

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: QUD242/2021
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v
GENERAL COMMERCIAL GROUP PTY LTD & ORS
Registry: QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 22/07/2021 4:09:43 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

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**CONCISE STATEMENT**

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: QUEENSLAND
DIVISION: GENERAL

No. QUD of 2024★

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

GENERAL COMMERCIAL GROUP PTY LTD (ACN 134 168 540) and others

Respondents

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM**Introduction**

1. In this concise statement, Corporations Act means the *Corporations Act 2001* (Cth), Credit Act means the *National Consumer Credit Protection Act 2009* (Cth), Credit Regs means the *National Consumer Credit Protection Regulation 2009* (Cth), and Federal Court Act means the *Federal Court of Australia Act 1976* (Cth).
2. This case concerns serious and repeated breaches of statutory obligations to cooperate with the Australian Financial Complaints Authority (**AFCA**) by entities holding an Australian Credit Licence (**ACL**) and their officers.

Parties

3. Between 22 August 2018 and 12 November 2020 (**Relevant Period**), the first respondent, General Commercial Group Pty Ltd, formerly Urban Commercial Group Pty Ltd (**Urban**) operated a business as a credit assistance provider and the second respondent, Eden Capital (Australia) Pty Ltd (**Eden**) operated a business as a credit provider. At all times during the Relevant Period Urban and Eden each held an ACL, and were members of the AFCA external dispute resolution scheme (**AFCA Scheme**).
4. During the Relevant Period until early January 2020, the third respondent, Dale Heremaia (**Dale Heremaia**), was the sole director and shareholder of Urban. At all times during the Relevant Period Dale Heremaia was employed full-time by Urban and was the responsible manager for Urban's ACL until 4 August 2020. Dale Heremaia was occasionally employed as lending manager of Eden during the Relevant Period. During the Relevant Period, Dale Heremaia used the false names David Fletcher and Josh Pines in written correspondence and during telephone calls.
5. During the entirety of the Relevant Period, the fourth respondent, Benjamin Heremaia (**Benjamin Heremaia**) was employed full-time by Eden and was its sole director. During the Relevant Period until early January 2020, Benjamin Heremaia was the sole shareholder of Eden. During the Relevant Period from 14 September 2020 Benjamin Heremaia was a responsible manager of Eden. During the Relevant Period, Benjamin Heremaia used the false names, James Harder and Craig Wintle in written correspondence and during telephone calls.
6. From around January 2020, both Urban and Eden have been wholly owned by Miravo Pty Ltd (**Miravo**). During the Relevant Period from January 2020, Benjamin Heremaia was the sole director and shareholder of Miravo. Miravo did not carry out any business in its own right and operated as the head company of a tax consolidated group which included Urban and Eden.

Filed on behalf of the Australian Securities and Investments Commission, Applicant

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Complaints to AFCA

7. At all material times it was a requirement under section 47(1)(i) of the Credit Act that a person holding an ACL (**licensee**) be a member of the AFCA Scheme, an external dispute resolution scheme that is available free of charge to consumers; is required to resolve complaints in a way that is fair, efficient, timely and independent; and whose determinations are binding on members but not on consumers. Under the rules of the AFCA Scheme a licensee must not begin legal proceedings against a complainant while AFCA is considering their complaint.
8. These proceedings relate to complaints made by consumers to AFCA about the provision of credit assistance by Urban and credit by Eden to consumers who were seeking to purchase real property. The complaints alleged that Urban recommended that the consumers apply to Eden to obtain a personal loan and that they use the proceeds of that loan to demonstrate that they had a deposit so as to be able to secure a home loan from another lender. The consumers were not given access to the loan proceeds but were required to make repayments. Urban charged a consultation fee of approximately \$990 and Eden charged a "risk fee" of approximately 16% of the amount of the personal loan (in this case, \$9,791 and \$7,509), and these fees were deducted from the loan proceeds. Interest was charged by Eden on the personal loan, initially at 8.99% (for 26 weeks) and then increasing to 19.99% pa. The consumers did not secure home loans from another lender and never obtained access to the proceeds of the loans from Eden.
9. During the Relevant Period, the respondents engaged in disruptive, aggressive and uncooperative behaviour toward AFCA in respect of the complaints filed by consumers, with the intent of disrupting AFCA's complaints handling and investigation processes and undermining the effectiveness, efficiency and fundamental principles of the AFCA Scheme. Those consumer complaints are set out below.

Ashton Eden Complaint (613517)

10. On or around 8 January 2019, a complaint was filed with AFCA by Michael and Renee Ashton (the **Ashtons**) about Eden (**Ashton Eden Complaint**).
11. On 21 February 2019, 7 March 2019 and 20 June 2019, AFCA requested documents and information from Eden in relation to the Ashton Eden Complaint. Eden did not provide the documents and information requested by AFCA. Rather, by letters of 1 March 2019, 29 March 2019 and 3 July 2019, Eden refused to provide the requested documents and information and made a complaint with AFCA (Complaint 647787) about the caseworker handling the Ashton Eden Complaint. Further, by a telephone call of 15 March 2019, a representative of Eden refused to provide the requested documents and was verbally abusive to an AFCA staff member.
12. Between 25 and 29 July 2019 Eden and the Ashtons reached an agreement to resolve the complaint, which included an agreement by Eden to close the Ashtons account and waive any remaining balance (**Ashton Eden Settlement Agreement**). The Ashton Eden Complaint was subsequently closed by AFCA.

Ashton Urban Complaint (673708)

13. On or around 11 October 2019, a complaint was filed with AFCA by the Ashtons about Urban (**Ashton Urban Complaint**).
14. By an email to AFCA of 4 November 2019, Urban claimed that the Ashton Urban Complaint had been resolved in reliance upon the Ashton Eden Settlement Agreement notwithstanding that it was not a party to the Ashton Eden Settlement Agreement. By an email of 15 November 2019, Urban threatened the Ashtons that it would commence legal proceedings against them if they did not withdraw the Ashton Urban Complaint by 22 November 2019.
15. On 31 December 2019, 14 January 2020, 11 February 2020 and 17 February 2020, AFCA requested documents and information from Urban in relation to the Ashton Urban Complaint. Urban did not provide the documents and information requested by AFCA. Rather, by correspondence of 13 January 2020, 20 January 2020, 12 February 2020, 17 February 2020, 21 February 2020 and 25 February 2020, Urban

refused to provide the requested documents and information, including using aggressive and insulting language to AFCA staff.

16. On or around 25 September 2019 the Ashton Urban Complaint was included in a new AFCA systemic issue case bearing file number 669414 to investigate possible serious contraventions arising from the complaint (**Urban Serious Contraventions Investigation**). By a letter of 28 April 2020, the Team Manager of AFCA's Systemic Issues team informed Urban about the Urban Serious Contraventions Investigation and requested documents relating to the Ashton Urban Complaint and the Webby and Pokai Urban Complaint (discussed below). Urban did not provide the documents. Rather, on 25 May 2020, Urban refused to provide the documents, used insulting language, and threatened to commence legal proceedings against the Team Manager personally.
17. On 25 May 2020, AFCA issued a recommendation in relation to the Ashton Urban Complaint that Urban pay to the Ashtons the amount of \$10,737.71 (**Ashton Recommendation**). The Ashtons accepted the Ashton Recommendation on that same day.
18. On 1 June 2020, Urban commenced a minor civil dispute in the Queensland Civil and Administrative Tribunal (**QCAT**) against the Team Manager of Systemic Issues personally seeking damages alleged to have occurred as a consequence of the Urban Serious Contraventions Investigation (**AFCA staff member QCAT Proceedings**). By a notice of withdrawal of application received by QCAT on 4 November 2020, the AFCA staff member QCAT Proceedings were withdrawn.
19. On 3 June 2020, Miravo commenced a minor civil dispute in QCAT against the Ashtons seeking damages alleged to have occurred as a consequence of the Ashton Eden Complaint and the Ashton Urban Complaint (**Ashton QCAT Proceedings**). In commencing the Ashton QCAT Proceedings, Miravo was acting as the agent of Urban and Eden. By letters dated 15 June 2020, AFCA informed Urban and Eden that the Ashton QCAT Proceedings were contrary to rule A.7 of the AFCA Rules and should be withdrawn. By emails of 16 June 2020, Urban and Eden denied involvement in the Ashton QCAT Proceedings. On 4 September 2020, the Ashton QCAT Proceedings were dismissed.
20. On 23 June 2020, Eden sent an email to an AFCA staff member within the Support and Allocation team, in response to the Ashton Recommendation. The email stated that the Ashton Recommendation should be withdrawn and impliedly threatened to commence legal proceedings against that AFCA staff member personally.
21. On 31 July 2020, AFCA issued a determination in relation to the Ashton Urban Complaint that Urban pay to the Ashtons the amount of \$11,492.71 (**Ashton Determination**). The Ashtons accepted the Ashton Determination on that same day. As at the date of the commencement of these proceedings, the Ashton Determination has not been paid.

Webby and Pokai Eden Complaint (626243)

22. On or around 22 August 2018, a complaint was filed with the Credit and Investments Ombudsman by Aroha Webby and Curtis Pokai (**Webby and Pokai**) about Eden. The complaint was subsequently transferred to AFCA in around December 2018 (**Webby and Pokai Eden Complaint**).
23. On 12 December 2018, 9 January 2019 and 11 April 2019, AFCA requested documents and information from Eden in relation to the Webby and Pokai Eden Complaint. Eden did not provide most of the documents and information requested by AFCA. Rather, by letters of 17 December 2018 and 15 January 2019, Eden refused to provide the requested documents and information. By a letter of 17 April 2019, Eden provided some but not all of the requested documents. On 27 May 2019, AFCA made a further request for documents from Eden. On 30 May 2019, Eden refused to provide those documents.
24. On 4 September 2019, AFCA issued a recommendation in relation to the Webby and Pokai Eden Complaint that Eden pay to Webby and Pokai the amount of \$2,097.28 plus any other repayments made since 31 July 2018. By an email of 4 September 2019, Eden stated that it did not accept the recommendation, used insulting language about the AFCA staff member and threatened to refer the matter to their solicitor and the Minister. By a telephone call of 23 September 2019, Benjamin Heremaia, acting as a representative of Eden, was verbally abusive to an AFCA staff member. By an email dated

23 September 2019, Eden threatened to “withdraw from AFCA’s process” and stated that it could “...terminate our membership to AFCA at any time”.

25. On 17 January 2020, AFCA issued a determination in relation to the Webby and Pokai Eden Complaint that Eden pay to Webby and Pokai the amount of \$2,097.28 plus any other repayments made since 31 July 2018 (**Webby and Pokai Determination**).
26. On 6 February 2020, 27 February 2020, 4 March 2020 and 11 March 2020, AFCA requested documents and information from Eden concerning payment of the Webby and Pokai Determination. By an email of 4 March 2020 and a telephone call of 12 March 2020, Eden refused to provide the requested documents.
27. On or around 1 April 2020, the Webby and Pokai Eden Complaint was included in a new AFCA systemic issue case bearing file number 658459 to investigate possible serious contraventions arising from the Webby and Pokai Eden Complaint (amongst others) (**Eden Serious Contraventions Investigation**). The AFCA staff member responsible for investigating the Eden Serious Contraventions Investigation was the same AFCA staff member who was responsible for investigating the Urban Serious Contraventions Investigation. On 1 April 2020, AFCA wrote to Eden advising of the Eden Serious Contraventions Investigation.
28. By way of letter dated 30 April 2020, Eden wrote to the AFCA staff member investigating the Eden Serious Contraventions Investigation describing the staff member as “being hypocritical and in breach of AFCA’s guidelines” and “an ex-claims adjuster with no relevant lending experience”, stating that “there is no limit to how many times a member may challenge AFCA’s jurisdiction as there is no limit to the number of complaints a member may face” and “how Eden may or may not comply with [‘its legal and licensee requirement to be a member of the AFCA scheme] when not a member of AFCA is none of your business”.
29. On 6 May 2020, Ms Webby advised that she had received payment of the Webby and Pokai Determination.

Webby and Pokai Urban Complaint (627350)

30. On or around 13 March 2019, a complaint was filed with AFCA by Webby and Pokai about Urban (**Webby and Pokai Urban Complaint**). On 6 June 2019, Urban made a complaint about the AFCA case worker handling the complaint (Complaint 649422). The complaint described the AFCA case worker as, a “white, privileged male”, arrogant, patronising, incompetent, a “rancid individual” and a “wannabe intellectual”. As a consequence, the Webby and Pokai Urban Complaint was assigned to another AFCA case worker.
31. On 9 July 2019, 17 July 2019 and 23 July 2019 AFCA requested documents and information from Urban in relation to the Webby and Pokai Urban Complaint. Urban did not provide the documents and information requested by AFCA. Rather, by correspondence of 19 July 2019 and 23 July 2019, Urban refused to provide the requested documents and information.

B. THE RELIEF SOUGHT FROM THE COURT

32. The applicant seeks the relief set out in the Originating Application.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

33. By section 47(1)(m) of the Credit Act, a licensee must comply with any other obligations that are prescribed by the Credit Regulations. By section 11A of the Credit Regulations, from 6 April 2019 a licensee must take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which the licensee is a party. The matters set out in paragraphs 10 to 31 above amount to contraventions of section 47(1)(m) by the failure to take reasonable steps to cooperate with AFCA in resolving the respective complaints:

- (a) by Urban and Eden by failing to provide reasonable assistance to AFCA, including by engaging in disruptive, aggressive and uncooperative behaviour toward AFCA, failing to provide information

and documents reasonably sought by AFCA, and commencing the Ashton QCAT Proceedings;
and

- (b) by Urban by wrongly attempting to rely on the Ashton Eden Settlement Agreement, threatening AFCA staff personally with legal action, commencing the AFCA staff member QCAT Proceedings and failing to give effect to the Ashton determination.

34. By section 47(1)(a) of the Credit Act, a licensee must do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly. The matters set out in paragraph 14 and 19 above amount to contraventions of section 47(1)(a):

- (a) by Urban and Eden, in commencing the Ashton Proceeding through their agent Miravo; and
- (b) by Urban, in wrongly attempting to rely on the Ashton Eden Settlement Agreement and threatening the Ashtons with legal proceedings if they did not withdraw their complaint.

35. Dale Heremaia was involved (within the meaning of section 5(1) of the Credit Act), in the contraventions of the Credit Act by Urban during the Relevant Period because he was the sole director for most of that period, managed the business, was responsible for the day to day significant decisions, was the responsible manager for the ACL, and exercised control over the systems and processes of the business activities of Urban

36. Benjamin Heremaia was involved (within the meaning of section 5(1) of the Credit Act), in the contraventions of the Credit Act by Eden during the Relevant Period because he was the sole director, managed the business, was responsible for the day to day significant decisions, was the responsible manager for the ACL for part of that period, and exercised control over the systems and processes of the business activities of Eden.

37. By section 169 of the Credit Act, a person who is involved in a contravention of a civil penalty provision is taken to have contravened the provision. Accordingly, by reason of their involvement in the respective contraventions by Urban and Eden of sections 47(1)(m) and 47(1)(a) of the Credit Act, Dale Heremaia and Benjamin Heremaia are taken to have contravened those provisions. By section 47(4) of the Credit Act, a contravention of sections 47(1)(m) or 47(1)(a) occurring after 13 March 2019 may attract a civil penalty.

38. By section 166 of the Credit Act, the Court may make declarations that a person has contravened a civil penalty provision, and by section 167 of the Credit Act, the Court may order a person to pay a pecuniary penalty for contravening a civil penalty provision. Accordingly, the Court may make declarations and order payment of a penalty in relation to the contraventions by the respondents of the Credit Act set out above.

39. By section 177(1) of the Credit Act, the Court may grant injunctions on such terms as it considers appropriate in relation to contraventions of the Credit Act. Accordingly, the Court may restrain the respondents from further contravention of those provisions of the Credit Act. The Court may also restrain, for a period it sees fit, Urban and Eden from engaging in credit activity, and Dale Heremaia and Benjamin Heremaia from carrying on any business engaging in credit activity or being involved in the carrying on by another person of any business engaging in credit activity. Further, in respect to Urban, the failure to pay the Ashton Determination is a contravention of section 47(1)(m), and therefore the Court may direct payment of that amount. By section 51A of the Federal Court Act, the Court may order interest to be paid on that amount.

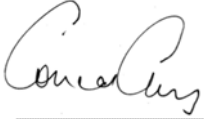
D. THE ALLEGED HARM SUFFERED

40. By Urbans' failure to pay the Ashton Determination, direct harm was caused to the Ashtons by the denial of those monies. ASIC seeks orders in respect to that harm. The Ashtons suffered further harm by the requirement to respond to the Ashton QCAT Proceedings. Further, by the respondents' conduct in failing to provide reasonable cooperation to AFCA in resolving the complaints pleaded above, harm was caused to AFCA through the imposition of unnecessary additional administrative burden. ASIC does not seek orders in respect to that further harm.

Certificate of lawyer

I, Conrad Gray, certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the statement.

Date: 22 July 2021



Signed by Conrad Gray
Lawyer for the Applicant

This Concise Statement was prepared by Mr S.E. Seefeld of Counsel