed policy, in respect of either the costs of the examination or claims made by Provident debenture holders;
- (j) that the examination or claims made by Provident debenture holders had or would directly or indirectly arise from the insolvency of external administration of Provident;
- (k) that Provident's insolvency or external administration and its consequences impacted on the extent to which AET had cover, or would have cover under any

renewed policy, in respect of either the costs of the examination or claims made by Provident debenture holders;

- (l) that, if IOOF renewed its insurance with AXIS for the 2014/2015 policy period by adopting the existing 2013/2014 AXIS policy wording so as to maintain the Insolvent Issuer Exclusion, but in a form which was actually narrower than the form which appeared in the existing 2011/2012 AXIS policy under which AXIS had positively confirmed cover in respect of the examination, AET would not be covered in respect of claims made by Provident debenture holders in that renewed period; and
- (m) that although AXIS had received the notifications described above and the premium was exactly the same under each of the two renewal quotes it had provided, and it had accepted AET was covered for the examination under the terms of its existing 2011/2012 AXIS policy which contained the Insolvent Issuer Exclusion, AET would only be covered for claims made against it by Provident debenture holders in the renewed period if it accepted the quotation based on the modular wording, and would not be covered in respect of such claims if it accepted the quote based on policy wording which contained a narrower version of the Insolvent Issuer Exclusion that had appeared in the 2011/2012 AXIS policy which AXIS confirmed provided cover for the examination.

34. By its conduct as described above, and in the circumstances pleaded above, in the period from 8 October to 30 November 2014, AXIS impliedly represented and conveyed the impression to IOOF and AET that:

- (a) Provident's insolvency or external administration and its consequences were not relevant to the extent to which AET had cover, or would have cover under any renewal on the terms quoted and referred to above, in respect of claims made by Provident debenture holders which had been the subject of the notifications of circumstances;
- (b) the Insolvent Issuer Exclusion did not operate so as to take such claims outside the scope of cover provided by the existing policy regime, or by a renewed policy on the terms quoted; and
- (c) AET was covered by the existing policy regime, or by a renewed policy on the terms quoted, in respect of claims made by Provident debenture holders which had been the subject of the notifications of circumstances, or alternatively, at least

that the coverage did not turn upon the fact or consequences of Provident's insolvency or external administration;

- (d) (a) to (c) above reflected AXIS' position in relation to the operation of the policies and any renewed policy on the terms quoted;
 - (e) AXIS would conduct its relationship with IOOF on that basis.
35. In fact, on the assumed basis, and having regard to the nature of the representations and impressions conveyed, AXIS' conduct and the representations and impressions conveyed by it was misleading or deceptive, or likely to be so.
36. In the premises, AXIS engaged in conduct in contravention of section 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) or section 1041H of the *Corporations Act 2001* (Cth), or alternatively engaged in conduct in trade and commerce in contravention of schedule 2, section 18 of the *Competition and Consumer Act 2010* (Cth) (*Australian Consumer Law*).
37. By reason of AXIS' misleading or deceptive conduct, and on the assumed basis:
- (a) AXIS induced IOOF and AET to mistakenly believe, or alternatively to affirm and maintain a mistaken belief, that:
 - (i) Provident's insolvency or external administration and its consequences were not relevant to the extent to which AET had cover, or would have cover under any renewal on the terms quoted, in respect of claims made by Provident debenture holders which had been the subject of the notifications of circumstances;
 - (ii) the Insolvent Issuer Exclusion did not operate so as to take such claims outside the scope of cover provided by the existing policy regime, or by a renewed policy on the terms quoted; and
 - (iii) AET was covered by the existing policy regime, or by a renewed policy on the terms quoted, in respect of claims made by Provident debenture holders which had been the subject of the notifications of circumstances, or alternatively, at least that the coverage did not turn upon the fact or consequences of Provident's insolvency or external administration;
 - (iv) (i) to (iii) above reflected AXIS' position in relation to the operation of the policies and any renewed policy on the terms quoted;

- (v) AXIS would conduct its relationship with IOOF on that basis; and
 - (b) IOOF proceeded to renew its financial institutions professional indemnity insurance policy in the manner and on the terms pleaded above.
38. On the assumed basis, by reason of AXIS' contraventions described above AET has suffered loss and damage.

Particulars

AET contends in its claim against Willis that, had AET appreciated the effect of the Insolvent Issuer Exclusion, it would have been able to secure a more favourable policy of insurance for (inter alia) the 2014/2015 policy period, and as a result would have had insurance cover in respect of the claims made against it, whereas in fact it is not covered by the claims. Willis denies those claims. However for the purposes of this proportionate liability defence it is assumed (as it must be in that context) that those contentions are correct. On that assumption, it follows from the matters described herein, that had AXIS acted differently and conducted itself so as to disclose or otherwise reveal the true position in October or November 2014, AET would have been in the position it contends it ought to have been in with respect to insurance cover.

39. Willis repeats paragraphs 4E and 4F of the First Cross-Claim Statement. If and to the extent the matters there described have the effect that AXIS' liability to AET as described above was transferred to Swiss Re, it identifies Swiss Re as the concurrent wrongdoer. Alternatively, Willis identifies AXIS as the concurrent wrongdoer.
40. Willis does not admit any other allegation or assumption upon which any one or more of the claims against it is based.
41. Further or in the alternative, in the event Willis is liable as is alleged (which is denied), Willis says that:
- (d) the proceedings involve apportionable claims under s 34(1) of the *Civil Liability Act 2002* (NSW), those claims being the claims brought by AET against Willis in the First Cross Claim Statement;
 - (e) Mr Riordan, Mr Stanelos and IOOF are concurrent wrongdoers in relation to those claims in the circumstances described below; and

- (f) pursuant to section 35(1) of the *Civil Liability Act 2002* (NSW), the liability of Willis in relation to that claim is therefore limited to such amount which reflects that proportion of the damage or loss as the Court considers just.
42. AET's claim against Willis in contract proceeds on the basis that Mr Riordan, Mr Stanelos and IOOF acted for AET in respect of its dealings with Willis as broker. If that was so, Willis alleges that AET impliedly appointed them as agents for the purposes of:
- (a) retaining a broker to act for AET;
 - (b) making decisions as to the terms upon which that broker would be retained and the nature and extent of the functions to be performed by the broker;
 - (c) making decisions about the extent to which the terms of any tender submitted by Willis and other brokers would be accepted or rejected;
 - (d) reviewing, forming a view about and providing instructions to the retained broker as to the nature and extent of AET's business activities and the area or areas of its operations which created exposures or risks of a kind in respect of which insurance cover was to be sought;
 - (e) reading and reviewing the terms of any policy of insurance offered in respect of AET and taking steps to identify the extent to which its terms, including in particular its exclusions, referred to any kind of financial product, service or business with which AET was or may be concerned;
 - (f) communicating with the retained broker in relation to any such term, and identifying the financial product, service or business;
 - (g) making decisions about whether to accept a policy of insurance offered in respect of AET, or to instead instructing the broker to seek to negotiate changes to the offer.
43. In so acting, IOOF, Mr Riordan and Mr Stanelos each owed AET a duty to exercise reasonable skill and care in carrying out these functions.

Particulars

The duty arises by virtue of their position as agent of AET.

Alternatively, AET relied on them to carry out the above functions; they assumed the responsibility for performing these functions; AET was vulnerable to suffering

loss and damage of the kind it claims to have suffered if they did not exercise reasonable skill and care in carrying out these functions; the risk that loss and damage would be suffered in such a circumstance was foreseeable and not insignificant; and a reasonable person in their position would have taken the precautions that these parties did not take (as to which see the particulars to the following paragraph).

44. IOOF, Mr Riordan and Mr Stanelos breached the duty pleaded in the previous paragraph.

Particulars

The particulars to paragraph 18 are repeated.

45. On the basis of the case pleaded by AET against Willis, the said breaches caused or contributed to AET suffering the loss and damage.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 of 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 for the Second Cross-Defendant

Date of signature


7/9/2018

AFFIDAVIT VERIFYING

Name Greg Vlahos
 Address Level 16, 123 Pitt Street, Sydney, NSW 2000
 Occupation Accountant
 Date 7 September 2018

I say on oath:


1. I am a director of Willis Australia Limited and am authorised to verify this defence on its behalf.
2. I believe that the allegations of fact contained in the defence are true.
3. I believe that the allegations of fact that are denied in the defence are untrue.
4. After reasonable inquiry, I do not know whether or not the allegations of fact that are not admitted in the defence are true.

SWORN at Sydney
 Signature of deponent 
 Name of witness Katherine J. Simmons
 Address of witness 33 Wolseley Rd, Mosman NSW 2088
 Capacity of witness Solicitor

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

1. I saw the face of the deponent.
2. I have known the deponent for at least 12 months OR I have confirmed the deponent's identity using an identification document:

Driver Licence No 2499E2, NSW
 Identification document relied on (may be original or certified copy)¹

Signature of witness: 

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

¹ 'Identification documents' include current driver licence, proof of age card, Medicare card, credit card, Centrelink pension card, Veterans Affairs entitlement card, student identity card, citizenship certificate, birth certificate, passport or see Oaths Regulation 2011 or JP Ruling 003 - Confirming identity for NSW statutory declarations and affidavits, footnote 3.

FURTHER DETAILS ABOUT FILING PARTY**Filing party****Second Cross-Defendant**

Name	Willis Australia Limited
Address	C/- Minter Ellison, Governor Macquarie Tower, Level 40, 1 Farrer Place, Sydney NSW 2000
Frequent user identifier	246

Legal representative for filing party

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