

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v General Commercial Group Pty Ltd [2023] FCA 24

File number(s): QUD 242 of 2021

Judgment of: **DOWNES J**

Date of judgment: 24 January 2023

Catchwords: **CONSUMER LAW** – admitted contraventions of s 47(1)(a) and s 47(1)(m) *National Consumer Credit Protection Act 2009* (Cth) – where failure to comply with obligations imposed by reg 11A *National Consumer Credit Protection Regulations 2010* (Cth) – where complaints made to the Australian Financial Complaints Authority about corporate respondents by consumers – where respondents failed to take reasonable steps to cooperate including refusing to provide documents – where failure to do all things necessary to ensure credit activities authorised by Australian Credit Licence were engaged in efficiently, honestly and fairly – where directors were involved in contraventions by corporate respondents – where declarations, pecuniary penalties and injunctions sought against each respondent by consent – proposed declarations, pecuniary penalties and injunctive relief ordered with minor modifications

Legislation: *Fair Work Act 2009* (Cth) s 546
National Consumer Credit Protection Act 2009 (Cth) ss 5(1), 6, 47(1)(a), 47(1)(m), 47(4), 166, 167, 167A, 167B, 169, 177, Pt 2.2
Trade Practices Act 1974 (Cth)
National Consumer Credit Protection Regulations 2010 (Cth) reg 11A

Cases cited: *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599; [2022] HCA 13
Australian Securities and Investments Commission v Commonwealth Bank of Australia [2020] FCA 1543
Australian Securities and Investments Commission v Financial Circle Pty Ltd (2018) 131 ACSR 484; [2018] FCA 1644
Australian Securities and Investments Commission v GoGetta Equipment Funding Pty Ltd [2021] FCA 420

Australian Securities and Investments Commission v National Australia Bank Limited [2020] FCA 1494
Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate (2015) 258 CLR 482; [2015] HCA 46
Trade Practices Commission v CSR Ltd [1990] FCA 521; (1991) ATPR 41-076
Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission (2021) 284 FCR 24; [2021] FCAFC 49

Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	107
Date of hearing:	6 December 2022
Counsel for the Applicant:	Mr S Seefeld
Solicitor for the Applicant:	Australian Securities and Investments Commission
Solicitor for the Respondents:	Mr J F Brady of John F Brady, Solicitor

ORDERS

QUD 242 of 2021

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

AND: **GENERAL COMMERCIAL GROUP PTY LTD**
First Respondent

EDEN CAPITAL (AUSTRALIA) PTY LTD
Second Respondent

DALE BRENDAN HEREMAIA (and others named in the
Schedule)
Third Respondent

ORDER MADE BY: DOWNES J

DATE OF ORDER: 24 JANUARY 2023

THE COURT DECLARES THAT:

1. The first respondent contravened:
 - (a) section 47(1)(m) of the *National Consumer Credit Protection Act 2009* (Cth) (the ***Credit Act***) by reason of a contravention of its obligation under reg 11A(2) of the *National Consumer Credit Protection Regulations 2010* (Cth) (the ***Credit Regulations***) from 6 April 2019 to take reasonable steps to cooperate with the Australian Financial Complaints Authority (AFCA) with respect to AFCA complaint number 673708, being the complaint to AFCA by Mr Michael and Mrs Renee Ashton of 14 October 2019;
 - (b) section 47(1)(m) of the *Credit Act* by reason of a contravention of its obligation under reg 11A(2) of the *Credit Regulations* from 6 April 2019 to take reasonable steps to cooperate with AFCA with respect to AFCA complaint number 627350, being the complaint to AFCA by Ms Aroha Webby and Mr Curtis Pokai on or around 13 March 2019;
 - (c) section 47(1)(a) of the *Credit Act* by breaching its obligation to do all things necessary to ensure that the credit activities authorised by its Australian Credit Licence were engaged in efficiently, honestly and fairly, through its conduct in:

- (i) attempting to rely on the settlement agreement dated 29 July 2019 between the second respondent and Mr and Mrs Ashton in order to claim to AFCA that AFCA complaint number 673708 had been resolved and was therefore outside of AFCA's jurisdiction;
- (ii) threatening Mr and Mrs Ashton with legal proceedings unless they withdrew AFCA complaint number 673708; and
- (iii) commencing proceedings in the Queensland Civil and Administrative Tribunal, through its agent Miravo Pty Ltd, against Mr and Mrs Ashton, seeking damages alleged to have occurred as a consequence of AFCA complaint number 673708.

2. The second respondent contravened:

- (a) section 47(1)(m) of the *Credit Act* by reason of a contravention of its obligation under reg 11A(2) of the *Credit Regulations* from 6 April 2019 to take reasonable steps to cooperate with AFCA with respect to AFCA complaint number 613517, being the complaint to AFCA by Mr and Mrs Ashton of 9 January 2019;
- (b) section 47(1)(m) of the *Credit Act* by reason of a contravention of its obligation under reg 11A(2) of the *Credit Regulations* from 6 April 2019 to take reasonable steps to cooperate with AFCA with respect to AFCA complaint number 626243, being the complaint by Ms Webby and Mr Pokai initially made to the Credit and Investments Ombudsman (reference number 18/4337) and then transferred to AFCA in or around December 2018;
- (c) section 47(1)(a) of the *Credit Act* by breaching its obligation to do all things necessary to ensure that the credit activities authorised by its Australian Credit Licence were engaged in efficiently, honestly and fairly, through its conduct in:
 - (i) entering into the settlement agreement with Mr and Mrs Ashton on 29 July 2019 in order to resolve AFCA complaint number 613517; and
 - (ii) notwithstanding that settlement agreement, subsequently commencing proceedings against Mr and Mrs Ashton in the Queensland Civil and Administrative Tribunal, through its agent Miravo Pty Ltd, seeking damages alleged to have occurred as a consequence of AFCA complaint number 613517.

3. The third respondent contravened s 47(1)(a) and s 47(1)(m) of the *Credit Act* by reason of his involvement in the contraventions of those sections by the first respondent.
4. The fourth respondent contravened s 47(1)(a) and s 47(1)(m) of the *Credit Act* by reason of his involvement in the contraventions of those sections by the second respondent.

THE COURT ORDERS THAT:

1. Pursuant to s 167 of the *Credit Act*, the first respondent pay a pecuniary penalty in respect of the contraventions in declaration 1 in the amount of \$50,000.
2. Pursuant to s 167 of the *Credit Act*, the second respondent pay a pecuniary penalty in respect of the contraventions in declaration 2 in the amount of \$50,000.
3. Pursuant to s 167 of the *Credit Act*, the third respondent pay a pecuniary penalty in respect of the contravention in declaration 3 in the amount of \$30,000.
4. Pursuant to s 167 of the *Credit Act*, the fourth respondent pay a pecuniary penalty in respect of the contravention in declaration 4 in the amount of \$20,000.
5. Pursuant to s 177 of the *Credit Act*, the first respondent is restrained from engaging in credit activity (within the meaning of s 6 *Credit Act*) (**credit activity**) for a period of 12 months from the date of this Order.
6. Pursuant to s 177 of the *Credit Act*, the second respondent is restrained from engaging in credit activity for a period of 12 months from the date of this Order, other than:
 - (a) collecting payments on loans currently outstanding; and
 - (b) engaging an independent third party to undertake collection activity in relation to any currently outstanding loan that falls into default.
7. Pursuant to s 177 of the *Credit Act*, the third respondent is restrained from carrying on any business engaging in credit activity, or being involved in the carrying on by another person of any business engaging in credit activity, for a period of 12 months from the date of this Order.
8. Pursuant to s 177 of the *Credit Act*, the fourth respondent is restrained from carrying on any business engaging in credit activity, or being involved in the carrying on by another person of any business engaging in credit activity, for a period of 12 months from the date of this Order other than continuing to act as responsible manager of the second respondent in connection with any credit activities undertaken by the second respondent pursuant to orders 6(a) and 6(b).

9. The respondents pay the applicant's costs of the proceeding, to be taxed if not agreed.

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

REASONS FOR JUDGMENT

DOWNES J:

- 1 In this proceeding, the Australian Securities and Investments Commission (**ASIC**) contends
that the first respondent, General Commercial Group Pty Ltd (formerly known as **Urban**
Commercial Group Pty Ltd) and the second respondent, **Eden** Capital (Australia) Pty Ltd
(formerly known as Southside Lending Services Pty Ltd) contravened ss 47(1)(a) and 47(1)(m)
of the *National Consumer Credit Protection Act 2009* (Cth) (**Credit Act**) during the period
between 22 August 2018 to 12 November 2020.
- 2 ASIC also contends that the third respondent (Mr Dale Heremaia) and the fourth respondent
(Mr Benjamin Heremaia) contravened those sections of the *Credit Act* by reason of their
involvement in the contraventions, respectively, of Urban and Eden.
- 3 ASIC seeks declarations of contraventions, pecuniary penalty orders and injunctions against
each of the respondents.
- 4 By a **Statement of Agreed Facts** and Admissions filed on 20 September 2022, the respondents
have admitted certain facts and the alleged contraventions. The parties have agreed, subject to
the Court's concurrence, as to the declarations to be made, the amounts of pecuniary penalties
to be imposed, and that injunctions should be granted and the terms of those injunctions.
- 5 It has therefore not been necessary to resolve any contested questions of fact or law.
- 6 The Statement of Agreed Facts is annexed to these reasons. For this reason, only particular
aspects of the relevant facts will be referred to in these reasons.
- 7 For the reasons below, the declarations sought by the parties will be made. Further, for the
reasons below, I am satisfied that the agreed pecuniary penalties are appropriate, and that it is
also appropriate to grant the injunctions, with minor modifications.

OVERVIEW

- 8 Urban and Eden each held an Australian Credit Licence issued pursuant to Part 2.2 of the *Credit*
Act and were members of the Australian Financial Complaints Authority (**AFCA**) external
dispute resolution scheme (**AFCA Scheme**).
- 9 Mr Dale Heremaia was an employee of Urban. He was also the sole director and shareholder
of Urban until early January 2020.

- 10 Urban's business included providing advice to consumers about obtaining home financing in circumstances where those consumers may not have had sufficient funds for a deposit. This advice typically involved recommending a loan to be arranged by Urban.
- 11 Eden's business included providing the initial loans arranged by Urban on behalf of consumers.
- 12 Mr Benjamin Heremaia was an employee and the sole director of Eden. He was also the sole shareholder of Eden until early January 2020.
- 13 From around January 2020, both Urban and Eden became wholly owned subsidiaries of **Miravo Pty Ltd**.
- 14 From January 2020, Mr Benjamin Heremaia was the sole director and shareholder of Miravo. Miravo did not carry on any business in its own right.
- 15 This proceeding concerns the actions taken by Urban and Eden with respect to **complaints** which were made to AFCA about them by certain consumers, namely Mr Michael Ashton and Mrs Renee Ashton, and Ms Aroha Webby and Mr Curtis Pokai.
- 16 Based on the facts in the Statement of Agreed Facts, the respondents admit that Urban and Eden contravened s 47(1)(m) of the *Credit Act*, by reason of a contravention of the obligation under reg 11A(2) of the *National Consumer Credit Protection Regulations 2010* (Cth) (***Credit Regulations***) to take reasonable steps to cooperate with AFCA in respect of the complaints. Among other matters, this involved failing to provide documents sought by AFCA with respect to the complaints, commencing proceedings in the Queensland Civil and Administrative Tribunal (**QCAT**) against Mr and Mrs Ashton and an AFCA staff member, and uncooperative communications with AFCA.
- 17 Urban and Eden further admit that they contravened the obligation imposed by s 47(1)(a) of the *Credit Act* to do all things necessary to ensure that the credit activities authorised by their respective Australian Credit Licences were engaged in efficiently, honestly and fairly. This included Urban wrongly attempting to rely upon a settlement agreement to which it was not a party.
- 18 Finally, Mr Dale Heremaia and Mr Benjamin Heremaia admit that they contravened ss 47(1)(a) and 47(1)(m) of the *Credit Act* by reason of their involvement in the contravention of those sections by Urban and Eden respectively.

RELEVANT LEGISLATION

19 Sections 47(1)(a) and 47(1)(m) of the *Credit Act* relevantly provide:

47 General conduct obligations of licensees

General conduct obligations

- (1) A licensee must:
 - (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
 - ...
 - (m) comply with any other obligations that are prescribed by the regulations.

20 Since 13 March 2019, ss 47(1)(a) and 47(1)(m) have been civil penalty provisions: s 47(4).

21 Regulation 11A of the *Credit Regulations*, which took effect from 6 April 2019, relevantly provides:

11A Obligations of licensees—cooperation with AFCA

- (1) For the purposes of paragraph 47(1)(m) of the Act, a licensee must comply with the obligations in subregulation (2).
- (2) The licensee must take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA scheme to which the licensee is a party, including by:
 - (a) giving reasonable assistance to AFCA in resolving the complaint; and
 - (b) identifying, locating and providing to AFCA any documents and information that AFCA reasonably requires for the purposes of resolving the complaint; and
 - (c) giving effect to any determination made by AFCA in relation to the complaint.

22 It follows that failure by a licensee to comply with reg 11A is a breach of s 47(1)(m) of the *Credit Act*.

23 Section 169 of the *Credit Act* provides that a person who is involved in a contravention of a civil penalty provision is taken to have contravened the provision. Relevantly, “involved in” is defined by s 5(1) of the *Credit Act* and includes where a person has procured the contravention, or has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention.

CONTRAVENTIONS BY URBAN

Ashtons

- 24 In around April and May 2018, Urban provided advice to Mr and Mrs Ashton which resulted in them signing a loan agreement with Eden.
- 25 On 8 January 2019, Mr Ashton lodged an online complaint with AFCA in relation to the loan agreement with Eden (**Ashton Eden Complaint**). The Ashton Eden Complaint was ultimately resolved in July 2019 by a **settlement agreement** between Mr and Mrs Ashton and Eden which effectively waived the remaining balance of the loan.
- 26 On 11 October 2019, Mr and Mrs Ashton made a complaint to AFCA about the broking services provided to them by Urban (**Ashton Urban Complaint**).
- 27 On 4 November 2019, Mr Dale Heremaia sent an email to AFCA in relation to the Ashton Urban Complaint claiming that the complaint had been resolved by the settlement agreement, notwithstanding that Urban was not party to that agreement.
- 28 On 15 November 2019, Mr Dale Heremaia sent an email to Mr Ashton on behalf of Urban:

Dear Mr Michael Ashton and Mrs Renee Ashton

We have been advised by AFCA that you wish to continue with your complaint against this company despite signing a complaint resolution agreement to the contrary.

Please be advised that as a company we will not be renewing our membership of AFCA and will therefore no longer be bound by it's [sic] rules or decisions. We will then be free to proceed with legal action to recover the costs we have incurred as well as the damages we have suffered as a result of your actions and breach of agreement.

This amount currently stands at approximately \$9,750.

If you wish to withdraw your complaint we will honour our current commitment to AFCA and take no further action. If not, we will commence legal proceedings to recover the debt.

...

- 29 On 31 December 2019, 14 January 2020, 12 February 2020, 17 February 2020 and 21 February 2020, AFCA requested documents and information from Urban in relation to the Ashton Urban Complaint. Urban did not provide the documents and information requested by AFCA. Rather, by correspondence on 20 January 2020, 12 February 2020, 17 February 2020, 21 February 2020 and 25 February 2020, Urban refused to provide the requested documents and information. The failure to provide documents and information requested by AFCA amounts to a failure to take reasonable steps to cooperate with AFCA in resolving this complaint.

- 30 On 25 May 2020, AFCA made a recommendation with respect to the Ashton Urban Complaint, which was communicated to Urban on 27 May 2020. The recommendation was that Urban pay to Mr and Mrs Ashton the amount of \$10,737.71.
- 31 On 3 June 2020, Miravo commenced proceedings in the QCAT seeking \$25,000 in damages against Mr and Mrs Ashton purportedly based, in part, on the AFCA recommendation amount (**Ashton proceedings**). On 15 June 2020, AFCA sent correspondence to both Urban and Eden reminding each of them that commencement of the Ashton proceedings was prohibited under the AFCA Rules (being the AFCA Complaint Resolution Scheme Rules) and requiring confirmation that the proceedings had been withdrawn.
- 32 On 31 July 2020, AFCA issued a determination in relation to the Ashton Urban Complaint requiring Urban to pay \$11,492.71 to Mr and Mrs Ashton (**Ashton Determination**). Following numerous attempts to obtain payment pursuant to the Ashton Determination, the sum was only paid on 25 May 2022, being approximately 10 months after these proceedings were commenced on 22 July 2021.
- 33 The failure by Urban to pay the Ashton Determination amount constituted a failure to take reasonable steps to cooperate with AFCA in resolving that complaint, such failure being aggravated by the length of time it took Urban to pay.
- 34 Whilst the Ashton Urban Complaint was progressing, AFCA was also communicating with Urban in respect of an AFCA investigation which concerned matters arising from the Ashton Urban Complaint, such as the attempt to rely on the settlement agreement and the failure to respond to information requests. Urban was informed about these matters on 28 April 2020. The AFCA case manager for this investigation was Ms Dalia Ismaiel.
- 35 Urban's response to these matters was sent by Mr Dale Heremaia to AFCA on 25 May 2020, which included the statement that:
- Ms Ismaiel's efforts to impune [sic] our reputation and to commence action threatening our business and the livelihood of its stakeholders is inappropriate and unacceptable. We will be commencing legal proceedings against Ms Dalia Ismaiel. She may think she has immunity, we will be seeking to test that in Court.
- 36 On 1 June 2020, Urban brought proceedings in the QCAT against Ms Ismaiel personally seeking \$25,000 in damages (**Ismaiel proceedings**).
- 37 On 18 August 2020, AFCA's legal representatives wrote to Mr Dale Heremaia on behalf of Urban noting that commencement of the Ismaiel proceedings was contrary to the AFCA Rules

and requiring that these proceedings be withdrawn. On 3 November 2020, Urban submitted a notice of withdrawal of the application in the Ismaiel proceedings and, on 27 August 2021, the Ismaiel proceedings were dismissed by the QCAT.

Webby and Pokai

38 On 13 March 2019, AFCA sent an email to Urban attaching a complaint submitted by Ms Webby (the **Webby and Pokai Urban Complaint**).

39 On 6 June 2019, Mr Dale Heremaia on behalf of Urban responded by making a complaint to AFCA's Chief Ombudsman about the AFCA case manager handling the complaint. That complaint included these statements:

I don't know if this white, privileged male has a problem with all people of a ethnic minority or just me, either way, he clearly has a problem. After 30 years in this industry I have dealt with a huge variety of arrogant, patronising and incompetent people but Mr Moore beats them all.

...

His digital footprint shows him to be some kind of wannabe intellectual come philosopher with a predilection to being a bit of a social crusader.

...

Please keep this rancid individual away from me and my business, sort him and his attitude out and please allocate #627350 to someone else to process.

40 As a consequence, the Webby and Pokai Urban Complaint was assigned to another AFCA case manager.

41 On 9 July 2019, 17 July 2019 and 23 July 2019, AFCA requested documents and information from Urban in relation to the Webby and Pokai Urban Complaint. Urban did not provide the documents and information requested by AFCA. Rather, by its correspondence of 19 July 2019 and 23 July 2019, Urban refused to provide the requested documents and information.

42 Urban's initial response to the Webby and Pokai Urban Complaint, and the failure to provide documents and information requested by AFCA, amounts to a failure to take reasonable steps to cooperate with AFCA in resolving this complaint.

Conclusions as to contraventions

43 By paragraphs 95(a) and 95(b) of the Statement of Agreed Facts, Urban has admitted that from 6 April 2019 it contravened s 47(1)(m) of the *Credit Act*, by reason of a contravention of its obligation under reg 11A(2) of the *Credit Regulations* to take reasonable steps to cooperate

with AFCA in respect of the Ashton Urban Complaint and the Webby and Pokai Urban Complaint.

44 Having regard to the agreed facts, I am satisfied that Urban contravened s 47(1)(m) *Credit Act*.

45 By paragraph 95(c) of the Statement of Agreed Facts, Urban has admitted that it contravened s 47(1)(a) of the *Credit Act* by breaching its obligation to do all things necessary to ensure that the credit activities authorised by its Australian Credit Licence were engaged in efficiently, honestly and fairly. It has admitted this contravention by reason of its attempted reliance on the settlement agreement, threatening Mr and Mrs Ashton with legal proceedings unless they withdrew the Ashton Urban Complaint, and commencing the Ashton proceedings (through Miravo).

46 Having regard to the agreed facts, I am satisfied that Urban contravened s 47(1)(a) *Credit Act*.

CONTRAVENTIONS BY EDEN

Ashtons

47 On 8 January 2019, Mr Ashton made the Ashton Eden Complaint to AFCA.

48 On 21 February 2019 and 7 March 2019, AFCA requested documents and information from Eden in relation to the Ashton Eden Complaint. Eden did not provide the documents and information requested by AFCA. Rather, by letters of 1 March 2019, 29 March 2019 and 3 July 2019, and by a telephone call from Mr Benjamin Heremaia of 15 March 2019, Eden refused to provide the requested documents.

49 The failure to provide documents and information requested by AFCA amounts to a failure to take reasonable steps to cooperate with AFCA in resolving this complaint.

50 The Ashton Eden Complaint was ultimately resolved in July 2019 by the settlement agreement. However, on 3 June 2020, Miravo commenced the Ashton proceedings seeking \$25,000 in damages. The damages sought in this proceeding were based, in part, on losses claimed by Eden relating to the loan agreement with Mr and Mrs Ashton.

Webby and Pokai

51 On or around 3 August 2018, Ms Webby submitted a complaint to the Credit and Investments Ombudsman in relation to Eden (**Webby and Pokai Eden Complaint**). In November 2018,

AFCA took over the handling of this complaint. AFCA informed Eden about the complaint by a letter of 4 December 2018.

52 On 12 December 2018, 9 January 2019 and 11 April 2019, AFCA requested documents and information from Eden in relation to the Webby and Pokai Eden Complaint. Eden did not provide the documents and information requested by AFCA. Rather, by letters of 17 December 2018 and 15 January 2019, Eden refused to provide the requested documents and information.

53 By a letter of 17 April 2019, Eden provided some but not all of the requested documents. In particular, Eden refused to provide statements showing transactions for the loan account which were the subject of the complaint.

54 On 27 May 2019, AFCA made a further request for documents from Eden. On 30 May 2019, Eden refused to provide those documents.

55 Eden's failure to provide documents and information requested by AFCA as set out above amounts to a failure to take reasonable steps to cooperate with AFCA in resolving this complaint.

56 On 4 September 2019, AFCA issued a recommendation in relation to the Webby and Pokai Eden Complaint that Eden pay to Ms Webby and Mr Pokai the amount of \$2,097.28 plus any other repayments made since 31 July 2018.

57 By an email of 4 September 2019, Eden stated that it did not accept the recommendation, and that it planned to refer the matter to their solicitor and the "Honourable Josh Frydenberg's Office". By emails of 9 September 2019 and 23 September 2019, Eden then stated that it had made the recommended payment. However, as the result of an incorrect bank account number being provided by AFCA, it was unclear whether payment had been made.

58 On 17 January 2020, AFCA issued a determination that Eden pay to Ms Webby and Mr Pokai the amount of \$2,097.28 plus any other repayments made since 31 July 2018 (**Webby and Pokai Determination**).

59 Following the Webby and Pokai Determination, AFCA then spent several months trying to obtain information from Eden to confirm that payment had been made. On 6 February 2020, 27 February 2020, 4 March 2020, 11 March 2020 and 1 April 2020, AFCA requested documents and information from Eden concerning payment of the Webby and Pokai

Determination. By an email of 4 March 2020 and a telephone call of 12 March 2020, Eden refused to provide the requested documents.

60 On 17 April 2020, the Webby and Pokai Determination amount was paid.

61 Eden's conduct with respect to the Webby and Pokai Determination, including the failure to provide documents and information requested by AFCA as set out above, amounts to a failure to take reasonable steps to cooperate with AFCA in resolving this complaint.

Conclusions as to contraventions

62 By paragraphs 96(a) and 96(b) of the Statement of Agreed Facts, Eden has admitted that from 6 April 2019 it contravened s 47(1)(m) of the *Credit Act*, by reason of a contravention of its obligation under reg 11A(2) of the *Credit Regulations* to take reasonable steps to cooperate with AFCA in respect of the Ashton Eden Complaint and the Webby and Pokai Eden Complaint.

63 Having regard to the agreed facts, I am satisfied that Eden contravened s 47(1)(m) *Credit Act*.

64 By paragraph 96(c) of the Statement of Agreed Facts, Eden has admitted that it contravened s 47(1)(a) of the *Credit Act* by breaching its obligation to do all things necessary to ensure that the credit activities authorised by its Australian Credit Licence were engaged in efficiently, honestly and fairly. It has admitted this by reason of its commencement of the Ashton Proceedings (through Miravo) seeking damages against Mr and Mrs Ashton, notwithstanding that they had previously entered into the settlement agreement.

65 Having regard to the agreed facts, I am satisfied that Eden contravened s 47(1)(a) *Credit Act*.

CONTRAVENTIONS BY MR DALE HEREMAIA

66 Mr Dale Heremaia was the only participant with respect to the conduct of Urban. Mr Dale Heremaia has admitted to sending the relevant correspondence on behalf of Urban. For most of the relevant period, he was the sole director and shareholder of Urban, and was the responsible manager for its Australian Credit Licence. Further, Mr Dale Heremaia has admitted that he was involved in the contraventions by Urban.

67 Given these matters, I am satisfied that Mr Dale Heremaia had the required knowledge and practical involvement so as to find that he was involved in the contraventions by Urban within the meaning of 169 of the *Credit Act*. It follows, by operation of the same section, that Mr Dale Heremaia is taken to have contravened ss 47(1)(a) and 47(1)(m) *Credit Act*.

CONTRAVENTIONS BY MR BENJAMIN HEREMAIA

68 At all relevant times, Mr Benjamin Heremaia was the sole director and an employee of Eden. For most of the relevant period, Mr Benjamin Heremaia was also the sole shareholder of Eden and, from January 2020, he was the sole shareholder and director of Eden's parent company, Miravo. Mr Benjamin Heremaia was responsible for sending the relevant correspondence on behalf of Eden and has admitted that he was involved in the contraventions by Eden.

69 Given these matters, I am satisfied that Mr Benjamin Heremaia had the required knowledge and practical involvement so as to find that he was involved in the contraventions by Eden within the meaning of 169 of the *Credit Act*. It follows, by operation of the same section, that Mr Benjamin Heremaia is taken to have contravened ss 47(1)(a) and 47(1)(m) *Credit Act*.

DECLARATIONS

70 Section 166(1) of the *Credit Act* enables ASIC to apply to the court for a declaration that the respondents contravened ss 47(1)(a) and 47(1)(m) of that Act.

71 If, as has occurred in this case, I am satisfied that there has been a contravention of these provisions (being civil penalty provisions), a declaration must be made: s 166(2) *Credit Act*. That is, I am required to make the declarations sought if I am satisfied that these contraventions have occurred: see *Australian Securities and Investments Commission v GoGetta Equipment Funding Pty Ltd* [2021] FCA 420 at [28] (Davies J); *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 1543 at [31] (Murphy J); *Australian Securities and Investments Commission v National Australia Bank Limited* [2020] FCA 1494 at [108] (Lee J); *Australian Securities and Investments Commission v Financial Circle Pty Ltd* (2018) 131 ACSR 484; [2018] FCA 1644 at [154] (O'Callaghan J).

72 Pursuant to s 166(3) of the *Credit Act*, the declaration must specify the following:

- (1) the court that made the declaration;
- (2) the civil penalty provision that was contravened;
- (3) the person who contravened the provision; and
- (4) the conduct that constituted the contravention.

73 The proposed declarations satisfy the requirements of s 166(3) *Credit Act*.

74 For these reasons, I am satisfied that it is appropriate that the declarations, as agreed by the parties, should be made, with minor modifications.

PECUNIARY PENALTIES

Power to impose pecuniary penalty

- 75 Pursuant to s 167(2) of the *Credit Act*, if a declaration has been made under s 166 that a person has contravened a civil penalty 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 the legislation, which is addressed below).

Agreement of the parties

- 76 The parties have agreed to the following pecuniary penalties in respect of their contraventions of the *Credit Act*:

- (1) Urban pay a pecuniary penalty in respect of its contravening conduct occurring from 6 April 2019 in the amount of \$50,000;
- (2) Eden pay a pecuniary penalty in respect of its contravening conduct occurring from 6 April 2019 in the amount of \$50,000;
- (3) Mr Dale Heremaia pay a pecuniary penalty in respect of his contravening conduct occurring from 6 April 2019 in the amount of \$30,000;
- (4) Mr Benjamin Heremaia pay a pecuniary penalty in respect of his contravening conduct occurring from 6 April 2019 in the amount of \$20,000.

Relevant factors

- 77 In *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24; [2021] FCAFC 49 (Wigney, Beach and O’Bryan JJ), the Full Court identified the following apposite principles from the High Court decision of *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482; [2015] HCA 46:

- (1) the Court must be persuaded that the penalty proposed by the parties is appropriate. The agreement of the parties cannot bind the Court in any circumstances to impose a penalty which it does not consider to be appropriate: [125];
- (2) if the Court is persuaded of the accuracy of the parties’ agreement as to facts and consequences, and that the agreed penalty jointly proposed is an appropriate remedy in all the circumstances, it would be highly desirable in practice for the Court to accept the parties’ proposal and therefore impose the proposed penalty: [126];

- (3) in considering whether the proposed agreed penalty is an appropriate penalty, the Court should generally recognise that the agreed penalty is most likely the result of compromise and pragmatism on the part of the regulator, and to reflect, amongst other things, the regulator’s considered estimation of the penalty necessary to achieve deterrence and the risks and expense of the litigation had it not been settled. The fact that the agreed penalty is likely to be the product of compromise and pragmatism also informs the Court’s task when faced with a proposed agreed penalty. The regulator’s submissions, or joint submissions, must be assessed on their merits, and the Court must be wary of the possibility that the agreed penalty may be the product of the regulator having been too pragmatic in reaching the settlement: [129].

Whether penalties proposed by the parties are appropriate

Relevant principles

78 The scope of the power to impose civil pecuniary penalties was considered by the High Court in *Australian Building and Construction Commissioner v Pattinson* (2022) 399 ALR 599; [2022] HCA 13. While the High Court was considering s 546 of the *Fair Work Act 2009* (Cth) in that case, that provision has similar wording to s 167(2) of the *Credit Act*. The following statements of the High Court are pertinent to this case:

- (1) subject to the particular statutory scheme, “the purpose of a civil penalty is primarily, if not solely, the promotion of the public interest in compliance with the provisions of the [relevant legislation] by the deterrence of further contraventions of the Act”: [9], [15], [42], [47]–[48];
- (2) civil penalties must be fixed with a view to ensuring that the penalty is not such as to be regarded by the offender or others as an acceptable cost of doing business: [17];
- (3) the factors identified by French J (as his Honour then was) in *Trade Practices Commission v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076 at 52,152–52,153 (as set out below) are possible relevant considerations which inform the assessment of a penalty of appropriate deterrent value; however, these should not be considered as a “legal checklist”: [18]–[19], [54].

79 The factors identified by French J in *CSR* which informed the assessment of a penalty for contravention of the *Trade Practices Act 1974* (Cth) were:

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.

80 Section 167(3) of the *Credit Act* (as in force from 13 March 2019) identifies mandatory considerations (which overlap with the *CSR* factors) as follows:

Determining amount of 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.

Maximum penalty

81 Section 167A *Credit Act* (as in force from 13 March 2019) provides that the pecuniary penalty must not be more than the pecuniary penalty applicable to the contravention of the civil penalty provision.

82 Section 167B *Credit Act* relevantly provides:

Pecuniary penalty applicable to the contravention of a civil penalty provision—by an individual

- (1) The ***pecuniary penalty applicable*** to the contravention of a civil penalty provision by an individual is the greater of:
 - (a) the penalty specified for the civil penalty provision; and
 - (b) if the court can determine the benefit derived and detriment avoided

because of the contravention—that amount multiplied by 3.

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.

83 Based on the evidence, I am unable to determine the benefit derived and detriment avoided by any of the respondents, and it is common ground that the annual turnover of each of Urban and Eden is substantially less than 50,000 penalty units.

84 Therefore, applying a penalty unit of \$210 (which was applicable for the majority of the relevant period until 1 July 2020), the maximum penalty for an individual is \$1.05 million and for a body corporate is \$10.5 million. The proposed penalties do not exceed these amounts.

The nature, extent and circumstances of the contraventions

85 The conduct of the respondents is identified in detail in the Statement of Agreed Facts. This conduct continued over a lengthy period of time, it was not inadvertent and it undermined the effective operation of AFCA’s processes and the resolution of the complaints by the consumers. However, there is no suggestion of dishonesty.

86 Mr Dale Heremaia was the person involved in the contraventions by Urban. He was the person who sent correspondence to AFCA on its behalf and was responsible for its misconduct. Further, Mr Dale Heremaia was the sole person who made decisions on behalf of Urban and was therefore responsible for its contraventions. Urban and Mr Dale Heremaia were jointly responsible for the escalation of misconduct in commencing the Ismaiel proceedings.

87 Urban and Mr Dale Heremaia failed to pay the Ashton Determination amount by 17 August 2020, being the timeframe within which payment was required by AFCA, and they failed to

respond to the numerous attempts by AFCA and Mr Ashton to arrange payment of same during the period 5 August 2020 to 9 December 2020. The Ashton Determination amount was not paid until 25 May 2022.

88 Mr Benjamin Heremaia was the person involved in the contraventions by Eden. He was the person who sent correspondence to AFCA on its behalf and was responsible for its misconduct. Mr Benjamin Heremaia was the sole person who made decisions on behalf of Eden and was therefore responsible for its contraventions.

89 The respondents were jointly responsible for the escalation of the misconduct by the commencement of the Ashton proceedings by Miravo.

90 The respondents did not take steps to remediate their misconduct beyond the following:

- (1) on 4 November 2020, Urban and Mr Dale Heremaia withdrew the Ismaiel proceedings; and
- (2) on 25 May 2022, Urban paid the Ashton Determination amount.

The nature and extent of any loss or damage suffered

91 The respondents' contravening conduct caused loss and damage to Mr and Mrs Ashton, as well as to AFCA. In particular:

- (1) the failure by Urban to pay the Ashton Determination amount for a substantial period of time caused direct harm to Mr and Mrs Ashton who were deprived of those funds for that period. Mr and Mrs Ashton also suffered stress and inconvenience as a consequence of the proceedings brought in the QCAT;
- (2) the respondents' conduct caused harm to AFCA through the imposition of unnecessary additional administrative burden, including the cost of responding to the Ismaiel proceedings, as well as harm to AFCA staff through being subjected to inappropriate and unprofessional behaviour.

Cooperation with the regulator

92 During the investigation prior to commencement of these proceedings, the respondents demonstrated limited cooperation with ASIC in response to statutory notices issued by ASIC.

93 The responses by the respondents to the statutory notices issued by ASIC were consistent with
their previous uncooperative communications with AFCA. Examples of these responses are
contained in paragraph 100 of the Statement of Agreed Facts.

Size and financial position of the respondents

94 The profit and loss statements for Urban and Eden for the year ended 30 June 2022 indicate
only modest income of around \$20,000 and \$235,000 respectively. Both companies had a net
loss in that financial year.

95 ASIC accepted that the Court may proceed on the basis that Urban and Eden are companies of
modest size and financial position.

96 There was no evidence of the financial position of the individual respondents.

Previous findings of similar conduct

97 There was no evidence that any of the respondents has previously been found to have engaged
in similar conduct.

General deterrence

98 Cooperation by AFCA members with AFCA is important to the effective running of the AFCA
Scheme. For this reason, it is necessary that the penalties be sufficient to deter other members
of AFCA from engaging in similar conduct to that of the respondents.

Specific deterrence

99 The respondents accept that their actions may have been “better considered” and that a different
course should have been undertaken by them. Further, they have demonstrated remorse in
relation to their actions.

100 The respondents have also indicated their intention to exit the market once their obligations
under the proposed orders are met.

101 In these circumstances, the contraventions are unlikely to be repeated. This supports a
conclusion that the penalties to be imposed, as agreed by the parties, would achieve the object
of specific deterrence.

Conclusion

102 Taking into account these considerations, I am satisfied that it is appropriate to order that the respondents each pay the pecuniary penalty as agreed.

103 In making this finding, I am persuaded of the accuracy of the parties' agreement as to facts and consequences and I recognise that it would be highly desirable to accept the parties' proposal and to impose the proposed penalties. In this regard, it is apparent that the parties have given careful consideration to the relevant issues, and the proposed agreed penalties are the result of compromise and pragmatism on the part of ASIC to reach a considered estimation of the penalties necessary to achieve deterrence and avoid the risks and expense of the litigation, had the penalties not been agreed.

INJUNCTIONS

104 The parties have agreed to certain injunctions being granted pursuant to s 177 of the *Credit Act*.

105 Section 177 of the *Credit Act* confers a broad discretion on the Court to grant an injunction where there has been a contravention of that Act, or the parties have agreed to the injunction by consent.

106 For the following reasons, it is appropriate to grant the injunctions which are the subject of agreement by the parties:

- (1) the nature, extent and circumstances of the contraventions support the imposition of injunctions;
- (2) if repeated, the impugned conduct would be likely to cause harm to consumers who enter into arrangements with the respondents for the provision of credit, as well as increase the administrative burden on AFCA in relation to any complaints made by such consumers;
- (3) the imposition of the proposed injunctions reinforces the importance of compliance with the *Credit Act*, including the importance of cooperation with AFCA by members of the AFCA Scheme;
- (4) the respondents have shown remorse in relation to their actions. This suggests that such conduct is unlikely to be repeated by them and supports the grant of an injunction for a limited period only;

- (5) there have been no allegations of dishonesty made against any of the respondents in connection with the contravening conduct;
- (6) there was no evidence that the impugned conduct had been engaged in by the respondents previously, or that any of the respondents have failed to comply with their legal obligations in any other respect.

DISPOSITION

107 For these reasons, the proposed orders will be made, with minor modifications which do not affect the substance of the orders sought.

I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Downes.

Associate: 

Dated: 24 January 2023

ANNEXURE: STATEMENT OF AGREED FACTS AND ADMISSIONS

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 20/09/2022 4:18:24 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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



Dated: 20/09/2022 4:30:02 PM AEST

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

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



QUD242 of 2021

Form 1
Rule 2.13(2)

Federal Court of Australia
District Registry: Queensland
Division: General

Australian Securities and Investments Commission
Applicant

General Commercial Group Pty Ltd (ACN 134 168 540)
and others named in the schedule
Respondents

Statement of Agreed Facts and Admissions

INTRODUCTION

1. This Statement of Agreed Facts and Admissions (**Statement**) is made jointly by the Applicant, the Australian Securities and Investments Commission (**ASIC**), and the Respondents, General Commercial Group Pty Ltd (formerly known as Urban Commercial Group Pty Ltd) (**Urban**), Eden Capital (Australia) Pty Ltd (formerly known as Southside Lending Services Pty Ltd) (**Eden**), Dale Brendan Heremaia (**Dale Heremaia**) and Benjamin Eden Heremaia (**Benjamin Heremaia**).
2. The Statement is made for the purposes of section 191 of the *Evidence Act 1995* (Cth). The facts agreed to and the admissions made in this Statement are agreed to for the purpose of these proceedings (**Proceedings**) only; they do not constitute any admission outside the context of these Proceedings.
3. The statements made in this Statement relate to the period 22 August 2018 and 12 November 2020 (**Relevant Period**) unless expressly stated otherwise.
4. Exhibited to this Statement is a USB containing true copies of a number of documents. Each of these documents has a barcode attached. Where they are referred to in this Statement they are referred to by their barcode.

Business of the Respondents

5. During the Relevant Period, Urban operated a business as a finance broker and Eden operated a business providing loans. At all times during the Relevant Period Urban and Eden each held an Australian Credit Licence (**ACL**) issued pursuant to Part 2.2 of the

National Consumer Credit Protection Act 2009 (Cth) (**Credit Act**) and were members of the Australian Financial Complaints Authority (**AFCA**) external dispute resolution scheme (**AFCA Scheme**). The AFCA Scheme is dealt with further below at paragraphs 11 to 19 below.

6. During the Relevant Period, Dale Heremaia:
 - (a) until early January 2020, was the sole director and shareholder of Urban;
 - (b) at all times was an employee of Urban;
 - (c) until 4 August 2020 was registered with ASIC as the responsible manager for Urban's ACL, and as such was the person managing Urban's credit business;
 - (d) was employed as the lending manager of Eden from October 2015 to October 2017, 1 July 2019 and from 18 November 2019 to 31 December 2019;
 - (e) used the names "David Fletcher" and "Josh Pines" in written correspondence (including emails) and during telephone calls;
 - (f) used and had access to:
 - (i) the following email addresses 'admin@urbanhomeloans.com.au', 'dale@urbanhomeloans.com.au', 'david@urbanhomeloans.com.au', 'documents@urbanhomeloans.com.au', 'finance@urbanhomeloans.com.au', 'info@urbanhomeloans', 'josh@urbanhomeloans.com.au'; and
 - (ii) the email signature blocks "General Commercial Group Pty Ltd", "David Fletcher", "Dale Heremaia" and "Office Administration";
 - (g) sent correspondence on behalf of Urban.
7. During the Relevant Period, Benjamin Heremaia:
 - (a) at all times, was an employee of Eden and was its sole director;
 - (b) until early January 2020, was the sole shareholder of Eden;
 - (c) from 14 September 2020 was registered with ASIC as a responsible manager for Eden's ACL, and as such was one of the people managing Eden's credit business;
 - (d) used the names "James", "James Harder", "Craig", and "Craig Wintle" in written correspondence (including emails) and during telephone calls;

- (e) used and had access to:
 - (i) the following email addresses 'accounts@edencapital.com.au', 'accounts@edencapital.co', 'apply@edencapital.com.au', 'bheremaia@edencapital.com.au', 'complaints@edencapital.com.au', 'contact@edencapital.com.au', 'credit@edencapital.com.au', 'cwintle@edencapital.com.au', 'settlements@edencapital.com.au';
 - (ii) the email signature blocks "Compliance Team Eden Capital", "Eden Capital (Australia) Pty Ltd" and "The Team @ Eden Capital"; and
 - (f) sent correspondence on behalf of Eden.
8. Ben Heremaia is Dale Heremaia's son.
 9. During the Relevant Period:
 - (a) Urban's business included providing advice to consumers about obtaining home financing in circumstances where those consumers may not have had sufficient funds for a deposit. This advice often involved proposing a two-step process as follows:
 - (i) Urban would arrange an initial loan to cover the funds necessary to be treated as a deposit and other costs;
 - (ii) the proceeds of this loan, once held for 3 months, would then be considered by particular lenders to be genuine savings, allowing the consumers to obtain a home loan;
 - (b) Eden's business including providing the initial loans arranged by Urban on behalf of consumers.
 10. From around January 2020, both Urban and Eden became wholly owned by Miravo Pty Ltd (Miravo). During the Relevant Period from January 2020, Benjamin Heremaia was the sole director and shareholder of Miravo. Miravo did not carry out any business in its own right and operated as the head company of a tax consolidated group which included Urban and Eden.

AFCA Scheme

11. The AFCA Scheme is an external dispute resolution scheme established by Part 7.10A of *Corporations Act 2001* (Cth) (**Corporations Act**). The structure of Part 7.10A is as follows.

- (a) The Minister for Revenue and Financial Services authorises an external dispute resolution scheme (which then becomes known as the AFCA Scheme and the operator known as AFCA): s.1050 Corporations Act.
 - (b) The AFCA Scheme must comply with a number of mandatory requirements set out in the legislation: ss.1051, 1052 Corporations Act.
 - (c) The AFCA Scheme must comply with regulatory requirements and directions made by ASIC: ss.1052A, 1052B, 1052BA Corporations Act.
 - (d) Where AFCA becomes aware, in connection with a complaint under the AFCA scheme, that a party to the complaint may have refused or failed to give effect to a determination made by AFCA or where systemic issues or a serious contravention of any law may have occurred it must give particulars to ASIC: s1052E Corporations Act.
12. The mandatory requirements include:
- (a) membership of AFCA must be open to every entity that is required to be a member of an external dispute resolution scheme under a law of the Commonwealth or the conditions of a licence or permission issued under such a law (s.1051(2)(a));
 - (b) the AFCA Scheme must be available free of charge to consumers (s.1051(2)(d) Corporations Act);
 - (c) the AFCA Scheme must resolve complaints in a way that is fair, efficient, timely and independent (s.1051(4)(b)); and
 - (d) under the AFCA Scheme, determinations by AFCA are binding on members but not on consumers (s.1051(4)(e)).
13. On 1 November 2018, the AFCA scheme replaced the external dispute resolution schemes operated by the Financial Ombudsman Service (**FOS**) and the Credit and Investments Ombudsman (**CIO**) respectively. From this time AFCA has dealt with all new credit, finance and loan product complaints, and managed any ongoing complaints previously lodged with FOS and CIO.
14. AFCA is governed by a set of Rules (**AFCA Rules**). These Rules are approved by ASIC, in accordance with the requirements of the Corporations Act. From 1 November 2018, all new complaints made to AFCA are handled under the AFCA Rules. Whilst there have been six versions of the AFCA Rules published since the commencement of AFCA, for the process of receiving complaints and making determinations against financial firms, the six versions

of the AFCA Rules do not materially differ. The AFCA Rules are explained in more details in AFCA's Operational Guidelines, both of which are published on AFCA's website. The versions of the AFCA Rules and Operational Guidelines in force during the Relevant Period were:

- (a) AFCA Rules effective 1 November 2018 [URB.0003.0020.0789];
 - (b) Operational Guidelines effective 1 November 2018 [URB.0003.0020.0001];
 - (c) AFCA Rules effective 30 June 2019 [URB.0003.0020.0839];
 - (d) Operational Guidelines effective 30 June 2019 [URB.0003.0020.0201];
 - (e) AFCA Rules effective 1 October 2019 [URB.0003.0020.0891];
 - (f) Operational Guidelines effective 1 October 2019 [URB.0003.0020.0407];
 - (g) AFCA Rules effective 21 February 2020 [URB.0003.0020.0944];
 - (h) Operational Guidelines effective 16 April 2020 [URB.0003.0009.0001]; and
 - (i) AFCA Rules effective 25 April 2020 [URB.0003.0009.0211].
15. The AFCA Rules include a requirement that a licensee not begin legal proceedings against a complainant while AFCA is considering their complaint.
16. As part of AFCA's complaint resolution process, AFCA may provide the parties with a preliminary assessment of the complaint. This assessment includes:
- (a) the relevant factual information;
 - (b) the relevant issues arising out of the complaint;
 - (c) how AFCA thinks the complaint should be resolved and why; and
 - (d) the timeframe by which the parties are to confirm with AFCA whether they are willing to settle in accordance with the preliminary assessment.
17. A determination is the final stage in AFCA's complaint resolution process. A complainant may choose to accept the decision that AFCA makes, or not. When determining a complaint, the AFCA decision maker must do what is fair in all the circumstances, and take into account:
- (a) legal principles;

- (b) applicable industry codes or guidance;
 - (c) good industry practice; and
 - (d) previous relevant determinations of AFCA or predecessor schemes.
18. A determination will be made in writing and will outline the reasons for the decision. Any remedy that AFCA award, whether it be monetary compensation, or some other remedy will also be included. The financial firm is required to comply with AFCA's decision, if the complainant chooses to accept it.
19. The determination will set out:
- (a) the relevant factual information available at the time of making the determination;
 - (b) the relevant issues arising in the complaint and AFCA's analysis of those issues; and
 - (c) AFCA's decision as to how the complaint should be resolved and why, including a particular remedy (if any) to be provided to the complainant.

MEMBERSHIP OF AND COOPERATION WITH AFCA

20. During the Relevant Period a person holding an Australian Credit Licence was required to be a member of the AFCA Scheme: s.47(1)(i) of the Credit Act.
21. In addition, from 6 April 2019 a person holding an Australian Credit License was required to take reasonable steps to cooperate with AFCA in resolving any complaint under the AFCA Scheme including by:
- (a) giving reasonable assistance to AFCA in resolving the complaint;
 - (b) identifying, locating and providing to AFCA any documents and information that AFCA reasonable requires for the purpose of resolving the complaint; and
 - (c) giving effect to any determination made by AFCA in relation to the complaint:
- section 47(1)(m) of the Credit Act and r.11A of the *National Consumer Credit Protection Regulations 2010* (Cth).
22. Urban was a member of CIO from 23 May 2017 and then became a member of AFCA on or around 1 November 2018. On 12 November 2020, Urban was expelled from AFCA.

23. Eden was a member of CIO from 4 November 2014 until on or around 1 November 2018 when it became a member of AFCA. Eden remains a member of AFCA.

MR AND MRS ASHTON

24. In around April 2018 Michael and Renee Ashton (**Mr and Mrs Ashton or the Ashtons**) were referred to Dale Heremaia by an unrelated business called 'Integra Homes', for the purpose of seeking advice about obtaining finance to purchase their first home.
25. Soon after Mr and Mrs Ashton had a telephone call with Dale Heremaia during which he asked them questions about their financial circumstances and asked them to provide further information.
26. Following this conversation Mr and Mrs Ashton had dealings with Dale Heremaia which included the following:
- (a) on 24 April 2018, Dale Heremaia of Urban sent an email to Mr and Mrs Ashton [URB.0010.0002.4454].
 - (b) in about late April 2018, Mr and Mrs Ashton had an online video conference with Dale Heremaia. During this conference, Dale Heremaia advised Mr and Mrs Ashton that:
 - (i) he could assist them to obtain a loan;
 - (ii) they should hold the proceeds of the loan in an account in their name for 3 months; and
 - (iii) the proceeds could then be used to demonstrate genuine savings in order to allow them to obtain a further loan to fund the purchase of a house.
 - (c) on 1 May 2018, Mr and Mrs Ashton received an email from Dale Heremaia on behalf of Urban [URB.0010.0002.0747] attaching an Eden loan application form [URB.0010.0002.0749];
 - (d) shortly after receiving it, Mr and Mrs Ashton signed the loan application form and returned it to Dale Heremaia; and
 - (e) on 11 May 2018, Urban, using the name "Josh Pines" sent an email to Mr and Mrs Ashton [URB.0010.0002.0746] informing them that their loan application with Eden had been approved.

27. On 16 May 2018, Mr and Mrs Ashton had a face-to-face meeting with Dale Heremaia where they signed a loan agreement with Eden (**Eden Deposit Loan**) [URB.0010.0002.0106]. The Eden Deposit Loan included the following terms:
- (a) Eden (then known as Southside Lending Services Pty Ltd trading as 'Eden Capital') was the lender;
 - (b) Mr and Mrs Ashton were the borrowers;
 - (c) the loan amount was \$58,746;
 - (d) the total amount of interest payable was \$52,789.06;
 - (e) the introductory interest rate was 8.99% per annum fixed for 26 weeks and thereafter 19.99% per annum for the remainder of the loan;
 - (f) the loan term was 389 weeks (7.5 years) commencing from execution date, made up of:
 - (i) 26 interest only weekly repayments of \$101.56;
 - (ii) 362 principal and interest weekly repayments of \$300.35;
 - (iii) 1 principal and interest weekly repayment of \$167.12;
 - (g) the following fees were payable to Eden:
 - (i) documentation fee of \$495;
 - (ii) risk fee of \$9,791;
 - (h) loan proceeds were to be dealt with as follows:
 - (i) \$10,286 retained by Eden for the fees referred to at (g) above;
 - (ii) \$990 to Urban; and
 - (iii) \$47,470 to an account in the name of Eden (then known as Southside Lending Services Pty Ltd trading as Eden Capital HomeStart) and remaining there until the Ashtons had entered into an unconditional contract for the sale or purchase of land as purchaser and had sufficient other funds to complete the purchase.
28. After signing the agreement for the Eden Deposit Loan, the Ashtons:

- (a) on 21 May 2018, engaged a building company to design and build a home;
 - (b) on 26 May 2018, signed a contract to purchase a block of land for a purchase price of \$292,000 and a covenant agreement to build a home, and paid an initial deposit of \$1,000 to secure the land;
 - (c) subsequently (on 16 and 30 July 2018) paid a total of \$2,245 to that company for preliminary works to be carried out; and
 - (d) on 11 September 2018, paid the balance of the deposit to the building company of \$2,245.
29. On or about 16 August 2018, after the Ashtons had held the Eden Deposit Loan for three months, Mr Ashton contacted Dale Heremaia about their home loan.
30. Subsequently, on 16 August 2018, Mr and Mrs Ashton received:
- (a) an email from Dale Heremaia on behalf of Urban [URB.0010.0002.4458]; and
 - (b) another email from Urban [URB.0010.0002.4681] enclosing a tax invoice addressed to Mr and Mrs Ashton for a consultation fee payable to Urban of \$990 [URB.0010.0002.4682].
31. Between 22 and 27 August 2018, Mr and Mrs Ashton and Eden exchanged numerous emails, which included but was not limited to:
- (a) on 22 August 2018 at 4.49pm, Mr Ashton sent an email to Eden [URB.0010.0002.0178];
 - (b) on 23 August 2018 at 1.09pm, an automatic response was sent by Eden to Mr Ashton [URB.0010.0002.0635];
 - (c) on 23 August 2018 at 1.11pm and 1.14pm, Mr Ashton sent a further two emails to Eden [URB.0010.0002.0178];
 - (d) on 24 August 2018 between 1:39 pm and 3:28pm, there was an email exchange between Mr Ashton, Mrs Ashton and Eden [URB.0010.0002.0178];
 - (e) on 27 August 2018, Eden sent an email to Mr and Mrs Ashton [URB.0010.0002.0178].
32. On about 28 September 2018, Mr and Mrs Ashton spoke to another finance broker after which:
- (a) at 2.54pm, they sent an email to Eden [URB.0010.0002.0176]; and

- (b) at 3.50pm, they received an email from Eden [URB.0010.0002.0176].
- 33. Shortly after receiving the email dated 28 September 2018 from Eden, Mr Ashton called Dale Heremaia and said words to the following effect:

"We can't use the funds from the deposit loan as deposit funds because the banks have told us that if the funds are not in our savings account, they can't be considered to be savings".
- 34. On 12 and 13 November 2018, Mr and Mrs Ashton exchanged emails with Dale Heremaia of Urban [URB.1034.0002.0001].
- 35. Between 19 and 21 November 2018 Mr and Mrs Ashton had a further exchange of emails with Eden [URB.0010.0002.0172].
- 36. Following the exchange of email referred to above:
 - (a) the loan proceeds of \$47,470 which had been held by Eden on behalf of the Ashtons were applied to the amount owed by the Ashtons under the Eden deposit loan;
 - (b) Eden charged the Ashtons an early repayment interest penalty of \$2,932.10 and an early repayment administration fee of \$300;
 - (c) the Ashtons had made repayments totalling \$5,492.71;
 - (d) the Ashtons still owed Eden \$11,276.

ASHTON EDEN COMPLAINT

- 37. On 8 January 2019, Mr Ashton lodged an online complaint with AFCA in relation to Eden Deposit Loan made to them by Eden (the **Ashton Eden Complaint**). A copy of the Ashton Eden Complaint is [URB.1009.0001.3035]. AFCA allocated the complaint the case number 613517.
- 38. Between 8 January 2019 and 31 January 2019, AFCA and Eden exchanged the following correspondence regarding the Ashton Eden Complaint:
 - (a) on 8 January 2019, AFCA sent a letter to Eden [URB.0013.0002.0006];
 - (b) on 25 January 2019, Eden sent an email to AFCA [URB.0010.0002.0523];
 - (c) on 29 January 2019, AFCA sent an email to Eden [URB.0010.0002.0523]; and
 - (d) on or around 31 January 2019, Eden sent a letter to AFCA [URB.0013.0002.0009].

39. On 20 February 2019, May Chng, Case Analyst of AFCA, (Ms Chng) and Benjamin Heremaia, who identified himself as "Craig", had a telephone conversation, the effect of which was recorded in a file note taken by Ms Chng. A copy of the file note is [URB.0013.0002.0014].
40. Between 21 February 2019 and 7 March 2019, AFCA, Eden and the Ashtons exchanged the following correspondence in relation to the Ashton Eden Complaint:
 - (a) on 21 February 2019, AFCA sent a letter to a letter to Eden [URB.0013.0002.0016];
 - (b) on 26 February 2019, AFCA sent a letter to Mr Ashton [URB.0010.0002.0055];
 - (c) on 1 March 2019, Eden sent an unsigned letter to AFCA [URB.0013.0002.0025]; and
 - (d) on 7 March 2019, AFCA sent a letter to Eden [URB.0013.0002.0034].
41. On 15 March 2019, Ms Chng and Benjamin Heremaia, who identified himself as "Craig", had a telephone conversation, the effect of which was recorded in a file note taken by Ms Chng. A copy of the file note is [URB.0013.0002.0037].
42. On 29 March 2019, Eden sent a letter to AFCA [URB.0013.0002.0040]. The letter was registered as a complaint and given complaint number 647787.
43. Between 20 June 2019 and 29 July 2019, AFCA, Eden and the Ashtons exchanged the following correspondence:
 - (a) on 20 June 2019, AFCA sent a letter to Eden in relation to complaint number 647787 [URB.1009.0001.2811];
 - (b) on 3 July 2019, Benjamin Heremaia sent a letter to AFCA on behalf of Eden [URB.0013.0002.0042];
 - (c) on 9 July 2019, Ms Chng sent a copy of Eden's letter of 3 July 2019 to Mr Ashton [URB.0010.0002.0852], [URB.0010.0002.0853];
 - (d) on 25 July 2019 Eden sent:
 - (i) a letter to AFCA at 11.46am [URB.0013.0002.1410]; and
 - (ii) an email to Mr and Mrs Ashton at 2.12pm which contained an offer to resolve the Ashton Eden Complaint [URB.0010.0002.0983];
 - (e) on 29 July 2019 at 10.08am, Benjamin Heremaia sent on behalf of Eden an email to the Ashtons regarding the entry into a Complaint Resolution Agreement to resolve the

Ashton Eden Complaint (Complaint Resolution Agreement)
[URB.0010.0002.0985].

44. On 29 July 2019, Mr and Mrs Ashton accepted the offer to resolve the Ashton Eden Complaint and signed the Complaint Resolution Agreement via DocuSign. A copy of the Complaint Resolution Agreement is [URB.0010.0002.0978].
45. On 29 July 2019, AFCA finalised the Ashton Eden Complaint.

ASHTON URBAN COMPLAINT

46. On 11 October 2019, Mr Ashton lodged an online complaint with AFCA in relation to the broking services provided by Urban (the **Ashton Urban Complaint**). A copy of the Ashton Urban Complaint is [URB.1009.0001.2007]. AFCA allocated the complaint the case number 673708.
47. Between 4 November 2019 and 11 May 2020, AFCA, Dale Heremaia and Mr Ashton exchanged the following correspondence regarding the Ashton Urban Complaint:
 - (a) on 4 November 2019, Dale Heremaia sent an email to AFCA [URB.1009.0001.2030] attaching a copy of the Complaint Resolution Agreement entered into between the Ashtons and Eden in relation to the Ashton Eden Complaint referred to at paragraph 44 above;
 - (b) on 15 November 2019, Urban sent an email to the Ashtons using the name "David Fletcher", which Mr Ashton forwarded to AFCA [URB.1009.0001.2033];
 - (c) on 18 November 2019, AFCA sent an email to Urban [URB.1009.0001.2034];
 - (d) on 6 December 2019, AFCA sent an email to Dale Heremaia [URB.1009.0001.2041] attaching a letter [URB.1009.0001.2042];
 - (e) on 31 December 2019, AFCA sent:
 - (i) an email to Dale Heremaia [URB.0010.0002.4414] attaching a letter [URB.0010.0002.4415]; and
 - (ii) an email to Mr Ashton [URB.0010.0002.4420] attaching a letter [URB.0010.0002.4422];
 - (f) on 8 January 2020, Urban sent an email to AFCA using the name "David Fletcher" [URB.0013.0002.1433];
 - (g) on 13 January 2020:

- (i) Mr Ashton sent an email to AFCA [URB.1009.0001.2306];
 - (ii) AFCA sent an email in reply to the email sent by Urban on 8 January 2020 using the name "Mr Fletcher" [URB.0013.0002.1435];
 - (iii) Urban, using the name "David Fletcher", sent an email to AFCA [URB.0010.0002.4691];
- (h) on 14 January 2020, AFCA sent an email in reply to the email sent by Urban on 13 January 2020 using the name "Mr Fletcher" [URB.0010.0002.4691];
- (i) on 17 January 2020, AFCA sent an email to Mr Fletcher at Urban [URB.1009.0001.2315];
- (j) on 20 January 2020:
 - (i) AFCA sent an email to Mr Fletcher of Urban [URB.1009.0001.2316];
 - (ii) Urban sent an email to AFCA using the name "David Fletcher" [URB.1009.0001.2317];
 - (iii) AFCA sent an email to Mr Fletcher of Urban [URB.0013.0002.1461];
- (k) on 21 January 2020, Urban sent an email to AFCA using the name "David Fletcher" [URB.1032.0003.0006];
- (l) on 23 January 2020, AFCA sent an email to Mr Fletcher [URB.0013.0002.1464];
- (m) on 29 January 2020, Urban sent an email to AFCA using the name "David Fletcher" [URB.1009.0001.2322];
- (n) on 7 February 2020, Dale Heremaia of Urban sent an email to AFCA using the name "David Fletcher" [URB.1009.0001.2324];
- (o) on 12 February 2020:
 - (i) AFCA sent an email to Mr Fletcher at Urban [URB.1009.0001.2329] attaching a letter to "Mr Fletcher" [URB.1009.0001.2330];
 - (ii) Urban replied to AFCA's email on behalf of Urban using the name "David Fletcher" [URB.1009.0001.2336];
- (p) on 17 February 2020:

- (i) at 2:46pm, AFCA sent an email to "Mr Fletcher" [URB.0010.0002.4739] attaching a letter to "Mr Fletcher" [URB.0010.0002.4740];
- (ii) at 3:43pm, Urban sent an email to AFCA using the name "David Fletcher" [URB.1032.0003.0005];
- (iii) at 4:43pm, AFCA sent an email to Mr Ashton [URB.0013.0002.1481] attaching a letter to Mr Ashton [URB.0013.0002.1482] and Dale Heremaia's email on behalf of Urban sent to AFCA on 7 February 2020 [URB.0013.0002.1484];
- (iv) at 4:49pm, AFCA sent an email to "Mr Fletcher" [URB.0010.0002.4839] attaching AFCA's letter to "Mr Fletcher" dated 17 February 2020 [URB.0010.0002.4840];
- (v) at 5:52pm, Dale Heremaia of Urban sent an email to AFCA using the name "David Fletcher" [URB.1009.0001.2349];
- (vi) at 7pm, Mr Ashton sent an email to AFCA [URB.1009.0001.2353];
- (q) on 20 February 2020, Mr Ashton sent an email to AFCA [URB.1009.0001.2363];
- (r) on 21 February 2020:
 - (i) at 9:42am, Urban sent an email to AFCA using the name "David Fletcher" [URB.0013.0002.1488];
 - (ii) at 5:18pm, AFCA sent "Mr Fletcher" a letter. A copy of the letter (without the attachments) is [URB.1009.0001.2369];
 - (iii) at 5:28pm, Dale Heremaia of Urban sent an email to AFCA using the name "David Fletcher" [URB.1009.0001.2376];
- (s) on 25 February 2020:
 - (i) at 10:14am, AFCA sent an email to "Mr Fletcher" [URB.1009.0001.2377];
 - (ii) at 12:59pm, Dale Heremaia of Urban sent an email to AFCA using the name "David Fletcher" [URB.1009.0001.2381]; and
- (t) on 11 May 2020, Mr Ashton sent two emails to AFCA [URB.1000.0008.0225] [URB.1000.0008.0214].

48. On 25 May 2020:

- (a) at 3.57pm, AFCA sent Mr Ashton an email [URB.1009.0001.2408] attaching a letter and AFCA's recommendation in respect of the Ashton Urban Complaint [URB.1009.0001.2409], [URB.1009.0001.2411]; and
 - (b) at 5.45pm, Mr Ashton sent an email to AFCA advising that he accepted AFCA's recommendation [URB.1009.0001.2446].
- 49. On 27 May 2020, AFCA sent an email to Urban attaching the recommendation of 25 May 2020 and advising that it had been accepted by Mr and Mrs Ashton and noting that Urban had until 24 June 2020 to accept or reject the recommendation [URB.0013.0002.1490].
- 50. On 3 June 2020, Miravo filed an application in the Queensland Civil and Administrative Tribunal (**QCAT**) against Mr and Mrs Ashton (the **Ashton Proceedings**). A copy of the application is [URB.0013.0002.1494]. On the same date, Mr and Mrs Ashton were personally served with the application by a process server at their home.
- 51. Between 12 June 2020 and 26 July 2020, Mr Ashton, AFCA, Urban and Eden exchanged the following correspondence:
 - (a) on 12 June 2020, Mr Ashton sent an email to AFCA [URB.0013.0002.1493] attaching a copy of the QCAT application in the Ashton Proceedings [URB.0013.0002.1494];
 - (b) on 15 June 2020, AFCA sent:
 - (i) an email addressed to Dale Heremaia as Director of Urban [URB.1000.0008.0097] attaching a letter [URB.1000.0008.0098]; and
 - (ii) an email addressed to "the Accounts Team" to Eden [URB.1032.0003.0063], attaching a letter [URB.1032.0003.0064];
 - (c) on 16 June 2020:
 - (i) Benjamin Heremaia sent an email on behalf of Eden to AFCA [URB.0003.0008.0041]; and
 - (ii) Dale Heremaia sent an email on behalf of Urban to AFCA [URB.1009.0001.2508];
 - (d) on 23 June 2020, Urban sent an email to AFCA [URB.1009.0001.2525];
 - (e) on 24 June 2020, AFCA sent a letter to Urban [URB.0013.0002.0164];
 - (f) on 26 June 2020, Mr Ashton sent an email to AFCA [URB.1009.0001.2531]; and

- (g) on 30 June 2020, AFCA sent a letter to Eden [URB.1032.0003.0175].
52. On 31 July 2020:
- (a) AFCA issued a determination in relation to the Ashton Urban Complaint (**Ashton Determination**) [URB.0013.0002.1593];
 - (b) at 10.45am, AFCA sent an email to Dale Heremaia of Urban [URB.0013.0002.1622] attaching a letter addressed to Dale Heremaia [URB.0013.0002.1623] and a copy of the Ashton Determination; and
 - (c) at 12.32pm, Mr Ashton sent an email to AFCA advising that he accepted the Ashton Determination [URB.0013.0002.1654].
53. On 3 August 2020, AFCA sent letters to Mr Ashton [URB.0010.0002.9116], [URB.0010.0002.9117] and to Urban [URB.0010.0002.9118], [URB.0010.0002.9119] confirming that Mr Ashton had accepted the Ashton Determination and that Mr Ashton should discuss how the Ashton Determination was to be implemented with Urban directly.
54. Between 5 August 2020 and 9 December 2020, AFCA and Mr Ashton made attempts to obtain payment of the Ashton Determination by Urban to the Ashtons as follows:
- (a) on 5 August 2020, Mr Ashton sent an email to Dale Heremaia of Urban [URB.1034.0001.0035];
 - (b) on 19 August 2020, Mr Ashton sent an email to AFCA [URB.1032.0002.0003];
 - (c) on 25 August 2020, AFCA sent an email to Dale Heremaia of Urban [URB.1032.0003.0166] attaching a letter to Dale Heremaia [URB.1032.0003.0167]; and
 - (d) on 9 December 2020, Mr Ashton sent two emails to Dale Heremaia of Urban [URB.1034.0001.0035], [URB.1034.0001.0036].
55. On 4 September 2020, QCAT dismissed the Ashton Proceedings.
56. On 5 October 2020, AFCA sent a letter to Urban regarding Urban's failure to pay the Ashton Determination. A copy of the letter (without annexure) is [URB.1032.0003.0170].
57. Urban did not pay the Ashton Determination until 25 May 2022.

REPORTING TO ASIC AND COMMENCEMENT OF THE ISMAIEL PROCEEDINGS

58. On 8 October 2019, Mr John Apps of AFCA on behalf of Ms Dalia Ismaiel, Case Manager, Systemic Issues of AFCA (**Ms Ismaiel**) sent two letters to ASIC detailing concerns

surrounding a potential serious contravention arising from a conflict of interest in relation to Urban and its relationship with Eden (with AFCA allocated case number 669414) [URB.0013.0002.0198] as well as a potential serious contravention arising from a conflict of interest in relation to Eden and its relationship with Urban (with AFCA allocated case number 658459) [URB.0013.0002.0173].

59. On 21 November 2019, Ms Ismaiel sent a letter to ASIC reporting possible serious contraventions by Urban involving non-cooperation with AFCA processes [URB.0010.0002.6840], [URB.0010.0002.6841].
60. On 19 December 2019, Ms Ismaiel sent a letter to ASIC detailing an additional possible serious contravention in relation to Urban [URB.1009.0001.3027], [URB.1009.0001.3029].
61. Between 28 April 2020 and 25 May 2020, AFCA and Dale Heremaia of Urban exchanged the following correspondence regarding AFCA's assessment of potential serious contraventions by Urban:
 - (a) on 28 April 2020, Ms Ismaiel sent an email to Dale Heremaia of Urban [URB.1009.0001.3631] attaching a letter addressed to Dale Heremaia [URB.1009.0001.3632];
 - (b) on 14 May 2020 at 4.32pm, Dr June Smith, Deputy Chief Ombudsman of AFCA (**Dr Smith**) sent an email to Dale Heremaia of Urban advising that she had assumed conduct of AFCA's possible serious contravention investigation into Urban [URB.1009.0001.3640];
 - (c) on 14 May 2020 at 5.42pm, Dale Heremaia of Urban sent an email to Dr Smith responding to her email of the same day [URB.1000.0008.0238]
 - (d) on 15 May 2020:
 - (i) at 4.22pm, Dale Heremaia sent an email to Dr Smith on behalf of Urban [URB.1000.0008.0244];
 - (ii) at 4.27 pm, Dr Smith replied to Dale Heremaia's email [URB.1000.0008.0244] and
 - (iii) at 4.41pm, Dale Heremaia sent an email to Dr Smith on behalf of Urban [URB.1000.0008.0246]; and
 - (e) on 25 May 2020, Dale Heremaia sent an email to Dr Smith [URB.0003.0007.0167].

62. On 1 June 2020, Urban lodged an application and affidavit in support in QCAT against Ms Ismaiel which was dated 28 May 2020 and signed by Dale Heremaia (**the Ismaiel Proceedings**). A copy of the application and affidavit is [URB.1009.0001.3669].
63. On 4 June 2020, Dr Smith sent a letter to Dale Heremaia [URB.1000.0008.0480].
64. The Ismaiel Proceedings were subsequently served on AFCA's legal representatives, Clarendon Lawyers.
65. On 18 August 2020, AFCA's legal representatives, Clarendon Lawyers, sent a letter to Dale Heremaia [URB.1000.0002.0006] regarding Urban's breach of the AFCA Rules relating to the commencement of the Ismaiel proceedings and potential breach of confidentiality under the AFCA Rules.
66. On 19 August 2020, Dale Heremaia sent an email to Clarendon Lawyers in response to the 18 August 2020 letter [URB.1000.0002.0018].
67. On 3 November 2020, Urban submitted a notice of withdrawal of application in the Ismaiel Proceedings.
68. On 4 October 2021, AFCA's legal representatives sent an email to AFCA [URB.1000.0012.0001] attaching the QCAT Decision which recorded that the Ismaiel Proceedings had been dismissed for lack of jurisdiction on 27 August 2021 [URB.1000.0012.0003].

WEBBY AND POKAI EDEN COMPLAINT

69. On or around 3 August 2018, Aroha Webby (**Ms Webby**) submitted a complaint to the CIO in relation to Eden (**Webby and Pokai Eden Complaint**). A copy of the complaint is [URB.0010.0002.5596] and [URB.1000.0008.0148]. The complaint was registered with CIO and given the reference number 18/4337. When AFCA assumed the functions of the CIO in November 2018 it took over the handling of the complaint. In March 2019, the CIO complaint was closed and a corresponding complaint was formally registered as an AFCA complaint and allocated the case number 626243. This occurred at the same time as Ms Webby and Mr Pokai made a new complaint in relation to Urban (which is dealt with at paragraphs 87 - **Error! Reference source not found.** below).
70. On 3 August 2018, the CIO sent a letter to Eden regarding the Webby and Pokai Eden Complaint [URB.1009.0001.2620].
71. On 31 August 2018, Eden sent a letter to CIO regarding the Webby and Pokai Eden Complaint [URB.0010.0002.5581].

72. Between 4 December 2018 and 17 December 2018, AFCA, Eden and Ms Webby exchanged the following correspondence regarding the Webby and Pokai Eden Complaint:
- (a) on 4 December 2018, AFCA sent a letter to Eden [URB.0010.0002.5566];
 - (b) on 10 December 2018, Eden sent a letter to AFCA [URB.1009.0001.2653];
 - (c) on 12 December 2018, AFCA sent a letter to Eden [URB.1009.0001.2687];
 - (d) on 17 December 2018, Eden sent a letter to AFCA [URB.1009.0001.2660].
 - (e) on 9 January 2019, AFCA sent a letter to Eden [URB.1009.0001.2695];
 - (f) on or about 15 January 2019, Eden sent a letter to AFCA [URB.1000.0008.0150];
 - (g) on 30 January 2019, AFCA sent a letter to Eden [URB.1009.0001.2707];
 - (h) on 31 January 2019, Ms Webby sent an email to AFCA [URB.1000.0008.0165];
 - (i) on 19 February 2019, AFCA sent a letter to Eden [URB.1009.0001.2709];
 - (j) on 1 March 2019, Eden sent a letter to AFCA [URB.0010.0002.5562];
 - (k) on 5 March 2019, AFCA sent a letter to Eden [URB.1000.0009.0002]; and
 - (l) on 14 March 2019, AFCA sent a letter to Eden [URB.1000.0009.0008].
73. Between 11 April 2019 and 30 May 2019, AFCA and Eden exchanged the following correspondence regarding the Webby and Pokai Eden Complaint:
- (a) on 11 April 2019, AFCA sent an email to Eden [URB.1032.0003.0018] attaching a letter to Eden [URB.1032.0003.0019] and a copy of Eden's letter of 10 December 2018;
 - (b) on 17 April 2019, Eden sent a letter to AFCA [URB.0013.0002.0235];
 - (c) on 23 April 2019, AFCA sent an email to Eden [URB.1009.0001.0513];
 - (d) on or about 24 April 2019 Eden sent a letter to AFCA [URB.0013.0002.0383];
 - (e) on 27 May 2019, AFCA sent a letter to Eden [URB.1009.0001.0279]; and
 - (f) on 30 May 2019, Benjamin Heremaia sent a letter to AFCA on behalf of Eden [URB.1009.0001.0393].

74. On 4 June 2019, Mr Piet Moore, Case Manager of AFCA (**Mr Moore**) prepared a file note regarding his contact with Eden and their cooperation to date [URB.0013.0002.0403].
75. On 6 June 2019, Dale Heremaia of Urban sent an email to AFCA's Chief Ombudsman making a complaint about a telephone call he had with Mr Moore in relation to the Webby and Pokai Eden Complaint [URB.1000.0007.0006]. AFCA allocated case number 649422 to this complaint.
76. AFCA responded to the complaint referred to in paragraph 75 by way of:
 - (a) an email on 28 June 2019 [URB.1009.0001.2826]; and
 - (b) a letter dated 2 July 2019 [URB.1009.0001.2844].
77. Between 3 September 2019 and 24 September 2019, AFCA, Ms Webby and Eden exchanged the following correspondence regarding the Webby and Pokai Eden Complaint:
 - (a) on 3 September 2019, Eden sent an email to AFCA using the name "James Harder" [URB.1009.0001.0835];
 - (b) on 4 September 2019:
 - (i) AFCA made a recommendation in relation to the Webby and Pokai Eden Complaint [URB.1032.0003.0045]
 - (ii) AFCA sent a letter to Eden attaching the recommendation [URB.1032.0003.0053];
 - (iii) Eden sent an email using the name "James Harder" to AFCA responding to AFCA's letter [URB.1009.0001.0833];
 - (c) on 6 September 2019:
 - (i) AFCA sent a letter to Eden [URB.0010.0002.2404];
 - (ii) Eden sent an email using the name "James Harder" to AFCA replying to AFCA's letter [URB.1009.0001.0844];
 - (d) on 9 September 2019:
 - (i) at 9.35am, Ms Webby sent an email to AFCA accepting AFCA's recommendation [URB.1009.0001.0851];
 - (ii) at 12:14pm, AFCA sent an email and letter to Eden regarding Ms Webby's acceptance of the recommendation [URB.1009.0001.0849];

- (iii) at 2.26pm, Eden sent an email to AFCA and provided a receipt showing payment [URB.1009.0001.0853; URB.1009.0001.0398];
- (e) on 12 September 2019:
 - (i) at 7.51am, Ms Webby sent an email to AFCA [URB.1009.0001.0864];
 - (ii) at 9.56am, AFCA sent an email to Eden [URB.1009.0001.0868];
 - (iii) at 11.18am, Eden sent an email to AFCA [URB.1009.0001.0862];
- (f) on 23 September 2019:
 - (i) AFCA sent a letter to Benjamin Heremaia of Eden [URB.1009.0001.0879];
 - (ii) at 1.35pm, Benjamin Heremaia sent an email to AFCA on behalf of Eden in reply to AFCA's letter [URB.1009.0001.0881];
 - (iii) at 4:52pm, Ms Alexia Fink, Senior Manager of AFCA (**Ms Fink**) and Benjamin Heremaia of Eden had a telephone conversation, the effect of which was recorded in a file note taken by Ms Fink [URB.0013.0002.0407];
- (g) on 24 September 2019, AFCA sent a letter to Eden [URB.1009.0001.0894].
- 78. On 17 January 2020, AFCA issued a determination in relation to the Webby and Pokai Eden Complaint [URB.1009.0001.0341].
- 79. On 17 January 2020, Ms Webby sent an email to AFCA accepting the determination [URB.1009.0001.0917].
- 80. Between 6 February 2020 and 11 March 2020, AFCA and Eden exchanged the following correspondence regarding the determination made by AFCA in relation to the Webby and Pokai Eden Complaint:
 - (a) on 6 February 2020:
 - (i) at 4.41pm, AFCA sent a letter to Eden [URB.1009.0001.0929]; and
 - (ii) at 5.45pm, Eden sent an email to AFCA [URB.1009.0001.0936].
 - (b) on 27 February 2020:
 - (i) at 10.30am, AFCA sent an email to Eden [URB.1009.0001.0955]; and
 - (ii) at 12.01pm, Eden sent an email to AFCA [URB.1009.0001.0955].

- (c) on 4 March 2020:
 - (i) at 1.45pm, AFCA sent a letter by email to Eden [URB.1009.0001.0962]; and
 - (ii) at 1.59pm, Eden, sent an email to AFCA [URB.1009.0001.0967];
- (d) on 11 March 2020, AFCA sent a letter to Eden [URB.1009.0001.0970].
- 81. On 12 March 2020, Ms Dalia Ismaiel, Case Manager, Systemic Issues of AFCA (**Ms Ismaiel**) and Benjamin Heremaia had a telephone conversation, the effect of which was recorded in a file note taken by Ms Ismaiel [URB.0013.0002.0408].
- 82. On 1 April 2020, AFCA sent a letter to Eden [URB.1009.0001.3393].
- 83. On 30 April 2020, Benjamin Heremaia sent a letter to AFCA on behalf of Eden [URB.1009.0001.3426].
- 84. On 17 April 2020, Eden paid Ms Webby an amount of \$2,097.28.

EDEN POTENTIAL SERIOUS MISCONDUCT CIO COMPLAINT

- 85. In or around January 2019, AFCA allocated case number S18/0136 to the potential serious misconduct arising out of Eden's conduct in relation to the Webby and Pokai Eden Complaint and Eden's conduct relating to complaint number 18/5507 made by Ms Lockyer (the **Eden Potential Serious Misconduct CIO Complaint**).
- 86. Between 8 January 2019 and 1 May 2019, AFCA and Eden exchanged the following correspondence regarding the Eden Potential Serious Misconduct CIO Complaint:
 - (a) on 8 January 2019, AFCA sent an email to Eden attaching a letter [URB.0010.0002.9273; URB.0010.0002.9274];
 - (b) on 8 January 2019, an automated response from the email address 'contact@edencapital.com.au' was sent to AFCA [URB.0010.0002.9278];
 - (c) on or about 21 January 2019, Eden sent a letter to AFCA [URB.0010.0002.9263];
 - (d) on 23 January 2019:
 - (i) at 8.49am, AFCA sent an email to Eden [URB.0010.0002.9280];
 - (ii) at 11.49am, sent an email to AFCA [URB.0010.0002.9292];
 - (iii) at 1.40pm, AFCA sent an email to Eden [URB.0010.0002.9294];

- (iv) at 2.27pm, Eden sent an email to AFCA [URB.0010.0002.9299];
- (e) on 25 January 2019, AFCA sent a letter to Eden [URB.1035.0001.0010];
- (f) on or about 6 February 2019, Eden sent a letter to AFCA [URB.0010.0002.9269];
and
- (g) on 1 May 2019, AFCA sent an email and letter to Eden [URB.0010.0002.9301;
URB.0010.0002.9254].

WEBBY AND POKAI URBAN COMPLAINT

87. On 13 March 2019, AFCA sent an email to Urban attaching a complaint submitted by Ms Webby (the **Webby and Pokai Urban Complaint**) [URB.1009.0001.1082; URB.1009.0001.1083]. AFCA allocated the complaint the case number 627350.
88. Between 9 July 2019 and 23 July 2019, AFCA and Urban exchanged the following correspondence regarding the Webby and Pokai Urban Complaint:
 - (a) on 9 July 2019, AFCA sent a letter to Dale Heremaia of Urban [URB.1009.0001.1102];
 - (b) on 17 July 2019, AFCA sent a letter to Dale Heremaia of Urban [URB.1009.0001.1107];
 - (c) on 19 July 2019:
 - (i) at 1.49pm AFCA sent an email to Dale Heremaia of Urban [URB.1009.0001.1110];
 - (ii) at 3.36pm Dale Heremaia of Urban, sent an email to AFCA [URB.1009.0001.1118];
 - (iii) at 4:13pm AFCA sent an email to Dale Heremaia of Urban [URB.0010.0002.3348]
 - (d) on 23 July 2019:
 - (i) at 2.05pm, Dale Heremaia of Urban, sent an email to AFCA [URB.1009.0001.1122]; and
 - (ii) AFCA sent an email to Dale Heremaia of Urban [URB.1009.0001.1127].
89. AFCA did not continue to investigate the Webby and Pokai Urban Complaint after 5 August 2019.

EXPULSION OF URBAN FROM AFCA

90. On 22 September 2020, AFCA sent a letter to Dale Heremaia of Urban notifying that the expulsion of Urban from the membership of AFCA was being considered by the AFCA Board at a meeting on 12 November 2020 [URB.1008.0001.0003].
91. On 28 October 2020, Urban's legal representatives, AHL Legal, wrote to AFCA [URB.1000.0002.0019].
92. On 5 November 2020, Clarendon Lawyers wrote to AHL Legal [URB.1000.0002.0016].
93. On 13 November 2020, AFCA wrote to Dale Heremaia of Urban notifying that the AFCA Board had decided to expel Urban from AFCA's membership effective 12 November 2020 in accordance with clause 3.4(a) of AFCA's Constitution [URB.1000.0002.0005].
94. Urban has not been a member of the AFCA scheme since its expulsion by the AFCA Board on 12 November 2020.

ADMISSIONS BY THE RESPONDENTS

95. Urban admits that, during the Relevant Period, it contravened:
 - (a) by reason of the circumstances described in paragraphs 46 to 57 above, section 47(1)(m) of the Credit Act by reason of a contravention of its obligation under section 11A(2) of the Credit Regulations, to take reasonable steps to cooperate with AFCA in respect of the Ashton Urban Complaint;
 - (b) by reason of the circumstances described in paragraphs 87 to 89 above, section 47(1)(m) of the Credit Act by reason of a contravention of its obligation under section 11A(2) of the Credit Regulations from 6 April 2019 to take reasonable steps to cooperate with AFCA in respect of the Webby and Pokai Urban Complaint;
 - (c) section 47(1)(a) the Credit Act, by breaching its obligation to do all things necessary to ensure that the credit activities authorised by its ACL were engaged in efficiently, honestly and fairly, through its conduct in:
 - (i) attempting to rely on the Ashton Eden Settlement Agreement in order to claim to AFCA that the Ashton Urban Complaint had been resolved and was therefore outside of AFCA's jurisdiction;
 - (ii) threatening Mr and Mrs Ashton with legal proceedings unless they withdraw the Ashton Urban Complaint; and

- (iii) commencing the Ashton Proceedings in QCAT, through its agent Miravo, seeking damages alleged to have occurred as a consequence of the Ashton Urban Complaint.

96. Eden admits that it contravened:

- (a) by reason of the circumstances described in paragraphs 37 to 45 above, section 47(1)(m) of the Credit Act by reason of a contravention of its obligation under section 11A(2) of the Credit Regulations from 6 April 2019 to take reasonable steps to cooperate with AFCA in respect of the Ashton Eden Complaint;
- (b) by reason of the circumstances described in paragraphs 69 to 84 above, section 47(1)(m) of the Credit Act by reason of a contravention of its obligation under section 11A(2) of the Credit Regulations from 6 April 2019 to take reasonable steps to cooperate with AFCA in respect of the Webby and Pokai Eden Complaint;
- (c) section 47(1)(a) of the Credit Act by breaching its obligation to do all things necessary to ensure that the credit activities authorised by its ACL were engaged in efficiently, honestly and fairly, through its conduct in:
 - (i) entering into the Ashton Eden Settlement Agreement on 29 July 2019 in order to resolve the Ashton Eden Complaint with AFCA; and
 - (ii) notwithstanding that settlement agreement, subsequently commencing the Ashton Proceedings in QCAT, through its agent Miravo, against Mr and Mrs Ashton seeking damages alleged to have occurred as a consequence of the Ashton Eden Complaint.

97. Dale Heremaia admits that he contravened sections 47(1)(a) and 47(1)(m) of the Credit Act by reason of his involvement in the contraventions of those sections by Urban.

98. Benjamin Heremaia admits that he contravened section 47(1)(a) and 47(1)(m) of the Credit Act by reason of his involvement in the contraventions of those sections by Eden.

99. Notwithstanding the statements in paragraphs 95 to 98 above, the parties acknowledge that there is no allegation of dishonesty made against any of the Respondents.

FACTS RELEVANT TO RELIEF, INCLUDING PENALTY AND INJUNCTION

Engagement with ASIC

100. During the investigation prior to commencement of the Proceedings, the Respondents demonstrated limited cooperation with ASIC in response to statutory notices issued by ASIC, including:
- (a) Urban claimed that it did not need to respond to a statutory notice issued pursuant to the NCCP Act after its licence had been cancelled (the letter listed the author as Dale Heremaia) [URB.1036.0002.0007];
 - (b) Urban described ASIC's request for client files and policy documents as "*unreasonable*" [URB.1036.0002.0007];
 - (c) described ASIC's investigation as "*retaliatory*" (the email listed the author as Dale Heremaia) [URB.1036.0002.0018];
 - (d) Eden stated that "*A basic search of Google indicates that a standard investigative tool used by ASIC is to request a lot of information to the distract the subject of the investigation from the true intentions of ASICs investigation*" and described ASIC's investigation as "*retaliatory*" (the letter listed the author as Dale Heremaia) [URB.1036.0002.0003]; and
 - (e) Eden stated that ASIC's investigation had been "*closed, confrontational, and punitive*" and that the "*allegation of an unsuitable loan is unfounded and misguided. It is simply the produce of an underqualified poorly trained AFCA case manager motivated by personal animosity and spite*" (the letter listed the author as Dale Heremaia) [URB.1036.0002.0011].

Size and financial position of the Respondents

101. In the 2020 financial year, Miravo reported on its company tax return a total of \$1,165,638 in receivables.

Management knowledge, identification of conduct and response

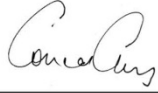
102. Dale Heremaia was the only person involved in the contraventions by Urban, was the only person who sent correspondence to AFCA on its behalf and was responsible for its misconduct. Dale Heremaia solely made decisions on behalf of Urban and was therefore responsible for its contraventions. Urban and Dale Heremaia were jointly responsible for the escalation of misconduct in commencing the Ismaiel Proceedings.

103. Urban and Dale Heremaia failed to pay the Ashton Determination by 17 August 2020, being the timeframe required by AFCA, and failed to respond to the numerous attempts by AFCA and Mr Ashton to arrange payment of same during the period 5 August 2020 to 9 December 2020. The Ashton Determination was not paid until 25 May 2022.
104. Benjamin Heremaia was the only person involved in the contraventions by Eden, was the only person who sent correspondence to AFCA on its behalf and was responsible for its misconduct. Benjamin Heremaia solely made decisions on behalf of Eden and was therefore responsible for its contraventions.
105. The Respondents were jointly responsible for the escalation of the misconduct by commencing the Ashton Proceedings by Miravo.
106. The Respondents did not take steps to remediate their misconduct beyond the following:
 - (a) on 4 November 2020, Urban and Dale Heremaia withdrew the Ismaiel Proceedings; and
 - (b) on 25 May 2022, Urban paid the Ashton Determination.

Amount of Loss or Damage caused

107. By Urban's failure to pay the Ashton Determination, direct harm was caused to Mr and Mrs Ashton by the denial of those monies. Mr and Mrs Ashton suffered stress and inconvenience by the filing of the Ashton QCAT Proceedings.
108. Further, by the Respondents' conduct in failing to provide reasonable cooperation to AFCA:
 - (a) harm was caused to AFCA through the imposition of unnecessary additional administrative burden and the cost of responding to the Ismaiel Proceedings; and
 - (b) harm was caused to AFCA staff through being subjected to inappropriate and unprofessional behaviour.

Date: 20 September 2022



Signed by Conrad Gray
Lawyer for ASIC



Signed by John Brady
Lawyer for General Commercial Group Pty Ltd (ACN 134 168 540)
Eden Capital (Australia) Pty Ltd (ACN 602 485 487)
Dale Brendan Heremaia
Benjamin Eden Heremaia

SCHEDULE

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: QUEENSLAND
DIVISION: GENERAL

No. QUD 242 of 2021

Respondents

Second Respondent	EDEN CAPITAL (AUSTRALIA) PTY LTD (ACN 602 485 487)
Third Respondent	DALE BRENDAN HEREMAIA
Fourth Respondent	BENJAMIN EDEN HEREMAIA

SCHEDULE OF PARTIES

QUD 242 of 2021

Respondents

Fourth Respondent:

BENJAMIN EDEN HEREMAIA