

# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Darranda Pty Ltd (Liability) [2024] FCA 1015

File number(s): VID 181 of 2022

Judgment of: **HESPE J**

Date of judgment: 4 September 2024

Catchwords: **CONSUMER LAW** – consumer credit – whether customer contracts are consumer leases or credit contracts for the purposes of the National Credit Code (Sch 1 to the *National Consumer Credit Protection Act 2009* (Cth)) – whether Australian Credit Licence holder failed to do all things necessary to ensure that its licensed credit activities were engaged in efficiently, honestly and fairly – whether master franchisor “involved in” contraventions

Legislation: *Evidence Act 1995* (Cth), s 140  
*Federal Court of Australia Act 1976* (Cth), s 21  
*National Consumer Credit Protection Act 2009* (Cth) ss 3, 5, 47, 166, 169, Sch 1 (*National Credit Code*) ss 3, 4, 5, 9, 11, 14, 17, 23, 24, 32A, 169, 170, 171, 172, 173, 174, 174A

Cases cited: *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342; (2015) 235 FCR 181  
*Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* [2020] FCA 208; (2020) 275 FCR 57  
*Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69  
*Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* [2012] FCA 414  
*Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1422  
*Australian Securities and Investments Commission v Ferratum Australia Pty Limited (in liq)* [2023] FCA 1043  
*Australian Securities and Investments Commission v GetSwift* [2021] FCA 1384  
*Australian Securities and Investments Commission v Membo Finance Pty Ltd (No 2)* [2023] FCA 126

*Australian Securities and Investments Commission v National Australia Bank Ltd* [2022] FCA 1324  
*Australian Securities and Investments Commission v Rent 2 Own Cars Pty Ltd* [2020] FCA 1312  
*Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515  
*Cochrane v Moore* (1890) 25 QBD 57  
*Commissioner of State Revenue v Politis* [2004] VSC 126  
*Commissioner of Taxation v Carter* [2022] HCA 10; (2022) 274 CLR 304  
*Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* [2000] HCA 35; (2000) 201 CLR 520  
*Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 165  
*Earl of Egmont v Smith* (1877) 6 Ch D 469  
*Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 61; (2002) 117 FCR 588  
*Flinn v White* [1950] SASR 195  
*Hamilton v Whitehead* [1988] HCA 65; (1988) 166 CLR 121  
*Hill v Wilson* (1873) LR 8 Ch App 888  
*Irons v Smallpiece* (1819) 106 ER 467  
*Make It Mine Finance Pty Ltd* [2015] FCA 393; (2015) 238 FCR 562  
*Maxwell v Maxwell* [2022] NSWSC 1028  
*Nolan v Nolan* [2003] VSC 121; (2003) 10 VR 626  
*Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27  
*Rowland v Stevenson* [2005] NSWSC 325  
*Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53  
*Scammell v Ouston* [1941] AC 251  
*Scott v Bridge* [2020] EWHC 3116 (Ch)  
*Tesco Supermarkets Ltd v Natrass* [1972] AC 153  
*Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661

Division: General Division  
Registry: Victoria  
National Practice Area: Commercial and Corporations

Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	296
Date of last submission/s:	26 March 2024
Date of hearing:	5–14 February 2024, 18 March 2024
Counsel for the Applicant	Ms F McLeod SC, Ms L Papaelia and Ms A Ballard
Solicitors for the Applicant	Australian Securities and Investments Commission (in house)
Counsel for the Respondents	Mr B Quinn KC and Mr A Middleton
Solicitors for the Respondents	Strongman & Crouch

# ORDERS

VID 181 of 2022

**BETWEEN:**            **AUSTRALIAN SECURITIES AND INVESTMENTS  
COMMISSION**  
Applicant

**AND:**                 **DARRANDA PTY LTD (ACN 005 663 561)**  
First Respondent

**RENT4KEEPS (AUST) PTY LTD (ACN 006 507 811)**  
Second Respondent

**ORDER MADE BY: HESPE J**

**DATE OF ORDER: 4 SEPTEMBER 2024**

## THE COURT ORDERS THAT:

1. Within 14 days, the parties file an agreed minute or, in the absence of agreement, competing minutes of order, in the light of these reasons.
2. The matter be listed for a case management hearing, in order to set a timetable for a hearing on the question of the appropriate final orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

## REASONS FOR JUDGMENT

### HESPE J:

#### INTRODUCTION

1 At heart, these proceedings concern the characterisation of 516 contracts (**516 Relevant Contracts**) entered into between the First Respondent (**Darranda**) and its customers over the period 1 April 2019 to 30 June 2019 (**relevant period**). The essential issue is whether those contracts are consumer leases or credit contracts for the purposes of the *National Credit Code*. The Australian Securities and Investments Commission (**ASIC**) contends that the contracts are credit contracts and therefore subject to an annual cost cap of 48% as well as certain disclosure requirements. Darranda contends that the contracts are consumer leases and therefore the cap and the disclosure requirements do not apply.

2 A secondary issue concerns the manner in which Darranda conducted its business. ASIC contends that irrespective of whether Darranda's customer contracts are consumer leases or credit contracts, Darranda failed to do the things necessary to ensure that its credit activities authorised by its Australian Credit Licences were engaged in efficiently, honestly and fairly.

3 A further issue arises if Darranda is found to have contravened a civil penalty provision. That issue is whether **Rent4Keeps (Aust) Pty Ltd**, the master franchisor, was involved in any of Darranda's contraventions of a civil penalty provision for the purposes of s 169 of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**).

#### STATUTORY CONTEXT CONCERNING CONSUMER LEASES AND CREDIT CONTRACTS

4 The Code is contained in sch 1 to the Credit Act and given effect by s 3 of that Act. The Court was provided with a version of the Code that the parties agreed was applicable during the relevant period.

5 Section 5(1) of the Code provides:

##### **Provision of credit to which this Code applies**

(1) This Code applies to the provision of credit (and to the credit contract and related matters) if when the credit contract is entered into or (in the case of precontractual obligations) is proposed to be entered into:

(a) the debtor is a natural person or a strata corporation; and

- (b) the credit is provided or intended to be provided wholly or predominantly:
  - (i) for personal, domestic or household purposes; or
  - (ii) to purchase, renovate or improve residential property for investment purposes; or
  - (iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and
- (c) a charge is or may be made for providing the credit; and
- (d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

6 Section 4 of the Code provides:

**Meaning of *credit contract***

For the purposes of this Code, a *credit contract* is a contract under which credit is or may be provided, being the provision of credit to which this Code applies.

7 Section 3(1) of the Code provides:

- (1) For the purposes of this Code, *credit* is provided if under a contract:
  - (a) payment of a debt owed by one person (the *debtor*) to another (the *credit provider*) is deferred; or
  - (b) one person (the *debtor*) incurs a deferred debt to another (the *credit provider*).

8 Section 9 of the Code provides:

**Goods leases with option to purchase to be regarded as sale by instalments**

- (1) For the purposes of this Code, a contract for the hire of goods under which the hirer has a right or obligation to purchase the goods, is to be regarded as a sale of the goods by instalments if the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so) exceeds the cash price of the goods.

Note: A contract includes a series of contracts, or contracts and arrangements (see Part 13).

- (2) A debt is to be regarded as having been incurred, and credit provided, in such circumstances.
- (3) Accordingly, if because of subsection 5(1) the contract is a credit contract, this Code (including Part 6) applies as if the contract had always been a sale of goods by instalments, and for that purpose:
  - (a) the amounts payable under the contract are the instalments; and
  - (b) the credit provider is the person who is to receive those payments; and

- (c) the debtor is the person who is to make those payments; and
  - (d) the property of the supplier in the goods passes under the contract to the person to whom the goods are hired on delivery of the goods or the making of the contract, whichever occurs last; and
  - (e) the charge for providing the credit is the amount by which the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so), exceeds the cash price of the goods; and
  - (f) a mortgage containing the terms and conditions set out in the regulations is taken to have been entered into in writing between the person to whom the goods are hired under the contract and the supplier as security for payment to the supplier of the amount payable to the supplier by the person to whom the goods are hired under the contract; and
  - (g) any provision in the contract for hiring by virtue of which the supplier is empowered to take possession, or dispose, of the goods to which the contract relates is void.
- (4) For the purposes of this section, the amount payable under the contract includes any agreed or residual value of the goods at the end of the hire period or on termination of the contract, but does not include the following amounts:
- (a) any amount payable in respect of services that are incidental to the hire of goods under the contract;
  - (b) any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.

Note: Part 11 (Consumer leases) applies to the contracts specified in that Part for the hire of goods under which the hirer does not have a right or obligation to purchase the goods.

9 Section 14 of the Code provides:

**Credit contract to be in form of written contract document**

- (1) A credit contract must be in the form of:
  - (a) a written contract document signed by the debtor and the credit provider; or
  - (b) a written contract document signed by the credit provider and constituting an offer to the debtor that is accepted by the debtor in accordance with the terms of the offer.
- (2) An offer may be accepted by the debtor for the purposes of paragraph (1)(b):
  - (a) by the debtor or a person authorised by the debtor accessing or drawing down credit to incur a liability; or
  - (b) by any other act of the debtor or of any such authorised person that satisfies the conditions of the offer and constitutes an acceptance of the offer at law.

- (3) The credit provider, or a person associated with the credit provider, may not be authorised by the debtor for the purposes of subsection (2). However, this subsection does not prevent the debtor authorising the credit provider to debit the debtor's account.
- (4) In the case of a contract document consisting of more than one document, it is sufficient compliance with this section if one of the documents is duly signed and the other documents are referred to in the signed document.

10 Section 17 of the Code relevantly provides:

**Matters that must be in contract document**

- (1) The contract document must contain the following matters.

...

*Amount of credit*

- (3) The contract document must contain:
  - (a) if the amount of credit to be provided is ascertainable:
    - (i) that amount; and
    - (ii) the persons, bodies or agents (including the credit provider) to whom it is to be paid and the amounts payable to each of them, but only if both the person, body or agent and the amount are ascertainable; and
  - (b) if the amount of the credit to be provided is not ascertainable—the maximum amount of credit agreed to be provided, or the credit limit under the contract, if any; and
  - (c) if the credit is provided by the supplier for a sale of land or goods by instalments—a description of the land and its cash price or of the goods and their cash price.

The requirement under paragraph (c) is in addition to, and does not limit, the requirement under paragraph (a) or (b).

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Annual percentage rate or rates*

- (4) In the case of a credit contract other than a small amount credit contract, the contract document must contain:
  - (a) the annual percentage rate or rates under the contract; and
  - (b) if there is more than one rate, how each rate applies; and
  - (c) if an annual percentage rate under the contract is determined by referring to a reference rate:
    - (i) the name of the rate or a description of it; and
    - (ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or



rates; and

- (iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and
- (iv) the current annual percentage rate or rates.

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Calculation of interest charges*

- (5) In the case of a credit contract other than a small amount credit contract, the contract document must contain the method of calculation of the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract.

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

*Total amount of interest charges payable*

- (6) In the case of a credit contract other than a small amount credit contract, the contract document must contain the total amount of interest charges payable under the contract, if ascertainable (but only if the contract would, on the assumptions under sections 180 and 182, be paid out within 7 years of the date on which credit is first provided under the contract).

Note: A penalty may be imposed for contravention of a key requirement in this subsection: see Part 6.

...

11 Section 23(1) of the Code provides:

**Prohibited monetary obligations—general**

- (1) A credit contract (other than a small amount credit contract) must not impose a monetary liability on the debtor:
  - (a) in respect of a credit fee or charge prohibited by this Code; or
  - (b) in respect of an amount of a fee or charge exceeding the amount that may be charged consistently with this Code; or
  - (c) in respect of an interest charge under the contract exceeding the amount that may be charged consistently with this Code.

Note 1: A penalty may be imposed for contravention of a key requirement in this subsection, but only at the time the credit contract is entered into: see Part 6.

Note 2: This subsection also applies to liabilities imposed contrary to section 133BI of the National Credit Act: see subsection (7) of that section.

12 Section 24(1) of the Code relevantly provides:

**Offences related to prohibited monetary obligations—credit providers**

- (1) A credit provider must not:

- (a) enter into a credit contract on terms imposing a monetary liability prohibited by subsection 23(1);...

13 Section 32A(1) of the Code provides:

**Prohibitions relating to credit contracts if the annual cost rate exceeds 48%**

*Entering into a credit contract*

- (1) A credit provider must not enter into a credit contract if the annual cost rate of the contract exceeds 48%.

Criminal penalty: 50 penalty units.

14 Part 11 of the Code applies to consumer leases.

15 Section 169 of the Code provides:

**Meaning of *consumer lease***

For the purposes of this Code, a *consumer lease* is a contract for the hire of goods by a natural person or strata corporation under which that person or corporation does not have a right or obligation to purchase the goods.

16 Section 170(1) of the Code provides:

**Consumer leases to which this Part applies**

- (1) This Part applies to a consumer lease if, when the lease is entered into:
  - (a) the goods are hired wholly or predominantly for personal, domestic or household purposes; and
  - (b) a charge is or may be made for hiring the goods and the charge together with any other amount payable under the consumer lease exceeds the cash price of the goods; and
  - (c) the lessor hires the goods in the course of a business of hiring goods carried on in this jurisdiction or as part of or incidentally to any other business of the lessor carried on in this jurisdiction.

17 Section 171(1) of the Code provides:

*Short term or indefinite leases*

- (1) This Part does not apply to a consumer lease for a fixed period of 4 months or less or for an indefinite period.

18 Section 172(1) of the Code provides:

**Presumptions relating to application of this Part**

- (1) In any proceedings (whether brought under this Code or not) in which a party claims that a lease is a consumer lease to which this Part applies, it is presumed to be such unless the contrary is established.

19 Section 173(1) and (1A) of the Code provides:

**Form of consumer lease**

- (1) A consumer lease must be in the form of a written lease document:
  - (a) signed by the lessor and the lessee; and
  - (b) containing the information required by this Division.
- (1A) Subject to subsection (2), a consumer lease may consist of one or more separate documents.

20 Section 174 of the Code provides:

**Disclosures in consumer leases**

- (1) A consumer lease must contain the following matters, if ascertainable:
  - (a) a description or identification of the goods hired under the lease;
  - (b) the amount or value of any consideration to be paid or provided by the lessee before the delivery of those goods;
  - (c) the amount of any stamp duty or other government charge (other than on receipts or withdrawals) payable by the lessee in respect of the lease;
  - (d) the amount of any other charges not included in the rental payable under the lease, and a description of those charges;
  - (e) the amount of each rental payment to be made by the lessee under the lease, the date on which the first rental payment is due and either the dates on which subsequent rental payments are due or the interval between rental payments;
  - (f) the number of rental payments to be made by the lessee, and the total amount of rental payable under the lease;
  - (g) a statement of the conditions on which the lessee may terminate the lease;
  - (h) a statement of the liabilities (if any) of the lessee on termination of the lease.
- (2) A consumer lease is taken to comply with this section despite any omission or other error if the court is satisfied that the omission or error is not of such a nature as to mislead the lessee to his or her disadvantage.
- (3) A lessor must not enter into a consumer lease that contravenes a requirement of this section.  
Civil penalty: 5,000 penalty units.
- (4) A lessor commits an offence of strict liability if the lessor enters into a consumer lease that contravenes a requirement of this section.  
Criminal penalty: 100 penalty units.

21 It was not in dispute in this proceeding that each of the 516 Relevant Contracts was a contract for the hire of goods. Nor was it in dispute that each of the customers under each of the 516 Relevant Contracts was a natural person nor that each of s 170(1)(a)-(c) were otherwise satisfied.

22 In summary, the distinction between a credit contract and a consumer lease in the context of this proceeding relevantly depends on whether the hirer has a right or obligation to purchase the goods.

## **FACTS AND EVIDENCE**

### **Darranda's witnesses**

23 Darranda adduced evidence from five witnesses:

- (a) Mr Payne (the founder and one of the directors of Darranda and Rent4Keeps (Aust)) who gave evidence about the background of Darranda's business;
- (b) Mr Boucher (Chief Executive Officer of Rent4Keeps (Aust)) who gave evidence of the background to Darranda's Australian Credit Licence and the background to the form of its customer contracts;
- (c) Mr Tannous (Group Operations Manager of Darranda) who gave evidence about the customer approvals process;
- (d) Mr Chikyala (Chief Technology Officer of Rent4Keeps (Aust)) who gave evidence about Darranda's technology systems and training processes;
- (e) Ms Wallace (Team Leader of Centralised Leads Officers at Darranda) who gave evidence about her experience of the training she received and the application process for customers.

24 Each of Messrs Payne, Boucher, Tannous and Chikyala, and Ms Wallace, were cross-examined.

### **Market context of consumer leases**

25 Under a consumer lease, consumers make rental payments to the lessor (usually fortnightly) over a fixed term. The fortnightly payments tend to be relatively low but over the term of the lease, the consumer generally pays significantly more than the retail price of the goods.

26 The subject of consumer leases tends to be household appliances including whitegoods. Oftentimes these goods have no or little value at the end of the lease. Under a consumer lease

the consumer does not have a contractual right or obligation to purchase the goods at the end of the lease. Because the goods do not have a material residual value, there is a practical question as to what the lessor is to do with the goods at the end of the lease. ASIC recognised that, as a practical matter, most lessors allow the consumer to either retain the goods at the end of the contract or “gift” the goods to a third party nominated by the consumer. The notion of “gifting” became central to Darranda’s business model.

27 Consumer leases are appealing to those on lower incomes by giving such consumers access to household goods without the need to finance the entire payment up front. Many lessees are recipients of government benefits.

### **Background to Darranda’s business**

28 Darranda operates a franchise business under the name “Rent4Keeps” (**Rent4Keeps Business**), which rents personal use and household items (such as appliances and furniture) to customers.

29 Mr Payne founded the Rent4Keeps Business. Mr Payne has a background in accounting and had conducted a number of businesses including Dial-a-Dino’s master franchise, “Abra Kebab” and a mortgage broking business. He had no background in consumer credit or consumer leasing.

30 In around April 2011, he responded to a newspaper advertisement in relation to franchise opportunities for a business called “Rent the Roo”. Although Mr Payne did not become a franchisee of “Rent the Roo”, he saw promise in the business and decided to start his own business of what he described as “product rentals”.

31 In 2011, Mr Payne decided to commence his own business of consumer product rentals which he called Rent4Keeps. Mr Payne changed the name of a company he had previously incorporated to “Rent4Keeps (Aust) Pty Ltd”. That company became the master franchisor of the Rent4Keeps Business. Darranda, another pre-existing company owned by Mr Payne, became the master franchisee of the Rent4Keeps Business in Victoria.

32 In 2012, Rent4Keeps (Aust) granted State master franchises in each of Queensland, New South Wales and Western Australia. During the relevant period, Darranda operated the master franchise business in Victoria, South Australia, Tasmania and the Northern Territory.

33 Mr Payne described the Rent4Keeps Business in the following terms:

The Rent4Keeps business broadly involves renting out personal use goods (such as TVs, fridges, washing machines and furniture) to customers by way of a consumer lease agreement. I understand from my years of experience in operating the Rent4Keeps business that consumers who have difficulties buying products outright (or difficulties obtaining credit to buy products) seek out Rent4Keeps to rent the products they need, as they can lease the product by making regular lease payments. I have been told by many of Rent4Keeps' customers that without the consumer leases provided by Rent4Keeps, they would not be able to access the products they need.

Around 60% of Rent4Keeps' customers are repeat or referral customers. The other 40% (new customers) come through some of the marketing that Rent4Keeps does.

34 When he started the business, Mr Payne had no to little understanding of the regulatory framework within which consumer leases were provided or of the distinction between consumer leases and credit contracts.

35 In 2011, Mr Payne prepared a document he entitled an "Operations Manual" (**2011 Operations Manual**). The 2011 Operations Manual named the head office personnel and their responsibilities as:

**RENT4KEEPS Head Office Personnel**

Director - Vikki Payne

Manager - Kevin Payne

Administration - Alan Symons

State Operations Manager - Alan Symons

Accountant - Michael Dudley

Marketing - Kevin Payne

Public Relations - Kevin Payne

Training - Kevin Payne/Alan Symons

**Responsibilities**

- Support of R4K Franchisees
- Franchise System Development
- Group Product Sourcing
- Corporate Marketing
- Franchisee Training
- Franchisee Reporting & Payment
- Development of New Franchisee Territories
- Administration and Accounting

36 Notably, there was no compliance or regulatory officer with responsibility for regulatory compliance named in the 2011 Operations Manual.

37 The 2011 Operations Manual described the “R4K Services” as including:

At the end of the rental term we allow the customer to give the product, free of charge, to a person of their choosing

38 The advertising and marketing section of the 2011 Operations Manual recorded that “Rent4Keeps” has two meanings:

The Customer “Keeps” the product

More importantly, we “Keep” the Customer

39 An Australian Credit Licence Application was made on behalf of Darranda in April 2011. Darranda’s intended business was described as “lessor” and the credit activities that Darranda intended to engage in were described as relating to “other consumer leases”. The application included a representation that there is “a person(s) internal to the business who will be responsible for ongoing monitoring and reporting in relation to the applicant’s level of compliance and for maintaining the adequacy of the applicant’s compliance arrangements from the date of commencement of its credit licence”.

40 In January 2012, Darranda employed Mr Tannous, initially in a role focussed on promoting and launching new franchises. Mr Tannous had worked with Mr Payne in the hospitality industry. Mr Tannous was one of two Darranda employees — the other being Mr Symons. Mr Tannous’s role included training franchisees in how to market their businesses in shopping centres and assisting them with franchise related documentation. In early 2012, Mr Tannous prepared a document entitled “Sales Process” (later named “R4K Credit Process”) and another entitled “R4K Procedures for Debt Management”, both of which he revised over the 2012 and 2013 calendar years.

41 The December 2013 version of the Credit Process document describes the Rent4Keeps Business’s sales process from the receipt of new customer enquiries to assessing whether the customer satisfies an initial serviceability assessment process to proceeding to and processing an application. By 2013, the sales process included the following steps for completing the signing process:

- **Rental Agreement / Tax Invoice** - Details of the nominated person for the item the customer would like the goods gifted to be completed in section 3.

- **You must complete the Rental Agreement in full** i.e. First Name and Surname of the “GIFTEE” and then have the Box on the Right Hand side initialled by the applicant or Applicants in box 2 should a secondary applicant be on the Agreement.

THE FOLLOWING STATEMENT MUST BE VERBALLY DELIVERED TO THE RENTER IN THE FOLLOWING MANNER

- **“The items remain the property of R4K until the rental agreement is completed”.**
- **“At the end of the rental agreement - R4K will consider gifting the products to the person nominated in section 3 on the rental agreement”**

42 Rent4Keeps (Aust)’s Australian Credit Licence Annual Compliance Certificate dated 31 May 2012 included Mr James Allen in the list of “fit and proper people”. Mr Allen had responsibility for compliance related activities. He was not a legal practitioner nor did he have legal qualifications.

43 In late 2012, Mr Payne employed Mr Boucher and, in June 2013, Mr Chikyala. They assisted in the development of an in-house IT system. Mr Boucher worked on financial modelling, market research and, with Mr Allen, on matters related to regulatory compliance. Mr Chikyala was engaged to work on the Rent4Keeps Business’s IT system and its client relationship management software.

44 From about 2014, the Rent4Keeps Business’s franchise network ceased to rely upon written manuals and moved to computer-based systems and processes.

45 From 2014, Mr Tannous’s responsibilities transitioned to overseeing and managing the performance of existing franchisees and to assisting in the development of IT systems.

46 In January 2015, ASIC wrote to Mr Allen informing him of concerns it had arising from information it had received in respect of his past employment. Mr Boucher informed ASIC by email that having received a copy of the ASIC letter from Mr Allen, Rent4Keeps (Aust) had “terminated Mr Allen’s employment with immediate effect”. By 29 June 2015, Mr Allen had been reinstated as a compliance officer for Rent4Keeps (Aust). Mr Allen passed away in July 2019.

47 In about late 2018, Mr Tannous’s role expanded to include overseeing Darranda’s general operations. He performed this expanded role during the relevant period.



### **Darranda's business during the relevant period**

48 As master franchisor, Rent4Keeps (Aust) provides marketing, administration and systems support, including compliance related services, and training to its franchise network.

49 At a practical level, during the relevant period, representatives of the Rent4Keeps Business (whether they be franchisees, managers or employees of franchisees) operated on a mobile basis — there were no Rent4Keeps stores. Customer relationship management software (CRM) was installed on an iPad provided to these representatives. This software was maintained by Rent4Keeps (Aust). Customer applications were processed using the CRM. If the application was approved, the representative purchased the item from a retailer, attended the customer's premises for the rental agreement to be signed electronically on the iPad, and delivered the product to the customer.

50 Darranda used Centrepay to collect payments on many of its leases. Centrepay is a voluntary deduction service under which recipients of Centrelink payments can choose to have certain amounts deducted (including those payable under a lease of household goods) from their Centrelink payments prior to the recipient receiving their Centrelink payments. Recipients of Centrelink payments can opt out of a Centrepay deduction at any time.

### **History of terms and conditions of Darranda's rental agreements**

51 In 2011, Mr Payne engaged Frenkel Partners, a law firm which had performed work for him in the past, to prepare a standard form rental contract. The agreement was comprised of a tax invoice and a page of terms and conditions.

52 The proforma tax invoice included at item 3 a Renter Declaration. Item 3(d) of that Renter Declaration was in the following terms:

At the end of the Rental Term I hereby gift the item/s rented on behalf of Rent4Keeps to:

Name: \_\_\_\_\_

53 Clause 5 of the 2011 Rent4Keeps terms and conditions provided:

#### **5. Ownership and Interest**

5.1 You have a right to use the Products during the Term, but the Products remain the property of Rent4Keeps until the end of the Rental Agreement.

5.2 At this time, if you have met all the terms and conditions of the agreement then Rent4Keeps allows you to gift the item/s to a person of your choice on their behalf.

5.3 This is the person nominated in "Renter Declaration" subsection d) on the previous page.

54 By letter dated 15 February 2013, ASIC wrote to Ms Payne as director of Rent4Keeps (Aust) expressing concerns relating to the company and its rental business. ASIC noted that on the Rent4Keeps Business's website it was said that "You keep the product" and "[t]he product is yours to gift at the end of the term – to your partner, relative or anyone of your choosing". ASIC's letter went on to state:

Based on information contained in your Australian credit licence application, ASIC understands that the Company offers consumer lease facilities. As you are aware there are differences between *goods leases with an option to purchase* and *consumer leases*.

- *Goods leases with an option to purchase* – these include contracts for the hire or rental of goods where the consumer *has a right or obligation to purchase* the goods and the amount payable under the contract exceeds the cash price of the goods (i.e. where goods are effectively sold by instalments such as "rent to own" arrangements). These are deemed to be *credit contracts* in terms of section 9 of Schedule 1 to the Credit Act.
- *Consumer leases* – Contracts for the hire or rental of goods for a set period, where the consumer *does not have a right or obligation to purchase the goods* and the amount payable under the contract exceeds the cash price of the goods is defined in section 169 of Schedule 1 of the Credit Act.

The pre contractual and contractual disclosure obligations for consumer leases and credit contracts (i.e. goods lease) are different.

As the name of your company, website and business, Rent4Keeps, indicates that the consumer has a right to keep the goods, we ask that you clarify your business model and also demonstrate what information you are disclosing to consumers concerning their financial commitments and their rights and obligations in relation to ownership of the goods.

55 ASIC also expressed concerns relating to:

- (a) misleading statements in relation to the representation in the business name "Rent4Keeps" which may mislead or deceive a customer that they have a right to purchase "whereas in fact they may only have a right to determine to whom the goods may be gifted".
- (b) certain representations made which could have the potential to create an expectation by the consumer that the Rent4Keeps Business "rent[s] to everyone". Such a claim was inconsistent with a licensee's responsible lending obligations.

56 ASIC required a detailed explanation of the Rent4Keeps Business and customer contract terms.

57 Mr Payne instructed Holley Nethercote to respond to ASIC’s concerns. Mr Payne selected Holley Nethercote because, based on his inquiries, he had found out Holley Nethercote had performed services for ASIC and he wanted his business to be “ASIC-proof”.

58 By letter dated 8 March 2013, Holley Nethercote responded to ASIC’s letter, stating that “Rent4Keeps provides consumer leases only” and “does not provide credit under credit contracts or pursuant to sale of goods by instalments arrangements”. Holley Nethercote went on to say:

At the end of the rental term Rent4Keeps may, at its discretion, gift the goods which are the subject of the rental agreement to a person nominated by the lessee. There is no right or obligation for the hirer of the goods to purchase the goods at the end of the rental term.

59 Holley Nethercote noted that:

- (1) Several aspects of the “Operations Manual” were being updated as the Rent4Keeps Business was “in the process of introducing a new Customer Relationship Management (CRM) software system”. The CRM system was implemented to improve record keeping and in compliance particularly with respect to responsible lending obligations.
- (2) It had undertaken a review of the Rent4Keeps Business’s advertising material and changes were being made.

60 Holley Nethercote submitted that ““Rent4Keeps’ can have several meanings and, coupled with Rent4Keeps [sic] credit disclosure documents and rental agreement, consumers will not be misled by the Rent4Keeps name” and that the name “Rent4Keeps” was not misleading given “that the consumer keeps the benefit of the product, if they want, without the right or obligation to purchase”.

61 Holley Nethercote represented to ASIC that it had reviewed the Rent4Keeps Business’s rental agreement in light of new obligations that were imposed from 1 March 2013 by amendments made to the Credit Act.

62 A copy of what was said to be the Rent4Keeps Business’s current template Rental Agreement, as updated in February 2013, was attached to the Holley Nethercote response. That template included at Item 3(d) of the Renter Declaration the following:

At the end of the Rental Term, Rent4Keeps may, at its discretion, gift the Products to the following person nominated by me:

63 Clause 5 of the template Terms and Conditions provided:

5. Ownership and Interest

5.1 You have a right to use the Products during the Term, but the Products remain the property of Rent4Keeps until the end of the Rental Agreement.

5.2 At this time, if you have met all the terms and conditions of the Agreement then Rent4Keeps will gift the item/s to the person nominated by you in “Renter Declaration” subsection d) on the previous page.

64 By letter dated 27 June 2013, ASIC responded to Holley Nethercote expressing concerns about the form of the Rent4Keeps Business’s customer contract as follows:

After reviewing the template copies of the contracts you have supplied, we are of the view that the contracts on offer appear to be a sale of goods by instalment agreement, rather than a consumer lease.

You have indicated that the consumer may nominate who is to receive the goods at the end of the fixed term of the agreement. The name of this nominee appears to be inserted at clause 3d of the *‘Tax Invoice and Rental Agreement’* (the agreement).

Clause 3d states:

*‘At the end of the Rental Term, Rent4Keeps may, at its discretion, gift the Products to the following person nominated by me:’*

Our concern is that there appears to be nothing in the agreement stipulating who may be nominated to receive the goods at the end of the rental term.

In addition, clause 5 of the agreement says at 5.2

*‘At this time [end of the Rental Agreement], if you have met all the terms and conditions of the agreement then Rent4Keeps will gift the item/s to the person nominated by you in “Renter Declaration” subsection d) on the previous page.’*

In this clause, it is indicated that the company will gift the items to the nominated person. This is indicating the company’s intention to release the goods — with the discretionary component that was indicated in clause 3d, removed.

If the nominated person is the renter, and they are assured of ownership at the conclusion of the agreement then the contract would appear to give the renter a right or obligation to purchase the rented item.

65 ASIC thus expressed its concerns as:

- (1) There appears to be “nothing in the agreement stipulating who may be nominated to receive the goods at the end of the rental term”.
- (2) The wording of cl 5.2 “indicated that the company will gift the items to the nominated person” and this indicated “the company’s intention to release the goods — with the discretionary component that was indicated in clause 3d, removed”.

- (3) If the nominated giftee was the renter and they were assured of ownership at the conclusion of the agreement, then the contract appeared, in ASIC’s view, “to give the renter a right or obligation to purchase the rented item”.

66 Holley Nethercote responded to ASIC by letter dated 10 July 2013, representing that:

The ‘Tax Invoice and Rental Agreement’ that Rent4Keeps uses has been amended in response to ASIC’s observations and concerns (*the Amended Agreement*). The amendments make it clear that while the renter may nominate the person whom they wish to be given the rented goods (the Goods), Rent4Keeps at all times retains the discretion to gift the Goods or not. The renter does not have a right to retain the goods or gift the goods to another at the end of the lease term.

The Amended Agreement is attached at **Annexure A**. The amendments are as follows:

Clause 3d of the Renter Declaration now states:

*‘At the end of the Rental Term, Rent4Keeps may, at its discretion, gift the Products to a person nominated by me. That person cannot be myself. Rent4Keeps is not bound by my nomination. The person I nominate is \_\_\_\_\_.’*

Clause 5.2 of the Rent4Keeps Terms and Conditions now states:

*‘At this time [end of the Rental Agreement], if you have met all the terms and conditions of the agreement then Rent4Keeps may gift the item/s to the person nominated by you in “Renter Declaration” subsection d) on the previous page’*

These amendments clarify that the Amended Agreement is a consumer lease and not a sale of goods by instalments agreement.

67 The evidence was that none of the 2013 Holley Nethercote changes to the 2011 invoice and rental agreement were in fact implemented in 2013. The evidence was that the form of the contract in fact in use by Darranda did not change from the 2011 version prior to 2014.

68 On 14 January 2014, Mr Boucher informed Holley Nethercote of his proposal to include two fees to the invoice part of the Rental Agreement, which he annotated and sent to Holley Nethercote by email. The form of the invoice with his handwritten changes and terms and conditions sent by Mr Boucher was the 2011 version. Holley Nethercote responded to Mr Boucher noting the terms did not match those provided to ASIC and, by email sent on 23 January 2014, forwarded Mr Boucher a copy of its letter to ASIC of 10 July 2013.

69 Mr Boucher instructed Mr Chikyala by email sent on 23 January 2014 to “please use” the version provided by Holley Nethercote “in rolling out as our new invoice” and that Mr Chikyala would also need “other wording to be added to section 2”.

70 A customer rental agreement from December 2014, to which Darranda was a party, was consistent with the terms provided by Holley Nethercote to ASIC on 10 July 2013, but with the addition of a note below section 2 of the invoice disclosing that the total payment included an Agreement Administration Fee and Franchise Process Fee. The agreement supports Mr Chikyala's evidence that he updated the CRM to reflect the Holley Nethercote terms that had been given to ASIC in July 2013.

71 Between October 2016 and the end of March 2017, Rent4Keeps (Aust) sought advice in relation to the inclusion of late and other fees in its rental agreements. Rather than seeking this advice from Holley Nethercote, Rent4Keeps (Aust) returned to Frenkel Partners.

72 By email sent on 29 March 2017, Frenkel Partners sent to Mr Boucher a marked-up copy of a document entitled "Rent4Keeps Tax Invoice & Rental Agreement". The content of that document was different from any version that had been used by Darranda, even though the document used a Rent4Keeps Business trademark. The invoice section did not include any equivalent to 3d of the Renter Declaration provided to ASIC by Holley Nethercote. The terms and conditions included a marked-up cl 5 in the following terms:

**5. Ownership and Interest**

5.1 You have a right to use the Product during the Term, but the Product remain ~~the Our~~ property of Rent4Keeps unless ownership is transferred to You at the end of end of the Term in accordance with this Agreement. During the term, You must not:

- a) part with possession of the Product; or
- b) give another person an interest in the Product.

5.2 Subject to the terms of this Agreement, at the end of the Term, provided You have complied with all of Your obligations under this Agreement, ownership of the Product automatically transfers to You.

73 The terms of the Frenkel Partners document were not consistent with a consumer lease.

74 On around 5 April 2017, the Rent4Keeps Business's CRM system was updated to include the terms and conditions from the Frenkel Partners document (including cl 5 (as amended) as set out in [72]) but continued to use the form of the invoice provided by Holley Nethercote (including 3d in the form provided to ASIC in the letter of 10 July 2013).

75 On 6 April 2017, Mr Allen amended cl 5.2 of the terms and conditions on the Rent4Keeps Business's CRM system. No amendment was made to cl 5.1. The amended cl 5 as at 6 April 2017 provided:

## 5. Ownership and Interest

5.1 You have a right to use the Product during the Term, but the Product remain Our property unless ownership is transferred to You at the end of end of the Term in accordance with this Agreement. During the term, You must not:

- a) part with possession of the Product; or
- b) give another person an interest in the Product.

5.2 Subject to the terms of this Agreement, at the end of the Term, provided You have complied with all of Your obligations under this Agreement, ownership of the Product automatically transfers to the nominated giftee.

76 Mr Allen passed away in 2019. The basis of and the reasons for the amendments he made are not known.

### ASIC inquiries of the Rent4Keeps Business

77 In December 2014, ASIC informed Mr Allen that ASIC Licensing had decided to recommend the refusal of an Australian Credit Licence application made on behalf of a Rent4Keeps franchise entity. The reasons included:

- the Applicant does not have adequate supervision and monitoring procedures to ensure credit services provided by its representatives are compliant.
- the Applicant's responsible lending policies do not meet the requirements set in ASIC's Regulatory Guide 209: *Credit licensing: Responsible lending conduct*.

78 In late 2014, Mr Allen approached Mr Chikyala to work on strengthening the CRM to ensure regulatory compliance.

79 In February 2015, ASIC issued a notice to Darranda requiring it to lodge a written statement pursuant to s 49 of the Credit Act. The notice was directed to matters relating to Darranda's compliance with its responsible lending obligations.

80 Throughout 2016, Rent4Keeps (Aust) made changes to its systems, including improvements to its CRM to centralise its process for credit assessments. Training was implemented to foster a culture whereby franchisees were to use and follow the CRM which was to be viewed within the Rent4Keeps Business network as the "source of all truth". Amongst the changes made to the processes was a modification to the algorithm relating to the processing of applications which required a giftee name to comprise more than three characters. The characters could be symbols and spaces.

81 On 29 September 2016, there was a licensing cancellation hearing at which Darranda sought to challenge a proposed decision by ASIC to cancel Darranda's Australian Credit Licence. At

the conclusion of that hearing before the Administrative Appeals Tribunal, Darranda made an offer for ASIC to review the changes and new systems Darranda and the Rent4Keeps franchise network had implemented to address ASIC's concerns. ASIC suggested that an independent third party be engaged to conduct that review and report back to ASIC. The review would need to focus on responsible lending and how the processes implemented addressed ASIC's concerns. ASIC put the following to Darranda:

When accepting a consultant we would require advice that there has been no previous relationship with the consultants to ensure their independence. Generally we are also provided with details of the expertise/experience of those conducting the review (ie CV of the key people involved in the review) to show their qualifications to conduct a review in this area. For a review of this kind, we would expect the key persons involved to have experience with the application of the responsible lending laws.

- 82 Mr Payne sought to appoint Pitcher Partners to conduct the review of the Rent4Keeps Business's credit assessment process.
- 83 It took some months before ASIC and Darranda could reach agreement on an appropriate third party consultant to conduct the review and the terms of engagement. While ASIC was satisfied that Pitcher Partners was qualified to conduct an audit of the processes and procedures that Rent4Keeps (Aust) had implemented, ASIC was not satisfied that Pitcher Partners was qualified to provide an opinion on whether those processes were sufficient to make Darranda (and the Rent4Keeps network more generally) compliant with the legislated responsible lending obligations. On 2 November 2016, ASIC gave Mr Boucher a list of possible compliance consultants. One of those consultants named was from Holley Nethercote. ASIC also raised the prospect of imposing a condition on the Australian Credit Licence held by Darranda and/or Rent4Keeps (Aust).
- 84 In November 2017, Rent4Keeps (Aust) continued to refine its CRM system, including improving the interface with myGov services and introducing improved expense and income validations within the CRM system.
- 85 Pitcher Partners met with Holley Nethercote in the first half of the 2017 calendar year to formulate audit procedures with a view to commencing an audit before the end of May 2017.
- 86 On or about 23 November 2017, ASIC informed Rent4Keeps (Aust) of conditions it proposed to put on Rent4Keeps (Aust)'s Australian Credit Licence. Those conditions included:

- 1) The licensee must:



- (a) By **24 November 2017** engage an external compliance consultant (the Consultant), whose appointment and terms of reference are to be approved by ASIC in writing.
- ...
- (c) require the Consultant to undertake a review of the licensee’s franchisees and representatives as specified by ASIC compliance with the following provisions:
  - (i) the general conduct obligations under section 47 of the *National Consumer Credit Protection Act 2009* (National Credit Act); and
  - (ii) The responsible lending obligations under Chapter 3 of the National Credit Act;
- ....
- (f) ensure that the Consultant submits the report...to the licensee and ASIC by **15 December 2017**.

87 Pitcher Partners was engaged in November 2017 to prepare a written report as required by the Australian Credit Licence conditions. Pitcher Partners in turn engaged Holley Nethercote to assist in the review.

88 Pitcher Partners provided a final report dated December 2017. While the final report was issued by Pitcher Partners, Holley Nethercote had undertaken an assessment of the Rent4Keeps Business’s key documents, including the tax invoice and rental agreement that had been used in November 2017. Pitcher Partners relied on Holley Nethercote’s legal opinion relating to the Rent4Keeps Business’s compliance with the requirements of the Credit Act. Pitcher Partners assessed customer files based on a compliance checklist provided by Holley Nethercote.

89 Holley Nethercote provided a draft of its report dated 30 November 2017 to Mr Boucher. On page 40 of a 48 page report, which canvassed a range of topics relating to the statutory obligations imposed on Rent4Keeps (Aust) and its franchisees, was a subheading entitled “Consumer Lease Agreement”, where the following observation was recorded:

Fundamental to the distinction between a credit contract and a consumer lease is whether the customer has the right or obligation to acquire the goods at the end of the lease. The Paragraph 3(d) of the Renter declaration makes it quite clear that the customer does not have any such right or obligation. Rather, Rent4keeps may, at its discretion, give the product to a person nominated by the consumer.

However, clause 5 of the terms and conditions is unclear. Clause 5.1 contemplates ownership being transferred to You (the consumer) at the end of the Term. Clause 5.2 says that at end of the term ownership of the Product automatically transfers to the nominated giftee. Clause 5.1 and 5.2 seem inconsistent with each other, and clause 5.2 seems to be at odds with the discretion referred to in the Renter Declaration.

The Renter Declaration and clause 5.2 would not give rise to a credit contract, but clause 5.1 with its reference to 'You' confuses the matter.

90 Draft recommendation 39 (out of 40 draft recommendations made) was that:

...Rent[4]Keeps conduct a review of its terms and conditions to rectify this uncertainty and also for any provisions that may offend against the unfair contract terms legislation

91 In early December 2017, one of the partners of Holley Nethercote met with Mr Payne, Mr Boucher and Mr Allen to discuss the draft report.

92 On the following day, Mr Boucher met with Mr Allen. Mr Boucher made a handwritten notation on the copy of the draft provided to him to change “You” to “giftee” in the margin next to the second paragraph set out at [89] above. Mr Boucher gave Mr Allen his copy of the draft Holley Nethercote report with Mr Boucher’s handwritten notation and asked Mr Allen to implement that change. The next day, Mr Allen returned that copy to Mr Boucher and told Mr Boucher the change had been made.

93 A purported final version of Holley Nethercote’s report was issued on 14 December 2017. Unlike the draft provided to Mr Boucher, the 14 December 2017 report included the following observations:

[Under a heading *Compliance Procedure*]

There was a physical Operations Manual provided to Franchisees in 2012. In 2015 a project was commenced to updated [sic] the Operations Manual. However, this was discontinued in favour of replacing a physical Operations Manual with the procedures that are available through the CRM.

Nevertheless I was provided with copies of the 2015 Operations Manual. My understanding is that this Operations Manual has not been made available to Franchisees. The Operations Manual was very readable and contained a lot of excellent material on conducting a small business and a user friendly ‘how to’ in relation to operating a franchised territory. However, it was largely silent in relation to the National Credit Act. Some parts of the Operations Manual were incorrect in dangerous ways. For example in describing the rent for keeps offering:

3.1.9.1 –“At the end of the rental term the customer keeps the product, free of charge.”  
“Rent4Keeps our name says it all”

3.1.9.3 “Product is the customers at the end of the agreement”.

3.3.8 Scripting requiring the Franchisee to tell the customer that “At the end of the Lease they OWN THE GOODS – it’s’ that simple”

All these passages suggest that the customer has a right at the end of the lease to the goods. This would make the rental agreement a credit contract, rather than a consumer lease.

It is inconsitent [sic] with text presumably added later that explains that Rent4Keeps may at its discretion gift the product at the end of the term.

And later:

The Scripting for Explanation of Documents makes it clear that there is no right or obligation to purchase the goods at the end of the lease. However, not all Territory managers follow the script and we received mixed explanations.

The Operations Manual 2012, which many Franchisees will have, is very unclear in relation to the right or obligation to purchase the goods at the end of the lease and may be contributing to the variations in approach taken by the interviewees. (See comments above under *Compliance Procedure* at page 14).

We recommend that training focus on the importance of explaining this component of the contract correctly.

94 Not all statements recorded as appearing in the 2015 Operations Manual (which was not before the Court and there was no evidence that it was ever provided or made available to franchisees) appeared in the 2012 version of the Operations Manual. Instead the 2012 Operations Manual included the following statements:

*R4K Services*

...

At the end of the rental term we allow the customer to give the product, free of charge, to a person of their choosing

...

Rent4Keeps - Our name says it all!

...

*Shopping Centre Displays Guidelines*

...

When addressing the clients, your typical discussion will be along the lines of:

*Hello, my name is ..... from R4K.*

*Can I explain our business and service to you?*

*OK Thanks.*

*We are a locally based home appliance and furniture rental business.*

*We offer clients the opportunity to choose any BRAND NEW white good, electrical appliance or furniture they need from any supplier and we rent it to them for a year to two years and at the end of the term they OWN THE GOODS. It is that simple.*

95 The Pitcher Partners report recorded the following finding:

In light of the identified shortcomings in R4K's processes and procedures additional and ongoing training is required to be provided to all employees on:

- Responsible lending;

- How licensees ensure they comply with the Responsible lending practices;
- The roles and responsibilities of licensees and credit representatives;
- Provision of leases in an efficient, honest and fair manner (including not falsifying records associated with the provision of credit); and,
- Key roles and responsibilities for compliance across R4K.

It was also identified that R4K Responsible Managers had significant knowledge and experience on responsible lending but did not demonstrate an understanding of the general obligations under Section 47 of the Act.

It was found that there was also inconsistent practices about the gifting of the product at the conclusion of the lease.

96 The Pitcher Partners report included a corresponding high priority recommendation that training be developed which informed staff about each of the above matters, as well as:

additional and ongoing training should be conducted (as part of employees annual training requirements) on the general compliance obligations under the National Credit Act and broader regulatory changes affecting the credit industry, ie, privacy, competition law, cyber security etc.

R4K should update their training for all staff and franchisees to ensure they understand the importance of the gifting provisions in their consumer leases.

97 On 15 February 2018, Mr Boucher sent an email to ASIC attaching Rent4Keeps (Aust)'s response to the Pitcher Partners report. Included in that response was the following representation:

The terms and conditions of the R4K Tax Invoice and Agreement have been amended so any ambiguity with the gifting provisions are eliminated.

R4K (Aust) have also revised their internal credit application and agreement process to include audio scripting for all applications.

All customers will be played a recorded audio which explains, in plain English, the terms and conditions of the consumer lease including important issues like gifting.

98 By email sent to him on 22 February 2018, Mr Boucher received another version of the final Holley Nethercote report dated 19 December 2017. Relevantly, under the heading Compliance Procedure, was the following (emphasis added):

There was a physical Operations Manual provided to Franchisees in 2012. In 2015 a project was commenced to updated [sic] the Operations Manual. However, this was discontinued in favour of replacing a physical Operations Manual with the procedures that are available through the CRM. **The Operations Manual is not in use.**

Nevertheless I was provided with copies of the **2012 and 2015 Operations Manuals. My understanding is that the 2015 Operations Manual has not been made available to Franchisees. However, some Franchisees will have been provided with the 2012 Operations Manual.**

99 Contrary to the observation in the Holley Nethercote report, Mr Payne’s evidence was that the 2012 Operations Manual was not used and instead was replaced with two documents — one entitled “R4K Credit Process” and the other entitled “R4K Procedures for Debt Management” which were authored by Mr Tannous in about 2013.

100 It is unnecessary for me to resolve the conflicting evidence as I am satisfied that by the relevant period in 2019, the 2012 Operations Manual was not in use.

### **Regulatory reports in relation to consumer leasing**

101 On 7 August 2015, the Federal Government announced a review of the small amount credit contract (SACC) laws contained in the Credit Act. The review also covered consumer leases. The Government asked the Review Panel to examine and report on the effectiveness of the law relating to SACCs and to make recommendations on whether any of the provisions which apply to SACCs should be extended to consumer leases.

102 In September 2015, ASIC issued Report 447 entitled “Cost of consumer leases for household goods” which set out ASIC’s findings on the costs charged by providers of leases of household goods. The report recorded:

[36] From our previous work reviewing lessor conduct, we have found that many lessors operate a model in which the consumer is able to have continued use of the leased goods (or similar goods) at the end of the lease for minimal or no additional cost. This feature is disclosed to the consumer both in advertising and also at the time that the consumer is entering into the lease. In cases where the purchase price of the goods is so low that the lessor is unlikely to have any commercial value at the end of the lease, there is a strong disincentive for the lessor to regain possession of the leased goods.

[37] Lessors arrange for the consumer to retain possession of the goods at the end of the lease contract, using two approaches:

- (a) a rent-to-buy model, under which there is an expectation that the consumer will be able to buy the goods at the end of the lease for a token or nominal amount; and
- (b) a gift model, in which the lessor agrees that the leased goods can be gifted to a third party as nominated by the consumer.

103 In December 2015, the Review Panel published an interim report entitled “Review of the Small Amount Credit Contract Laws” setting out the Review Panel’s initial observations. One of those observations was:

The high cost of consumer leases appears to be causing consumers financial harm. While there are technical differences between credit contracts and consumer leases, these differences do not appear to justify consumer leases being excluded from the

consumer protection regulations that apply to other forms of finance under the Credit Act.

The report also referred to Rent4Keeps as an example of a lease provider using a business name “which implied that the consumer would become the owner”.

104 Rent4Keeps (Aust) made a submission to the Review Panel in respect of the interim report.

105 In March 2016, the final SACC report was issued. It recommended the introduction of a cap on the total amount of the payments to be made under a consumer lease of household goods. The Review Panel recommended a higher cap than allowed in general for credit products “to ensure a viable continuing consumer lease of household goods market”. The higher cap was to cover the additional costs associated with providing services for leased goods. The report included the following observation:

The Panel also notes that under the law a lessor under a consumer lease retains ownership of a good and cannot guarantee ownership to the consumer at the end of the agreed lease period. However, in practice, many consumer lease providers have mechanisms to allow ownership at the conclusion of the term to pass to the lessee or their nominee. This practice highlights the artificiality of the distinction under the National Credit Code between sales by instalment (including hire purchase) which currently are subject to the 48 per cent APR cap and consumer leases which currently escape any cap. The distinction, which is based on form rather than substance, provides no reason not [to] seek to achieve similar consumer protection, whether through appropriate caps or otherwise, for both categories of products.

106 On 28 November 2016, the Government released its response to the Review of the Small Amount Credit Contract laws.

107 In October 2017, an exposure draft of the National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) **Bill** 2017 was released for consultation. The consultation period was 22 October 2017 – 3 November 2017.

108 Rent4Keeps (Aust) made a joint submission with Rent the Roo and Local Appliance Rentals. The submission was entitled “Submission from Franchise Leasing Group (FLG)”. The submission was concerned that the cap proposed to be introduced by the Bill (being a multiple of 1.48 of the base price of the goods) was too low and would result in the consumer lease industry becoming unviable. A cap of two times the base price was sought.

109 Following the public consultation, the Bill was not progressed.

110 Reforms, including the introduction of a cap on costs charged under consumer leases, were enacted by the *Financial Sector Reform Act 2022* (Cth). The cap applies to consumer leases entered into, or variations to consumer leases made, on or after 12 June 2023.

**Darranda’s customer processes during the relevant period**

111 During the relevant period, the process implemented by Darranda (and the broader Rent4Keeps franchise network) by which customers came to enter rental agreements with Darranda involved the following.

112 Customers interested in obtaining the use of a product from the Rent4Keeps Business made an enquiry either through the Rent4Keeps website or by calling the Rent4Keeps office. The website and office were operated by Rent4Keeps (Aust). These customer leads were received by a centralised leads officer.

113 Customers who made an enquiry then completed an application process. The purpose of the application process was to assess the credit capacity and character of the customer. The centralised leads officer receiving the enquiry asked the customer for information including the customer’s address, previous addresses and the names and contact details of at least two referees. The customer was then sent a number of links for the customer to attach financial information such as bank statements and myGov statements to send to the Rent4Keeps Business. The centralised leads officer reviewed this information to obtain an understanding of the customer’s income and expenditure. The centralised leads officer obtained further details of the product being sought by the customer.

114 The application was assessed against a credit approval matrix. The approval process involved the use of a Quick Rental Calculator to calculate the amount of the fortnightly payments (which were a function of the cost of the product, other charges and the length of the rental period) and assess whether the customer had the capacity to pay those fortnightly payments based on the customer’s income and expenditure. A credit search was also conducted using credit data and information from Equifax and the results of that search recorded by the centralised leads officer.

115 The completed application and supporting information was forwarded by the centralised leads officer to the Rent4Keeps Centralised Credit Compliance team for review. Once reviewed, the application was submitted into the software system for approval by a credit officer. Once the system recorded the application as approved, the centralised leads officer phoned the customer

to inform the customer of the approval, confirmed the product details and obtained the name of a person who the customer nominated as “giftee”.

116 Customers were allocated to a franchisee by a centralised leads officer, based on the location of the customer. Darranda was allocated customers in areas designated as Darranda franchise areas. Once the customer application was approved, and the product details confirmed, the franchisee allocated to the customer purchased the product sought by the customer from a retailer with the franchisee’s own funds.

117 After purchasing the product, Darranda’s field representative attended the customer’s premises. The field representative was expected to assess the customer’s need for the product. If the field representative was satisfied that the customer had a genuine need for the product, the field representative used an iPad (or other tablet device) to complete the rental agreement and tax invoice form with the customer. The form included a block for the nominated giftee name to be completed. The evidence (which I accept) was that during the relevant period to complete this block more than three characters were required to be entered. However, those characters could include symbols or spaces. The customer created a proforma signature and initials on the tablet. The field representative was then required to enter the representative’s own signature on the tablet.

118 Under Darranda’s processes, it was expected that field representatives would draw the customer’s attention to the terms of the agreement and to the terms of the Renter Declaration. An audio recording was required by the system to be played before the system enabled the next step to be completed. The script for the audio recording was in the following terms:

<<Applicant Name>> of <<suburb>>. Please listen carefully to the following message in relation to your rent for keeps rental agreement. The agreement is for a <<product name>>. The agreement term is for <<term>> months. There will be <<number of schedule payments>> scheduled. <<payment frequency>> payments of \$<<scheduled amount>>. The total agreement value will be <<\$>>. At the completion of the rental term Rent4Keeps may at its sole discretion gift the product or products to the person nominated by you. For this agreement that person is <<giftee>>. Rent4Keeps is not bound by your nomination. Your payment conduct over the term of the agreement will determine if the product is gifted at the end of the term. If you agree with this recorded statement and you do not require any changes please proceed to sign as your acknowledgement and your complete acceptance of these terms.

The audio recording was “dynamic” in the sense that it automatically adopted the applicant’s name, suburb, product name, rental term and payment details.



- 119 Once the computer system registered that the audio had been played, the system enabled the customer to apply their signature to the agreement and adopt their initials at different parts of the agreement. After the customer signature blocks were completed, the field representative applied the representative's signature in the respective signature block. An email was sent to the customer attaching a signed copy of the agreement.
- 120 Once the agreement was signed, the field representative handed the product to the customer or, in the case of large bulky products, confirmed the third party delivery details with the customer.
- 121 Once the system registered the agreement as having been signed, the system generated a task to press a button in the system to produce a welcome letter to be sent to the customer (generally by email).
- 122 When the system registered that the customer had two rental payments left to be made, the system generated a task for the centralised leads officer to either have the system send a letter (by email), an SMS or to have the centralised leads officer call the customer. The customer was asked if the customer wished to secure another product. In at least some instances, the SMS sent to the customer informed the customer that there were two payments left to be made and if the customer made at least one of those payments, the last payment would be waived. There was no mention in the letter or SMS of the product being gifted or the possibility of it being gifted at the end of the contract term.
- 123 Once the system registered all payments as having been made, the system generated three tasks to be completed by a representative or employee of the Rent4Keeps Business. The three tasks were:
- (1) Check that Centrepay deductions had ceased to be made from the customer's Centrepay payments.
  - (2) Call the customer to tell the customer that the agreement had come to its end and check with the customer that there was no change to the nominated giftee. In respect of customers of Darranda, these tasks were undertaken during the relevant period by a contractor, Ms Sheryl Privitelli. If the nominated giftee name had changed, Ms Privitelli was tasked with updating the name of the nominated giftee recorded in the system.
  - (3) Have a letter sent to the customer confirming the agreement had come to an end and ask the customer if they would like to rent another product. The letter made no mention of the product being gifted at the end of the contract term.

124 I find that, contrary to ASIC’s submissions, this was the process provided for in the systems used by Darranda. However, there was nothing in the process that provided for a delegate or representative of Darranda to exercise a discretion at the end of the agreement. Darranda did not seek to repossess the products at the end of the agreement or contact the nominated giftee to inform the nominated giftee that Darranda had transferred ownership of the product to them. Darranda did not seek to confirm if the customer retained possession of the product after the end of the agreement.

125 In cross-examination, Mr Boucher gave the following evidence (emphasis added):

APPLICANT’S SENIOR COUNSEL: Now, these customers needed those goods, they were often household appliances and other essentials; correct?

MR BOUCHER: Yes.

APPLICANT’S SENIOR COUNSEL: And they were not able to access credit for those goods easily elsewhere from banks and the like; correct?

MR BOUCHER: Correct.

....

APPLICANT’S SENIOR COUNSEL: They continued to need the goods throughout the course of the rental agreement; right? They needed a fridge at the start, they needed a fridge at the end; correct?

MR BOUCHER: Yes.

APPLICANT’S SENIOR COUNSEL: And there was no action to take that fridge away from them at the end of the agreement; correct?

MR BOUCHER: Correct.

APPLICANT’S SENIOR COUNSEL: And when you give them the marketing touch point call, you don’t say, “We’re coming to get the fridge. Can we get you a new one?” you assume that they will keep it, right?

MR BOUCHER: No.

APPLICANT’S SENIOR COUNSEL: So if you assume they won’t keep it, why was it not part of your marketing to offer them a new essential product, the same product?

MR BOUCHER: We didn’t ask for them – the same – we didn’t ask them if they ..... another – two fridges.

APPLICANT’S SENIOR COUNSEL: Exactly. You assumed they would keep the first fridge; right?

MR BOUCHER: No.

APPLICANT’S SENIOR COUNSEL: Does that not just contradict exactly what you just said; they wouldn’t need two fridges?

MR BOUCHER: **Well, what are you going to do with two fridges?**

126 In cross-examination, Mr Tannous gave the following evidence:

APPLICANT’S COUNSEL: Did you train your staff to suggest to consumers that they name as the giftee someone who was close to them, like their mum or their child?

MR TANNOUS: The customer was allowed to nominate anyone they felt comfortable with.

...Ideally, you want a family member.

HER HONOUR: Ideally, you want a family member?

MR TANNOUS: Yes.

127 Mr Payne’s evidence in cross-examination was:

APPLICANT’S SENIOR COUNSEL: So if we produce documents and copies of the website that suggest the language was used in those terms, “you keep the product”, you would be surprised by that?

MR PAYNE: Yes.

APPLICANT’S SENIOR COUNSEL: And if we produce documents and entries on the website that say, “The product is yours to gift at the end of the term to your partner, relative or anyone of your choosing,” you would be surprised by that too?

MR PAYNE: No, that’s right.

128 I find that Darranda generally expected the nominated giftee to be a member of the customer’s household and generally expected the customer would continue to have physical possession or use of the product after the end of the rental agreement. Mr Payne’s evidence was based on his understanding of how the concept of a consumer lease had operated in practice. That understanding was reflected in the following evidence:

MR PAYNE: Well, I pinched the concept. I copied the concept from Rent the Roo. So fundamentally it wasn’t really my concept. I looked at a concept that somebody else was doing. I thought it was going well. Been going for 80 years – the industry, and I thought I may as well join in. So I copied somebody else’s concept, and then proceeded to, you know, compete with them...

...and I thought that after looking at the Rent the Roo model and the amount of inquiries that I was getting, that I was more than well placed to develop a better system than that. That business – and that business had been going for 10 years. I then looked at the Thorn model [Radio Rentals] that had been going for 80 years. I thought I could develop a system better than they had, so as a consequence of those observations - - -

...

APPLICANT’S SENIOR COUNSEL: And you’ve given evidence there were no standard procedures in place requiring the franchisee to retrieve those goods, to deliver them to the nominated giftee or to make any contact with the giftee at all, okay?

MR PAYNE: No, in line with what the industry that has operated for 80 years, we did exactly what every other operator has done for the last 80 years. Exactly.

129 Given their lack of legal training, Mr Payne’s and Mr Boucher’s evidence is to be understood drawing no distinction between ownership (“keeping”) and possession. Because Darranda’s expectation was that the nominated giftee was a family member, the expectation was that the customer would continue to have access to the use of the product.

### **Franchisee training**

130 Rent4Keeps (Aust) provided policies in relation to training to franchisees and staff. Between 2013 and 2018, Mr Tannous was involved in training franchisees and staff in relation to how to engage with customers, the application process, the assessment of customer applications and entering into customer contracts. Mr Tannous was familiar with the processes as they applied in the relevant period. Mr Boucher was also involved in reviewing training materials for franchisees and their representatives during the relevant period.

131 Messrs Tannous, Boucher, and Chikyala conducted up to four roadshow presentations each year where they travelled around Australia to demonstrate and train any changes to the Rent4Keeps Business’s processes. Memoranda were also provided to franchisees highlighting instructions on changes to the systems.

132 During the relevant period, training was focussed on the computer customer relationship management software system (whether it be called the CRM or enterprise resource management system, “ERP”). Within Rent4Keeps (Aust), this system was described as the “source of all truth” which is understood to mean that the system is to be the only source of information and all relevant information is to be stored in and found on that system. The use of the centralised automated system was regarded by management of Rent4Keeps (Aust) as critical to compliance with ASIC requirements.

133 In March 2016, Mr Tannous and Mr Boucher gave a presentation to the Rent4Keeps Business’s staff (including franchisees) entitled “R4K CRM Training”. The presentation noted:

- (1) Audits completed since 2015 had shown that the majority of users did not record notes in the system and, if they did, the notes were insufficient. This resulted in changes being made to the software so that the system required notes to be entered in certain sections of the “R4K Application Process”.
- (2) The focus was primarily on financial data collection to ensure compliance with responsible lending obligations. The fields to be completed included a record of why the customer required the product and why the agreement was approved.

(3) Attention was also given to the “giftee” nomination process. The presentation recorded that 12.5% of agreements written in 2015 had “incorrect” giftee names. Examples on another slide included “TBA”, “Mum”, “Cat”, “Wife”.

(4) The presentation included the following as a “Giftee Script”:

As I have explained to you this is a Rental Agreement and Rent4Keeps is the owner of the goods for the full term of the agreement. **Once all of the rental payments have been made in full** R4K need to decide what will happen to the rented goods and **R4K may consider gifting them to the third party nominated by yourself today.**

(5) The reason for having a “giftee” was because of the difference between a consumer lease and a hire purchase agreement. The presentation recorded the following:

- **Consumer Lease** - at the end of the credit term the goods may be:
  - Returned
  - Purchased for a nominal fee
  - Given to a nominated giftee (R4K model)
- **Higher [sic] Purchase** – at the end of the contract the consumer owns the goods.

Higher Purchase = R4K would therefore have to quote the interest rate charged.

**NOTE:** The user will not be allowed to proceed in the agreement process if a first & surname have not been noted.

134 I find that the “Giftee Script” was not used during the relevant period. By that time, Darranda and Rent4Keeps (Aust)’s franchise network had implemented an audio recording and no longer used scripts. Furthermore, the terms of the giftee script in the presentation are consistent with Darranda’s contract terms from 2015 but not those implemented in 2017 following the changes provided by Frenkel Partners as altered by Mr Allen.

135 The 2016 presentation was prepared by Mr Tannous with the assistance of Mr Boucher and Mr Chikyala. None of these individuals were qualified lawyers. There is no evidence that the content of the slides was reviewed by Holley Nethercote. I observe that the distinction articulated in the slides between a consumer lease and hire purchase agreement does not reflect the terms of the Code.

136 From August 2018, following recommendations from Pitcher Partners, all employees within Rent4Keeps (Aust)’s franchise network were required to complete an annual training module prepared by an external training provider, AAMC Training Group. The modules offered by AAMC included modules concerning ASIC requirements relating to consumer leases.

137 Training presentation materials prepared by Mr Tannous in 2018 included a module on responsible lending. One of the slides used in that module was entitled “Giftee”. It included the following text:

**Must always be communicated to the customer**

- The items remain the property of R4K until the agreement is completed.
- At the end of the rental agreement – R4K will consider gifting the product/s to the person nominated in section 3 or the rental agreement – audio recording
- Giftee details to be captured and included in the referee section of the assessment
- Generally a spouse, partner, child or close family member and usually in the same household

138 I accept the following evidence of Mr Tannous:

It was clear to me when reading [the Pitcher Partners] report that regardless of how many times we trained staff to do the right thing, errors are still possible.

139 I accept that Mr Chikyala modified the customer management system with the intention of improving its robustness but I do not accept that the system in fact required that a first and surname be noted for the nominated giftee. The automated system only required more than three characters be entered, including spaces.

140 Ms Wallace’s evidence was that although she was not personally involved with processing customer applications and signing up customers during the relevant period, she heard conversations between centralised leads officers and customers. Her evidence was that sales representatives were trained as follows:

[I]f a customer asked during the application or signing process whether they would own the product during the term of the lease or at its end, [territory managers] and [Centralised Leads Officers] were trained to explain to the customer that they did not own the product either during the term of the lease or at its end. Customers were told that it was a requirement that the product be gifted at the end of the lease to the person they had earlier nominated during the application or signing process. This was how I was trained and since becoming a Team Leader in January 2019, this is how I have trained others.

141 I accept that the training designed by Mr Tannous informed staff that customers were to be told that the products were owned by Darranda during the term of the rental agreements. I also accept that Mr Tannous trained staff that field representatives should confirm certain details, including the nominated giftee’s name, with the customer by referring to the information on the screen in the presence of the customer. I also accept that Mr Tannous trained staff to play a dynamic audio recording to customers.

142 However, I also find that Mr Tannous was not present during field representative visits to customers and did not undertake audits of the way in which those visits were in fact conducted by periodically attending some of those visits. I find, based on the evidence adduced from some of the customers, that the practice of field representatives was not consistent. Furthermore, the circumstances in which the customer contracts were in fact completed did not invariably accommodate the Rent4Keeps Business's process. For example, there were instances of contracts being completed in the presence of very young children in the driveway of a customer's residence by an individual with sole caring responsibilities for those children and where the product the subject of the agreement was for use by those children. Such circumstances were not conducive to a process that was predicated on close customer attention. Mr Tannous's training did not invariably translate into field representative practice.

143 Ms Wallace also confirmed during cross-examination that she was not present during field representative customer attendances. Her expectation was that field representatives would comply with their training because "they were good people".

#### **CUSTOMER EVIDENCE**

144 ASIC called the following individuals who were customers of the Rent4Keeps Business and recipients of Centrelink payments at the time of entering into their agreements with Darranda (trading under the business name "Rent4Keeps").

- (1) Ms Rebecca Bennett, a single mother with two children aged under 10 during the relevant period;
- (2) Ms Patricia Bailey, a retiree recipient of an aged pension;
- (3) Ms Krystle Day, a single mother with four young daughters during the relevant period;
- (4) Ms Brooke Hopkins, a mother of two young children who lives with her cousin;
- (5) Ms Ebony Solomon, currently a single parent with two very young children and in the relevant period was unemployed.

145 Each of these witnesses was cross-examined.

146 ASIC also tendered an affidavit from a customer, Ms Jodie Murphy (also a recipient of Centrelink benefits) who was unavailable for cross-examination due to illness. During the relevant period Ms Murphy was a single mother with a young daughter. At the relevant time, Ms Murphy was a recipient of WorkCover payments and a carer's allowance.

## **Ms Bennett**

- 147 Ms Bennett first heard about the Rent4Keeps Business in 2015/16 through a friend.
- 148 Ms Bennett had entered into eight rental agreements (each consisting of a tax invoice and a page of terms and conditions) with Darranda (operating under the business name “Rent4Keeps”), only one of which was entered into during the relevant period:
- (1) A rental agreement dated 29 June 2016 for a Sony Blu-Ray Player and Soniq television. The rental period for each product was 12 months, with 26 fortnightly payments of \$60 per fortnight. The nominated giftee was named “Chloe Fleming”, Ms Bennett’s daughter.
  - (2) A rental agreement dated 15 November 2016 for an Apple iPhone with a privacy screen protector. The rental period was for 18 months, with 39 fortnightly payments of \$97 per fortnight. The nominated giftee was “Denise Bennett”, Ms Bennett’s mother.
  - (3) A rental agreement dated 13 April 2017 for a notebook computer, software and laptop bag. The rental period was for 18 months, with 39 fortnightly payments of \$107 per fortnight. The nominated giftee was “Khloe Bennett”. This agreement was in the same terms as those applying during the relevant period.
  - (4) A rental agreement dated 1 August 2017 for an Apple iPad with a case. The rental period was for 18 months, with 39 fortnightly payments of \$58 per fortnight. The nominated giftee was “Khloe Bennett”. This agreement was in the same terms as those applying during the relevant period.
  - (5) A rental agreement dated 6 July 2018 for a Samsung Tablet and Apple iPhone plus a cover. The rental period was for 24 months, with 52 fortnightly payments of \$112 per fortnight. The nominated giftee was “Luke Searle”, Ms Bennett’s partner at the time. This agreement was in the same terms as those applying during the relevant period.
  - (6) A rental agreement dated 20 December 2018 for an Apple iPhone plus a cover. The rental period was for 24 months, with 52 fortnightly payments of \$119 per fortnight. The nominated giftee was “Khloe Bennett”. This agreement was in the same terms as those applying during the relevant period.
  - (7) A rental agreement dated 2 April 2019 for a laptop with a bag and mouse. The rental period was for 24 months, with 52 fortnightly payments of \$60 per fortnight. The nominated giftee was “Khloe Bennett”.



(8) A rental agreement dated 11 March 2020 for an Apple iPad. The rental period was for 12 months, with 26 fortnightly payments of \$66 per fortnight. The nominated giftee was “Khloe Bennett”. This agreement was in the same terms as those applying during the relevant period.

149 Ms Bennett had no recollection of reading any of the agreements before signing.

150 Ms Bennett did not have a clear recollection of the different agreements she had entered into with Darranda operating under the Rent4Keeps Business name. She gave the following evidence of her recollection of the general nature of her dealings with the Rent4Keeps Business.

151 Ms Bennett selected an item from the Rent4Keeps website. Either she called or a representative from the Rent4Keeps Business called her by phone to process an application. The application was completed by the Rent4Keeps Business representative with Ms Bennett being required to provide Centrelink documents and references. Ms Bennett’s evidence was that after the application was processed, a Rent4Keeps Business field representative came to her house. The representative pointed out the various sections of the agreement on an iPad but she could not recall what, if any, explanations were given to her in relation to the clauses of the agreement. Ms Bennett provided a sample signature on the iPad. Ms Bennett did not recall hearing any audio recording before she adopted her signature at various places on the documents. Ms Bennett nominated her school-aged daughter, her mother and her former partner respectively as giftees under the agreements. The product was delivered to her by the representative at the time of signing the agreement. At the end of the rental period no one from the Rent4Keeps Business checked that the items had been gifted. Ms Bennett retained possession of the items at the end of the agreements.

### **Ms Bailey**

152 Ms Bailey first heard about the Rent4Keeps Business in 2015 after coming across some flyers. She recalled her parents had had dealings with hire purchase companies in the past.

153 Ms Bailey had entered into five rental agreements (each consisting of a tax invoice and a page of terms and conditions) with Darranda (operating under the business name “Rent4Keeps”), only one of which was entered into during the relevant period:

(1) A rental agreement dated 5 August 2016 for a Sony PS4 bundle. The rental period was 12 months, with 26 fortnightly payments of \$58 per fortnight. The nominated giftee

was named “Errin Bailey”, who was Ms Bailey’s son. Ms Bailey purported to give the product to her son for his birthday shortly after receiving the product.

- (2) A rental agreement dated 24 February 2017 for an Apple iPhone. The rental period was 12 months, with 26 fortnightly payments of \$79 per fortnight. The nominated giftee was named “Errin Bailey”. Ms Bailey purported to give the phone to her son for his birthday in September of that year.
- (3) A rental agreement dated 7 September 2017 for a laptop. The rental period was 18 months, with 39 fortnightly payments of \$74 per fortnight. The nominated giftee was named “Chrystal-Lea Clark”, Ms Bailey’s granddaughter. This agreement was in the same terms as those applying during the relevant period.
- (4) A rental agreement dated 29 March 2018 for a television. The rental period was 24 months, with 52 fortnightly payments of \$38 per fortnight. The nominated giftee was named “Peter Bailey”, Ms Bailey’s father, who was ill and living with Ms Bailey at the time the agreement was entered into. The product was installed in his bedroom. This agreement was in the same terms as those applying during the relevant period.
- (5) A rental agreement dated 17 April 2019 for a toaster and sandwich press. The rental period was 12 months, with 26 fortnightly payments of \$35 per fortnight. The nominated giftee was “Erin Bailey”.

154 Ms Bailey gave the following evidence of her recollection of the process of her dealings with the Rent4Keeps Business.

155 Ms Bailey visited the Rent4Keeps website to select a product and then had a conversation with a Rent4Keeps Business representative in which she provided details of her outgoings and expenses.

156 A Rent4Keeps Business field representative subsequently came to her house. She recalled she had a practice of reading the agreements on the representative’s iPad before signing. In cross-examination, Ms Bailey recalled hearing an audio recording before she adopted her signature at various places on the later documents. The product was delivered to her by the representative at the time of signing the agreement. Ms Bailey entered into the agreements in order to give the products to each of the nominated giftees as gifts from herself and did gift the products to these family members before the end of the agreements. At the end of the rental period no one from the Rent4Keeps Business checked that the items had been gifted.

157 At the end of the rental agreement for the toaster and sandwich press, Ms Bailey was sent a letter on Rent4Keeps letterhead. That letter was in the following terms:

**RE: Completion of rent4keeps St Albans Agreement 3180002099**

Congratulations! We are writing to inform you that we have received the final payment on your rent4keeps St Albans Agreement 3180002099 - Kitchen Small Appliance Package.

Thank you for doing business with rent4keeps.

Building long-term relationships with our customers and being able to fulfil their rental needs is our main objective, so if you have any future requirements please contact your R4K St Albans representative on...

We would like to remind you of our R4K Referral Rewards program so, if you know someone who could benefit from our services, please refer them to us.

Should they become a rent4keeps customer we will send you a \$50 E-Gift voucher once they have made their first payment. Its [sic]our way of saying thanks!

Once again thank you for your business and we look forward to speaking with you shortly.

158 In one of her first interactions with the Rent4Keeps Business, Ms Bailey was informed of a “gifting arrangement”. Ms Bailey’s affidavit evidence was that during this interaction, the Rent4Keeps Business representative said that the gifting arrangement was a way to keep Centrelink happy but her oral testimony was that she had no clear recollection back that far. I accept Ms Bailey’s oral evidence. Ms Bailey’s oral evidence was that she understood that she would not become the owner of the product and that the products were to be gifted to the nominated giftee. As explained further at [222] below, there was a lack of consistency in her responses in relation to who she understood was performing the gifting and when the product was gifted.

**Ms Day**

159 Ms Day came across the Rent4Keeps Business after a Google search following persistent requests from one of her daughters for an Xbox gaming console.

160 Ms Day had entered into two rental agreements (each consisting of a tax invoice and a page of terms and conditions) with Darranda (operating under the business name “Rent4Keeps”), one of which was entered into during the relevant period:

- (1) A rental agreement dated 23 April 2019 for an Xbox One X bundle. The rental period was 18 months, with 39 fortnightly payments of \$67 per fortnight. The nominated giftee was named “Zoe Crowley”, who was Ms Day’s friend.

(2) A rental agreement dated 16 April 2020 for a dryer. The rental period was 12 months, with 26 fortnightly payments of \$75 per fortnight. The nominated giftee named was again “Zoe Crowley”.

161 Ms Day gave the following evidence of her recollection of the process of her dealings with the Rent4Keeps Business.

162 In respect of her first agreement, Ms Day made an expression of interest inquiry through the Rent4Keeps website. A representative from the Rent4Keeps Business called Ms Day over the phone to provide more information and to obtain some details from Ms Day. Ms Day recalled being told the cost would be \$36 per fortnight. The details provided by Ms Day included her income and Centrelink benefits and expenses.

163 A few days later, a Rent4Keeps Business representative attended Ms Day’s premises with the goods and an iPad tablet. Ms Day recalled the Rent4Keeps Business representative handing her the tablet to sign the rental application form and a document consisting of a rental agreement and a tax invoice. Ms Day did not expect the fortnightly payments to be \$67 and was told that the payments were higher than had been quoted over the phone because she had requested an additional controller be included in her bundle. Ms Day proceeded to sign the documents as she had her daughters with her in an excited state and one of her daughters had been promised the Xbox for her birthday. Ms Day did not recall hearing any audio recording prior to or after signing. Ms Day recalled being told by that consultant that the Xbox was Rent4Keeps’s item until she finished paying for it, and that they would fix it if she ever had issues with it. Ms Day did not recall being told the product was to be or might be gifted at the end of the agreement to the nominated giftee. Her understanding was that the nominated giftee was her referee.

164 Ms Day’s evidence was that the Xbox did not work properly and the Rent4Keeps Business had declined to fix it. She continued to make the rental payments. After the agreement ended Ms Day purchased a new Xbox from a retailer. At the end of the rental period no one from the Rent4Keeps Business checked that the items had been gifted.

165 In 2020, Ms Day became in need of a dryer as she was struggling to air dry her family’s clothes. Ms Day contacted the Rent4Keeps Business. She did not have to provide as many details as the Rent4Keeps Business already had her details on file. Ms Day recalled being told the cost would be \$65 per fortnight. Ms Day gave the Rent4Keeps Business Ms Crowley’s name and

contact details as a referee. Ms Day recalled signing the rental agreement by email. A dryer was later delivered to Ms Day's premises.

166 A few months later the dryer ceased to work. Ms Day's evidence was that she contacted the Rent4Keeps Business and was told to contact the manufacturer. Ms Day did not do so. Ms Day continued to make the rental payments through Centrepay. At the end of the rental period no one from the Rent4Keeps Business checked that the items had been gifted. When she moved house in August 2022 she threw away the broken dryer.

### **Ms Hopkins**

167 Ms Hopkins's evidence was that she first came across the Rent4Keeps Business in 2013 after a friend told her about them. She recalled her first Rent4Keeps agreement being entered into in 2013 in relation to an iPhone. A copy of the rental agreement for 2013 was not in evidence.

168 The Court was provided with copies of the following documents executed by Ms Hopkins, the earliest of which was dated January 2015:

- (1) A tax invoice dated 2 January 2015 for a smart phone and an iPhone repair. The rental period for each was 12 months, with 26 fortnightly payments totalling \$44 per fortnight. The nominated giftee was named "Bentley Hopkins", Ms Hopkins's son. A copy of the terms and conditions referred to in that tax invoice was not before the Court.
- (2) A rental agreement (consisting of a tax invoice and a page of terms and conditions) dated 24 May 2016 for a mobile phone repair and a mobile phone. The rental period for each was 12 months with 26 fortnightly payments totalling \$40 per fortnight. The nominated giftee was Ms Hopkins's son.
- (3) A rental agreement (consisting of a tax invoice and a page of terms and conditions) dated 12 July 2017 for a freezer and a mobile phone repair. The rental period for each was 12 months. The invoice stated that there were to be 52 payments however the rental payments were described as being fortnightly. The total fortnightly payments were \$70.00. The total rentals payable were calculated on the basis that there were to be 26 payments. The nominated giftee was named "Adam Roksa", Ms Hopkins's now former partner. Ms Hopkins's evidence was that this name was recorded in error.
- (4) A rental agreement (consisting of a tax invoice and a page of terms and conditions) dated 24 October 2017 for a television. The rental period was 18 months with 39 fortnightly payments of \$69 per fortnight. The nominated giftee was Ms Hopkins's

son, but only his first name was disclosed on the tax invoice form. This agreement was in substantially the same form as that entered into in the relevant period.

- (5) A rental agreement (consisting of a tax invoice and a page of terms and conditions) dated 31 January 2018 for a Sony Playstation with two controllers. The rental period was 18 months with 39 fortnightly payments of \$81 per fortnight. The nominated giftee was Ms Hopkins's son. This agreement was in the same form as that entered into in the relevant period.
- (6) A rental agreement (consisting of a tax invoice and a page of terms and conditions) dated 12 November 2018 for a vacuum cleaner. The rental period was 18 months with 39 fortnightly payments of \$67 per fortnight. The nominated giftee was Ms Hopkins's son. This agreement was in the same form as that entered into in the relevant period.
- (7) A rental agreement (consisting of a tax invoice and a page of terms and conditions) dated 9 April 2019 for a home security system comprising a monitor and four cameras. The rental period was 18 months with 39 fortnightly payments of \$51 per fortnight. The nominated giftee was Ms Hopkins's former partner. Ms Hopkins's evidence was that this name was recorded in error as her relationship with him had broken up by that time.

169 Ms Hopkins gave the following evidence of her recollection of the process of her dealings with the Rent4Keeps Business. She did not have a clear recollection of any changes that may have been made to those processes as they applied in respect of her different agreements.

170 Ms Hopkins telephoned the Rent4Keeps Business and told the representative which product she was seeking.

171 A representative of the Rent4Keeps Business attended Ms Hopkins's premises to deliver the products and finalise the paperwork. Ms Hopkins recalled the representative filling in the application form on a tablet, mostly using information from her previous applications. She recalled being read a script but recalled that the script read to her was in similar terms to the audio recording played during her cross-examination. She did not recall hearing an audio recording at any time. She recalled reading the Renter Declaration in each agreement. Ms Hopkins nominated her young son as the giftee. Although some of the agreements listed the name of Ms Hopkins's former partner as a giftee, Ms Hopkins was adamant under cross-examination that she would not have nominated him as a giftee. The products were delivered to Ms Hopkins at the time of signing the agreement. At the end of each rental period

Ms Hopkins did not recall that anyone from the Rent4Keeps Business checked that the items had been gifted.

### **Ms Solomon**

172 Ms Solomon first heard about the Rent4Keeps Business around the middle of 2018 from her sister. Ms Solomon was in need of a mobile phone at the time and did not have the funds to purchase a phone outright.

173 Ms Solomon had entered into six rental agreements (each consisting of a tax invoice and a page of terms and conditions) with Darranda (operating under the business name “Rent4Keeps”), only one of which was entered into during the relevant period:

- (1) A rental agreement dated 20 February 2018 for a Samsung Galaxy mobile phone. The rental period was 18 months. The invoice stated that there were to be 78 payments however the rental payments were described as being fortnightly. The fortnightly payment was \$38. The total rentals payable were calculated on the basis that there were to be 39 payments. The nominated giftee was named “Donna Soloman”, Ms Solomon’s mother. This agreement was in the same terms as the agreement entered into in the relevant period.
- (2) A rental agreement dated 21 June 2019 for a Samsung mobile phone. The rental period was 18 months, with 39 fortnightly payments of \$109 per fortnight. The nominated giftee was named “Trisha Solomon”, Ms Solomon’s sister.
- (3) A rental agreement dated 21 April 2021 for a laptop. The rental period was 18 months, with 39 fortnightly payments of \$91 per fortnight. The nominated giftee was named “Patricia Solomon”, Ms Solomon’s sister. This agreement was in the same terms as the agreement entered into in the relevant period.
- (4) A rental agreement dated 19 October 2021 for a Samsung mobile phone and a CMI bundle. The rental period was 18 months, with 39 fortnightly payments of \$62.41 per fortnight. The nominated giftee was named “Patricia Soloman”, Ms Solomon’s sister’s name misspelt.
- (5) A rental agreement dated 16 November 2022 for a Samsung Galaxy tablet. The rental period was 18 months, with 39 fortnightly payments of \$74 per fortnight. The terms of this agreement were different from the terms of the agreement entered into in the relevant period. The Renter Declaration on the tax invoice included the following:

- d) At the end of the Rental Term, You may offer to purchase the Product/s from Rent4Keeps for a residual value under this Agreement. R4K may accept or decline that offer in its absolute discretion, and upon terms as it sees fit.
- e) You agree and acknowledge that nothing in this Agreement provides You with any right or obligation to purchase the Product/s from Rent4Keeps during or at the expiry of the Rental Term.

The terms and conditions included the following:

- 2.2 You agree that this Agreement does not contain an offer by R4K to sell the Product(s) to You and You have no right or obligation to purchase the Product(s) from R4K during or at the expiry of the Term.

...

**5. Ownership and Interest**

- 5.1 You have a right to use the Product during the Term, but the Product remains R4K's property. During the Term, You must not part with possession of the Product or grant another person an interest in the Product.

- 5.2 Within a reasonable time prior to the expiry of the Term, You may offer to purchase the Product from R4K for a residual value under this Agreement. R4K may accept or decline that offer in its absolute discretion, and upon terms as it sees fit. If You do not wish to make an offer to purchase the Product, or if You and R4K cannot agree to the terms of that purchase, You must deliver the Product to R4K on the expiry of the Term and pay to R4K any Rental or other money owing by You to the expiry of the Term.

- 5.3 If this Agreement continues beyond the expiry of the Term, or if You remain in possession of the Product beyond the expiry of the Term, then without prejudice to R4K's rights to require immediate delivery by You of the Product, You must continue to pay to R4K the Rental and other payments at the amount and at the frequency specified in this Agreement and You shall continue to be bound by your obligations under this Agreement. R4K may but is not obliged to agree to an extension of the Term.

- 5.4 For the avoidance of doubt and further to clause 2.2, You agree and acknowledge that nothing in this clause provides You with any right or obligation to purchase the Product from R4K during or at the expiry of the Term.

- (6) A rental agreement dated 6 April 2023 for a sofa set. The rental period was 36 months, with 78 fortnightly payments of \$70 per fortnight. The terms of this agreement were different from the terms of the agreement entered into in the relevant period but the same as the November 2022 agreement.

174 Ms Solomon gave the following evidence of her recollection of the process of her dealings with the Rent4Keeps Business.



175 When seeking to obtain her first mobile phone from the Rent4Keeps Business, Ms Solomon went to the Rent4Keeps website and filled out an application form. She uploaded her Centrelink and bank statements using a link provided by the Rent4Keeps Business. Shortly thereafter, a representative from the Rent4Keeps Business came to her house with an iPad and the phone she had sought. She recalled glancing at a form on the iPad, ticking some boxes and initialling and signing on the iPad. She was then handed the phone. Under cross-examination, Ms Solomon accepted that the Rent4Keeps Business representative “might have” read the terms and conditions to her (including the Renter Declaration), but she did not understand what the documents meant. Ms Solomon’s evidence was that she “definitely did not hear” any audio played before signing the agreements. Ms Solomon nominated her mother and sister respectively as nominated giftees on the agreements she signed. Ms Solomon believed that she was nominating these individuals as referees. Ms Solomon did not understand that at the end of the agreement, the product would be gifted to someone. At the end of the first four agreements, Ms Solomon retained possession of the products she rented. At the end of each rental period no one from the Rent4Keeps Business checked whether Ms Solomon retained the items.

### **Ms Jodie Murphy**

176 Ms Murphy came across the Rent4Keeps Business at a shopping centre stand in 2013. She made inquiries at the stand of how she might acquire a washing machine. Ms Murphy’s evidence was that she filled out an application form online on the Rent4Keeps website (though Mr Tannous testified that there were no online forms in 2013). The washing machine was subsequently delivered to her by a Rent4Keeps Business representative. Her affidavit evidence was that she signed some documents at that time. At the end of the agreement, Ms Murphy retained possession of the product she had rented. At the end of the rental period no one from the Rent4Keeps Business checked whether she had retained the item.

177 In early June 2019, Ms Murphy’s television stopped working. Ms Murphy went to the Rent4Keeps website and filled out an application form, specifying the television she wanted. Ms Murphy signed a prefilled rental application form electronically. Ms Murphy also signed a rental agreement and tax invoice electronically. “Dianne Gilham”, Ms Murphy’s stepmother, was named as the nominated giftee. The television was delivered the next day. Ms Murphy retained possession of the television at the end of the agreement and no one from the Rent4Keeps Business checked whether she had retained the items.

178 In October 2021, Ms Murphy filled out an online application form for a mobile phone on the Rent4Keeps website. Ms Murphy did not proceed with a rental agreement.

179 Because she was not cross-examined, I attribute no weight to her evidence of what she recalls being told about arrangements with Darranda.

### **WERE THE RELEVANT CONTRACTS CONSUMER LEASES?**

180 The definition of consumer lease in the Code is based on the terms of the contract.

181 It is not disputed that the 516 Relevant Contracts were contracts for the hire of goods. Nor is it disputed that the amounts payable under the lease exceeded the “cash price” of the goods nor that the lease term was for a defined term of longer than four months. Whether the 516 Relevant Contracts were consumer leases depends on whether, under the contract, the hirer has a right or obligation to purchase the goods.

182 By reason of ss 14 and 173 of the Code, the terms of a credit contract or consumer lease are required to be in writing. Although as a matter of fact, parties may agree to terms not recorded in writing, such an agreement would be in breach of the Code. In the present case, the terms are to be found in the written agreement comprising of the page of terms and conditions and the tax invoice. The tax invoice page of each of the Relevant Contracts commenced with the following:

Darranda Pty Ltd ... trading as Rent4Keeps [suburb] (“Rent4Keeps”) agrees to rent to You the “Renter” named below, the “Products” listed below, on the terms and conditions of this Rental Agreement (“Agreement”), which is comprised of this invoice (“Invoice”) and the terms and conditions (“Terms”) that commence overleaf

183 For the reasons explained further below, the terms of the contract are not to be found in surrounding circumstances or in the audio recording which was required to be played to customers as part of the agreement signing process.

### **Labels**

184 The use by the parties of terms such as “rental agreement”, “rent”, “renter” or “gift” do not determine the issue of construction. Whether the contract is a consumer lease depends on the rights and obligations conferred by the contract and not to the labels that the parties have chosen to describe their relationship: see by way of analogy, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 165 at [63]–[66] (Kiefel CJ, Keane and Edelman JJ), [184] (Gordon J).

## Construction of the contract

185 Each of the 516 Relevant Contracts contained the following clauses:

### 3. Renter Declaration

...

- (d) At the end of the Rental Term, Rent4keeps may, at its discretion, gift the products to a person nominated by me. That person cannot be myself. Rent4keeps is not bound by my nomination. The person nominated is: .....

...

### Terms and Conditions

#### 5. Ownership and Interest

- 5.1 You have a right to use the Product during the Term, but the Product remain [sic] Our property unless ownership is transferred to You at the end of end of [sic] the Term in accordance with this Agreement. During the Term, You must not:

- (a) part with possession of the Product; or
- (b) give another person an interest in the Product.

- 5.2 Subject to the terms of this Agreement, at the end of the Term, provided You have complied with all of Your obligations under this Agreement, ownership of the Product automatically transfers to the nominated giftee.

186 ASIC relied on the name “Rent4Keeps” as evidencing an intention that the customer was to “keep” the product. The fact that the business was operated under the trading name “Rent4Keeps” was part of the factual matrix in which the rental agreements were entered. It is a circumstance which might inform the manner in which the terms of the written contract are to be construed but do not override those terms.

187 The business name does not assist in the construction of cl 5.2. By closing submissions, ASIC accepted that the reference “to You” after the phrase “unless ownership is transferred” in cl 5.1 was an error and that the words ought to have read “the nominated giftee”. The issue of whether, under the contract, a hirer has a right or obligation to acquire the goods is to be determined on that basis.

188 Clause 5.1 addresses ownership and use of the product during the term of the agreement. Clause 5.1 provides that during the term of the agreement ownership of the product remains with Darranda, with the hirer having a right to use the product.

189 Clause 5.2 addresses what is to happen at the end of the term of the agreement. There is an apparent inconsistency between the Renter Declaration in 3(d) and cl 5.2. The declaration refers

to a discretion by Darranda (trading under the Rent4Keeps business name) exercisable at the end of the Rental Term to gift the products to a person nominated by the hirer. Clause 5.2 provides for “ownership of the Product” to automatically transfer to the nominated giftee at the end of the term if the hirer has complied with their obligations under the agreement. An automatic transfer is not consistent with the existence and exercise of a discretion.

190 I accept ASIC’s submission that the two provisions can be read harmoniously by construing cl 5.2 as providing for an automatic transfer of “ownership” if the conditions of that clause are satisfied — namely, that the hirer has complied with all of their obligations under the lease. On that construction, the declaration in 3(d) has residual effect where the hirer has not complied with all of his or her obligations during the term of the agreement. In those circumstances, Darranda retains a discretion to transfer ownership of the goods to a person nominated by the hirer and Darranda is not bound by that nomination.

191 The Respondents submitted that this construction was erroneous because:

- (1) It erroneously treated the two provisions as operating independently of each other to address different circumstances at the end of the contract term. It was said by the Respondents to make no sense to treat different parts of the document as addressing different circumstances existing at the same point in time and that “[l]ogically one would deal with the two possibilities within a single clause”.
- (2) It ignores the qualifying words at the beginning of cl 5(2) “subject to the terms of this Agreement” which “subjugates that clause to section 3(d) of the Renter Declaration”.
- (3) The terms make it clear that Darranda retains ownership of the goods throughout the contract term. The right to gift the goods is an incident of ownership. Darranda retained both the discretion as to whether to gift the goods and to whom the goods were to be gifted. On this construction, cl 5(2) does no more than provide a mechanism for an automatic transfer of ownership if the discretion is exercised, thus obviating the need for any further act to effect the gift.

192 The Respondents’ contentions conflate the contractual rights retained by Darranda during the term of the contract with what is to happen to the goods at the end of the contract. By its terms, Darranda has agreed to exercise its right to deal with the goods at the end of the contract in a particular way if certain conditions are satisfied. Those conditions are not matters external to the contract but are matters relating to compliance with the terms and conditions agreed between the hirer and Darranda. If the hirer complied with all of his or her obligations under

the agreement, Darranda has agreed that ownership will be transferred to the nominated giftee. This construction of cl 5.2 is not inconsistent with Darranda's contractual retention of the rights of ownership during the contract term.

193 The Respondents' contention that it makes no sense to treat different parts of the document as addressing different circumstances existing at the same point in time is not accepted. The invoice and the terms and conditions are required to be read as a whole. The exercise of construing the contract as a whole is not advanced by an inquiry as to why one obligation might appear in one part of the document rather than another where the contract is comprised of two documents. The need to reconcile 3(d) of the Renter Declaration and cl 5.2 would exist irrespective of whether they appeared in the same clause.

194 The contract, comprised as it is of an invoice and a page of terms and conditions, is hardly a paradigm example of coherent drafting. For example, the term "Term" is said by the terms and conditions page to "have the same [meaning] as appear[s] on the tax invoice that forms part of this Agreement." Yet the word "Term" is not defined on the tax invoice, which instead refers to a Rental Term (another undefined term), "Rental Period" (which is a column in the product description section of the table) and "Terms" (being the terms and conditions).

195 The difficulty with the Respondents' construction is that it does not give effect to the word "automatically" in cl 5.2. If the transfer of ownership provided for in cl 5.2 was subject to the exercise of a discretion by Darranda at the end of the contract, the transfer would not be automatic. The phrase "Subject to the terms of this Agreement" does not require that the Renter Declaration take precedence over cl 5.2. In the context of cl 5.2, the phrase may be seen to reinforce the condition that the hirer comply with the obligations imposed by the agreement.

196 I do not accept that the audio recording is of assistance in resolving the inconsistency between cl 5.2 and the Renter Declaration. First, the evidence supports a finding that the audio was not consistently played in a manner that enabled each customer to hear it. The evidence established that the Rent4Keeps Business's system was designed so that the audio had to be played but did not (and could not) require that it in fact be heard. Field operatives were trained to play the audio but the evidence supports a finding that the processes provided for in training were not consistently implemented in the field in practice. The evidence was that not all customers heard the audio transcript or were even aware of it being played. I find that Ms Bailey heard the audio script and also find that Ms Solomon and Ms Day did not. I find that the content of the dynamic audio script was not a matter of common knowledge between the parties to the 516 Relevant

Contracts nor that it was, as the Respondents sought to characterise it, a “mutually known aid”. Secondly, the audio script itself did not add to or qualify the written terms of the contract. The script was intended to explain those terms and repeated the inconsistency by asserting, on the one hand, that “[a]t the completion of the rental term Rent4Keeps may at its sole discretion gift the product...to the person nominated by you” and “Rent4Keeps is not bound by your nomination” and, on the other hand, that “[y]our payment conduct over the term of the agreement **will determine** if the product is gifted at the end of the term” (emphasis added).

197 Under the contract terms, if the hirer complies with its rights and obligations under the contract, Darranda has contractually committed to transferring ownership to the nominated giftee. Ownership of a good does not necessarily equate to a right to possession. Throughout the term of the contract the hirer has the contractual right to possess the goods but does not have the right to deal with the goods — the right to deal with the goods during the term of the contract remains with Darranda. Darranda contractually agrees with the hirer, at the end of the contract, to transfer its rights to deal with the goods in favour of the nominated giftee if the hirer has complied with the contract. As the hirer’s rights to use (and impliedly possess) the goods ceases at the end of the term of the contract, the right to possess the goods is also agreed, as between the hirer and Darranda, to be transferred to the nominated giftee as an incident of the right of ownership. If the hirer complies with the obligations under the agreement, Darranda agrees to be bound by that nomination and, in that circumstance, cl 5.2 prevails over 3(d) in the Renter Declaration.

198 The issue therefore is whether the conditional agreement by Darranda to transfer ownership of the goods to the giftee nominated by the hirer constitutes a right or obligation by the hirer to purchase the goods.

#### **No requirement for a separate or additional purchase price**

199 For the purposes of ss 9 and 169 of the Code, a right or obligation to purchase does not require the hirer to be under an obligation to pay a separate or additional amount as a purchase price. It is sufficient if under the contract of hire, the hirer acquires the right to compel Darranda to transfer ownership of the goods. In *Make It Mine Finance Pty Ltd* [2015] FCA 393; (2015) 238 FCR 562, Beach J made declarations in circumstances where the uncontroversial facts were:

- (1) The structure of the arrangements was via a “lease” of goods. A customer “leased” the goods and paid a “hire fee”. The “hire fee” was paid over a 12-month period. Ownership

of the goods would transfer to the customer at the end of 12 months upon all payments being made.

- (2) The arrangement entered into between each customer and Make it Mine was structured and represented in form to be a “lease” arrangement. Nevertheless, in substance it was a contract of sale by instalments and therefore, because credit was in substance given and charged for, a credit contract (see ss 9 and 11 of the Code; it was not a “consumer lease” (cf s 169 of the Code)).

200 At para [58] of his Honour’s judgment, Beach J concluded:

although they were expressed as a rental arrangement, nevertheless, title to the goods passed at the time that the final payment was made under each contract. Accordingly, the contracts were not lease agreements. The amount of each repayment involved a payment for the cost of the item, and interest, and other costs (such as delivery). Accordingly, the contracts entered into by [Make it Mine] were instalment contracts and were relevantly credit contracts. It was therefore necessary for [Make it Mine] to be registered with ASIC as a credit provider during each relevant period.

201 That conclusion is equally applicable in the present case.

### **Conditional right or obligation**

202 The Respondents contended that given the conditional nature of the contract, it could not be said that the hirer acquired a right under the contract. The Respondents’ contention was that “the asserted ‘right’ said to be conferred by the automatic transfer in clause 5.2, even if it to be a right to ‘purchase’ (which the Respondents dispute), is not a right at all, but a mere possibility”.

203 I do not accept that contention. There is a distinction to be drawn between a right conditional on performance of the very contract conferring the right and a mere possibility. In the statutory context of the Code, a right contingent on the performance of the contract is nonetheless a right arising under the contract, albeit one that is not exercisable unless and until those conditions are satisfied. In referring to a right or obligation to purchase, neither s 9 nor 169 requires the right to be presently exercisable or the obligation to be immediately enforceable at the time the contract is made. Nor does it require the right or obligation to be conferred unconditionally by the contract where the condition of the right is the performance of the contract itself. It is sufficient that the hirer acquires a right to purchase that is conditional on due performance of the contract.

204 This construction is consistent with the common law understanding of a hire purchase agreement, as articulated by Wright LJ in his speech in the House of Lords in *Scammell v Ouston* [1941] AC 251 at 270 (footnotes omitted, emphasis added):

It is here necessary to remember what a hire-purchase agreement is. It is not a contract of sale, but of bailment. The owner of the chattel lets it out on hire on a periodic rent on the terms that on completion of the agreed number of payments, and on **due compliance with the various terms of the agreement**, the hirer is to have the option to buy the chattel on payment of one shilling or some nominal sum. The condition that the hirer is not to become owner automatically on completion of the agreed payments but merely has an option to purchase was adopted to avoid difficulties under the Factors Act or the Bills of Sale Act, as explained by this House in *Helby v. Matthews*, and *McEntire v. Crossley Brothers, Ld.* While the bailment continues the property remains in the letter. Such a transaction, though not a contract of sale, is used in practice to carry out a sale transaction, with the advantage to the buyer of credit facilities. Though the property in the chattel does not pass while the agreement is current, the hirer gets the use of it. What would be the price if it were a contract of sale has to be increased by whatever sum is necessary for interest and bank charges until the periodic instalments have been discharged. Terms must accordingly be arranged in respect of the period of the bailment as to user, repairs, insurance, rights of retaking possession on the hirer's default and various other matters. A hire-purchase agreement is therefore in practice a complex arrangement.

205 In requiring the right or obligation to be one which a hirer has “under the contract”, the legislation requires the contract to be the source of the right or obligation (see by analogy, *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* [2000] HCA 35; (2000) 201 CLR 520 at [42] (Gleeson CJ, Gaudron, McHugh and Hayne JJ), in the context of s 160U of the *Income Tax Assessment Act 1936* (Cth)). The source of the right in this case is the contract for the hire of goods and the conditions of the right are found within the contract.

### **Nominated giftee**

206 The Respondents contend that a right to purchase requires the hirer to have the right to acquire the goods for his or herself. It followed, according to the Respondents, that the contracts in the present case were not credit contracts because nothing in the contract obliged or entitled the hirer “to take or accept a transfer of title of absolute or general property” under the rental agreements.

207 The premise of the Respondents’ contention is not accepted. A right to purchase is no less a right to purchase because the right acquired is a right to compel the transfer of title to the purchaser’s nominee rather than to the individual named as purchaser. The ordinary contract of sale is not only to convey to the purchaser but to convey as the purchaser shall direct: *Earl of Egmont v Smith* (1877) 6 Ch D 469 at 474 (Jessel MR). There is no basis for denying the existence of a right to purchase because contractually the party named as purchaser has agreed



that the purchase is to be settled by the transfer of property to the purchaser's nominee rather than to the purchaser. The nominee takes ownership at the direction of the hirer.

208 Clause 5.2 refers to ownership of the product being automatically transferred to “the nominated giftee”. The term “nominated giftee” is not defined. Its meaning is to be ascertained by construction of the terms and conditions and tax invoice as a whole. In context, the reference to “nominated giftee” is a reference to the “person nominated” referred to in 3(d) of the Renter Declaration. Where cl 5.2 is satisfied, the “person nominated” as “the nominated giftee” is the person nominated by the hirer for the purpose of taking a transfer of ownership of the product.

209 Under the terms of the contract, subject to the hirer complying with the obligations imposed under the contract, the hirer acquires a right to compel Darranda to transfer ownership to the “nominated giftee” and can prevent Darranda from asserting any contrary right of ownership. By contrast, the “nominated giftee” does not acquire rights against Darranda (see for example, *Commissioner of State Revenue v Politis* [2004] VSC 126 at [15] (Nettle J)). The acquisition by the hirer of the hirer's rights as against Darranda is the acquisition of a right to purchase, albeit a right to purchase for the benefit of another.

210 This conclusion is not entirely consistent with the views expressed by ASIC in its correspondence with Holley Nethercote in 2013. By its correspondence, ASIC elided two concepts — the exercise of discretion by Darranda (which is critical to the notion of a gift by Darranda) and the identity of the nominated giftee (whom ASIC suggested was required to be a person other than the hirer). To the extent that ASIC was suggesting that a right to purchase existed only if the nominated giftee was the hirer, that view is not consistent with the law as properly understood. Fundamental to the existence of a gift by Darranda is the exercise by Darranda of a discretion to gift. If Darranda contractually commits to transfer ownership at completion of the contract (albeit subject to the hirer's compliance with the contract), there is no gift by Darranda but a transfer by Darranda upon receipt of consideration in the form of performance by the hirer of the hirer's obligations.

211 Nor is the conclusion reached here entirely consistent with the views expressed by Holley Nethercote in its report to Pitcher Partners, to the extent that Holley Nethercote concluded that 3(d) was consistent with Darranda gifting ownership of the product.

212 It follows that because the contract conferred on the hirer a right to purchase the goods, the contract, properly construed, was not a consumer lease.

213 It follows also that having regard to the terms of the Relevant Contracts, the presumption provided for in s 172(1) of the Code has been displaced.

### **WERE THE GIFTING CLAUSES A SHAM?**

214 In the alternative to its construction argument, ASIC contended that the “gifting clauses”, which provided for the transfer to the nominated giftee at the end of the contract, were a sham. ASIC contended that the parties intended that the hirer would in fact “keep” the goods at the end of the contract.

215 Given the conclusions I have reached above, the issue of sham does not arise. The following observations are made.

216 First, it is not possible for the Court to draw an inference as to the intention of a party in the absence of evidence relating to that particular party. The Court does not have evidence from more than a handful of Darranda’s customers. That evidence disclosed that there was no consistency in the representations that were heard by each customer or in the understanding of each customer.

217 Second, there is a lack of precision in the articulation of the sham contention. The term “keep” is not a legal term. At law, there is a distinction between ownership and possession or use. I find that there was an expectation on the part of Darranda’s directing minds (in particular on the part of Mr Payne and Mr Boucher) that the hirer would retain access to the use of the products because they expected the nominated giftee to be somebody willing to let the hirer continue to use the products the hirer required.

218 Third, because Darranda had no system or procedure in place for the exercise of a discretion at the end of the contract term, the contract provided for ownership to be automatically transferred at the end of the contract, if the terms and conditions were otherwise complied with by the hirer. I do not accept that Darranda retained or intended to retain a discretion to “gift” the product at the end of the contract if the hirer had so complied. The automatic process was important to Darranda and Darranda intended for the process to operate automatically.

219 Fourth, there was no common subjective understanding of what the so-called “gifting” process entailed. Mr Payne described the gifting process as having been “organised at the beginning, where [the hirer] nominated the giftee at the beginning” and that “if the customer did the right thing, they gifted them out and they went to the giftee”. At another point in his cross-examination Mr Payne said:

...you've asked me as a lay person to give you a bit of a summary of the – the relationship. There's a product. We buy it. We fill in an agreement and they make payments. They nominate a person to give it to at the end. If they've done a good job and they've made all their payments, we will get the product across to them... There was an automatic transfer of the product across to the – across to the client.

And later:

APPLICANT'S SENIOR COUNSEL: So your business model did involve gifting of goods to a family member...?

MR PAYNE: They could gift them to whoever they wanted.

220 I find that Mr Payne's understanding was that a consumer lease required the customer to be obligated to gift the product at the end. He did not understand the gifting process as involving a gift by Darranda. Mr Payne's understanding was that a consumer lease required the customer to "gift" it to someone else and he believed that the process of automatic transfer of ownership was sufficient to achieve this.

221 Ms Wallace's evidence as an employee of Darranda is consistent with Mr Payne's. Her evidence in cross-examination was:

APPLICANT'S SENIOR COUNSEL: You say that the recording contained certain information, including...that customers did not own the product they were leasing?

MS WALLACE: That's correct.

APPLICANT'S SENIOR COUNSEL: That's the first thing I want to draw your attention to. And did not have a right of ownership at the end of the lease. That's the second thing. Rather, they were required to gift the product to a nominated giftee. That's the third thing. Now, at the time you completed your affidavit, did that reflect your understanding of the gifting process?

MS WALLACE: Yes, that's correct.

APPLICANT'S SENIOR COUNSEL: In other words, customers were required to gift the product to a nominated giftee?

MS WALLACE: That's correct.

222 There was no consistency in the customer evidence around gifting. Ms Day's evidence was that she had never heard about a gift and that "there's no way I would pay that much money and then give it to somebody else". Ms Hopkins's evidence was that "I was gifting them" at the end of the rental term. Ms Solomon had no understanding of the gifting process at all. Ms Bailey gave inconsistent responses in cross-examination. She agreed at one point that "at the end of the rental period, when you paid everything off, Rent4Keeps might gift the product to your son" but, at another point, that at the end of the rental term she was the one who gifted the product to her son and laptop to her granddaughter. In re-examination, Ms Bailey said she

had gifted the product to the nominated giftee soon after each product arrived. Ms Bennett had no recollection of reading the rental agreement at all.

223 The evidence does not support a conclusion that Darranda intended to exercise discretion at the end of the contract to gift the goods. This is consistent with Darranda having no process for the exercise of such a discretion at the end of the contract, no procedure for directing delivery of the goods to the nominated “giftee” and making no attempt to reclaim possession of the goods from the hirer.

224 Finally, it is doubtful whether the legal requirements for a valid transfer of goods by gift from Darranda to the nominated giftee were satisfied for each of the 516 Relevant Contracts.

225 The legal requirements to effect a transfer of property by gift include:

- (1) In the absence of a deed or instrument of gift (in the nature of a testamentary document), there must be actual delivery of the goods to the donee: *Irons v Smallpiece* (1819) 106 ER 467 at 468 (Abbott CJ); *Cochrane v Moore* (1890) 25 QBD 57 at 72 (Fry LJ). A statement of intention without delivery does not constitute a valid gift: *Rowland v Stevenson* [2005] NSWSC 325 at [49] (Gzell J); *Flinn v White* [1950] SASR 195 at 202 (Abbot J). In the case of bulky goods, delivery may be constructive: *Rowland* at [51] (Gzell J); *Flinn* at 201 (Abbot J).
- (2) Whilst goods are in the possession of a third party (here, the hirer), there must be a change in the character of that possession to effect a valid gift to the donee.
- (3) There must be an intention on the part of the donor to make the gift: *Nolan v Nolan* [2003] VSC 121; (2003) 10 VR 626 at [131] (Dodds-Streeton J). In this regard it appears that there can be no gift in the absence of certainty of the person to whom the gift is to be made: *Scott v Bridge* [2020] EWHC 3116 (Ch) at [123] (Matthews J), cited with approval in *Maxwell v Maxwell* [2022] NSWSC 1028 (Ward P).
- (4) There must be an intention on the part of the donee to accept the gift: *Hill v Wilson* (1873) LR 8 Ch App 888 at 896 (Mellish LJ); *Commissioner of Taxation v Carter* [2022] HCA 10; (2022) 274 CLR 304 at [30] (Gageler, Gordon, Steward and Gleeson JJ). It has been established that acceptance by the donee is required to constitute a valid gift. A gift thus requires two contemporaneous acts — intention on the part of the donor to make the gift and its acceptance by the donee: *Cochrane v*

*Moore* at 76 (Lord Esher MR). There is a presumption of assent on the part of the giftee: *Carter* at [30] (Gageler, Gordon, Steward and Gleeson JJ). However, that presumption of law is engaged where there is an act of transfer of property: *Carter* at [30] (Gageler, Gordon, Steward and Gleeson JJ). The act of transfer may take the form of a declaration of trust in favour of an identified beneficiary even in the absence of a communication to the beneficiary (as were the facts in *Carter*).

226 Under the contracts with Darranda, the parties to the contract agree that ownership is automatically transferred to the nominated giftee if the terms and conditions of the contract are satisfied by the hirer. However, there is no communication of the gift to the giftee nor a delivery of the goods to the giftee. Absent a communication or delivery of the goods, it is highly questionable whether the terms and conditions agreed between Darranda and the hirer are to be construed as a declaration of trust by Darranda in favour of a third party giftee in respect of whose identity Darranda takes no steps to verify or confirm. The evidence concerning Ms Privitelli did not demonstrate anything more than that the customer was asked whether the customer wished to change the name of the nominated giftee. The evidence did not establish that steps were taken to verify the identity or provide contact details for the nominated giftee. Particularly where incomplete or false “nominated giftee” names were given, it may be doubted whether Darranda properly formed an intention to gift the goods.

227 As explained above, properly construed, the contract operated to automatically transfer ownership to the nominated giftee if the hirer complied with the hirer’s obligations under the contract. In those circumstances, the contract did not provide for the exercise of a discretion by Darranda. There was no sham because Darranda intended for the contract to operate in accordance with the terms provided for in cl 5.2.

228 For the reasons given above, the 516 Relevant Contracts were not consumer leases.

## **CONTRAVENTIONS**

### **Specific obligations**

229 Pursuant to s 32A(1) of the Code, a credit provider must not enter into a credit contract if the annual cost rate of the contract exceeds 48%. The annual cost rate is calculated pursuant to s 32B.

230 Relevantly, pursuant to s 23(1) of the Code, a credit contract (other than a small amount credit contract) must not impose a monetary liability on the debtor in respect of an amount of a fee

or charge, or an interest charge, exceeding the amount that may be charged consistently with the Code.

231 Pursuant to s 24(1)(a) of the Code, a credit provider must not enter into a credit contract on terms imposing a monetary liability prohibited by s 23(1) of the Code.

232 Pursuant to s 17 of the Code, the contract document for a credit contract must contain:

- (a) if the credit is provided by the supplier for a sale of goods by instalments, a description of the goods and their cash price;
- (b) in the case of a credit contract other than a small amount credit contract, the annual percentage rate or rates under the contract;
- (c) in the case of a credit contract other than a small amount credit contract, the method of calculating the interest charges payable under the contract and the frequency with which interest charges are to be debited under the contract;
- (d) in the case of a credit contract other than a small amount credit contract, the total amount of interest charges payable under the contract.

233 It was common ground that none of the 516 Relevant Contracts was a small amount credit contract within the meaning of s 5 of the Code.

234 By its further amended notice of defence, Darranda admitted that if the 516 Relevant Contracts (or any of them) were credit contracts:

- (a) the 516 Relevant Contracts imposed a monetary liability in respect of an amount of a fee or charge or of an interest charge that exceeded the amount that may be charged under the Code (and therefore would be in breach of s 23(1) of the Code);
- (b) the annual cost rate of the contracts exceeded the 48% cap provided for in s 32A of the Code;
- (c) the 516 Relevant Contracts did not disclose the cash price of the goods, the annual percentage rate or rates, the method of calculating the interest charges or the frequency with which interest charges would be debited under the contract or the total amount of interest charges under the contract.

235 Because I have concluded that the 516 Relevant Contracts were credit contracts it follows that Darranda as a credit provider party to those contracts, contravened:

- (a) ss 23(1) and 24(1)(a) of the Code;
- (b) s 32A(1) of the Code;
- (c) s 17(3)(c), (4)(a), (5) and (6) of the Code.

### **General obligations**

236 Section 47(1)(a), (c) and (d) of the Credit Act provides:

- (1) A licensee must:
  - (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
  - ...
  - (c) comply with the conditions on the licence; and
  - (d) comply with the credit legislation; ...

237 As explained below, Darranda failed to comply with one of the conditions of its credit licence during the relevant period by failing to have a “key person” and was therefore in breach of s 47(1)(c) of the Credit Act.

238 As a result of the contraventions of the Code, Darranda failed to comply with the credit legislation and was therefore in breach of s 47(1)(d) of the Credit Act.

### **“Efficiently, honestly and fairly”**

239 In so far as s 47(1)(a) is concerned, ASIC contended that irrespective of whether the rental agreements were properly classified as “credit contracts” or “consumer leases”, Darranda failed to ensure that its credit activities were engaged in “efficiently, honestly and fairly” as required by s 47(1)(a) of the Credit Act.

### ***Applicable principles***

240 The principles applicable to a consideration of whether a licensee engaged in its licensed activities “efficiently, honestly and fairly” have been judicially considered in the context of s 912A(1)(a) of the *Corporations Act 2001* (Cth). The principles are equally applicable to s 47(1)(a) of the Credit Act, which uses the same expression: *Australian Securities and Investments Commission v Membo Finance Pty Ltd (No 2)* [2023] FCA 126 at [37] (Yates J).

241 The principles were first elucidated by Foster J in *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* [2012] FCA 414 and summarised by

Beach J in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq)* (No 3) [2020] FCA 208; (2020) 275 FCR 57 in the following terms (emphasis in original):

- [506] First, the words “efficiently, honestly and fairly” are to be read as a compendious indication requiring a licensee to go about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.
- [507] Second, the words “efficiently, honestly and fairly” *connote* a requirement of competence in providing advice and in complying with relevant statutory obligations. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client’s affairs. I have emphasised here the notion of connotation rather than denotation to make the obvious point that the boundaries and content of the phrase or its various elements are incapable of clear or exhaustive definition.
- [508] Third, the word “efficient” refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate. Inefficiency may be established by demonstrating that the performance of a licensee’s functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect.
- [509] Fourth, it is not necessary to establish dishonesty in the criminal sense. The word “honestly” may comprehend conduct which is not criminal but which is morally wrong in a commercial sense.
- [510] Fifth, the word “honestly” when used in conjunction with the word “fairly” tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound.

242 In addition to the above summary, Beach J made the following relevant observations:

- (1) A contravention of the “efficiently, honestly and fairly” standard does not require a contravention or breach of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise. The statutory standard itself is the source of the obligation (at [512]). However, breach of another provision may itself be sufficient to constitute a violation of general obligations: *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515 at [73] (Beach J). This has been applied in the context of the general obligation to ensure that the credit activities authorised by a licence are engaged in efficiently, honestly and fairly (see, *Australian Securities and Investments Commission v Ferratum Australia Pty Limited (in liq)* [2023] FCA 1043 at [48] (Kennett J)).
- (2) The standard should be viewed as a “statutory norm” to be read in the applicable statutory context (at [519]).



- (3) In relation to the term “fairly”:
- (a) Judges applying s 912A(1)(a) have usually not sought to define “fairly” except to explain its structural setting in the composite phrase (at [520]).
  - (b) Dictionary definitions are not adequate for the task because they are intrinsically circular (at [520]).
  - (c) Although “fairly” cannot be defined by negative conditions (eg free from bias, free from dishonesty), to stipulate negative conditions is not unhelpful (at [521]).
  - (d) The term “fairly” is not to be viewed only from the perspective of an investor, borrower or other person interacting with the licensee. Fairness is to be judged having regard to the interests of both parties. The section is not a back door into an “act in the [best] interests of” obligation (at [522]).
- (4) The section requires one to look at the licensee’s behaviour more generally than with regard to any one person (at [525]–[526]). The language of the relevant section here is in the generality of “the credit activities authorised by the licence”.
- (5) The section does not require one to “ascertain the boundaries and content of a cause of action or an element thereof sounding in damages in favour of an individual (cf claims for misleading or deceptive conduct or statutory unconscionability)” (at [527]).

243 To this summary, the following may be added:

- (1) Use of the word “ensure” imports a forward-looking element into the obligation. It is necessary not only to act efficiently, honestly and fairly from day to day, but to take steps to guard against lapses from that standard by employees or representatives: *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1422 at [146] (Downes J), citing *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69 at [105] (Lee J); *Ferratum* at [49] (Kennett J).
- (2) Although the subjective intentions of the alleged infringer may clearly be relevant, the standard may be unintentionally breached. Contravention is generally a matter for objective analysis: *Australian Securities and Investments Commission v National Australia Bank Ltd* [2022] FCA 1324 at [352] (Derrington J); *Ferratum* at [49] (Kennett J).

*ASIC's pleaded case*

244 ASIC's pleaded case was that during the relevant period, Darranda:

- (1) entered into the hire contracts in circumstances where the gifting clauses were included for the purpose of having the hire contracts characterised as consumer leases and not credit contracts and avoiding obligations and/or limitations that apply to credit contracts but do not apply to consumer leases;
- (2) induced consumers to acquiesce in entering into the hire contracts that contained the gifting clauses by:
  - (a) engendering in consumers a reasonable expectation that, despite the gifting clauses, they could keep the goods by reason of the use of the trademark "Rent4Keeps", a logo using those words and the words "Rent new, rent now, rent4Keeps", adopting a practice of assuring customers that they could keep the goods if the customer asked and not taking any steps to enforce the gifting clause or confirming that the goods had been gifted or otherwise taking steps to verify the identity of the giftee;
  - (b) offering the hire contracts to consumers who were financially vulnerable, in need of the essential good that they hired and unlikely to be able to obtain the good from elsewhere; and
  - (c) establishing momentum by already approving the application by the time the requirement to nominate a giftee was disclosed;
- (3) used standard form hire contracts that were confusing as to whether ownership passed at the end of the contract term and, if so, to whom;
- (4) after being put on notice in December 2017 that the standard form hire contracts contained inconsistencies that were relevant to their characterisation as consumer leases or credit contracts and, despite knowing that certain obligations and/or limitations applied to credit contracts that did not apply to consumer leases, failed to resolve the inconsistencies in their contracts;
- (5) assuming the hire contracts are credit contracts, failed to comply with the rate cap or the disclosure requirements and accessed Centrepay in circumstances where it had been approved to use Centrepay on the basis that the hire contracts were consumer leases;

- (6) adopted and implemented a business model and processes with some or all of the above features and in the above circumstances where it was required to ensure that it did not do so, it generated financial reward for itself at the expense of its clients;
- (7) failed to have an officer of Darranda, or a person performing duties on behalf of Darranda, acting as the “key person” for the purposes of its Australian Credit Licence and failed to notify ASIC within five business days, or at all, that the “key person” had ceased to be an officer of Darranda or to perform duties on behalf of Darranda with respect to its credit business and to lodge with ASIC an application for variation of that condition as required by s 47(1)(c) of the Credit Act; and
- (8) failed to have in place necessary compliance measures to ensure that the matters identified in the preceding subparagraphs did not occur.

245 In so far as the “key person” matter is concerned, ASIC provided the following particulars:

Harry Fares was the “key person”, being an appropriately qualified and experienced person nominated by the licensee and approved by ASIC to be responsible for the day-to-day oversight of the credit activities authorised by the licence. Harry Fares ceased to be an officer of Darranda or to perform duties on behalf of Darranda on 12 November 2018.

246 There are parts of ASIC’s case that appear to elide the obligation to engage in licensed activities efficiently, honestly and fairly with an obligation to act in the best interests of the customers. As Beach J observed in *AGM Markets*, the standard of “efficiently, honestly and fairly” is not to be viewed solely from the viewpoint of the customer. The fact that Darranda sought to generate a financial reward by offering a product that was directed to consumers in need of the product and who would otherwise struggle to access the product does not of itself demonstrate that Darranda failed to do all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly.

247 Nor does the fact that Darranda attempted to deliberately structure its arrangements so as to satisfy the definition of consumer lease in order to be subject to the requirements applicable to consumer leases as opposed to a credit contract establish a failure of the “efficiently, honestly, fairly” standard. To this end, there is merit in the Respondents’ submission that the Code recognised a distinction between a consumer lease and a credit contract and subjected the two categories to different regulatory requirements. A conscious decision by those conducting a business to seek to adopt one form of contract over another does not result in a breach of the standard of efficiently, honestly and fairly.

248 I also accept that Darranda did not deliberately seek to engender a belief in customers that they would be entitled to own the product at the end of their rental agreements. Darranda sought to train staff and representatives to explain to customers that they would not own the product at the end of the rental agreement.

249 However, for the reasons set out above, the rental agreements did not satisfy the definition of consumer lease because, although the contract required that ownership not be transferred to the customer, the contract operated to transfer ownership to the customer's nominee and thus provided for a purchase by the customer at the end of the rental term, subject only to the customer complying with the terms of the agreement. As a result, the agreements were credit contracts and did not comply with the requirements of the Code. A failure to comply with a requirement of the Code can itself demonstrate a failure to engage in credit activities efficiently, honestly and fairly: *Westpac* at [73] (Beach J); *Ferratum* (Kennett J).

***The name "Rent4Keeps"***

250 ASIC submitted that by using the business and trademarks "Rent4Keeps", Darranda engendered in consumers a reasonable expectation that, despite the gifting clauses, they could keep the goods.

251 Use of the name "Rent4Keeps" must be evaluated in the context of the circumstances as a whole.

252 When Mr Payne commenced the Rent4Keeps Business, he had little to no understanding of the legal requirements of a consumer lease or how a consumer lease was different from a credit contract or hire purchase agreement. His evidence in ASIC examinations was that he chose the name because it was "catchy".

253 By 2013, Mr Payne was on notice from ASIC that:

- (1) A consumer lease required that the hirer not have the right to acquire the goods rented.
- (2) The name "Rent4Keeps" had the potential to mislead customers into believing that they did have such a right.

254 At trial Mr Payne under cross-examination said that the name "Rent4Keeps" had special significance for him:

...what I'm saying is, in terms of the business creation, the name, which is what you started your questioning on, the business creation of the name, it had nothing to do with the customer. It was everything to do with me and my family and my wife. We

were having a rental business for life, for keeps. We were going to keep it. Dad, what he said to me, you know, “Whatever you do in life, son, do it for keeps. Be good to people, but do it for keeps”. And that’s what I did. That was the “keeps” angle. That was the – the “4Keeps” bit that was in my heart when I came up with that name, and there was nobody I showed that said anything different to me.

255 Mr Payne’s evidence on this point was in the nature of *ex post* reconstruction, having regard to the fact that Mr Payne had been questioned about the name both at trial and earlier by ASIC in its examinations. I attach no weight to this part of Mr Payne’s evidence. It is not supported by the contemporaneous documents (in the form of the Operations Manuals which he drafted) or his earlier testimony.

256 In relation to the relevant period, ASIC relied upon the following as instances of Rent4Keeps (Aust) and Darranda using the term “Rent4Keeps” as a verb to convey to customers that the customer would keep the goods rented:

- (a) use of the registered trade mark “Rent new! Rent now! Rent4Keeps!”; and
- (b) use in advertising of the slogan “It’s as easy as 1... 2... 3. 1. Select the goods. 2. Call us & we visit. 3. Rent4Keeps”.

I do not consider that it is appropriate to analyse these catchphrases in grammatical terms. The catchphrases may also convey that if the consumer wishes to rent something new immediately, the consumer should contact the business called “Rent4Keeps”.

257 ASIC relied upon a screenshot of an archived website. The screenshot had a tab labelled “Rent To Own: Appliance Rentals” above the search bar. ASIC sought to rely upon this tab label as conveying to consumers that they would own the product. A relevant extract of the image relied upon is depicted below:



258 There was no expert evidence explaining how the tab label was generated much less how a consumer might interpret or rely upon a tab label appearing above an internet search bar. Mr Payne gave evidence of his understanding that the tab label was in some way related to a google search result and that he had engaged a “Google expert” who Mr Payne believed had ensured that the Rent4Keeps Business would be returned in response to a search request for

“Rent to Own”. Mr Payne’s evidence was speculative. In the absence of expert evidence in respect of how the tab was generated, no weight is accorded to the existence of this image.

259 Although in and of themselves, the use of the trading name and its related slogans does not demonstrate that the terms of the written agreement were a sham during the relevant period, having been put on notice that the name “Rent4Keeps” was apt to convey to customers that they would keep the goods, it was critical that the terms of the rental agreements and communications to customers were clear. The evidence was that Darranda’s officers, and those providing services to Darranda, were not even aware of the actual terms Darranda was using in its business. That itself was reflective of the deficiencies in the manner in which Darranda conducted its affairs.

260 ASIC also sought to rely upon an SMS message sent to customers in December 2018 that included the following:

Last minute gift ideas? Think R4K! Gaming/Phones/Tablets & more. Gr8prices!

261 The SMS message sent in December 2018 was reflective of the lack of understanding those within Rent4Keeps (Aust) had of the “gifting” clauses used in the Rent4Keeps terms and conditions. The SMS was not consistent with terms and conditions that provided for Darranda to own the products rented until the end of the agreement and which provided that the rental customer was not to part with possession of the goods during the rental period. As set out above, there was no consistent understanding by those individuals with responsibility for the Rent4Keeps terms and conditions of what the “gifting” clauses meant or required. The terms on which Rent4Keeps (Aust) and Darranda sought to contract with customers were not terms that were readily understood by those responsible for conducting the Rent4Keeps Business. The SMS message is reflective of a lack of competence by Darranda in how it engaged in its licensed credit activities.

### ***Deficiencies***

262 The evidence supports a finding that there were serious deficiencies in the manner in which Darranda engaged in its credit activities. Those deficiencies included:

- (1) A failure by those with ultimate responsibility for Darranda’s affairs to be aware of the terms and conditions that were in fact being used by field representatives. The testimony of both Mr Payne and Mr Boucher was that neither was aware that the terms

and conditions during the relevant period continued to be in the form critiqued by Holley Nethercote in its 2017 report.

- (2) A failure to ensure that its advisors were providing advice on terms and conditions that were in use. The mark-ups received from Frenkel Partners were provided on a document that bore no resemblance to the terms and conditions that had been in use and that had been provided to ASIC.
- (3) A failure to ensure that changes that were advised to be made to the terms and conditions were in fact made.
- (4) A failure to appoint a compliance officer with legal training and instead relying entirely on external providers, whether they be legal advisors or third party training providers. During the relevant period, there was no individual with legal training who had responsibility for ensuring that the terms and conditions reflected the advice received.
- (5) A failure to have a system in place for monitoring the activities of field representatives and to assess their compliance with the matters in respect of which they had received training. The difficulties were compounded by an overreliance on technological solutions which were inadequate to wholly or substantially address human behaviours. For example, the audio recordings relied upon to ensure customers were aware of certain key terms without any compliance monitoring undertaken to evaluate whether the recordings were in fact being played at a volume and in a setting that enabled them to be heard by customers.
- (6) Entering into contracts that provided for Darranda to have a discretion that may be exercised but having no system in place for the exercise of that discretion.
- (7) Failing to have a person acting as the “key person” for the purposes of its Australian Credit Licence and failing to notify ASIC within five business days, and for almost a year, that on 12 November 2018, its “key person”, Harry Fares, had ceased to be an officer of Darranda or to perform duties on behalf of Darranda. By failing to have a person acting as a key person, Darranda was in breach of a condition of its Australian Credit Licence and accordingly was in breach of s 47(1)(c) of the Credit Act.

263 These deficiencies resulted in:

- (1) Darranda using terms and conditions that were not clear and that lacked consistency in how field representatives in practice communicated with customers.

(2) Darranda breaching the terms of its credit licence. The failure to have a “key person” or notify ASIC within any reasonable time was likely a result of a failure to have a person responsible for compliance who had the requisite legal training.

264 The deficiencies demonstrate a failure to “do all things necessary to ensure” that its activities were undertaken efficiently, resulting in Darranda failing to meet a standard of competence and thus failing to engage in its activities “efficiently, honestly and fairly”.

265 Whilst I do not find that the controlling minds of Darranda intended to mislead customers or intended to breach the Credit Act or the Code, there was a lack of honesty in that Darranda should have been well aware of the deficiencies in its systems. It had been put on notice that its terms were at least confusing but took inadequate steps to clarify the terms. It was dealing with a financially vulnerable group of customers, offering a product to them that was highly nuanced. Although there was no subjective intention on the part of Darranda’s controlling minds to take unfair advantage of its customers, failing to have systems in place that effectively monitored the terms and conditions being used in the business, and whether those terms and conditions reflected the advice that had been received by Darranda, fell short of what may be considered to be “ethically sound”.

266 The nuanced nature of the product it sought to offer was not properly understood by those responsible for Darranda’s marketing communications (which were essentially outsourced to Rent4Keeps (Aust)). In sending communications to customers that were not consistent with the terms of the rental agreement, Darranda failed to ensure that its credit activities were engaged in “efficiently, honestly and fairly” as required by s 47(1)(a) of the Credit Act.

267 Darranda’s breach of its licence condition requiring it to have a “key person” is not to be dismissed as a mere oversight. It had been subject to a licence cancellation hearing as a result of ASIC concerns in relation to its compliance with responsible lending obligations in 2016 yet continued to fail to have in place a system for monitoring compliance with its licence conditions in 2019. The failure to comply was a result of a breach of the standard of competence required to engage in licensed credit activities “efficiently, honestly and fairly”.

#### **INVOLVEMENT OF RENT4KEEPS (AUST)**

268 ASIC contended that Rent4Keeps was “involved in” Darranda’s contraventions of ss 47(1)(a) and 47(4) of the Credit Act and ss 17(3)(c), 17(4)(a), 17(5), 17(6), 23(1), 24(1)(a) and 32A of the Code.



269 Section 169 of the Credit Act provides:

A person who:

- (a) attempts to contravene a civil penalty provision; or
- (b) is involved in a contravention of a civil penalty provision;

is taken to have **contravened** the provision.

270 The term “involved in” is defined in s 5 of the Credit Act relevantly as follows:

**involved in:** a person is **involved in** a contravention of a provision of legislation if, and only if, the person:

...

- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention...

271 A company may be knowingly concerned in a contravention. The intention and knowledge of the directing or governing mind and will of a company may be imputed to the company for this purpose: *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 at 170–1 (Lord Reid); *Hamilton v Whitehead* [1988] HCA 65; (1988) 166 CLR 121 at 127 (Mason CJ, Wilson and Toohey JJ); *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* [2015] FCA 342; (2015) 235 FCR 181 at [406] (White J).

272 The following principles are relevant:

- (1) “Knowingly concerned in” requires more than knowledge; the phrase “concerned in” also requires conduct, by act or omission, which implicates or involves the person in the contravention or shows a practical connection between the person and the contravention: see for example *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2002] FCA 61; (2002) 117 FCR 588 at [34] (Kenny J); ***Productivity Partners Pty Ltd v Australian Competition and Consumer Commission*** [2024] HCA 27 at [146] (Gordon J).
- (2) The knowledge that is required is actual knowledge of the essential factual elements of the contravention: *Yorke v Lucas* [1985] HCA 65; (1985) 158 CLR 661 at 667 (Mason ACJ, Wilson, Deane and Dawson JJ); *Australian Securities and Investments Commission v Rent 2 Own Cars Pty Ltd* [2020] FCA 1312 at [371] (Greenwood J). It is not necessary to know that those facts are capable of characterisation in the language of the statute: *Rural Press Limited v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [48] (Gummow, Hayne and

Heydon JJ); *Productivity Partners* at [82] (Gageler CJ and Jagot J), [270] (Edelman J), [339] (Beech-Jones J).

- (3) To invoke s 169, the contravention in respect of which involvement is required to be demonstrated is contravention of a “civil penalty provision”, as that term is defined in s 5(1) of the Credit Act. In the present case, the relevant civil provisions are s 24(1)(a) of the Code and s 47(1)(a) of the Credit Act. As explained by Greenwood J in *Rent 2 Own Cars* at [123], s 17 of the Code is not a civil penalty provision (as defined). Section 32A of the Code provides for a criminal penalty and is therefore not a civil penalty provision. Sections 47(1)(c) and (d) of the Credit Act are not civil penalty provisions by reason of s 47(4).
- (4) ASIC has the burden of proving its case to the civil standard provided for in s 140 of the *Evidence Act 1995* (Cth). As Lee J stated in *Australian Securities and Investments Commission v GetSwift* [2021] FCA 1384 at [118]–[122]:

[118]...This section requires the Court, in a civil proceeding, to find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities. In deciding, in a civil case, whether it is satisfied that the case has been proved, the Court is to take into account: (a) the nature of the cause of action or defence; (b) the nature of the subject-matter of the proceeding; and (c) the gravity of the matters alleged. Although the standard of proof remains the balance of probabilities, the degree of satisfaction varies according to the seriousness of the allegations made and the gravity of the consequences (if the allegations are found to be correct).

...

[121] As the defendants rightly stress, there is no doubt that the so-called “*Briginshaw* principles” apply to civil penalty proceedings (which is a particular example of the application of s 140(1) of the *EA*): see *Adler v Australian Securities and Investments Commission (ASIC)* [2003] NSWCA 131; (2003) 179 FLR 1 (at 29–30 [142]–[148] per Giles JA); *Whitlam v Australian Securities and Investments Commission* [2003] NSWCA 183; (2003) 57 NSWLR 559 (at 592 [117]–[119] per Hodgson, Ipp and Tobias JJA).

[122] It follows that, for ASIC to succeed, I am required to reach a state of satisfaction or an actual persuasion that it has proved its allegations of contravention, while taking into account the seriousness of the allegations and the gravity of the consequences that could follow if the allegations were to be accepted. Having said this, although the fact that this is a civil penalty proceeding is of real importance, when one comes to considering the “gravity of the matters alleged”, the focus is upon the particular factual allegations in the case, not an examination of the cause of action or issues at a level of abstraction. This makes sense when one considers that the focus on the gravity of the finding is linked to the notion that the Court takes into account the inherent unlikelihood of the alleged conduct, and common law principles

concerning weighing evidence: see *Qantas Airways Limited v Gama* [2008] FCAFC 69; (2008) 167 FCR 537 (at 576 [137]–[138] per Branson J); *Briginshaw* (at 361–362 per Dixon J).

273 The directing or governing mind of Rent4Keeps (Aust) for this purpose is to be found in Mr Payne and Mr Boucher. Although Mr Boucher was not a director of Rent4Keeps (Aust), he was authorised to oversee, and had responsibility for overseeing, its operations. Those operations included setting up the operating systems, computer systems and setting the standard terms and conditions pursuant to which the Rent4Keeps Business’s franchises were to operate.

274 A contravention of s 24(1)(a) of the Code requires:

- (a) entry into a credit contract by a credit provider;
- (b) the terms of that credit contract imposing a monetary liability exceeding the amounts permitted by the Code (as provided for in s 23(1)).

275 Mr Payne and Mr Boucher each had actual knowledge that Darranda was entering into agreements with customers, though they did not have actual knowledge of each contract entered into.

276 Neither Mr Payne nor Mr Boucher knew that the contracts being entered into had the character of credit contracts under the Code. However, knowledge of the legal character of the contracts is not required. The factual element of the contravention is to be found in the terms of the contracts entered into.

277 The Respondents rely upon the fact that neither Mr Payne nor Mr Boucher had actual knowledge of the terms of the contracts entered into by Darranda. Each had assumed that the changes noted by Mr Boucher as a result of the Holley Nethercote recommendations had been made. It was submitted that it followed from their lack of knowledge of the actual terms of the contracts that Rent4Keeps (Aust) was not knowingly concerned in Darranda’s contraventions of the Code.

278 That submission is not accepted. Whilst Mr Payne and Mr Boucher did not have actual knowledge of the form of some of the terms of the rental agreements, they did have actual knowledge of the term of the contract providing for automatic transfer of ownership at the end of the contract to the person nominated by the hirer of the goods if the hirer complied with the terms and conditions of the agreement. It was that term which resulted in the hirer having a right to purchase the goods and the contracts having the legal character of credit contracts. During the relevant period, Mr Payne also knew that the terms of the rental agreements imposed

monetary liabilities that were not consistent with the rate cap set by the Code. Mr Payne knew that his business model was premised on generating a rate of return higher than that which would result from the rate cap set by the Code. This was evident in the submissions made in 2016 and 2017 as part of the reform of the Code to which he had input.

279 Mr Payne and Mr Boucher not only had actual knowledge of these aspects of the terms and conditions of the rental agreements — these aspects of the rental agreements were based on the instructions they were responsible for providing to Frenkel Partners. Mr Payne and Mr Boucher’s involvement extended beyond the possession of knowledge. It follows that Rent4Keeps (Aust) was involved in Darranda’s breach of s 24(1)(a) of the Code and pursuant to s 169 of the Credit Act, Rent4Keeps (Aust) is taken to have contravened s 24(1)(a) of the Code.

280 In so far as Darranda’s contravention of s 47(1)(a) of the Credit Act is concerned, the factual element of that contravention was the deficiency in the systems, processes and marketing services. Each of those were functions which Darranda had outsourced to Rent4Keeps (Aust) and which Rent4Keeps (Aust) had assumed responsibility for designing. As a franchisee, Darranda was encouraged, if not obligated, to adopt, implement and rely upon those systems, processes and procedures. Mr Payne and Mr Boucher not only knew of the elements and features of the processes and procedures but were ultimately responsible for the design and delivery of those systems, processes and procedures to franchisees, including Darranda.

281 On the facts, Darranda’s failure to meet its general obligation under s 47(1)(a) cannot be divorced from the actions and conduct of Rent4Keeps (Aust). As a consequence, Rent4Keeps (Aust) was involved in Darranda’s breach of its obligations under s 47(1)(a) of the Credit Act and is taken to have contravened s 47(1)(a), pursuant to s 169 of the Credit Act.

## **CONCLUDING REMARKS**

282 The subject goods leased were generally goods with no material resale value. There was no economic incentive for a lessor to repossess the goods at the end of the contract. Furthermore, in many cases, the consumer might reasonably be expected to have a continuing need for the goods after the conclusion of the contract. It is not surprising that as a practical matter at the end of the contract the renter in fact remained in possession of the goods.

283 A gifting mechanism was a concept that had been accepted by ASIC over the years as satisfying the legal definition of a consumer lease. However, as a technical legal matter, such a gifting

mechanism could only so satisfy that definition within very limited constraints. It required the gift to be at the discretion of the lessor. The “discretion” could not be locked in at the commencement of the contract, conditionally or otherwise. It could not be “automatic”. To be implemented effectively, it required a process for its exercise. There is a real question as to whether, as a practical reality, such a mechanism was ever likely to be effectively implemented given the economic reality of the lack of commercial value in the goods at the end of the lease.

284 Darranda’s contraventions were not the result of malice or ill-will or an intention to exploit customers. They were at least partially the result of a lack of competence in operating in a highly regulated industry. There was no executive responsible for compliance who had the necessary qualifications and training. Those with executive management responsibility were not even aware of the terms on which Darranda was contracting with customers.

285 To be effective at law, a gifting mechanism required the lessor to essentially navigate a narrow strait. The guidance provided by ASIC and Darranda’s advisors was technical and nuanced. It is hardly surprising that Darranda foundered.

## **DISPOSITION**

286 The hearing held in February 2024 was limited to issues of liability.

287 ASIC has established breaches by the Respondents of “civil penalty provision[s]” (as defined in s 5 of the Credit Act): s 47(1)(a) of the Credit Act and s 24(1)(a) of the Code.

288 ASIC has also established breaches by Darranda of ss 17(3), 17(4), 17(5), 17(6) and 32A of the Code.

## **Forms of relief**

289 Under s 166(2) of the Credit Act, the Court is required to make declarations that the Respondents contravened a civil penalty provision.

290 Pursuant to s 113(1) of the Code, the Court is required, on an application being made, by order to declare whether or not the credit provider (Darranda) has contravened a key requirement in connection with a credit contract. For credit contracts that are not continuing credit contracts, key requirements relevantly include s 32A(1) and ss 17(3), 17(4), 17(5) and 17(6) of the Code: s 111(1) of the Code. The 516 Relevant Contracts were not continuing credit contracts as defined in s 204 of the Code.

291 ASIC also sought declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**) in respect of Rent4Keeps (Aust) in relation to its involvement in Darranda’s contraventions of ss 17 and 32A. These sections are not civil penalty provisions. As Greenwood J in *Rent 2 Own Cars* explained (original emphasis):

It would only be appropriate to make a declaration that a person was involved in a contravention of a particular provision, for the purposes of a provision of the [Credit Act] (and the Code) ...being the *source* of a legal *obligation* or *liability*. Otherwise, a declaration [pursuant to s 21 of the Federal Court Act] resting solely on, and for the purposes of, a defined term, is detached from any statutory nexus engaging liability on the part of the relevant person.

292 A declaration may be made that a person has been knowingly concerned in a contravention of the Credit Act which is not a contravention of a civil penalty provision as explanatory of the granting of an injunction: *Rent 2 Own Cars Australia* at [130]-[131] (Greenwood J). Section 177(1) of the Credit Act empowers the Court to grant an injunction if, on the application of ASIC or any other person, the Court is satisfied that, relevantly, a person has engaged in conduct that constitutes or would constitute “being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act”. I have not determined at this stage whether an injunction is to be granted.

293 A question also arises as to whether a declaration should be made, and if so in what terms, regarding Darranda’s contravention of s 47(1)(c) and (d) of the Credit Act. As noted above, neither s 47(1)(c) nor 47(1)(d) is a civil penalty provision.

294 In light of the findings I have made, I will hear from the parties regarding the terms of the declarations to be made.

295 Questions as to what civil penalty, if any, should be imposed also arise from the findings in relation to the contraventions. I will therefore need to hear from the parties, and possibly receive further evidence, as to the appropriate relief.

### **Orders**

296 Orders will be made for:

- (a) the parties to file an agreed minute or competing minutes of order in the light of these reasons; and
- (b) the matter to be listed for a case management hearing, in order to set a timetable for a hearing on the question of the appropriate final orders.

I certify that the preceding two hundred and ninety-six (296) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Hesse.

Associate: 

Dated: 4 September 2024