FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Darranda Pty Ltd (Penalty) [2025] FCA 938

File number(s):	VID 181 of 2022
Judgment of:	**HESPE J**
Date of judgment:	12 August 2025
Catchwords:	**CONSUMER LAW** – consumer credit – fixing pecuniary penalty – declarations that First Respondent contravened s 24(1)(a) of the National Credit **Code** (Sch 1 to the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**)) – declarations that First Respondent contravened s 47(1)(a) of the Credit Act – declarations that Second Respondent was involved in First Respondent's contravention of s 24(1)(a) of the Code and s 47(1)(a) of the Credit Act – declarations that First Respondent contravened ss 17(3), (4)(a), (5) and (6) of the Code – principles relevant to the fixing of a pecuniary penalty under s 167(3) of the Credit Act and s 113(4) of the Code
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 21 *Financial Sector Reform Act 2022* (Cth) *National Consumer Credit Protection Act 2009* (Cth) ss 47, 166, 167, 167B, 169, 175, Sch 1 (*National Credit Code*) ss 17, 23, 24, 32A, 111, 113, 116, 174 Explanatory Memorandum, Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth)
Cases cited:	*Australian Building and Construction Commission v Pattinson* [2022] HCA 13; (2022) 274 CLR 450 *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; 258 FCR 312 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330; (2015) 327 ALR 540 *Australian Competition and Consumer Commission v Francis* [2004] FCA 487; (2004) 142 FCR 1

Australian Competition and Consumer Commission v Murray Goulburn Co-Operative Co Ltd [2018] FCA 1964

Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited [2022] FCA 1115

Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 790

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

Australian Securities and Investments Commission v GetSwift Limited (Liability Hearing) [2021] FCA 1384

Australian Securities and Investments Commission v Macquarie Bank Limited [2024] FCA 416

Australian Securities and Investments Commission v Rent 2 Own Cars Pty Ltd [2020] FCA 1312

Australian Securities and Investments Commission v Ultiqa Lifestyle Promotions Limited (in liq) (No 2) [2022] FCA 1228

Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty) [2024] FCA 578

Australian Securities and Investments Commission v Westpac Banking Corporation (No 3) [2018] FCA 1701; (2018) 131 ASCR 585

Berry v CCL Secure Pty Ltd [2020] HCA 27; (2020) 271 CLR 151

BMW Australia Ltd v Australian Competition and Consumer Commission [2004] FCAFC 167; (2004) 207 ALR 452

Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation [2020] FCA 1538; (2020) 148 ACSR 247

Cousins v Merringtons Pty Ltd (No 2) [2008] VSC 340

Eva v Southern Motors Box Hill Pty Ltd [1977] FCA 2; (1977) 15 ALR 428

Make It Mine Finance Pty Ltd [2015] FCA 393; (2015) 238 FCR 562

Make It Mine Finance Pty Ltd, in the matter of Make It Mine Finance Pty Ltd (No 2) [2015] FCA 1255

New Image Photographics Pty Ltd v Fair Work Ombudsman [2013] FCA 1385

NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission [1996] FCA 1134

Rural Press Ltd v Australian Competition & Consumer Commission [2003] HCA 75; (2003) 216 CLR 53

Trade Practices Commission v CSR Ltd [1991] FCA 762; [1991] ATPR ¶41-076

	Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission [2021] FCAFC 49; (2021) 284 FCR 24
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Sub-area:	Regulator and Consumer Protection
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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: **12 AUGUST 2025**

THE COURT DECLARES THAT:

In this Order:

(a) References to the Credit Act are references to the *National Consumer Credit Protection Act 2009* (Cth).

(b) References to the Credit Code are references to Schedule 1 to the Credit Act.

Rate cap declarations

Pursuant to s 113(1) of the Credit Code, the Court declares that:

(1) Between 1 April 2019 and 30 June 2019 (**Relevant Period**), the First Respondent (**Darranda**) entered into 516 contracts titled "Tax Invoice and Rental Agreement" (**Relevant Contracts**) which were credit contracts within the meaning of s 4 of the Credit Code and on each occasion:

(a) entered into credit contracts that imposed an annual cost rate that exceeded the maximum rate of 48%, in contravention of the key requirement (as defined in s 111(1)(j) of the Credit Code) contained in s 32A(1) of the Credit Code; and

(b) the credit contract imposed a monetary liability on the debtor exceeding the amount that may be charged consistently with the Credit Code, in contravention of the key requirement (as defined in s 111(1)(i) of the Credit Code (but only at

the time the credit contract was entered into)) contained in s 23(1) of the Credit Code.

Pursuant to s 166 of the Credit Act, the Court declares that:

(2) During the Relevant Period, Darranda contravened s 24(1)(a) of the Credit Code by entering into the Relevant Contracts on terms imposing a monetary liability prohibited by subsection 23(1) of the Credit Code.

(3) During the Relevant Period, by virtue of s 169 of the Credit Act the Second Respondent (**Rent4Keeps (Aust)**) contravened s 24(1)(a) of the Credit Code because it was involved in Darranda's contraventions of s 24(1)(a) of the Credit Code.

Disclosure contravention declarations

Pursuant to s 113(1) of the Credit Code, the Court declares that:

(4) During the Relevant Period, in respect of each of the Relevant Contracts:

(a) Darranda contravened the key requirement (as defined in s 111(1)(a) of the Credit Code) in s 17(3) of the Credit Code by failing to disclose the cash price of the goods the subject of the credit contract;

(b) Darranda contravened the key requirement (as defined in s 111(1)(b) of the Credit Code) contained in s 17(4)(a) of the Credit Code by failing to disclose the annual percentage rate under the credit contract;

(c) Darranda contravened the key requirement (as defined in s 111(1)(c) of the Credit Code) contained in s 17(5) of the Credit Code by failing to contain the method of calculation of the interest charges payable under the credit contract and the frequency with which interest charges are to be debited under the credit contract; and

(d) Darranda contravened the key requirement (as defined in s 111(1)(d) of the Credit Code) contained in s 17(6) of the Credit Code by failing to disclose the total amount of interest charges payable under the credit contract.

General Obligation Contravention

Pursuant to s 166 of the Credit Act, the Court declares that:

(5) During the Relevant Period, Darranda contravened s 47(1)(a) of the Credit Act in failing to do all things necessary to ensure that the credit activities authorised by its licence

were engaged in efficiently, honestly and fairly by reason of the following deficiencies in its business systems, of which Darranda ought to have been aware:

(a) failing to have systems in place that effectively monitored the contractual terms and conditions being used in its business, including whether those terms and conditions reflected the advice that Darranda had received;

(b) failing to appoint a compliance officer with appropriate training;

(c) failing to monitor the activities of field representatives;

(d) sending marketing communications to customers that were inconsistent with the terms of Darranda's customer contracts;

(e) failing to implement a process for the exercise of a discretion provided for in its contracts; and

(f) failing to have a person acting as a "key person" and failing to notify the Australian Securities and Investments Commission that its key person had ceased to be an officer of Darranda, as required by the terms of its credit licence.

(6) During the Relevant Period, by virtue of s 169 of the Credit Act Rent4Keeps (Aust) contravened s 47(1)(a) of the Credit Act because it was involved in Darranda's contravention of s 47(1)(a) of the Credit Act.

THE COURT ORDERS THAT:

1. Darranda pay to the Commonwealth of Australia a pecuniary penalty of $2,000,000 in respect of the contraventions of s 24(1)(a) of the Credit Code referred to in paragraph (2) of the declarations set out above.

2. Darranda pay to the Commonwealth of Australia a pecuniary penalty of $400,000 in respect of the contraventions of ss 17(3), 17(4)(a), 17(5) and 17(6) of the Credit Code referred to in paragraph (4) of the declarations set out above.

3. Darranda pay to the Commonwealth of Australia a pecuniary penalty of $1,000,000 in respect of the contraventions of s 47(1)(a) of the Credit Act referred to in paragraph (5) of the declarations set out above.

4. Rent4Keeps (Aust) pay to the Commonwealth of Australia a pecuniary penalty of $1,000,000 in respect of the contraventions of s 24(1)(a) of the Credit Code referred to in paragraph (3) of the declarations set out above.

5. Rent4Keeps (Aust) pay to the Commonwealth of Australia a pecuniary penalty of $3,000,000 in respect of the contraventions of s 47(1)(a) of the Credit Act referred to in paragraph (6) of the declarations set out above.

6. The pecuniary penalties referred to in Orders 1 to 5 are to be paid within 30 days of the date of this order.

7. Subject to Order 8, the Respondents pay the costs of the Applicant, to be taxed if not agreed.

8. There be no order as to costs in relation to the Applicant's applications made on 16 October 2024 and 13 December 2024.

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

REASONS FOR JUDGMENT

HESPE J:

INTRODUCTION

1 On 4 September 2024, this Court delivered judgment in *Australian Securities and Investments Commission v* ***Darranda*** *Pty Ltd* ***(Liability)*** [2024] FCA 1015 on the question of liability. The reasons for judgment on that question should be read with these reasons.

2 In *Darranda (Liability)* it was found that Darranda had engaged in the following contraventions of the Code in respect of the 516 Relevant Contracts entered into between 1 April 2019 and 30 June 2019:

(1) Contravened the key requirement (as defined in s 111(1)(a) of the Code) contained in s 17(3)(c) of the Code by failing to disclose the cash price of the goods.

(2) Contravened the key requirement (as defined in s 111(1)(b) of the Code) contained in s 17(4)(a) of the Code by failing to disclose the annual percentage rate under the contract.

(3) Contravened the key requirement (as defined in s 111(1)(c) of the Code) contained in s 17(5) of the Code by failing to 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.

(4) Contravened the key requirement (as defined in s 111(1)(d) of the Code) contained in s 17(6) of the Code by failing to disclose the total amount of interest charges payable under the contract.

(5) Contravened the key requirement (as defined in s 111(1)(i) of the Code (but only at the time the credit contract was entered into)) contained in s 23(1) of the Code because the credit contract imposed a monetary liability in respect of a fee or charge which exceeded the amount that could be charged consistently with the Code.

(6) Contravened the key requirement (as defined in s 111(1)(j) of the Code) contained in s 32A(1) of the Code because the credit contracts had an annual cost rate exceeding 48%.

(7) Contravened s 24(1)(a) of the Code by entering into a credit contract on terms imposing a monetary liability prohibited by s 23(1) of the Code.

3 In *Darranda (Liability)* it was also found that Darranda had engaged in conduct contravening ss 47(1)(a), (c) and (d) of the Credit Act.

4 In *Darranda (Liability)* it was found that Rent4Keeps (Aust) had been involved in the contraventions of the civil penalty provisions in:

(a) s 24(1)(a) of the Code; and

(b) s 47(1)(a) of the Credit Act.

5 These reasons address:

(a) the form of the declarations to be made; and

(b) the penalties to be imposed.

6 ASIC does not seek injunctive relief. From 30 June 2023, Darranda has ceased to engage in a business of offering any contracts to consumers and operating activities are limited to servicing legacy contracts. From 30 June 2023, Rent4Keeps (Aust) has ceased to enter into franchise agreements. The business activities of Rent4Keeps (Aust) are limited to maintaining systems to the extent required to support legacy franchisees in relation to their ongoing customer contracts.

DECLARATORY RELIEF

Statutory power to make declarations

7 Section 113(1) of the Code provides:

> (1) The court must, on an application being made, by order declare whether or not the credit provider or lessor has contravened a key requirement in connection with the credit contract or contracts concerned, or consumer lease or leases concerned.

8 As set out above, by failing to comply with ss 17(3)(c), (4)(a), (5) and (6), 23(1) and 32A(1) of the Code, Darranda contravened key requirements in connection with the 516 Relevant Contracts. ASIC has made an application for declaratory orders. The Court is therefore required to make declarations in respect of those contraventions.

9 Section 166 of the Credit Act relevantly provides:

> **Declaration of contravention of civil penalty provision**
>
> *Application for declaration of contravention*
>
> (1) Within 6 years of a person contravening a civil penalty provision, ASIC may

apply to the court for a declaration that the person contravened the provision.

Declaration of contravention

(2) The court must make the declaration if it is satisfied that the person has contravened the provision.

(3) The declaration must specify the following:

(a) the court that made the declaration;

(b) the civil penalty provision that was contravened;

(c) the person who contravened the provision;

(d) the conduct that constituted the contravention.

10 As set out above, the Court has found Darranda contravened s 24(1)(a) of the Code by entering into credit contracts on terms imposing a monetary liability prohibited by s 23(1) of the Code. Section 24(1)(a) of the Code is a civil penalty provision because the words "civil penalty" and an amount in penalty units are set out at the foot of the subsection: see definition of "civil penalty provision" in s 5 of the Credit Act. ASIC has applied to the Court for a declaration that Darranda contravened s 24(1)(a) of the Code. The Court is therefore required to make declarations in respect of those contraventions.

11 As set out above, s 24(1)(a) of the Code is a civil penalty provision and the Court has found that Rent4Keeps (Aust) was involved in Darranda's contravention of s 24(1)(a) of the Code. As a result, Rent4Keeps (Aust) is taken to have contravened s 24(1)(a) of the Code: s 169 of the Credit Act. ASIC has applied to the Court for a declaration that Rent4Keeps (Aust) contravened s 24(1)(a) of the Code. The Court is therefore required to make declarations in respect of those contraventions.

12 As set out above, the Court has found that Darranda had engaged in conduct contravening ss 47(1)(a), (c) and (d) of the Credit Act. Of these, only s 47(1)(a) is a civil penalty provision: s 47(4) of the Credit Act. ASIC has applied to the Court for a declaration that Darranda contravened s 47(1)(a) of the Credit Act. The Court is therefore required to make a declaration in respect of that contravention.

13 The Court has also found that Rent4Keeps (Aust) was involved in Darranda's contravention of s 47(1)(a) of the Credit Act. As a result, Rent4Keeps (Aust) is taken to have contravened s 47(1)(a) of the Credit Act: s 169 of the Credit Act. ASIC has applied to the Court for a declaration that Rent4Keeps (Aust) contravened s 47(1)(a) of the Credit Act. The Court is therefore required to make a declaration in respect of that contravention.

14 The Court has a statutory discretionary power to make declarations under s 21 of the Federal Court Act. That power is not dependent on a contravention of a civil penalty provision. ASIC submitted that the Court should make declarations in respect of Darranda's contraventions of s 47(1)(c) and (d) of the Credit Act because the Court has made findings that those provisions were contravened and declarations will serve to warn others of the danger in engaging in such contraventions as well as marking the Court's disapproval of the contravening conduct in this case.

Form of the declarations

15 The parties did not agree on the form of the declarations to be made.

16 In formulating the declarations, the Court has had regard to the following matters.

Key requirement contraventions

17 Section 113(5) of the Code provides:

> (5) The court must, for the purposes of determining an application for an order under this Division or the amount of a penalty, treat a contravention of a key requirement that occurs merely because of another contravention of a key requirement as being a contravention of the same kind. If a provision referred to in section 111 contains several requirements, the court must treat contraventions of more than one of those requirements as a single contravention of the one key requirement for the purposes of determining the amount of a penalty.

18 As Beach J explained in *Make It Mine Finance Pty Ltd* [2015] FCA 393; (2015) 238 FCR 562 (***Make It Mine (Liability)***) at [44], s 113(5) has two functions:

> (a) to treat a contravention of a key requirement that occurs "merely" because of another contravention of that or another key requirement as being a contravention "of the same kind"; and
>
> (b) when dealing with a provision referred to in s 111 which contains several sub-elements, to treat the contraventions of more than one of those sub-elements as a single contravention of the one key requirement.

19 For present purposes, it is the first of these functions that is relevant. The stipulation in the first part of s 113(5) requires considering whether a contravention of one key requirement had occurred *merely* because of another contravention of a key requirement. The word "merely" in this context means without any other quality, reason or causative element. That stipulation is not addressed by pointing to a common external causative factor (here, the misconception that Darranda was entering into consumer leases rather than credit contracts): *Make It Mine (Liability)* at [47].

20 More specifically, as Beach J explained at [48], a failure of a contract to contain a method of calculation of interest charges payable under the contract (thereby contravening s 17(5) of the Code) does not occur merely because of a failure of the contract to contain the annual percentage rate charged under the contract (being a contravention of s 17(4)(a) of the Code):

> … "method" is a broader concept than just an annual rate. If there is an annual rate, is it to be paid monthly, quarterly etc? Is it to be paid in advance or in arrears? Is it simple interest or compounding interest? One can appreciate, given the breadth of the concept of "method", that a failure to stipulate the matter referred to in s 17(4)(a) would not in and of itself cause the contravention of s 17(5).

21 Similarly a failure of a contract to contain the total amount of interest charges payable under the contract (thereby contravening s 17(6) of the Code) does not occur merely because of a failure of the contract to contain the annual percentage rate charged under the contract (being a contravention of s 17(4)(a) of the Code) or the failure to contain the method of calculation of interest (a contravention of s 17(5) of the Code). As Beach J explained at [50]:

> … the stipulation of the total amount of interest charges required more than the annual rate and the method. Such a rate and method had to be applied to the term of the provision of credit and the relevant principal (or quantum of credit given) before one could work out the total amount of interest charges. And even if such latter variables were disclosed, the arithmetic may have been neither transparent nor simple.

22 Because of Darranda's misconception of the nature of the contracts it was entering into, it did not disclose any concepts relating to interest rates, annual percentage rates or total interest charges. One omission did not lead to another; rather, there was a complete absence of disclosure of all such matters: *Make It Mine (Liability)* at [48].

23 There were four separate contraventions in relation to the absence of key requirements, namely:

(a) a contravention of a key requirement for the 516 Relevant Contracts as identified in s 111(1)(a) (s 17(3) of the Code);

(b) a contravention of a key requirement for the 516 Relevant Contracts as identified in s 111(1)(b) (s 17(4) of the Code);

(c) a contravention of a key requirement for the 516 Relevant Contracts as identified in s 111(1)(c) (s 17(5) of the Code); and

(d) a contravention of a key requirement for the 516 Relevant Contracts as identified in s 111(1)(d) (s 17(6) of the Code).

24 Furthermore, the 516 Relevant Contracts imposed a monetary liability in respect of a fee or charge which exceeded the amount that could be charged consistently with the Code, thereby

contravening the key requirement in s 111(1)(j) of the Code. The contravention of that key requirement occurred because Darranda's credit contracts had an annual cost rate exceeding 48%, in contravention of the key requirement in s 111(1)(i) of the Code. Unlike the disclosure contraventions set out above, the contravention of the key requirement in s 111(1)(i) did occur "merely" because of another contravention of the key requirement in s 111(1)(j) and therefore contraventions of ss 111(1)(i) and (1)(j) are to be treated as being contraventions "of the same kind".

General obligation

25 The parties differed as to the terms of the declarations to be made in respect of the contravention of s 47(1)(a) of the Credit Act. Whilst it was accepted that declarations were required to set out the conduct that constituted the contravention, the Respondents submitted that it was only necessary to indicate the gist of the findings made in a concise way and contended that it was not appropriate to selectively collate and restate adverse findings or conclusionary remarks from across the reasons in *Darranda (Liability)*.

26 It is necessary to pay close attention to the form of the declaration to be made and it is necessary to indicate the gist of the findings identifying the contravening conduct: *Rural Press Ltd v Australian Competition & Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [89]-[90] (Gummow, Hayne and Heydon JJ). The declaration should contain sufficient indication about how and why the relevant conduct contravened the applicable statutory norm: *BMW Australia Ltd v Australian Competition and Consumer Commission* [2004] FCAFC 167; (2004) 207 ALR 452 at 465 [35] (Gray, Goldberg and Weinberg JJ). Declarations should be self-contained and intelligible. Declarations should not confuse the specification of the conduct in broad terms with the detailed evidence and legal analysis.

27 The Court considers it appropriate to frame the declarations by identifying in reasonably concise terms the substantive conduct which constitutes the contravention of the standard in s 47(1)(a) of the Credit Act.

28 The Court does not consider it appropriate to exercise its discretion to make the declarations in respect of the contraventions of ss 47(1)(c) and 47(1)(d) of the Credit Act for the following reasons.

29 *First*, declaratory relief is not granted simply because the Court finds that a contravention has occurred: cf *Australian Competition and Consumer Commission v Francis* [2004] FCA 487;

(2004) 142 FCR 1 at 36 [110]. As Lee J said in *Australian Securities and Investments Commission v GetSwift Limited (Liability Hearing)* [2021] FCA 1384 at [2615]:

> As a general proposition, there is little point in declaratory relief if it has no impact on the penalty. As I said in *Australian Securities and Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; (2020) 377 ALR 55 (at 94 [151]), the "reality is that both the Court's disapproval of contravening conduct and clarification of the law is much more likely to emerge from a perusal of reasons than the bare terms of essentially repetitive declarations".

30 *Second*, in the present case, the conduct contravening ss 47(1)(c) and 47(1)(d) formed part of the conduct that also contravened s 47(1)(a) and will be the subject of the declaration made in respect of that contravention. No injunctive relief is sought so such declarations could not be regarded as explanatory of the reasons for such injunctions: cf *Rent 2 Own Cars* at [130]-[131] (Greenwood J). In the circumstances a further declaration over and above that made in respect of the contravention of s 47(1)(a) would serve no useful purpose.

31 *Third,* declarations in respect of contraventions of ss 47(1)(c) and 47(1)(d) were not part of the relief sought by ASIC in its originating application.

Declarations

32 The Court will make the following declarations:

In this Order:

(a) References to the Credit Act are references to the *National Consumer Credit Protection Act 2009* (Cth).

(b) References to the Credit Code are references to Schedule 1 to the Credit Act.

Rate cap declarations

Pursuant to s 113(1) of the Credit Code, the Court declares that:

(1) Between 1 April 2019 and 30 June 2019 (**Relevant Period**), the First Respondent (**Darranda**) entered into 516 contracts titled "Tax Invoice and Rental Agreement" (**Relevant Contracts**) which were credit contracts within the meaning of s 4 of the Credit Code and on each occasion:

(a) entered into credit contracts that imposed an annual cost rate that exceeded the maximum rate of 48%, in contravention of the key requirement (as defined in s 111(1)(j) of the Credit Code) contained in s 32A(1) of the Credit Code; and

(b) the credit contract imposed a monetary liability on the debtor exceeding the amount that may be charged consistently with the Credit Code, in contravention of the key requirement (as defined in s 111(1)(i) of the Credit Code (but only at the time the credit contract was entered into)) contained in s 23(1) of the Credit Code.

Pursuant to s 166 of the Credit Act, the Court declares that:

(2) During the Relevant Period, Darranda contravened s 24(1)(a) of the Credit Code by entering into the Relevant Contracts on terms imposing a monetary liability prohibited by subsection 23(1) of the Credit Code.

(3) During the Relevant Period, by virtue of s 169 of the Credit Act the Second Respondent (**Rent4Keeps (Aust)**) contravened s 24(1)(a) of the Credit Code because it was involved in Darranda's contraventions of s 24(1)(a) of the Credit Code.

Disclosure contravention declarations

Pursuant to s 113(1) of the Credit Code, the Court declares that:

(4) During the Relevant Period, in respect of each of the Relevant Contracts:

(a) Darranda contravened the key requirement (as defined in s 111(1)(a) of the Credit Code) in s 17(3) of the Credit Code by failing to disclose the cash price of the goods the subject of the credit contract;

(b) Darranda contravened the key requirement (as defined in s 111(1)(b) of the Credit Code) contained in s 17(4)(a) of the Credit Code by failing to disclose the annual percentage rate under the credit contract;

(c) Darranda contravened the key requirement (as defined in s 111(1)(c) of the Credit Code) contained in s 17(5) of the Credit Code by failing to contain the method of calculation of the interest charges payable under the credit contract and the frequency with which interest charges are to be debited under the credit contract; and

(d) Darranda contravened the key requirement (as defined in s 111(1)(d) of the Credit Code) contained in s 17(6) of the Credit Code by failing to disclose the total amount of interest charges payable under the credit contract.

General Obligation Contravention

Pursuant to s 166 of the Credit Act, the Court declares that:

(5) During the Relevant Period, Darranda contravened s 47(1)(a) of the Credit Act in failing to do all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly by reason of the following deficiencies in its business systems, of which Darranda ought to have been aware:

(a) failing to have systems in place that effectively monitored the contractual terms and conditions being used in its business, including whether those terms and conditions reflected the advice that Darranda had received;

(b) failing to appoint a compliance officer with appropriate training;

(c) failing to monitor the activities of field representatives;

(d) sending marketing communications to customers that were inconsistent with the terms of Darranda's customer contracts;

(e) failing to implement a process for the exercise of a discretion provided for in its contracts; and

(f) failing to have a person acting as a "key person" and failing to notify the Australian Securities and Investments Commission that its key person had ceased to be an officer of Darranda, as required by the terms of its credit licence.

(6) During the Relevant Period, by virtue of s 169 of the Credit Act Rent4Keeps (Aust) contravened s 47(1)(a) of the Credit Act because it was involved in Darranda's contravention of s 47(1)(a) of the Credit Act.

PENALTIES

Power to impose penalties

33 There is separate penalty regime for contraventions of the key requirements from that applying to breaches of civil penalty provisions.

Key requirements

34 Section 113 of the Code relevantly provides:

> *Penalty orders*
>
> (2) The court may make an order, in accordance with this Division, requiring the credit provider or lessor to pay an amount as a penalty, if it is of the opinion that the credit provider or lessor has contravened a key requirement.

…

Other matters to be considered

(4) The court, in considering the imposition of a penalty, must have regard to the following:

(a) in the case of a credit contract—the conduct of the credit provider and debtor before and after the credit contract was entered into;

(aa) in the case of a consumer lease—the conduct of the lessor and lessee before and after the consumer lease was entered into;

(b) whether the contravention was deliberate or otherwise;

(c) the loss or other detriment (if any) suffered by the debtor or lessee as a result of the contravention;

(d) when the credit provider or lessor first became aware, or ought reasonably to have become aware, of the contravention;

(e) any systems or procedures of the credit provider or lessor to prevent or identify contraventions;

(f) whether the contravention could have been prevented by the credit provider or lessor;

(g) any action taken by the credit provider or lessor to remedy the contravention or compensate the debtor or lessee or to prevent further contraventions;

(h) the time taken to make the application and the nature of the application;

(i) any other matter the court considers relevant.

35 Section 113(5) of the Code in respect of related contraventions applies equally to the determination of an amount of a penalty.

36 There were two categories of contraventions of key requirements. The first category was the contravention of the key requirements relating to the rate cap (ss 111(1)(i) and 111(1)(j) of the Code). As explained above, these contraventions should be treated as contraventions of the same kind for the purposes of s 113(5).

37 The second category of contraventions of key requirements related to the disclosure breaches in ss 17(3) to (6) of the Code. As Beach J explained in *Make It Mine Finance Pty Ltd, in the matter of* ***Make It Mine*** *Finance Pty Ltd* ***(No 2)*** [2015] FCA 1255 at [38], each of these requirements services a distinct purpose:

> Sections 17(3) to (6) of the Code each impose separate key requirements. Each serves a distinct purpose in enabling a consumer to assess the value of the credit contract compared with other credit contracts or to decide not to undertake the transaction at all. For example:

(a) Section 17(3) requires disclosure of the amount of credit. This ensures that a consumer is aware that they are taking out a credit contract and the proportion in absolute terms of the cost of that credit. This provision also requires, in the case of sales by instalments, disclosure of the cash price of the goods. This ensures that a consumer is aware of what the goods would cost if he or she were to buy them outright from a retailer.

(b) Section 17(4) requires disclosure of the annual percentage rate(s) of interest. This ensures that consumers can easily compare different rates of interest available to them in the marketplace.

(c) Section 17(5) requires disclosure of the method of the calculation of interest and the frequency with which interest charges are to be debited. This permits consumers to easily compare offerings in the marketplace and to be fully informed of the consequences of the decision to enter the credit contract.

(d) Section 17(6) requires disclosure of the total interest charges payable. This requirement permits consumers to consider the impact of the credit contract on them and to allow comparisons with other options.

38 It is a breach of the Code to fail to include any single key requirement. As explained above, s 113(5) of the Code does not apply to treat these contraventions as contraventions of the same kind for the purposes of imposing a penalty.

39 Section 116 of the Code provides:

Penalty if application made by credit provider, lessor or ASIC

(1) On application being made by a credit provider, a lessor or ASIC for an order, the maximum penalty that may be imposed by the court for a contravention of a key requirement relating to a contract affected by the application is an amount calculated so that the total penalty for all contraventions of the requirement in Australia (as disclosed by the credit provider or lessor) does not exceed 5,000 penalty units.

(2) However, section 167B of the National Credit Act applies in the same way in relation to the contravention of a key requirement as it would apply in relation to a civil penalty provision under that Act.

40 As a result of s 116, the maximum penalty that can be imposed for all contraventions in Australia of each key requirement in s 17 of the Code is capped at 5,000 penalty units for that key requirement. Because the contraventions of the key requirement in ss 111(i) and (j) of the Code are to be treated as contraventions of the same kind, for the purposes of evaluating the maximum penalty it is appropriate to treat those contraventions as contraventions of the same kind.

41 Between 1 April 2019 and 30 June 2019, when the contravening conduct occurred, a penalty unit was $210. The maximum penalty for the contraventions of each of the key requirements

in ss 111(a), (b), (c), (d) and s 111(i) taken together with (j), is $1,050,000 (a maximum total of $5,250,000).

42 Section 167B(2) of the Credit Act provides:

> *Pecuniary penalty applicable to the contravention of a civil penalty provision—by a body corporate*
>
> (2) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by a body corporate is the greatest of:
>
> (a) the penalty specified for the civil penalty provision, multiplied by 10; and
>
> (b) if the court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and
>
> (c) either:
>
> (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
>
> (ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

43 By reason of s 167B(2), the maximum penalty for a body corporate is that number multiplied by 10, being $10,500,000. Therefore, the maximum penalty for a contravention of each of the key requirements is 50,000 penalty units which equals $10,500,000 (a maximum total of $52,500,000).

Civil penalties

44 Section 167 of the Credit Act relevantly provides:

> *Court may order person to pay pecuniary penalty*
>
> (2) If a declaration has been made under section 166 that the person has contravened the provision, the court may order the person to pay to the Commonwealth a pecuniary penalty that the court considers is appropriate (but not more than the amount specified in section 167A).
>
> *Determining pecuniary penalty*
>
> (3) In determining the pecuniary penalty, the court must take into account all relevant matters, including:
>
> (a) the nature and extent of the contravention; and
>
> (b) the nature and extent of any loss or damage suffered because of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in foreign country) to have engaged in similar conduct.

45 The Court will have made declarations under s 166 of the Credit Act that Darranda has contravened two civil penalty provisions: s 24(1)(a) of the Code (by entering into the 516 Relevant Contracts on terms imposing a monetary liability prohibited by subsection 23(1) of the Code) and s 47(1)(a) of the Credit Act (by failing to do all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly). Declarations will have been made that Rent4Keeps (Aust) was involved in each of these contraventions and accordingly Rent4Keeps (Aust) contravened both of those civil penalty provisions.

46 Section 175(1) of the Credit Act provides:

(1) If a person is ordered to pay a pecuniary penalty under a civil penalty provision in relation to particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth in relation to that conduct.

47 Two observations are made in relation to the application of this provision in the present case:

(1) The contraventions of s 24(1)(a) of the Code concerned the entry into credit contracts on terms imposing a monetary liability in excess of the rate cap provided for in the Code. That same conduct resulted in the breach of the key requirements in ss 111(i) and (j) of the Code. If Darranda is ordered to pay a pecuniary penalty under s 167 of the Credit Act for contravening s 24(1)(a) of the Code, Darranda is not liable to be ordered to pay a pecuniary penalty under s 113(2) of the Code for contravening those two key requirements.

(2) To the extent that Darranda's contravention of the general obligation in s 47(1)(a) of the Credit Act was attributable to its contravention of any of the key requirements, Darranda would not be liable to pay a pecuniary penalty under s 113(2) of the Code for contravening those key requirements. However, s 175(1) of the Credit Act has no application to the extent that Darranda's contravention of the general obligation in s 47(1)(a) of the Credit Act is attributable to Darranda's contraventions of other paragraphs of s 47 which do not render Darranda liable to a penalty.

48 The penalty unit specified for a contravention of s 24(1)(a) of the Code is 5,000 penalty units. The penalty unit specified for a contravention of s 47(1)(a) of the Credit Act is also 5,000 penalty units: s 47(4) of the Credit Act.

49 It was not disputed that the maximum penalty that could be imposed on each of Darranda and Rent4Keeps (Aust) under s 167B(2) of the Credit Act (extracted at [42] above) for each contravention of s 24(1)(a) of the Code and for each contravention of s 47(1)(a) of the Credit Act is $10,500,000. Section 24(1)(a) was contravened on each occasion that Darranda entered into one of the 516 Relevant Contracts, resulting in 516 contraventions. There was a single contravention of s 47(1)(a).

Darranda maximum penalties

Rate cap breaches

50 As the declarations make clear, by reason of the cost rates imposed under the 516 Relevant Contracts, Darranda contravened the key requirements in ss 32A(1) and s 23(1) of the Code. As explained above, and contrary to the submissions of ASIC, the Court considers that the effect of s 113(5) of the Code is to treat each contravention of these provisions as the contravention of a single provision. The effect of s 116 of the Code and s 167B(2) of the Credit Act together is that the maximum penalty for these contraventions is $10,500,000.

51 By reason of the cost rates imposed under the 516 Relevant Contracts, upon entering into the contracts, Darranda also contravened the civil penalty provision in s 24(1)(a) of the Code, resulting in a maximum penalty of $5.418 billion.

52 Although the number of contraventions in this case is not of the magnitude considered in *Australian Securities and Investments Commission v AMP Financial Planning Proprietary Limited* [2022] FCA 1115 at [108] (Moshinsky J); *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2015] FCA 330; (2015) 327 ALR 540 at [18] and [82] (Allsop CJ); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 at [143] (Dowsett, Greenwood and Wigney JJ), the Court nonetheless considers that calculating a maximum aggregate penalty by reference to 516 contraventions raises an aggregate maximum penalty to a number well beyond what this Court would impose. The size of the maximum penalty is, however, indicative of the legislature's view of the seriousness of the rate cap obligations imposed on credit providers.

53 The entry into of the 516 Relevant Contracts imposing a pecuniary liability on consumers in excess of the cost rates provided for in the Code in contravention of the key requirements in ss 32A(1) and s 23(1) of the Code was the same conduct as that which resulted in the contravention of the s 24(1)(a) civil penalty provision. By reason of s 175 of the Credit Act, penalties will be ordered for Darranda's contravention of s 24(1)(a) of the Code and not for Darranda's contraventions of the key requirements in in ss 32A(1) and s 23(1) of the Code.

Disclosure contraventions

54 As the declarations make clear, Darranda contravened four separate key requirements relating to the following disclosure failures:

(a) failing to disclose the cash price of the goods the subject of the credit contract as required by s 17(3) of the Code;

(b) failing to disclose the annual percentage rate under the credit contract as required by s 17(4)(a) of the Code;

(c) failing to contain the method of calculation of the interest charges payable under the credit contract and the frequency with which interest charges are to be debited under the contract, as required by s 17(5) of the Code; and

(d) failing to disclose the total amount of interest charges payable under the contract as required by s 17(6) of the Code.

55 The maximum penalty for the contravention of each disclosure requirement is $10,500,000 for all contraventions of that respective key requirement. Because four disclosure requirements were contravened, the total maximum penalty payable for the disclosure requirement contraventions is $42,000,000.

General obligation

56 The maximum penalty payable for the contravention of the civil penalty provision in s 47(1)(a) of the Credit Act is $10,500,000.

Rent4Keeps (Aust) maximum penalties

57 The maximum penalty payable for the contraventions by Rent4Keeps (Aust) of s 24(1)(a) of the Code (by reason of being involved in Darranda's contraventions of that provision) is $5.418 billion. Although that maximum is well beyond any penalty that a court would impose in the

circumstances of this case, it is indicative of the legislature's view that the rate cap obligations are an important part of the protections afforded by the Code.

58 The maximum penalty payable for the contravention by Rent4Keeps (Aust) of s 47(1)(a) of the Credit Act (by reason of being involved in Darranda's contravention of that provision) is $10,500,000.

Position of the parties

ASIC

59 ASIC submits that the appropriate penalty for each contravention or group of contraventions considered in isolation is as follows:

(a) $4,000,000 against Darranda and $3,000,000 against Rent4Keeps (Aust) for their contraventions of s 24(1)(a) of the Code;

(b) $500,000 against Darranda for each of their contraventions of ss 17(3)(c), (4)(a), (5) and (6) of the Code ($2,000,000 in total); and

(c) $3,000,000 against each of Darranda and Rent4Keeps (Aust) for their contraventions of ss 47(1)(a) and 47(4) of the Credit Act.

60 ASIC submits that the above total of $9,000,000 against Darranda and $6,000,000 against Rent4Keeps (Aust) should be reduced to take account of the potential overlap in the contraventions because some of the "deficiencies in the manner in which Darranda engaged in its credit activities that gave rise to the [contraventions of ss 47(1)(a) and 47(4) of the Credit Act] were in part causative of the [contraventions of s 24(1)(a) of the Code] and the [contraventions of ss 17(3)(c), (4)(a), (5) and (6) of the Code]". ASIC therefore submits that an appropriate total penalty against Darranda is $7,000,000 and against Rent4Keeps (Aust) is $5,000,000 comprised of the following:

(a) Darranda:

  (i) $2,500,000 for the contraventions of s 24(1)(a) of the Code;

  (ii) $1,500,000 for the contraventions of ss 17(3)(c), (4)(a), (5) and (6) of the Code; and

  (iii) $3,000,000 for the contravention of ss 47(1)(a) and 47(4) of the Credit Act.

(b) Rent4Keeps (Aust):

  (i) $2,000,000 for the contraventions of s 24(1)(a) of the Code; and

(ii) $3,000,000 for the contravention of ss 47(1)(a) and 47(4) of the Credit Act.

Respondents

61 By their written submissions, the Respondents submit that total penalties of no more than $1,000,000 for Darranda, and $250,000 for Rent4Keeps (Aust), are necessary and appropriate. At the hearing, it was submitted that the amount of $1,000,000 might be more appropriately payable by Rent4Keeps (Aust) and $250,000 payable by Darranda, reflecting the control that Rent4Keeps (Aust) exerted over the processes to be adopted by its then franchisees, including Darranda.

62 By oral submissions, the Respondents submit that the total penalty should take into account the unfair and incorrect adverse publicity initiated by ASIC following *Darranda (Liability)*: *Eva v Southern Motors Box Hill Pty Ltd* [1977] FCA 2; (1977) 15 ALR 428 at 437 (Smithers J); *Cousins v Merringtons Pty Ltd (No 2)* [2008] VSC 340 at [61] (Hansen J); *New Image Photographics Pty Ltd v Fair Work Ombudsman* [2013] FCA 1385 at [67] (Collier J); *Australian Securities and Investments Commission v* ***Web3 Ventures*** *Pty Ltd (Penalty)* [2024] FCA 578 at [20] (Jackman J).

63 The unfair and incorrect adverse publicity was said to be in the form of two media releases, both of which were titled "ASIC wins against Rent4Keeps for overcharging vulnerable consumers on essential household goods" and dated 4 September 2024. Among the statements in the first of those media releases were the following:

> The Court found that Rent4Keeps (which now trades as R4K) and Darranda attempted to style their lending arrangements as "leases" for goods which the customer was not entitled to keep, when in fact customers did keep the goods, consistent with the business's name. However, the Court found that they were not leases but instead credit contracts meaning that Darranda contravened the 48 per cent annual rate cap and other requirements under the Credit Act
>
> …
>
> 'This case should send a strong deterrent message about avoidance models in the credit industry which exploit the circumstances of financially vulnerable consumers.'

64 The second, revised media release of the same date was in slightly different terms, responding to some of the criticisms made by the legal representatives for Rent4Keeps (Aust) and Darranda. In particular, the first press release was factually wrong in its reference to R4K. R4K is not the trading name of Rent4Keeps (Aust) and does not carry on the business that Rent4Keeps (Aust) had carried on. The second media release contained the following relevant statements:

> The Court found that Rent4Keeps and Darranda attempted to style their lending arrangements as "leases" for goods which the customer was not entitled to keep, when in fact customers did keep the goods, consistent with the business's name. However, the Court found that they were not leases but instead credit contracts meaning that Darranda contravened the 48 per cent annual rate cap and other requirements under the Credit Act.
>
> …
>
> 'This case should send a strong deterrent message about business models in the credit industry which exploit the circumstances of financially vulnerable consumers.'

General principles

65 Although widely different in their position on the appropriate amount of the penalties, the parties were largely in agreement in relation to the principles to be applied in the imposition of pecuniary penalties, subject to any specific statutory modification.

66 The principal object of civil penalties is the promotion of compliance by deterrence of the contravening conduct by the contravenor (specific deterrence) and others who might be tempted to engage in similar conduct (general deterrence): *Australian Building and Construction Commission v* ***Pattinson*** [2022] HCA 13; (2022) 274 CLR 450 at [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). To achieve deterrence, penalties should be imposed at such a level that they do not become an acceptable cost of doing business: *Pattinson* at [17]. Penalties in excess of those required to achieve deterrence are oppressive: *Pattinson* at [40]-[41].

67 ASIC contended that it was necessary to ensure that the total penalty imposed was "proportionate to the gravity of the contraventions". Following *Pattinson* references to a civil penalty being "proportionate" may best be avoided. Penalties must be appropriate to achieving deterrence. They need not be proportionate to the seriousness of the particular conduct that constituted the contravention: *Pattinson* at [10]. Relatedly, the maximum penalty need not be reserved only for the most serious instances of contravening conduct. The maximum penalty may be imposed where it is necessary to the deterrence of future contraventions of a like kind by the contravenor and by others: *Pattinson* at [50]. In determining what is reasonable to secure deterrence, it may be relevant to consider both the character of the contravening conduct and the character of the contravenor as the High Court in *Pattinson* contemplated at [46]:

> There may also be cases, for example, where a contravention has occurred through ignorance of the law on the part of a union official, or where the official responsible for a deliberate breach has been disciplined by the union. In such cases, a modest penalty, if any, may reasonably be thought to be sufficient to provide effective deterrence against further contraventions.

68 The theoretical maximum penalty is a relevant factor, reflecting the penalty intended by the legislature to be imposed in respect of a contravention warranting the strongest deterrence. However, within the prescribed cap, there is no warrant for the Court to ascertain the extent of the necessity for deterrence by reference exclusively to the circumstances of the particular contravention: *Pattinson* at [58]. As explained above, the theoretical maximum civil penalty is well beyond the penalty that would be imposed in the circumstances of this case.

69 The fixing of a penalty is a matter of discretionary judgment. The process of fixing a pecuniary penalty proceeds by way of instinctive synthesis rather than mathematical calculation. It requires a balancing of all relevant factors to ascertain the appropriate penalty: *Make It Mine (No 2)* at [46]; ***Volkswagen*** *Aktiengesellschaft v Australian Competition and Consumer Commission* [2021] FCAFC 49; (2021) 284 FCR 24 at [172] (Wigney, Beach and O'Bryan JJ); *Australian Securities and Investments Commission v Westpac Banking Corporation* [2022] FCA 515; (2022) 407 ALR 1 at [129] (Beach J).

70 Concepts such as course of conduct, totality and parity are analytical tools which assist in the determination of a reasonable application of the law: *Pattinson* at [45].

71 Where closely related conduct has given rise to multiple contraventions, the course of conduct principle is useful in the determination of appropriate civil penalties. Because the nature of the conduct to be deterred is a relevant factor, it is relevant to consider whether multiple contraventions constitute a single course of conduct or separate instances of conduct: *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2017] FCAFC 159; 258 FCR 312 at [424] (Middleton, Beach and Moshinsky JJ). This involves a factual inquiry. The course of conduct principle is only a tool of analysis; it does not convert multiple contraventions into a single contravention: *Australian Competition and Consumer Commission v Murray Goulburn Co-Operative Co Ltd* [2018] FCA 1964 at [29] (Beach J).

72 The totality principle may also apply where legally distinct contraventions involve overlap in wrongdoing. The totality principle requires the Court to review the aggregate penalty to ensure it is just and appropriate having regard to the entire contravening conduct: *Chief Executive Officer of the Australian Transaction Reports and Analysis Centre v Westpac Banking Corporation* [2020] FCA 1538; (2020) 148 ACSR 247 at [69] (Beach J). The principle operates as a final check to ensure that the cumulative penalty is appropriate having regard to the nature, quality and circumstances of the overall conduct involved.

73 The parity principle is intended to ensure that inequalities in the imposition of penalties do not arise "as would suggest that the treatment meted out has not been even-handed": *Make It Mine (No 2)* at [49], citing *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* [1996] FCA 1134; (1996) 71 FCR 285 at 295 (Burchett and Kiefel JJ). There is however significant difficulty in comparing the penalties imposed in different cases in the context of different facts and circumstances. As Beach J observed in *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790 at [77]:

> …it is conceptually problematic to look at penalties in other cases to calibrate a figure in the present case when all that one has from the other cases are single point determinations produced by opaque intuitive synthesis. Deconvolution analysis of the single point determinations in order to work out the causative contribution of any particular factor is unrealistic.

Application: rate cap contraventions

74 As explained above, a civil penalty is to be imposed in respect of Darranda's contraventions of s 24(1)(a) of the Code.

Submissions

75 ASIC submitted, and the Court accepts, that the 516 contraventions of s 24(1)(a) of the Code during the relevant period should be considered as a single course of conduct.

76 ASIC referred to eight considerations which it contended supported the imposition of a penalty of $4,000,000 against Darranda (said to be reduced to $2,500,000 after the application of the totality principle) and of $3,000,000 as against Rent4Keeps (Aust) (said to be reduced to $2,000,000 after the application of the totality principle), for their respective contraventions of s 24(1)(a) of the Code:

(1) There were a large number of contraventions over the three-month relevant period (516 contraventions).

(2) The extent of overcharging was "extreme" with Darranda having charged $1,240,418.15 more than it was entitled to charge. Darranda charged consumers $1,841,350.94 in circumstances where the rate cap would have permitted it to charge $600,932.79.

(3) Consumers suffered direct loss as a result of the overcharging. If the total amount overcharged is divided by the number of contracts, it results in an overcharging of about $2,400 per contract. Even though Darranda may not have recovered the full amount overcharged, customers may also have suffered other detriments, such as having to

report a default to a credit reporting body or foregoing the purchase of other essential goods or services.

(4) Darranda received substantial direct financial returns as a result of the contraventions, collecting at least $861,708 in excess of the permitted rate cap. ASIC contended that the extent to which Rent4Keeps (Aust) received financial benefits from the rate cap contraventions could not be accurately ascertained. Rent4Keeps (Aust) was entitled to receive royalties, fees and levies from its franchisees rather than amounts directly referable to contracts entered into by franchisees with consumers.

(5) No steps have been taken by either Darranda or Rent4Keeps (Aust) to remediate affected customers since the *Darranda (Liability)* judgment was delivered.

(6) Darranda had been contracting on the terms and conditions that had found to be credit contracts for 5 years, affecting a large number of customers and enabling Darranda and Rent4Keeps (Aust) to "derive substantial benefit". In the period from April 2017 to March 2022, Darranda entered into 12,261 contracts and Rent4Keeps (Aust)'s total franchises (including Darranda) entered into 57,146 contracts. Others in the consumer leasing industry were operating similar business models.

(7) The penalties proposed by ASIC are well below the maximum penalties that could be sought.

(8) The individuals controlling the operations of Darranda and Rent4Keeps (Aust) continue to be operate a business involving credit contracts in the same regulated environment with the same vulnerable customer client base.

77 ASIC referred to what it characterised as "aggravating factors" and "neutral factors" that were said to be applicable in the circumstances of this case. These "aggravating factors" were said to be relevant to the assessment of the penalty for all of the contraventions the subject of these proceedings, including the rate cap contraventions.

78 The "aggravating factors" were said by ASIC to be:

(1) The fact that the Respondents were dealing with a financially vulnerable group of customers.

(2) The contraventions arose from Darranda's compliance with systems, processes and procedures designed and developed by Rent4Keeps (Aust). Darranda had obligations under its Australian Credit Licence to ensure compliance with credit legislation and by

outsourcing the design of systems, processes and procedures to Rent4Keeps (Aust), failed to give adequate attention to these matters itself. In so far as Rent4Keeps (Aust) is concerned, the consumers affected by its conduct were not limited to Darranda's customers.

(3) The Respondents had a substantial share of the consumer leasing market, in which other participants also used a "gifting" mechanism. The fact that law has since been amended to "minimise" the distinction between credit contracts and consumer leases does not diminish the importance of deterring conduct that contravenes a regulated environment.

(4) The contraventions arose from the highest level of management within Rent4Keeps (Aust) because it was those individuals who were responsible for the design and delivery of the systems, processes and procedures to franchisees, including Darranda.

(5) The Respondents' conduct ought to be regarded as reckless in circumstances where the Respondents were aware that the rate cap applied to credit contracts and that they were charging more than the rate cap and should have been aware of the deficiencies in their systems.

(6) The Respondents' corporate culture and internal systems were not conducive to compliance.

(7) The Respondents have not demonstrated remorse or contrition and have not remediated affected consumers.

79 The "neutral" factors were said by ASIC to be:

(1) There is no evidence that Darranda or Rent4Keeps (Aust) have previously been found by a court to have engaged in similar conduct.

(2) From 1 March 2022, the Respondents amended their standard terms and conditions to address concerns raised by ASIC during its investigation.

(3) ASIC commenced proceedings within a reasonable time after the contraventions occurred (within 3 years).

(4) The Respondents have not disputed their capacity to pay a penalty. Although Darranda has ceased to write new contracts, it continues to receive income from its pre-existing contracts and expects to do so until at least 30 June 2026. Both Darranda and Rent4Keeps (Aust) are part of a larger and wealthy private corporate group.

(5) The Respondents have not demonstrated a disposition to co-operate with ASIC in such a manner as to warrant a discount to penalty, with both liability and quantum contested.

80 The Respondents submitted that the following factors mitigate against the need for specific deterrence of Darranda and Rent4Keeps (Aust):

(1) Darranda has ceased to offer contracts to consumers. To the extent that Darranda is operating, it is conducting a run-off business involving the servicing of its remaining clients and receiving payments on its existing contracts.

(2) Rent4Keeps (Aust) has ceased entering into franchise agreements. It continues to provide access to its ERP system to legacy franchisees who require it in respect of their customer contracts entered into prior to 1 July 2023.

(3) Prior to ceasing to offer contracts to consumers, the terms and conditions of Darranda's customer contracts were amended in March 2022 to ensure that they were consumer leases. The gifting mechanism was removed entirely.

(4) A new "R4K" business is operated by different entities which are not before the Court.

(5) The 516 Relevant Contracts did disclose the information provided for in s 174 of the Code, including the total rental payments payable under the lease.

81 The Respondents made the following submissions in respect of general deterrence:

(1) ASIC's suggestion that it is relevant to take into account the fact that other industry participants use a "gifting" mechanism should be rejected. There is nothing wrong in using a "gifting" mechanism per se. ASIC's own publications had recognised that a consumer lease may involve a gifting mechanism. The contravention in the present case arose from the particular terms of the gifting mechanism used by Darranda.

(2) As a result of amendments made by the ***Financial Sector Reform Act*** *2022* (Cth), the distinction between a consumer lease and credit contract does not apply in so far as the rate cap is concerned – both are subject to the same rate cap. The underlying conduct in this case is far less significant because it is no longer possible to inadvertently mischaracterise a consumer lease in so far as the rate cap is concerned.

(3) There is a need for general deterrence in the sense that third parties ought to ensure that their contracts comply with disclosure obligations and the caps required by the Credit Act and Code. The Respondents accept that there is a need for effective systems to be

implemented to ensure clarity of terms and conditions and that companies operating in this regulated space comply with the conditions on their credit licences.

(4) As a result of the legislative changes, the consumer leasing industry is effectively closed. Consequently, there is a reduced need of general deterrence for businesses operating a consumer leasing business.

(5) This is not an "avoidance" case and does not involve "avoidance" type conduct. General deterrence must take account of the conduct the subject of the proceedings such that penalties must be reasonably necessary to deter contraventions "of a like kind".

(6) The need for general deterrence in fixing a penalty does not import the need to deter all third parties from breaching all provisions within the Credit Act and the Code.

(7) The financial information and operations of the R4K entities are not relevant to this issue of penalties. These entities are involved in operations that relate to the sale of goods by instalments and that business has no involvement with the previous business of the Respondents. Some Rent4Keeps Business customers may come across R4K through the legacy website but R4K does not directly market to Rent4Keeps Business customers.

82 The Respondents submitted that ASIC's contentions as to harm which consumers may have suffered should not be accepted. The contentions were speculative. There was no evidence of loss or damage of any particular scale or severity. The Respondents accepted that the consumers who entered into the 516 Relevant Contracts were charged more than was permitted but it was nonetheless submitted that it was "far from clear why any such 'overcharging' should be indicative of 'direct and tangible loss' to, and 'harm suffered' by, these consumers". Darranda could have "legitimately" charged the amounts that it did if the Relevant Contracts had been structured as consumer leases. The amounts charged were in accordance with the terms of the agreements. ASIC relies upon a cap that neither the Respondents nor the relevant customers could be taken to have intended to apply. The 516 Relevant Contracts provided a benefit to consumers by conferring automatic ownership on a person of their choice without imposing an additional cost.

83 ASIC's submissions were said to ignore the fact that Darranda did not receive the total amounts owing under the 516 Relevant Contracts. They also ignore evidence of customer satisfaction with the services they received and around 60% of Rent4Keeps Business customers were repeat

or referral customers. The customers obtained goods from Darranda that they needed and were unlikely to obtain elsewhere.

84 The Respondents contended that to express disagreement with a position taken by ASIC is not to be equated with a lack of contrition. The Respondents took extensive measures to ensure they complied with the responsible lending obligations and amended the standard terms and conditions from 1 March 2022 to make them consistent with the requirements of a consumer lease.

85 The Respondents relied heavily on advice received from Holley Nethercote and Frenkel Partners as well as representations made by ASIC. Mr Payne had intended make his business "ASIC-proof". The advice relied upon turned out to be inconsistent with the correct legal position. The Respondents believed that they were conducting a consumer leasing business. They received legal advice because they intended to be compliant.

Consideration

86 It may be accepted that the main focus in determining the amount of the civil penalty to be imposed for the contravention of s 24(1)(a) of the Code in this case is general deterrence. The Respondents have ceased to enter into contracts with consumers. It is also accepted that the law has changed such that the distinction between consumer leases and credit contracts is not relevant to the application of the rate cap and that, as a result of the legislative changes, the consumer leasing industry is effectively closed.

87 However, the need for general deterrence remains in the sense that it is necessary to ensure that those who in fact enter into contracts to which a rate cap applies, do so on terms and conditions that comply with that cap.

88 In determining the amount of a pecuniary penalty to be imposed for a contravention of a civil penalty provision (as s 24(1)(a) of the Code is), s 167(3) of the Credit Act requires the Court to take into account all relevant matters and identifies four specific matters in particular:

(a) the nature and extent of the contravention;

(b) the nature and extent of any loss or damage suffered because of the contravention;

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in foreign country) to have engaged in similar conduct.

89 It is convenient to commence with a consideration of the four specific matters in relation to the contraventions of s 24(1)(a) of the Code in the circumstances of this case.

90 It was accepted by ASIC that neither Darranda nor Rent4Keeps (Aust) had previously been found by a court to have engaged in relevantly similar conduct. As such, s 167(3)(d) of the Credit Act is not applicable in relation to the contraventions of s 24(1)(a) of the Code the present case. This is not a case where a penalty needs to deter a recalcitrant contravenor: cf *Pattinson*.

The nature and extent of the contravention

91 Although there were 516 contraventions of s 24(1)(a) of the Code, this is not a case of a serial recalcitrant contravenor but a case where the contraventions arose from a single course of conduct. Although involving multiple contraventions, the contraventions are to be regarded as a result of a singular failure by the contravenor to properly understand the legal consequences of the terms of its contracts rather than the latest instance of the contravenor's pursuit of a strategy of deliberate recalcitrance. The contraventions arose because of the failure of Darranda to understand that the terms and conditions of its customer contracts resulted in those contracts being characterised as credit contracts and not consumer leases. Deterrence is to be evaluated accordingly.

92 The same observation concerning the application of the course of conduct principle is made in relation to Rent4Keeps (Aust)'s contraventions of s 24(1)(a) of the Code.

93 The Court has some difficulty with ASIC's contention concerning the so-called "extreme" extent of the excess charged by Darranda over the rate cap. Because of a failure to appreciate that the terms and conditions of its contracts gave rise to credit contracts and not consumer leases, Darranda did not apply the rate cap in determining the amount it charged its customers. But that overcharging was not the result of a deliberate attempt to defraud or deliberately charge customers more than was permitted by the Code, whether to a minor or significant extent. During the relevant period, the Code did not prohibit charges in excess of the rate cap for all classes of customer contracts. Consumer leases, which provided for charges in excess of the rate cap, simply did not contravene the Code.

94 Similarly, the Court does not accept ASIC's contention that the conduct that is to be deterred is the use of "gifting" mechanisms in consumer leasing contracts. To be clear, the contraventions in the present case were not the result of a sham "gifting" clause. A contract did

not cease to be a consumer lease merely because a lessor chose to make a gift of the leased goods at the end of the contract or represented to a lessee that a lessor might choose to make a gift of the leased goods at the end of the contract. The contravention in the present case arose from the particular terms of the gifting mechanism used in the Rent4Keeps Business' standard terms and conditions which provided for "automatic" gifting to the giftee nominated by the lessee if the lessee complied with the terms of the contract.

The nature and extent of any loss or damage suffered because of the contravention

95 Because the contracts entered into by Darranda were properly characterised as credit contracts, customers were charged an amount above the rate cap in contravention of s 24(1)(a) of the Code. In that sense, customers were "overcharged".

96 As set out above, the Respondents submitted that it was "far from clear why any such 'overcharging' should be indicative of 'direct and tangible loss' to, and 'harm suffered' by, these consumers". The Respondents contended that there was no harm to consumers because it was possible for the contracts to have been structured as consumer leases which would not have been subject to a rate cap. If the contract terms had been different in relation to automatic "gifting", customers could lawfully have been charged the amounts they were charged.

97 That submission is not accepted.

98 The power to order that a person pay a pecuniary penalty is conditioned on the making of a declaration: s 167(2) of the Credit Act. Such a declaration is made if the Court is satisfied that the person has contravened a civil penalty provision: s 166(2) of the Credit Act. It follows that the power to order a person to pay a pecuniary penalty is engaged only once a court has found that there has been a contravention. Such a finding is made based on the terms and conditions in fact entered into between the parties.

99 By its terms and in context, s 167(3)(b) of the Credit Act, in referring to loss or damaged suffered because of the contravention, does not invite a counterfactual analysis that involves reconstructing the conduct of the contravenor to look to other possible terms and conditions that might have been provided by the contravenor. Loss or damage can be said to have been suffered *because* of the contravention of the rate cap even though there would have been no contravention of that cap if the contravenor had engaged in different conduct by providing for different terms and conditions in its contracts (particularly relating to gifting). This is not a case of a contract being rescinded for anticipatory breach of contract or a contract terminated as a

result of misleading or deceptive conduct. The issues relating to the identification of the counterfactual involving consideration of alternative modes of performance in assessing a loss of opportunity claim of the kind considered in *Berry v CCL Secure Pty Ltd* [2020] HCA 27; (2020) 271 CLR 151 do not arise.

100 The contravention occurred by Darranda entering into the 516 Relevant Contracts on terms imposing a monetary liability prohibited by subsection 23(1) of the Code. By paying more than Darranda was lawfully able to charge, having regard to the terms and conditions of their contracts, customers suffered a financial loss *because of the contravention*. If the Code had been complied with, having regard to the terms and conditions of the contracts entered into, customers would not have been required to pay a rate in excess of the rate cap.

101 Under the customer contracts that were in fact entered, Darranda imposed on customers $1,240,418.15 more in charges than it was entitled to charge had it applied the rate cap to the 516 Relevant Contracts. Darranda did not receive the full amount overcharged. Even so, customers paid to Darranda $861,708 more than they would have paid in respect of the 516 Relevant Contracts had the rate cap been applied. Based on the evidence at trial, at least some of the amount imposed was not sought to be collected because Darranda "waived" the last payment as a marketing tool in some cases.

102 For completeness, it should be observed that if the terms of the contracts had been different, further processes and procedures would need to have been adopted to give effect to those terms (see *Darranda (Liability)* at [225]-[226]).

103 ASIC contended that consumers who were not able to or did not pay the amount owed in full "may well" have suffered further detriments such as the reporting of their defaults to credit reporting agencies. The Court does not find that such a potential detriment can be said of itself to be loss or damage suffered because of the contravention, at least absent evidence that those defaulting customers would not have defaulted had the rate cap applied.

104 ASIC further contended that consumers were likely to have suffered other "non-financial losses including foregoing buying other essential goods for a longer period". It may be accepted that other more indirect forms of potential loss or damage *may* have been suffered but the Court has no evidence of such other specific loss or damage suffered by a particular customer. ASIC's submissions in this respect rise no higher than mere speculation.

105 Identifiable pecuniary loss or damage in the present case arises primarily from the fact that customers were charged an amount in excess of that permitted by the legislative scheme that applied to the relevant contracts based on the actual terms and conditions of those contracts.

106 The value of the amounts involved need to be understood in context. The contraventions involved customers who were individual consumers of household goods; and, in view of Darranda's customer base, those customers can be taken to have largely been persons of very limited financial means.

107 ASIC contended that "relevant context" included that the terms and conditions of the 516 Relevant Contracts were also used outside of the relevant period. It was not disputed that contracts in substantially the same form as the 516 Relevant Contracts were in use between 6 April 2017 and 1 March 2022 across the entire Rent4Keeps franchise network. The Court is mindful that the only contraventions of the rate cap in respect of which a penalty is being imposed relate to the 516 Relevant Contracts. The circumstances referred to in *Australian Securities and Investments Commission v Macquarie Bank Limited* [2024] FCA 416 at [80] (Wigney J) are distinguishable, as, in that case, the respondent had admitted to contravening a general obligation over a longer period.

The circumstances in which the contravention took place

108 There are a number of aspects to the circumstances in which the contraventions of s 24(1)(a) of the Code took place.

109 ASIC alleges that an "aggravating" factor in the present case that ought to be relevant to the deterrent purpose of the civil penalty concerns the broad context of the industry in which the Respondents operate – namely, the Respondents were dealing with a financially vulnerable group of customers.

110 Care needs to be taken against approaching the determination of a penalty in this case from a premise that there was something inherently ethically unsound in the nature of the business the Respondents conducted. ASIC's media releases following *Darranda (Liability)* referred to "avoidance models" in the credit industry which exploit the circumstances of financially vulnerable consumers or, perhaps less colourfully to "business models" which so "exploit". As Beach J observed in *Make it Mine (No 2)* at [19], there is nothing wrong with a commercial operator identifying a commercial opportunity in providing a service to a vulnerable class of consumers and pursuing that opportunity for profit. The provision of services to the vulnerable

class of consumers in the present case enabled those consumers to have access to essential household goods that they were otherwise struggling to access.

111 However, to recognise that a legitimate business may be conducted that involves the provision of services to a vulnerable class of persons is not to discount the fact that the legislature has enacted a statutory regime for the protection of that class. The statutory regime provided for a rate cap to apply to credit contracts. At the relevant time, it did not provide a rate cap for contracts that were consumer leases.

112 There is nothing reprehensible about a provider seeking to ensure that the contracts they enter into fall to be classed as consumer leases rather than credit contracts, in the knowledge that contracts which are consumer leases are not subject to a rate cap. But under the statutory regime, as it existed at the relevant time, if the provider makes an incorrect assessment of the nature of the contracts it enters into and charges an amount in excess of the rate cap, the provider will be taken to have contravened a civil penalty provision. A contract that conferred a benefit of automatic ownership on a person at the direction of the lessee is not a consumer lease and is subject to the rate cap under the legislative regime applicable at the relevant time. Contrary to the Respondents' suggestions, the fact that the contract confers a benefit of automatic ownership is not a basis on which a breach of the rate cap may be somehow justified.

113 The contraventions of s 24(1)(a) of the Code were not the consequence of a deliberate or reckless disregard of the rate cap applicable to credit contracts. The Respondents knew that the charges they were imposing could be imposed if the contracts that they entered into were consumer leases but not if they were credit contracts. The Respondents did not believe they were entering into credit contracts. They thought that the contracts being entered into were consumer leases. The contraventions were the result of a misunderstanding of the correct legal character of the contracts being entered into with customers.

114 The Respondents' misunderstanding arose in a context in which the Respondents engaged legal advisors but did not receive advice which accurately and clearly identified the consequences of an automatic transfer of ownership clause. Based on the history of the advice that had been provided and the history of their engagement with ASIC, it was less than prudent for Rent4Keeps (Aust) (and Darranda) to depart from the terms agreed with ASIC without engaging the solicitors (Holley Nethercote) who had dealt with ASIC on Rent4Keeps (Aust)'s behalf. However, when Holley Nethercote did come to be engaged, the terms of its advice did

not clearly identify the true difficulty with the automatic gifting mechanism (see *Darranda (Liability)* at [89]).

115 ASIC was not the provider of advice to the Respondents, but the difficulties of accurately explaining the sort of "gifting mechanisms" that might be consistent with a consumer lease as opposed to those which might not can be seen even in ASIC's own publications. For example, an ASIC publication entitled "Consumer leases" that was to be found at the Moneysmart website stated the following under a heading "How a consumer lease works" (emphasis added):

> A consumer lease lets you rent an item, like a laptop, TV or fridge, for a set amount of time. You make regular rental payments, typically weekly or fortnightly, until the lease ends. At the end of the lease, you don't own the item. The company you leased it from does.
>
> The lease agreement will tell you what happens at the end of the lease. Generally, you can choose to:
>
> - Return the item in working order. You won't need to make any further payment.
> - If an option, make an offer to purchase the item *or suggest someone else to gift it to*. The lease provider will tell you how much more you need to pay to keep it.

116 On a quick reading by an unsophisticated reader, the italicised and underlined phrase does not make it entirely clear that the "gifting" is that of the company you lease the goods from and that whether a gift is made at the entire discretion of that company.

117 The contravention of the rate cap was not the result of indifference by the Respondents as to their obligations to comply with the rate cap; it was the result of a misunderstanding that the obligation to comply with cap attached to the contracts having regard to the form in which they were executed.

Relevant matters

118 Section 167 of the Credit Act requires the Court to take into account all relevant matters. The following factors articulated by French J in *Trade Practices Commission v CSR Ltd* [1991] FCA 762; [1991] ATPR ¶41-076 at 52,152–52,153 were endorsed by the High Court in *Pattinson* at [18] as relevant to consider in determining an appropriate penalty:

> The assessment of a penalty of appropriate deterrent value will have regard to a number of factors which have been canvassed in the cases. These include the following:
>
> 1. The nature and extent of the contravening conduct.

2. The amount of loss or damage caused.

3. The circumstances in which the conduct took place.

4. The size of the contravening company.

5. The degree of power it has, as evidenced by its market share and ease of entry into the market.

6. The deliberateness of the contravention and the period over which it extended.

7. Whether the contravention arose out of the conduct of senior management or at a lower level.

8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.

9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

119 In *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701; (2018) 131 ASCR 585, Beach J at [49] augmented the list of factors to include:

(a) the extent to which the contravention was the result of deliberate or reckless conduct by the corporation, as opposed to negligence or carelessness;

(b) the number of contraventions, the length of the period over which the contraventions occurred, and whether the contraventions comprised isolated conduct or were systematic;

(c) the seniority of officers responsible for the contravention;

(d) the capacity of the defendant to pay, but only in the sense that whilst the size of a corporation does not of itself justify a higher penalty than might otherwise be imposed, it may be relevant in determining the size of the pecuniary penalty that would operate as an effective specific deterrent;

(e) the existence within the corporation of compliance systems, including provisions for and evidence of education and internal enforcement of such systems;

(f) remedial and disciplinary steps taken after the contravention and directed to putting in place a compliance system or improving existing systems and disciplining officers responsible for the contravention;

(g) whether the directors of the corporation were aware of the relevant facts and, if not, what processes were in place at the time or put in place after the contravention to ensure their awareness of such facts in the future;

(h) any change in the composition of the board or senior managers since the contravention;

(i) the degree of the corporation's cooperation with the regulator, including any admission of an actual or attempted contravention;

(j) the impact or consequences of the contravention on the market or innocent third parties;

(k) the extent of any profit or benefit derived as a result of the contravention; and

(l) whether the corporation has been found to have engaged in similar conduct in the past.

120 The lists are not a rigid catalogue of matters. They assist in identifying matters that are relevant to the contraventions and the circumstances of the Respondents and therefore assist in carrying out the task of determining what is an appropriate penalty in the circumstances of the case.

121 In the circumstances of the present case, and in so far as the contraventions of the rate cap are concerned, the following observations are made.

(1) Although Darranda and Rent4Keeps (Aust) were entitled to contest their liability, their conduct of the proceeding does not warrant a discount to penalty. It is not a question of increasing a penalty so as to penalise the exercise of a right to contest.

(2) Neither Darranda nor Rent4Keeps (Aust) have sought to implement a process of refunding amounts paid by customers over the rate cap. It is accepted however that Rent4Keeps (Aust) (and as a consequence Darranda) amended the terms and conditions of its standard customer contract to make their characterisation as consumer leases clearer, including by abandoning a gifting mechanism.

(3) Both Darranda and Rent4Keeps (Aust) benefited from the amounts overcharged. The benefit received by Darranda is not limited to the amounts in fact collected. At least some of the amounts were not collected as a result of a deliberate marketing strategy implemented from time to time to waive a customer's obligation to make the last payment and Darranda has benefited from the use of the amounts since the time of receipt as no part of those amounts have been refunded. Rent4Keeps (Aust) benefited from the amounts overcharged as a result of the terms of its **Master Franchise Agreement** entered into with Darranda on 1 August 2011, as explained further below.

(4) Both Darranda and Rent4Keeps (Aust) were significant players in the consumer leasing market. To deter others from similar contraventions, the relative size and market share of the contravenors are not irrelevant. The sum required to achieve deterrence may be larger where the company has vast resources: *Volkswagen* at [154]. Conversely, if the corporation is small and has limited resources, a lesser penalty may be appropriate.

However size alone does not justify a higher penalty than might otherwise be imposed: *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Limited* [2015] FCA 330; (2015) 327 ALR 540 at [92] (Allsop CJ).

(5) The terms and conditions were determined by the highest levels of management within Rent4Keeps (Aust). Darranda was obliged by the terms of its Master Franchise Agreement to apply Rent4Keeps (Aust)'s standard terms and conditions. The individuals responsible for terms of customer contracts within the Rent4Keeps franchise network, (which network included Darranda), continue to operate in a regulated consumer credit environment, albeit not by offering consumer leases. This fact reinforces the need to affirm the seriousness of complying with a rate cap where it applies.

(6) Neither Darranda nor Rent4Keeps (Aust) has sought to assert that they do not have the capacity to meet a substantial pecuniary penalty. The entities involved in and responsible for the contraventions were Darranda and Rent4Keeps (Aust). In these circumstances, it is not necessary to make findings about other entities under the common control of Mr Payne (cf *Australian Securities and Investments Commission v Ultiqa Lifestyle Promotions Limited (in liq) (No 2)* [2022] FCA 1228 at [45]-[58] (Downes J)).

122 Although Rent4Keeps (Aust) was not the entity that entered into customer contracts, it benefited financially from the gross revenues derived by Darranda. The Master Franchise Agreement between Rent4Keeps (Aust) and Darranda defined the term "Royalty" in Schedule 1 to include 5% of the "Gross Revenue" collected by Darranda from its company owned territories plus GST, payable monthly in arrears. It is not clear from the Master Franchise Agreement how the liability to pay a Royalty is imposed. The term "Gross Revenue" is not defined in the agreement though the term "Gross Income" is. "Gross Income" is defined to include, relevantly, all income whatsoever derived by Darranda, whether cash or credit (regardless of collection in the case of credit). Schedule 1 also provides for a "Marketing Levy", which is defined to mean 0.5% of Gross Revenue of Darranda, payable monthly in arrears. The Court infers that Gross Revenue has the meaning ascribed in the agreement to Gross Income.

123 The parties agreed the following facts:

With respect to the 516 Relevant Contracts:

(a) the aggregate Total Agreement Value of the 516 Relevant Contracts was $1,841,350.94;

(b) Darranda received payment of $1,462,641.50; and

(c) Rent4Keeps [(Aust)] received royalties of 5% of the amount that Darranda received with respect to the 516 Relevant Contracts.

124 Based on Darranda imposing on customers $1,240,418.15 more in charges than permitted by the rate cap, Rent4Keeps (Aust) received about $62,000 more in royalties than it would have received had the rate cap applied. It may have also received more by way of Marketing Levy than it otherwise would have.

125 The Respondents submitted that it was relevant for the Court to take into account the adverse publicity suffered by the Respondents.

126 Mr Payne's unchallenged affidavit evidence was that following publication of ASIC's first media release, solicitors acting for Mr Payne and his related entities, wrote to ASIC. That email correspondence relevantly stated:

> "The Court found that Rent4Keeps (which now trades as R4K) and Darranda attempted to style their lending arrangements as "leases" for goods which the customer was not entitled to keep, when in fact customers did keep the goods, consistent with the business's name."
>
> This statement is incorrect and misleading. R4K is an entirely different business to Rent4Keeps (Aust) which no longer trades (as R4K or anything else).
>
> Our clients require ASIC to immediately correct and retract this misleading statement which has been published widely and is likely to have negative consequences on R4K.

127 In response to that email, ASIC amended the press release, deleting the incorrect reference to "now trades as R4K" (amongst other changes). Instead, it included the following sentence further down in the text of the revised media release:

> Rent4Keeps is no longer providing credit contracts to consumers, however a related entity has been operating under the trading name "R4K" since 1 July 2023.

128 In his affidavit, Mr Payne made reference to an article published in The Australian newspaper on 24 September 2024, entitled "ASIC wins Rent4Keeps 'sham' gift fight". The article incorrectly recorded the findings of the Court. Mr Payne's evidence was:

> That the press continues to keep published articles referring to the Rent4Keeps business as a "sham" in circumstances where it was found in the Liability Judgment not to be continues to harm my reputation significantly. As the media release incorrectly stated that Rent4Keeps was now trading as R4K, this caused the R4K business great embarrassment, and caused significant issues with maintaining strong business relationships with suppliers and financiers.

129 The relevant principle was succinctly articulated by Jackman J in *Web3 Ventures* (appeal from which was dismissed in *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* [2025] FCAFC 58; (2025) 308 FCR 552) at [20] in the following terms:

> While adverse publicity in a general sense is often an inevitable consequence of wrongdoing and in most cases does not influence the assessment of the appropriate penalty, adverse publicity of an unfair or incorrect kind initiated by the prosecuting authority itself goes beyond the natural and probable consequences of the relevant wrongdoing, and may be taken into account in mitigation of penalty

130 The reputational issues to which Mr Payne referred relied upon linking the inaccurate reporting in The Australian with R4K.

131 There is no evidence that the article in The Australian was publicity initiated by ASIC. The media releases issued by ASIC on the day of the handing down of *Darranda (Liability)* made no reference to "sham". The Court has not assessed the amount of the penalty having regard to the article in The Australian.

132 In so far as the ASIC media releases published on 4 September 2024 are concerned, the Court accepts that contrary to the wording used in the first media release, this case was not about an "avoidance model". As explained above, there is nothing illegitimate about a credit provider seeking to structure its customer contracts so that they are characterised as consumer leases rather than credit contracts. Nor is this case about a business designed to "exploit" vulnerable consumers. Nor is there anything wrong about identifying a business opportunity that involves providing a finance related service to financially vulnerable customers. The Court made no finding that Darranda's business sought to "exploit" vulnerable customers. Further, as explained in *Darranda (Liability)*, the Code's definition of consumer lease is not directed at who "keeps" the goods. The term "keep" is not a legal term (*Darranda (Liability)* at [217]). The relevant findings of the Court were that Darranda and Rent4Keeps (Aust) expected the lessee to retain access to the leased goods because it was expected that the nominated giftee would be an individual in the same household as the lessee. That expectation was not the reason that the contracts were characterised as credit contracts.

133 The inaccuracies in the first media release do not in the circumstances of this case diminish the need for a penalty to achieve general deterrence. Mr Payne's evidence did not identify reputational damage to the Respondents as a result of the inaccuracies. As the media releases made clear, as at September 2024, the law had changed so that the rate cap applied to lease

arrangements as well as credit contracts. The form of the contract the subject of the current proceedings is no longer entered into.

134 Having regard to the need to impose a sum which will be recognised by the public as appropriate to the seriousness of the contravention for the purposes of achieving general deterrence and recognising the need to ensure that a penalty is not regarded as an acceptable cost of doing business, the Court will impose a penalty of $2,000,000 on Darranda and $1,000,000 on Rent4Keeps (Aust). Although not intentional, Darranda in fact charged customers more than it was entitled to having regard having regard to the terms and conditions on which Darranda in fact contracted with customers. Darranda has received most of the financial benefit of the breach of the rate cap. That benefit includes the continued use of the amounts overpaid. Rent4Keeps (Aust) was responsible for setting the terms and conditions and derived financial benefit from the fees paid to it based on Darranda's gross revenue.

Application: disclosure contraventions

135 As explained above, a penalty is to be imposed in respect of Darranda's breaches of the key requirements (as defined by s 111(1) of the Code) in ss 17(3) to (6) of the Code.

136 Section 113(4) of the Code requires the Court to have regard to certain specified matters.

The conduct of the credit provider and debtor before and after the credit contract was entered into

137 The disclosure breaches arose from the same misunderstanding about the character of the contracts as that which led to the rate cap contraventions. The disclosure breaches were not the result of a sham transaction but of failure to appreciate the legal character of the terms and conditions of the customer contracts. The contracts attempted to implement an automatic transfer of ownership to an individual nominated by the customer if the customer complied with the terms of the contract. That mechanism did not give rise to the making of a gift by Darranda but rather to the making of a transfer by direction of the customer.

138 The evidence does not disclose a common subjective understanding of the contracts by the customers who entered into those contracts. The customers from whom the Court heard evidence generally believed that they had control over where the goods would end up – by either believing they could gift the goods (whether before or at the end of the contract) or retain possession of the goods. Based on the evidence, customers generally sought to comply with their contractual payment obligations.

Whether the contravention was deliberate or otherwise

139 As explained in *Darranda (Liability)* and consistent with the conclusion with respect to the rate cap contravention above, although the process by which the terms of the customer contracts came to be drafted and implemented was highly flawed, the disclosure breaches were not the result of recklessness or intentional disregard of the law.

The loss or other detriment (if any) suffered by the debtor or lessee as a result of the contravention

140 The legislation requires that in assessing the amount of the penalty, regard must be had to the loss or other detriment suffered by the debtor / lessee. The reference to "other detriment" suggests that regard is not limited to quantifiable specific monetary loss or damage.

141 It is difficult to discern economic loss to the customers as a result of the disclosure contraventions. Customers were provided with goods they were seeking and, notwithstanding that Darranda was largely paid by directly accessing customer Centrelink payments (via Centrepay), Darranda bore some credit risk and bore some financing costs. The fact that the contracts cost more than an outright direct purchase of the goods is hardly surprising or of itself indicative of some form of exploitation.

142 Although there is no evidence of specific loss by any particular customer as a result of the disclosure breaches, it may be inferred that customers were deprived of statutory protections to which they were entitled. The customer base was largely comprised of Centrelink recipients, unsophisticated and seeking access to household goods. By failing to disclose the matters prescribed by statute, customers were not able to readily understand the nature and extent of the finance costs they were incurring or readily compare credit offerings.

When the credit provider or lessor first became aware, or ought reasonably to have become aware, of the contravention

143 By its draft report to Rent4Keeps (Aust) dated 30 November 2017, Holley Nethercote observed, amongst other things, that the automatic transfer provision "seems to be at odds with the discretion referred to in the Renter Declaration" (*Darranda (Liability)* at [89]). However, Holley Nethercote went on to conclude that the automatic transfer provision and Renter Declaration "would not give rise to a credit contract". Based on the terms of the advice Rent4Keeps (Aust) had received prior to the relevant period, it was not unreasonable for Rent4Keeps (Aust) to believe that the automatic transfer mechanism was consistent with a consumer lease. Although it was open to Darranda to seek its own advice, because of the

identity of the common controllers of Darranda and Rent4Keeps (Aust), Darranda did not have cause to do so.

144 ASIC formally commenced its investigation in relation to possible contraventions of the Code by Rent4Keeps (Aust) in April 2020 and in August 2021 expanded its investigation to include Darranda. ASIC's investigation did not commence until after the relevant period.

Any systems or procedures of the credit provider or lessor to prevent or identify contraventions

145 The systems and procedures adopted by Darranda and designed by Rent4Keeps (Aust) were inadequate. However, those inadequacies do not explain the reasons for the contraventions by Darranda of the key requirements during the relevant period.

146 From 1 March 2022, Rent4Keeps (Aust) (and as a consequence Darranda) amended the terms and conditions of its standard customer contract to make their characterisation as consumer leases clearer, including by abandoning a gifting mechanism. Following the amendments to the Credit Act by the Financial Sector Reform Act, the consumer leasing industry effectively closed down. Darranda has ceased to enter into contracts with customers.

Whether the contravention could have been prevented by the credit provider or lessor

147 The contraventions could have been prevented had Rent4Keeps (Aust) maintained the terms and conditions agreed with ASIC in July 2013 or if clearer advice had been received in 2017. This factor however is directed at the credit provider. Darranda, as the credit provider, was contractually obliged under the terms of its Master Franchise Agreement to implement Rent4Keeps (Aust)'s standard terms and conditions, although it was not precluded from obtaining its own advice. Whether that advice would have prevented the contraventions of the key requirement disclosures is a matter of speculation. The contraventions of the key requirements cannot be said to be the result of a specifically identifiable act or omission on the part of Darranda.

Any action taken by the credit provider or lessor to remedy the contravention or compensate the debtor or lessee or to prevent further contraventions

148 Darranda has not taken steps to compensate the affected customers but it is difficult to identify any quantifiable specific monetary loss customers have suffered as a result of the breach of the disclosure requirements.

Any other matter the court considers relevant

149 The above observations at subparagraphs (1), (4) and (5) to paragraph [121] made in relation to other relevant matters in the context of the rate cap breaches apply to the disclosure breaches. It is also important to have regard to the fact that Darranda was dealing with a financially vulnerable customer base. The statutory safeguards, including the key requirements, are there to protect the interests of those consumers in particular. The standards set by the legislation were breached. It is not appropriate for a commercial operator servicing a vulnerable class of consumers to breach statutory safeguards without consequence.

150 Having regard to the above considerations and the fundamental deterrence purpose of a pecuniary penalty imposed under the Code, the Court considers that a penalty in the total amount of $400,000 should be imposed on Darranda for the disclosure breaches. The breaches did not result in a direct financial benefit to either Darranda or Rent4Keeps and were not the result of recklessness or intentional disregard of the requirements of the Code.

Application: general obligation contraventions

151 The regime for the penalties to be imposed for the breach of a credit licence holder's general obligation under s 47(1)(a) of the Credit Act (to do all things necessary to ensure that the credit activities authorised by the licence were engaged in efficiently, honestly and fairly) is the same as that applying to the contraventions of s 24(1)(a) of the Code. It is to be recalled that Rent4Keeps (Aust) was involved in Darranda's contravention of s 47(1)(a) of the Credit Act and is consequently taken also to have contravened s 47(1)(a) of the Credit Act.

The nature and extent of the contravention

152 The nature and extent of the contravention and the circumstances in which the contravention of the general obligation occurred are distinguishable from the rate cap contraventions.

153 The contravention of s 47(1)(a) of the Credit Act was the product of a deficiencies in the culture of Rent4Keeps (Aust) and Darranda and arose from deficiencies at the highest level of management.

154 The contravention by Darranda of its general obligation arose largely from Darranda's unquestioning and almost blind adoption of the systems and procedures designed by Rent4Keeps (Aust). Darranda itself lacked the capacity to question and evaluate the processes and procedures by its lack of officers with experience relevant to operating in a highly regulated environment.

155 The contravention by Rent4Keeps (Aust) arose as a result of Rent4Keeps (Aust) being "involved in" Darranda's contravention. However, Rent4Keeps (Aust)'s involvement extended to the design and control of the procedures and systems adopted by Darranda (and which Darranda was contractually obliged to adopt). It was the fundamental and substantial failures of Rent4Keeps (Aust) that was the primary cause of the shortcomings in the processes and procedures adopted by Darranda.

156 The processes and procedures developed by Rent4Keeps (Aust) fell well short of those that may be expected to be conducive to the conduct of licensed activities in manner that was fair, honest and efficient. Those conducting credit licence activities can be expected to have systems in place that enable the ready identification by the highest level of management of the standard terms and conditions being used in the business. Systems and procedures need to be implemented to ensure that changes directed to be made are in fact made. Those conducting activities in the regulated environment of the Code and Credit Act can be expected to have compliance officers or employees who are legally qualified. Particularly given the financially vulnerable members of the customer base, the conduct and activities of field representatives directly engaging with customers should be monitored as a matter of reasonable practice. Conducting training is one thing; ensuring that those trained in fact act in accordance with that training is another. Rent4Keeps (Aust) failed to have systems and procedures in place to give effect to the terms and conditions of the customer contracts it was requiring its franchisees to adopt and in fact sent marketing messages inconsistent with those terms.

157 The Court reiterates that it accepts that none of the individuals involved in the management of Rent4Keeps (Aust) or Darranda intended the breach of the general obligation in s 47(1)(a) of the Credit Act; however, Rent4Keeps (Aust)'s lack of competence fell so far short of what might be expected in order to conduct regulated activities in a manner that is efficient, honest and fair as to warrant a description of not being "ethically sound" (see *Darranda (Liability)* at [265]). It is particularly unacceptable for entities conducting a regulated credit related business and for entities responsible for designing and implementing systems for those regulated businesses to implement systems, processes and procedures that result in the highest level of management being unaware of the current form of the terms and conditions of customer contracts.

The circumstances in which the contravention took place

158 The failings that gave rise to the contravention of the general obligation were not the result of relying on advice that, with the benefit of hindsight, turned out to be incorrect. They were the result of systems designed at the direction of the highest levels of management which failed to appreciate that the regulatory obligations extended beyond responsible lending obligations and assumed that regulatory obligations could be met through automated processes and technology-based practices and procedures. Those controlling those processes and procedures should have been aware of the shortcomings in those systems. The shortcomings were the result of systemic failings in the conduct of the business.

The nature and extent of any loss or damage suffered because of the contravention

159 It was not contended that specific loss or damage was suffered because of the contravention of the general obligation of Darranda to conduct its activities efficiently, honestly and fairly in the circumstances of this case.

160 As the declarations make clear, the contravention of the general obligation the subject of the penalty was the contravention of Darranda's general obligation during the relevant period. That contravention did not just affect Darranda's dealings with the customers who were parties to the 516 Relevant Contracts. It was a contravention that went to the fundamental way in which Darranda conducted its business during the relevant period.

161 Given that Rent4Keeps (Aust) no longer enters into franchise agreements and Darranda's business is essentially in run-off, the primary focus of the penalties to be imposed for the contravention by each of Darranda and Rent4Keeps (Aust) of the general obligation is general deterrence. Although the contravention of the general obligation did not result in the derivation of a direct financial benefit, the contraventions reflected a lack of care and competence that is not consistent with the statutory standard. The obligation to do all things necessary to ensure that the credit activities authorised by the licence were engaged in efficiently, honestly and fairly has particular resonance given the customer base which Darranda serviced. That customer base was financially vulnerable. The message must be conveyed that operators conducting a business for profit in a highly regulated industry with a financially vulnerable client base must do so to a standard that is efficient, honest and fair. The message is also directed to the individuals who controlled Darranda and Rent4Keeps (Aust) and who continue to control entities operating in the highly regulated consumer credit environment. Where that

standard is found not to be met, penalties will be imposed at a level that ensures that they do not become an acceptable cost of conducting that business.

162 Having regard to the above, the Court will impose a penalty of $1,000,000 on Darranda and $3,000,000 on Rent4Keeps (Aust) for the contravention of the general obligation in s 47(1)(a) of the Credit Act.

163 The Court is satisfied that each of Darranda and Rent4Keeps (Aust) have the capacity to pay the penalties imposed and that the overall penalties ($3,400,000 on Darranda and $4,000,000 on Rent4Keeps (Aust)) accords with the totality principle. Darranda's penalty would have been reduced if it had refunded to customers the amounts paid over and above the rate cap.

164 The Respondents contend that the present proceedings are analogous to the circumstances considered by Beach J in *Make It Mine (No 2)* in which total penalties of $1,250,000 were imposed.

165 As explained above, there is limited utility in comparing the penalties imposed in different cases in the context of different facts and circumstances. It is sufficient for present purposes to make the following observations:

(1) *Make It Mine (No 2)* did not involve a rate cap contravention or a breach of the general obligation.

(2) *Make It Mine (No 2)* concerned a single contravenor; not two contravenors (as is the case here).

(3) The legislation applicable in *Make It Mine (No 2)* was materially amended to substantially increase the maximum penalties for a contravention of the Code. The maximum penalty that could be imposed for a contravention of a key requirement was $500,000; here it is $10,500,000. The increase was intended to address, among other things, the eroded deterrent effect of civil penalties due to the effects of inflation and reflect the seriousness of the contravention and community expectation: Explanatory Memorandum to the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018 (Cth) at [1.83], [1.108]. The parity principle as a tool of analysis cannot be used to undermine the legislative intent of the Code.

(4) It follows that there is limited utility in comparing the absolute quantum of the penalties imposed in *Make It Mine (No 2)* with those proposed in the present case. To the extent it is useful to draw analogy to *Make It Mine (No 2)*, it may be more relevant to consider

the relative size of the penalty compared to the maximum penalty, even for a single contravention. The penalties imposed in *Make It Mine (No 2)* for the contravention of the key requirements in that case equalled the maximum penalty that would be imposed for a single contravention. The same cannot be said of the penalty imposed for the contraventions of the key requirements in this case.

166 Mr Payne evidently feels emotional distress at the closure of the consumer leasing business previously undertaken by the Respondents. Consumer leasing was a legitimate form of business. It was however unsuited for household goods that had no or little residual value and whose best use at the end of the contract was with the contracting customer. The effect of a consumer lease was that the provider of the goods retained ownership of the goods at the end of the contract. The fact that the goods had no material residual value at the end of the contract, meant that the goods were of no commercial interest to the provider of the goods. It was the fact that the goods had no real commercial value to Darranda at the end of its customer contracts that made an "automatic" transfer at the end of the lease appear attractive and efficient. That mechanism was not compatible with the legal character of a consumer lease.

167 The size of the penalty on Rent4Keeps (Aust) reflects shortcomings in the conduct of its business that were not directly related to the effect of the automatic gifting mechanism on the legal character of the 516 Relevant Contracts. Its imposition is largely attributable to a broader failure to do all things necessary to ensure that the regulated activities of Darranda were engaged in efficiently, honestly and fairly. Rent4Keeps (Aust) controlled the processes, procedures and systems by which that business was to be carried on. Those processes were unsatisfactory.

168 Although ASIC had initially requested that a compensation fund be set up which would involve the Court holding on to part of the penalty amounts to pay claims made by affected customers, ASIC did not press that claim at hearing. It need not be addressed further.

COSTS

169 The Respondents submitted that:

(1) There should be no order as to costs in respect of the trial on liability.

(2) Each party should bear their own costs in respect of applications made by ASIC on 16 October 2024 and 13 December 2024 in relation to requests for leave to issue subpoenas.

170 The Respondents submitted that a large part of the trial was taken up with the sham allegation in respect of which ASIC was unsuccessful. Although the Respondents accepted that part of the evidence from witnesses at trial also related to the general obligation allegations, the Respondents contended that at least half of the cross-examination of the Respondents' witnesses was addressed to the sham issue.

171 The Respondents' submission is not accepted. Whilst ASIC was unsuccessful on the sham issue, the matters canvassed in cross-examination also revealed the deficiencies in the systems, processes and procedures adopted by Darranda and designed by Rent4Keeps (Aust). It also revealed the lack of knowledge and understanding of those controlling the operations of Darranda and Rent4Keeps (Aust) of the terms of the customer contracts. The matters the subject of cross-examination were relevant to the general obligation contravention. The Court is not satisfied that it is appropriate to depart from the usual order as to costs in relation to the liability trial.

172 The Court does accept that it is appropriate that there be no order as to costs in relation to the two applications made by ASIC for leave to issue subpoenas. The leave ASIC did obtain was to issue subpoenas very limited in scope. The subpoena issues could largely have been resolved by the parties engaging in direct dialogue with each other and providing clarification as to what was to be put in issue in the penalty hearing. Through the course of the interlocutory hearings and correspondence exchanged shortly before those hearings, the Respondents agreed to produce some documents and ASIC agreed to withdraw certain requests. The form of subpoenas in respect of which requests for leave were made by ASIC bore little relationship to the form of subpoenas that were issued. The parties should bear their own costs of those two applications.

173 In light of the outcome of the penalty proceedings, it is appropriate that the Respondents pay ASIC's costs of the penalty hearing.

I certify that the preceding one hundred and seventy-three (173) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Hespe.

Associate: 

Dated: 12 August 2025