FEDERAL COURT OF AUSTRALIA

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

File number(s):	QUD 609 of 2018
Judgment of:	**GREENWOOD J**
Date of judgment:	11 September 2020
Catchwords:	**CONSUMER LAW** – consideration of whether the *National Consumer Credit Protection Act 2009* (Cth) (the "NCCP Act") and the *National Credit Code* (the "Code"), Schedule 1 to the NCCP Act, apply to 232 contracts for the provision of credit in the form of hire purchase style contracts – consideration of whether the contracts are credit contracts – consideration of the elements of provision of credit – consideration of the construction to be attributed to each of the subsections of s 9 in the context of the statutory purpose **CONSUMER LAW** – consideration of the following provisions of the NCCP Act: ss 3, 5, 7, 8, 29, 47, 64, 65, 71, 166, 168, 169, 177, 187 – consideration of the following provisions of the Code: ss 3, 4, 5, 6, 9, 17, 23, 32A, 32B, 111, 112, 113, 116, 122, 124, 204 **CONSUMER LAW** – consideration of whether conduct said to engage contraventions of the Code also engages contraventions of the *Australian Securities and Investments Act 2001* (Cth) (the "ASIC Act") – consideration of ss 12DA(1), 12DB(1)(a), 12DB(1)(g), 12BAA(7), 12BAB(1) of the ASIC Act – consideration of the terms "standard, quality, value or grade" in s 12DB(1)(a) of the ASIC Act **STATUTORY CONSTRUCTION** – consideration of the principles to be applied – consideration of provisions of the NCCP Act and the Code – consideration of whether the directors of the respondent corporation were knowingly concerned in the contraventions of the Code by the respondent corporation and whether they were knowingly concerned in the respondent corporation's contraventions of the ASIC Act – consideration of s 12GBA(1)(e) of that Act – consideration of the principles derived from *Yorke v Lucas* (1985) 158 CLR 661 – consideration of the state of knowledge that must be shown to exist in the relevant person before such a person is knowingly concerned in the

	contraventions of another – consideration of authorities of intermediate courts of appeal applying principles of accessorial liability under the statutory text in issue
Legislation:	*Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA(1), 12DB(1)(a), 12DB(1)(g), 12BAA(7), 12BAB(1) *Corporations Act 2001* (Cth) s 79 *National Consumer Credit Protection Act 2009* (Cth) ss 3, 5, 7, 8, 29, 47, 64, 65, 71, 166, 168, 169, 177, 187 *National Credit Code* ss3, 4, 5, 6, 9, 17, 23, 32A, 32B, 111, 112, 113, 116, 122, 124, 204 *Trade Practices Act 1974* (Cth) *Australian Securities and Investments Commission Regulations 2001* (Cth) reg 2B(1)
Cases cited:	*Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129 *Application by Isentia Pty Limited* [2020] ACopyT 2 *Australian Competition & Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17 *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212 *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536 *CH Real Estate Pty Ltd v Jainran Pty Ltd; Boyana Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37 *Cooper Brookes (Wollongong) Proprietary Limited v Federal Commissioner of Taxation* (1981) 147 CLR 297 *Downey & Anor v Carlson Hotels Asia Pacific P/L* [2005] QCA 199 *Ducret v Chaudhary's Oriental Carpet Palace Pty Ltd* (1987) 76 ALR 183 *Giorgianni v The Queen* (1985) 156 CLR 473 *Given v C V Holland (Holdings) Pty Ltd* (1977) 15 ALR 439 *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 *Hamilton v Whitehead* (1988) 166 CLR 121 *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1

	Milorad Trkulja (aka Michael Trkulja) v Google LLC (2018) 263 CLR 149 *Pereira v Director of Public Prosecutions* (1988) 82 ALR 217 *Quinlivan v Australian Competition and Consumer Commission* (2004) 160 FCR 1 *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 T.L.R. 284 *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53 *Thompson v Riley McKay Pty Ltd (No 2)* (1980) 31 ALR 507 *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) 16 IPR 189 *Yorke v Lucas* (1985) 158 CLR 661
Division:	General Division
Registry:	Queensland
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	438
Date of last submission/s:	1 August 2019
Date of hearing:	29 July 2019 – 1 August 2019
Counsel for the Applicant:	S J Cleary and S E Seefeld
Solicitor for the Applicant:	H Copley of ASIC
Counsel for the First and Third Respondents:	S J Forrest
Solicitor for the First and Third Respondents:	Behlan Murakami Grant ILP

ORDERS

QUD 609 of 2018

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**RENT 2 OWN CARS AUSTRALIA PTY LTD ACN 082 691 085** First Respondent
	TIMOTHY JAMES ROBERTS Second Respondent
	PAUL ANTHONY GREEN Third Respondent

ORDER MADE BY: **GREENWOOD J**

DATE OF ORDER: **11 SEPTEMBER 2020**

THE COURT ORDERS THAT:

1. The Applicant is directed to submit to the Court within 14 days proposed forms of relief to be granted having regard to the reasons for judgment published today and in particular taking into account the matters set out at [436] of the reasons for judgment.
2. The parties are directed to conduct discussions with a view to submitting to the Court within 14 days proposed directions for undertaking such steps as may be necessary for the hearing of the separate question of penalty.
3. As to the question of the period of the restraint the subject of an injunction as contemplated by point 5 of the matters at [436], the parties are directed to put on such further submissions (if any) within 14 days.
4. The costs of and incidental to the proceeding are reserved.
5. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), r 1.32 and r 1.36 of the *Federal Court Rules 2011*, these Orders and Reasons for Judgment in support of these Orders made and published in Court today are, additionally, dispatched to the parties from chambers.

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

REASONS FOR JUDGMENT

GREENWOOD J

Background

1 These proceedings are concerned with an application by the Australian Securities and Investments Commission ("ASIC") for a range of relief in relation to contended conduct on the part of the corporate respondent Rent 2 Own Cars Australia Pty Ltd ("R2O") said to involve contraventions of ss 32A, 23(1), 17(4) and 17(5) of the *National Credit Code* (or "Code") which is Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth) (the "NCCP Act"), and ss 12DA(1), 12DB(1)(a) and 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* (Cth) (the "ASIC Act").

2 Relief is also sought against two individual respondents, Mr Timothy James Roberts and Mr Paul Anthony Green, who were the directors of R2O at all times material to the conduct allegations made against that corporation. ASIC contends that Mr Roberts and Mr Green were "involved in" the contraventions of the National Credit Code asserted against R2O, within the terms of s 5(1) of the NCCP Act. The definition of the term "involved in" contained in s 5(1) of the NCCP Act is in the same terms as the definition of that term in s 79 of the *Corporations Act 2001* (Cth) (the "*Corporations Act*"). The same formulation of that term is adopted in s 2(1) of the *Australian Consumer Law* (the "*ACL*"; Schedule 2, *Competition and Consumer Act 2010* (Cth)). Section 12GBA(1) of the ASIC Act confers power on the Court to order a person who has contravened a relevant provision of the ASIC Act to pay such pecuniary penalty as the Court determines, and to order a person who has had any one of the degrees of involvement in the contravention described in s 12GBA(1)(b) to (f) to pay such pecuniary penalty as the Court determines. The text of s 12GBA(1)(c), (d) and (e) is in the same terms as s 5(1)(a), (b) and (c). Section 5(1)(d) is in similar terms to s 12GBA(1)(f). ASIC contends that the jurisprudence concerning the interpretation of the term "involved in" in s 79 of the *Corporations Act*, s 2(1) of the ACL and the elements of s 12GBA(1)(c), (d) and (e) of the ASIC Act assist in the construction and application of the statutory term "involved in" in s 5(1) of the NCCP Act.

3 These proceedings are concerned only with the question of the liability of the respondents in respect of the contended conduct. No question of penalty arises for consideration in these proceedings.

4 The question of the proper principles to be applied in determining whether a person is "involved in" a contravention of the relevant sections of the National Credit Code relied upon by ASIC and whether, applying those principles, Mr Green (and Mr Roberts) were involved in any (or all) contravention(s) established against R2O is one of the matters in controversy in these proceedings. ASIC also contends that Mr Green and Mr Roberts were involved in the contended contraventions of the ASIC Act by R2O within the terms of s 12GBA(1) of the ASIC Act. All of these matters at [2] and [3] are addressed later in these reasons.

5 The conduct allegations are framed by an Amended Concise Statement filed by ASIC in support of an Amended Originating Application. The respondents have put on a Concise Response. However, as mentioned later in these reasons, the character of the response adopted by R2O and Mr Green on the one hand, and Mr Roberts on the other hand, changed significantly after the filing of ASIC's opening submissions for the hearing of the proceeding.

6 For the purposes of an overview of the proceedings, the following matters should be noted.

7 ASIC contends that R2O operated a business as a credit provider for the purchase by consumers of used cars. R2O has held an Australian Credit Licence ("ACL") issued under the provisions of the NCCP Act since 24 December 2012 (Licence No. 428838). That licence recites 12 classes of "credit activities" in which R2O is authorised to engage as a "credit provider" which include: "carrying on a business of providing credit being credit the provision of which the National Credit Code applies to; and/or, being a credit provider under a credit contract". Between 1 July 2012 and 26 July 2018, R2O entered into 5,930 credit contracts and as at 19 April 2018, R2O had 2,239 credit contracts on foot.

8 In this proceeding, ASIC relies on 232 contracts made between R2O and consumers. Those credit contracts fall into two tranches. The first tranche comprises 142 contracts made between 1 March 2017 and 6 September 2017. They are described as the 2017 contracts in Schedule 1 to the Amended Concise Statement and para 86 of the affidavit of Ms Irma Schoch sworn on 18 March 2019. Ms Schoch is a lawyer employed by ASIC and three affidavits sworn by her form part of ASIC's evidence in the case. The second tranche of contracts comprises 90 contracts made between 25 May 2018 and 18 June 2018 described as the 2018 contracts as set out in Schedule 1 to the Amended Concise Statement and para 88 of Ms Schoch's affidavit of 18 March 2019.

9 As to those 232 contracts, ASIC contends that there are five versions of the contract. However, ASIC contends that within both tranches of contracts, the differences between the five versions are not material. The differences between them are said to be minor matters of terminology and formatting which do not affect the material terms of each contract for the purposes of these proceedings. In order to illustrate the material terms of the contracts represented by the 2017 contracts, ASIC has selected a contract made between R2O and Ms Adele Renae Abbott dated 7 June 2017 (Tab 99A to Ms Schoch's 18 March 2019 affidavit). As to the 2018 contracts, ASIC has selected a contract made between R2O and Ms Dorinda Rona May Abraham dated 5 June 2018 (Tab 101A to Ms Schoch's 18 March 2019 affidavit) as emblematic of the 2018 contracts.

10 Mr Roberts does not contest any aspect of the case made by ASIC against R2O or him. Mr Roberts advised the Court that he did not intend to participate in the trial of the proceeding and would submit to any order made in the proceeding but would wish to be heard on the question of costs.

11 R2O and Mr Green were represented by counsel in the proceeding. However, the area of contest between ASIC and these respondents narrowed considerably, especially as to important matters of fact. I will return to the scope of the issues between those respondents and ASIC, as framed by those respondents, shortly. For present purposes, however, it should be noted that there is no contest that the contract with Ms Abbott fairly reflects the material terms of the 2017 first tranche contracts (the "2017 contracts") or that the contract with Ms Abraham fairly reflects the material terms of the 2018 second tranche contracts (the "2018 contracts"): the consumers entering into these two tranches of contracts are described as the "2017 and 2018 consumers".

12 The following additional factual matters drawn from the written opening of ASIC (and the Court Book, exhibit 1) should be noted having regard to the position adopted by R2O and Mr Green at para 2 of the written submissions filed on behalf of those respondents. Those written submissions frame the areas of contest between ASIC and those respondents and, as mentioned, I will return to those matters shortly.

13 As to the topic of motor car dealers acting as franchisees and credit representatives of R2O, ASIC contends that R2O operated its business through a network of franchisees. At 17 July 2017 and 26 July 2018, there were 21 such franchisees operating in Queensland, New South Wales, Victoria, South Australia, Tasmania and Western Australia. Each franchisee, or a

person employed by the franchisee, held a Motor Dealer Licence within the relevant State jurisdiction. For each franchisee, R2O authorised the franchisee entity or person, and/or one or more persons employed by the franchisee to be a credit representative of R2O under s 64 of the NCCP Act, enabling that representative to engage in "credit activity" on behalf of R2O. The R2O Operations Manual noted the requirement for franchisees to hold a Motor Dealer Licence and to be a credit representative of R2O.

14 As to contracts made between R2O and the 2017 and 2018 consumers, ASIC contends that R2O provided credit through a hire purchase style of contract between R2O and consumers for the purchase by them of used cars from R2O franchisees. Examples of those contracts are the contracts with Ms Abbott and Ms Abraham. A template of the contract was provided by R2O to its franchisees through its intranet and was included in the R2O Operations Manual. The R2O contract with each of the 2017 and 2018 consumers, which ASIC says is a *credit contract* for the purposes of the National Credit Code, makes numerous references to the National Credit Code. R2O and Mr Green contest the contention that the 2017 and 2018 contracts are credit contracts for the purposes of the National Credit Code. For present purposes, I will describe the contracts with the 2017 and 2018 consumers as credit contracts recognising, of course, that the question of whether those contracts are credit contracts for the purposes of the National Credit Code is a question in issue.

15 By way of overview for present purposes, ASIC relies upon the following "key provisions" of the R2O credit contracts characterised in the following way.

16 *First*, each contract required a consumer to pay a *deposit*, sometimes called a *first payment*. ASIC contends that R2O recommended to consumers a deposit of approximately 75% of the *stock purchase price* of the used car. ASIC contends that R2O recommended that franchisees purchase used car stock for between $800 and $2,000 per vehicle with the aim of obtaining a deposit on each vehicle of 75% of the stock purchase price, having regard to the comments made under the heading "Stock Purchase" in the Operations Manual.

17 *Second*, the contract provided for each consumer to make weekly repayments throughout the term of the contract. ASIC contends that the term of the contracts the subject of the proceeding varied between 50 weeks (approximately one year) and 208 weeks (four years). The majority of contracts provided for a term between 78 weeks (1.5 years) and 104 weeks (two years).

18 *Third*, each contract referred to the cash price of the car as the *car retail price* or the *comparison price*. ASIC contends that R2O instructed its franchisees to determine this amount by researching the retail price of similar cars advertised on the internet and one example of a site providing such information was *carsales.com*.

19 *Fourth*, each contract set out the total amount to be paid by the consumer under the contract which was sometimes called the *contract total* or *contract price*. ASIC contends that the total amount to be paid under the contract was the deposit or first payment as described earlier plus the total of the weekly repayments, described earlier. For example, in the case of the contract with Ms Abbott, the *first payment* (deposit) was an amount of $1,200. The contract provided for 84 rental payments of $118.91 each resulting in total repayments of $9,988.44 which, taken together with the first payment, gave rise to a *contract price* of $11,188.44. The *comparison price*, as earlier described, is recited as $5,900. The contract also recites a warranty cost of $1,000 (to be mentioned shortly). The *contract total* or *contract price* is recited as $11,188.44. The contract recites an interest rate of 45% per annum and recites a total amount payable as interest of $4,288.44. Since the total repayments are recited as $9,988.44 and the total interest payable is recited as $4,288.44, it seems that the non-interest component amounted to $5,700. The amounts of $5,700, $4,288.44 and $1,200 amount to $11,188.44, described as the *contract cash price*.

20 *Fifth*, as mentioned, each contract stated an annual interest rate expressed as a percentage by reference to the letters "p.a." which is said to be a reference to a per annum rate of interest.

21 *Sixth*, each contract provided for a warranty amount to be charged as illustrated above.

22 *Seventh*, as to ownership, each contract provided for an option enabling the consumer to acquire title to the used car.

23 It will be necessary to examine the contract between R2O and Ms Abbott and R2O and Ms Abraham in greater detail later in these reasons, and the relationship between those contracts and the "price calculator" used by franchisees to calculate the weekly repayment amount.

24 As already noted, a consumer entering into a contract with R2O was required to make a first payment as part of the transaction and a number of regular repayments with title typically passing upon the exercise of an option to acquire title in the used car on payment of the last repayment (although the mechanism need not necessarily work in that way). Accordingly,

interest was a component of the amount of the repayment. In order to distil the calculus of factors into a quantified regular repayment over the term of the contract, R2O provided the franchisees with a number of "price calculators", from 16 August 2016, in the form of a "Microsoft Excel" calculator for the purpose of determining the weekly repayment under the contract for a stated interest rate and contract term. Mr Green provided six such price calculators by email to the franchisees: 16 August 2016; 10 November 2016; 14 December 2016; 19 January 2017; 1 November 2017; and 11 April 2018.

25 ASIC contends that each of these calculators (except for the price calculator sent to franchisees on 11 April 2018) required the franchisee to insert into the calculator the cash price of the used car, the deposit amount, the warranty amount, the term of the contract in weeks and a selected interest rate, so as to determine the quantified amount of the weekly repayments. ASIC contends that R2O issued instructions to its franchisees on how to use the price calculator.

26 As to these price calculators, ASIC relies on the price calculator sent by Mr Green to franchisees on 19 January 2017, as this was the last price calculator sent to the franchisees before R2O entered into the first tranche of contracts between 1 March 2017 and 6 September 2017.

27 ASIC also relies on the price calculator sent by Mr Green to the franchisees on 1 November 2017 as this calculator was sent after the first tranche of contracts, but before the 2018 contracts (the second tranche).

28 ASIC also relies on the last price calculator sent by Mr Green to the franchisees on 11 April 2018, which was sent before entry into the second tranche of contracts.

29 Assuming for the moment that the National Credit Code applies to each of the 232 contracts in issue in these proceedings, ASIC contends, put simply, that the National Credit Code establishes, relevantly for these proceedings, the following obligations.

30 *First*, s 32A(1) of the National Credit Code provides that a *credit provider* must not enter into a *credit contract* if the *annual cost rate* of the contract exceeds 48%. The term *annual cost rate* is determined according to the elements of s 32B of the National Credit Code. ASIC contends, based upon expert evidence given by Mr Michael John Hill, a Chartered Accountant retained by ASIC to provide an expert report for the purposes of these proceedings, that as to the first tranche of contracts, the annual cost rate of 48% has been exceeded in 108 of the 142 credit contracts and, as to the second tranche of contracts, ASIC contends that the annual cost

rate of 48% has been exceeded in 32 of the 90 contracts. In other words, ASIC contends that of the 232 contracts in issue in these proceedings, the annual cost rate of 48% has been exceeded in 140 of those contracts, in contravention of s 32A of the National Credit Code.

31 *Second*, s 23(1)(c) provides that a credit contract (other than a small amount credit contract) must not impose a *monetary liability* on the debtor in respect of an *interest charge* under the contract exceeding the amount that may be charged consistently with the National Credit Code. ASIC contends that because 140 of the 232 credit contracts in issue exceeded the annual cost rate of 48%, those 140 credit contracts imposed on the consumers a monetary liability in respect of an interest charge (in contravention of s 32A of the National Credit Code) which also gave rise to a contravention of s 23(1)(c) of the National Credit Code in respect of those 140 contracts.

32 *Third*, s 17(4)(a) of the National Credit Code provides that in the case of a credit contract (other than a small amount credit contract), the contract document must contain the annual percentage rate or rates under the contract. Section 27 of the National Credit Code defines the annual percentage rate under a credit contract to mean a rate "specified in the contract as an annual percentage rate". ASIC contends that when that definition is read with Division 3 of the National Credit Code, which addresses the topic of "interest charges" and, particularly, s 27 of the National Credit Code, which contains a number of definitions relating to "interest", it is clear that the "annual percentage rate" referred to in s 17(4) of the National Credit Code refers to an "interest charge" in a credit contract.

33 ASIC contends that all of the 232 credit contracts in issue in these proceedings purported to state an annual interest rate on the face of the document. It contends that for 187 of the credit contracts, the interest rate stated in the contract was not the annual percentage rate actually charged to the consumer. ASIC contends that the inclusion of an incorrect annual interest rate in each credit contract constitutes a contravention of s 17(4) of the National Credit Code and in order to illustrate that particular matter, ASIC refers to the contracts with Ms Abbott and Ms Abraham.

34 As to the credit contract with Ms Abbott dated 8 June 2017, the contract recites an interest rate of 45% per annum. ASIC contends that Mr Hill has calculated that the annual percentage rate for this contract was 77.11%. As to the credit contract with Ms Abraham dated 5 June 2018, the contract recites an interest rate of 35% per annum. ASIC contends that Mr Hill has

calculated that the annual percentage rate for this contract was 74.9%. I will refer to the schedules to Mr Hill's report later in these reasons.

35 As to Mr Hill's evidence, Mr Hill has concluded that the annual percentage rate actually charged to the consumer is different to that stated in the credit contracts for all 142 of the first tranche of credit contracts. In 133 of those credit contracts, the annual percentage rate actually charged was higher than that stated in the credit contract, whereas in nine cases it was lower. As to the second tranche of contracts, Mr Hill has concluded that the annual percentage rate actually charged to the consumer is different to that stated in the credit contracts in 45 of the 90 credit contracts. In 44 of those 45 contracts, the annual percentage rate actually charged was higher than that stated in the credit contract, whereas in one case it was lower.

36 ASIC observes that it has not pressed this contravention for nine of the credit contracts where the difference in question is only 0.01%. Nevertheless, in 187 of the 232 credit contracts in issue in these proceedings, the annual percentage rate actually charged to the consumer was different to the annual interest rate recited in the credit contract and in 177 of these contracts, the annual percentage rate actually charged to the consumer was higher than the interest rate recited in the credit contract, whereas in 10 cases it was lower.

37 *Fourth*, s 17(5) of the National Credit Code provides that in the case of a credit contract (other than a small amount credit contract), the contract document must contain the *method of calculation of the interest charges* payable under the contract and the frequency with which interest charges are to be debited under the contract. ASIC contends that R2O has failed to set out in its contracts the matters required by s 17(5) of the National Credit Code. ASIC contends that each of the credit contracts in issue contained a clause addressing the topic "Annual Interest Rate" in these terms (at, for example, p 5 of the Abbott contract):

> **Annual Interest Rate**
>
> [An] annual interest rate of a maximum 45% per year will be added to the stipulated Comparison Price of the Vehicle should you elect to rent your vehicle for the full term that you have specified in this agreement. This annual interest rate is included in your rental payments and is disclosed above in "Payment Arrangements".

38 In the case of the contract with Ms Abbott, for example, p 15 contains a "Contract Schedule" which has within it a section entitled "Payment Arrangement" in these terms:

Item	**Amount**
Contract Price	$11,188.44
First Payment	$1,200.00
Total Rental	$9,988.44

Rental Amount	$118.91
No. of Rental Payments: 84	Frequency: Weekly

39 ASIC contends that the Annual Interest Rate clause coupled with the Payment Arrangements part of the Contract Schedule fails to meet the requirements of s 17(5) of the National Credit Code because the most that the clause says is that an annual interest rate will be added to the comparison price of the vehicle. ASIC contends that this description falls short of the specificity required to describe the method of calculation of the interest charges payable under the credit contract and does not deal at all with the frequency with which interest rates are to be debited under the contract. ASIC contends that all 232 credit contracts in issue fail to comply with the requirements of s 17(5) of the National Credit Code.

40 As to the role of the price calculators sent by Mr Green to the franchisees, ASIC contends that R2O engaged in repeated contraventions of s 32A and s 17(4) of the National Credit Code because it directed its franchisees to use particular Microsoft Excel price calculators which incorrectly determined the amount of the weekly repayments for a stated interest rate and contract term. ASIC contends that Mr Hill has assessed each of the price calculators upon which ASIC principally relies, namely, the price calculators sent to the franchisees on 19 January 2017, 1 November 2017 and 11 April 2018, to determine whether those price calculators correctly carry out the purported calculations. ASIC contends that Mr Hill's evidence reveals that the price calculator of 19 January 2017 does not calculate the weekly repayments correctly because it applies the interest rate percentage to the cash price for the entire term of the loan and does not apply a periodic interest rate to the reducing loan balance. Mr Hill says that the calculator fails to deduct the *deposit amount* from the *cash price* and fails to take into account the warranty amount.

41 As to the price calculator of 1 November 2017, Mr Hill observes that whilst this calculator does deduct the deposit amount from the cash price, it nevertheless applies the interest rate percentage for the entire term of the loan and does not apply a periodic interest rate to the reducing loan balance. As to the calculator of 1 April 2018, Mr Hill concludes that this calculator calculates the weekly repayments for a stated interest rate and contract term correctly, save for a minor adjustment in respect of the average number of weeks per year. The April 2018 price calculator is based on 52.142 weeks per year, whereas it should have adopted 52.18 weeks per year. ASIC contends that even though the franchisees were provided with a price calculator on 11 April 2018 that derived a correct calculation, it nevertheless remains the

position that R2O contravened s 32A in 32 of the 90 credit contracts in the second tranche and contravened s 17(4) in 45 of the 90 contracts in the second tranche.

42 Apart from these provisions, ASIC contends that because, in the case of 177 of the 232 contracts in issue, the annual interest rate actually charged to consumers was higher than the interest rate recited in the relevant credit contract, R2O has engaged in conduct of making a false representation in the contract as to the annual interest rate to be charged to the consumer throughout the contract. ASIC contends that this conduct engages the following prohibitions contained in the ASIC Act.

43 *First*, s 12DA(1) prohibits misleading or deceptive conduct in relation to the provision of financial services.

44 *Second*, s 12DB(1)(a) prohibits false or misleading representations that services are of a particular quality in connection with the supply of financial services.

45 *Third*, s 12DB(1)(g) prohibits false or misleading representations with respect to the price of services in connection with the supply of financial services.

46 ASIC observes that these sections of the ASIC Act are each concerned with the provision of financial services. ASIC contends that for the purposes of s 12BAB(1) of the ASIC Act, a person provides a *financial service* if they *deal* in a *financial product* or if they provide a service that is otherwise supplied in relation to a financial product. ASIC contends that by reason of s 12BAA(7)(k), a credit facility (within the meaning of the *Australian Securities and Investments Commission Regulations 2001* (Cth) (the "ASIC Regs")) is a financial product for the purposes of Division 2 of Part 2 of the ASIC Act. Regulation 2B(1) of the ASIC Regs provides that for s 12BAA(7)(k) of the ASIC Act, the *provision of credit* for any period; and with or without prior agreement between the credit provider and the debtor; and whether or not both credit and debit facilities are available, is a *credit facility*. Regulation 2B(3) of the ASIC Regs provides that *credit* means a contract, arrangement or understanding under which payment of a debt owed by one person to another is deferred or one person incurs a deferred debt to another and includes any form of financial accommodation; and, specifically, a hire purchase agreement: ASIC Reg 2B(3)(b)(ii). ASIC contends that these provisions engage with the R2O credit contracts in issue in these proceedings with the result that the credit contracts are, by ASIC Reg 2B(1) a *credit facility* and therefore a *financial product* under s 12BAA(7)(k)

of the ASIC Act with the result that by s 12BAB(1), R2O provided a financial service and was thus governed by ss 12DA(1), 12DB(1)(a) and 12DB(1)(g) of the ASIC Act.

47 As to s 12DB(1)(g) of the ASIC Act, ASIC contends that R2O has, in connection with the supply or possible supply of financial services or in connection with the promotion of the supply or use of those services, made a false or misleading representation with respect to the *price of services* because for 177 of the credit contracts in issue, the annual interest rate actually charged to those consumers was higher than the annual interest rate recited in the contracts.

48 As to s 12DB(1)(a) of the ASIC Act, ASIC contends that R2O, in trade or commerce, in connection with the supply or possible supply of financial services or the promotion of the supply or use of those services, has made a false or misleading representation that services are of a particular *standard*, *quality*, *value* or *grade* because a representation about the size of an annual interest rate applicable to the provision of credit under a contract is a representation about a *quality* or *feature* of that credit contract and about the *value* of the credit contract. Because the statement of the annual interest rate in 177 of the R2O contracts was a false or misleading representation with respect to the quality or value of the financial services, R2O is said to have contravened s 12DB(1)(a) of the ASIC Act.

49 As to s 12DA(1) of the ASIC Act, ASIC contends that the section operates as a general prohibition against misleading and deceptive conduct with the result that if the Court is satisfied that R2O has contravened s 12DB(1)(a) and (g) of the ASIC Act, it would follow that the prohibition in s 12DA(1) is contravened. Section 12DA(1) provides that a person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

50 As to Mr Green and Mr Roberts, ASIC contends that each individual was "involved in" the contraventions by R2O of the National Credit Code and the ASIC Act.

51 For present purposes, it is sufficient to identify the terms of the definition of "involved in" contained in s 5(1) of the NCCP Act. The definition is in these terms:

> ***involved in:*** a person is ***involved in*** a contravention of a provision of legislation if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced the contravention, whether by threats or promises or otherwise; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

52 Particular emphasis is placed by ASIC on the elements of the defined term. For present purposes, it is sufficient to note that s 5(1) of the NCCP Act is simply a *definitional* or Dictionary section of that Act containing the defined terms used in the NCCP Act (but not the National Credit Code; s 5(1), NCCP Act). Section 5(1) must engage with a provision of the Act in order to have any role to play. It will be necessary to examine the elements of the statutory scheme later in these reasons.

53 Having regard to all of these matters, ASIC identifies as the central questions to be decided in the present proceedings, in relation to the 232 contracts in question, the following questions:

(a) whether the National Credit Code applies to each of the 232 contracts in issue, notwithstanding that ASIC contends that until recently, R2O seemed to regard each of the contracts as regulated by the National Credit Code;

(b) whether, in the event that the National Credit Code applies to each of the 232 contracts, R2O contravened ss 32A, 23(1), 17(4) and 17(5) of the National Credit Code;

(c) whether Mr Roberts and Mr Green were involved in any, or all, of the contended contraventions by R2O of the National Credit Code;

(d) whether R2O contravened ss 12DA(1), 12DB(1)(a) and/or 12DB(1)(g) of the ASIC Act; and

(e) whether Mr Roberts and Mr Green were involved in any, or all, of the contended contraventions of the ASIC Act.

54 In the context of all of these matters, it is now necessary to note the position adopted by the respondents.

55 As to Mr Roberts, as already mentioned, Mr Roberts elected not to contest any of the matters asserted by ASIC in its Amended Concise Statement. He elected not to participate in the trial of the proceeding and put on no evidence to contradict any of the evidence relied upon by ASIC. Mr Roberts has taken the position that he will submit to any order the Court might make in the proceedings, but wishes to be heard on the question of costs.

56 As earlier mentioned, R2O and Mr Green were represented by solicitors and counsel in the proceeding and they filed submissions which frame the position adopted on particular questions. In their written submissions, they say that R2O and Mr Green do not contest much of ASIC's case as opened in ASIC's opening submissions extensively described earlier. They

say that, in particular, with reference to the list of central issues to be determined as identified by ASIC (and set out at [53] of these reasons), R2O does not contest that:

> a. *if*, contrary to R2O's contention, on its proper construction the National Credit Code *does* apply to the contracts relied upon by ASIC, R2O has contravened sections 32A, 23(1), 17(4) and 17(5) in the respects alleged;
>
> b. R2O has contravened sections 12DA and 12DB(1)(g) of the *Australian Securities and Investments Commission Act 2001* in the respect alleged.

57 R2O and Mr Green also say this at para 4 of the opening submissions:

> The concession that R2O has contravened sections 12DA and 12DB(1)(g) of the ASIC Act is made in recognition that ASIC's evidence establishes that, as ASIC states at paragraph 78 of its opening submissions, for 177 of the credit contracts, "the annual interest rate charged to consumers was higher than the annual interest rate stated in those contracts". It follows that the inclusion of a lower interest rate than that actually charged constitutes conduct that is misleading or is likely to mislead or deceive within the meaning of the jurisprudence on that issue.

58 R2O and Mr Green also observe that, however, it is important to note that ASIC has not alleged that any customers were actually misled by the conduct. They say that there is no allegation nor any evidence that such conduct resulted in customers suffering any loss or damage as a result of the conduct. They also say that although it will only be relevant to the question of sanction (in the event that the Court accepts ASIC's submissions concerning the application of the National Credit Code to the contracts in issue) that the total dollar amounts calculated by Mr Hill in his reports were based upon the sums stated in the contracts to which he referred. They say, however, that the evidence will show, that the actual amounts charged to customers of R2O were in many cases significantly less than Mr Hill's reports would suggest. This proposition is advanced by Mr Green in his affidavit.

59 At para 7 of the submissions, R2O and Mr Green say this:

> As to the matters that are in contest, as between ASIC on the one hand and R2O and Mr Green on the other, the primary issues for determination by the court are:
>
> a. whether or not, on its proper construction, the National Credit Code applies to the contracts relied upon by ASIC;
>
> b. *if* (contrary to R2O's contentions), on its proper construction the National Credit Code *does apply* to those contracts, whether Mr Green was involved (within the meaning of the *National Consumer Credit Protection Act 2009*) in R2O's contraventions;
>
> c. whether R2O contravened s 12DB(1)(a) of the ASIC Act;
>
> d. whether Mr Green was involved (within the meaning of the *Corporations Act 2001*) in R2O's contravention or contraventions of the ASIC Act.

60 As to the matters identified by R2O and Mr Green at para 7(b) of the submissions set out above, it should be noted that Mr Green concedes that if the National Credit Code does apply to the contracts in issue in the proceeding, the evidence supports a finding that Mr Green "was *involved* in R2O's contravention of s 17(4) of the Code, in the respects alleged", although the reference to s 17(4) should be a reference to s 17(5) of the Code. At para 8 of the opening submissions, R2O and Mr Green observe that as to ASIC's summary of the case as opened and described above, "there is little by way of factual controversy between the parties" and rather "the contest is predominantly as to issues of law, and to a lesser degree, issues of mixed fact and law".

61 Before examining those matters, it is necessary to set out aspects of the statutory scheme.

The statutory scheme

62 The NCCP Act consists of the principal Act itself and a Schedule to the Act described as Schedule 1 which contains the *National Credit Code*. Section 3 of the NCCP Act provides that the National Credit Code has effect as a law of the Commonwealth. The provisions of the NCCP Act and the National Credit Code are considered in the terms they took during the period of the contended contraventions.

63 Section 5 of the NCCP Act contains a Dictionary of defined terms for the purposes of the Act, *but not* for the purposes of the National Credit Code. The National Credit Code contains a Dictionary of terms for the purposes of that Code at s 204.

64 Section 35 of the NCCP Act provides that an *Australian credit licence* is a licence that authorises the licensee to engage in particular *credit activities*. The credit activities in which a licensee is authorised to engage are those credit activities specified in a condition of the licence as authorised credit activities. The term *credit activity* is given meaning by s 6 of the NCCP Act and, relevantly for present purposes, a person engages in a credit activity if the person is a *credit provider* under a *credit contract* or the person carries on a business of providing credit to which the National Credit Code applies or the person performs the obligations or exercises the rights of a credit provider in relation to a credit contract or proposed credit contract (whether the person does so as the credit provider or on behalf of the credit provider).

65 A person engages in a *credit activity* if the person provides a *credit service*. A person provides a *credit service* if the person provides credit assistance to a consumer or acts as an intermediary: s 7, NCCP Act.

66 The term *credit assistance* is defined by s 8 of the NCCP Act.

67 A *credit contract* has the same meaning as that term has in s 4 of the National Credit Code. It will be necessary to separately examine the provisions of the National Credit Code.

68 Section 29(1) of the NCCP Act provides that a person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity. The prohibition in s 29(1) provides for a civil penalty of 2,000 penalty units. Part 2-2 of Chapter 2 of the NCCP Act addresses the topic of Australian credit licences, how to apply for such a licence, the basis on which a licence is granted and related matters. Division 4 of Part 2-2 addresses the topic of the conditions which may be imposed as part of a licence.

69 Section 47(1)(c) and (d) of the NCCP Act provide that a licensee must comply with the conditions on the licence, and comply with the "credit legislation". The term *credit legislation* is defined to mean the NCCP Act (which includes Schedule 1, consisting of the National Credit Code); the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* (Cth); Division 2 of Part 2 of the ASIC Act and Regulations made for the purpose of that Division; and any other Commonwealth or, relevantly, State legislation that covers conduct relating to credit activities, but only insofar as it covers conduct relating to credit activities.

70 Part 2-3 of Chapter 2 addresses the topic of "Credit representatives and other representatives of licensees". Section 64(1) of the NCCP Act provides that a licensee may give a person a written notice authorising the person to engage in specified credit activities on behalf of the licensee and s 64(2) provides that a person who is authorised under s 64(1) is a *credit representative* of the relevant licensee. The *credit activities* specified may be some or all of the credit activities authorised by the licensee's licence. Section 65(1) provides that a body corporate that is a credit representative of a licensee may, in that capacity, give a natural person a written notice authorising that natural person to engage in specified credit activities on behalf of the licensee and s 65(2) provides that a natural person who is authorised under s 65(1) is a *credit representative* of the relevant licensee. Again, the credit activities specified may be some or all of the credit activities authorised by the licensee's licence. Section 71 provides that if a person authorises a credit representative under s 64(1) or s 65(1), the person must,

within 15 business days, lodge with ASIC a written notice in accordance with s 71(3) of the NCCP Act.

71 The NCCP Act contains a wide-range of obligations to be discharged and prohibitions upon conduct. It is not necessary to set out a summary of those provisions.

72 Chapter 4 of the NCCP Act addresses the topic of "Remedies". Division 2 of Chapter 4 addresses the topic of "Declarations and pecuniary penalty orders for contraventions of civil penalty provisions". As to the notion of a *civil penalty provision*, s 5(1) of the NCCP Act defines a civil penalty provision in this way:

> ***civil penalty provision***: a subsection of this Act (or a section of this Act that is not divided into subsections) is a ***civil penalty provision*** if:
>
> (a) the words "civil penalty" and one or more amounts in penalty units are set out at the foot of the subsection (or section); or
>
> (b) another provision of this Act specifies that the subsection (or section) is a civil penalty provision.

73 The term *this Act* includes instruments made under the NCCP Act.

74 Section 166 of the NCCP Act provides that ASIC may apply to the Court, within six years of a person contravening a civil penalty provision, for a declaration that the person contravened the provision. Section 166(2) provides that the Court must make the declaration if it is satisfied that the person has contravened the provision, and s 166(3) specifies matters which must be within the terms of the declaration. Section 167 provides that ASIC may apply to the Court, within the same timeframe, for an order that the person pay the Commonwealth a pecuniary penalty. Section 166(3) addresses the topic of determining the amount of the pecuniary penalty.

75 Section 168 of the NCCP Act provides that a contravention of a civil penalty provision is not an offence.

76 Section 169 of the NCCP Act provides that a person who is *involved in* a contravention of a civil penalty provision is taken to have contravened that provision.

77 Section 169 of the NCCP Act is the operative provision which engages with the defined term *involved in*, as defined in s 5(1) of the NCCP Act as set out at [51] of these reasons. Thus, a person who is involved in a contravention of a civil penalty provision within the terms of that concept as defined by s 5(1) is taken to have contravened the provision in question.

78 Part 4-2 of Chapter 4 addresses the topic of the "Power of the court to grant remedies". Section 177 addresses the topic of "injunctions". Section 177(1) is in these terms:

> **177 Injunctions**
>
> (1) If, on the application of ASIC or any other person, the court is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute:
>
> (a) a contravention of this Act; or
>
> (b) attempting to contravene this Act; or
>
> (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
>
> (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
>
> (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
>
> (f) conspiring with others to contravene this Act;
>
> the court may grant an injunction on such terms as the court considers appropriate.

79 The NCCP Act contains other remedial provisions. It is not necessary to address all of those provisions in these reasons. Section 187 of that Act confers civil jurisdiction on the Federal Court of Australia in matters arising under the NCCP Act.

80 As to the National Credit Code, these matters should be noted.

81 Section 204 of the Code contains a number of "Principal definitions" for the purposes of the Code and, as already mentioned, the definitions contained in the NCCP Act in s 5(1) apply for the purposes of the Act, *other than* the National Credit Code. Section 3(1) of the Code provides that for the purposes of the Code, *credit* is provided, "if under a contract, payment of a debt owed by one person (the ***debtor)*** to another (the ***credit provider***) is deferred; or one person (the ***debtor***) incurs a deferred debt to another (the ***credit provider***).

82 Section 4 of the Code provides that, for the purposes of the Code, a *credit contract* is a contract under which credit is, or may be provided, being the provision of credit to which the Code applies.

83 Section 5 addresses the topic of the "Provision of credit to which this Code applies". Section 5(1) provides that the Code applies to the provision of credit (and to the credit contract and related matters) if, when the credit contract is entered into or (in the case of pre-contractual

obligations) is proposed to be entered into, the debtor is, relevantly, a natural person; and, the credit is provided or intended to be provided, relevantly, wholly or predominantly for personal, domestic or household purposes; and, a charge is or may be made for providing the credit; and, the credit provider provides the credit in the course of a business of providing credit carried on in the relevant jurisdiction, or as part of, or as an incident of, any other business of the credit provider.

84 Section 5(2) provides that if the Code applies to the provision of credit and to the credit contract, the Code applies in relation to all transactions or acts under the contract and the Code continues to apply even though the credit provider ceases to carry on a business in the relevant jurisdiction. No issue is taken with any of these elements of s 5 of the Code. Nor is any point made that s 6 of the Code is engaged which addresses the topic of the "Provision of credit to which this Code does not apply". No point is taken as to ss 5 or 6 by R2O or Mr Green, and Mr Roberts does not contest any aspect of ASIC's case. There is nothing in the material which suggests any question arising in relation to either ss 5 or 6 of the Code, except those questions concerning the construction and application of s 9 of the Code and its relationship with those sections as asserted by R2O and Mr Green.

85 Section 9 of the Code is the centre point of the contention on the part of R2O and Mr Green that none of the 232 contracts in issue in these proceedings are governed by the National Credit Code.

86 Section 9 is in these terms:

> **9 Goods leases with option to purchase to be regarded as sale by instalments**
>
> (1) For the purposes of this Code, a contract for the *hire* of goods under which the hirer has a *right* or obligation to *purchase* the goods, is to be *regarded* as a sale of the goods by instalments *if* the *charge* that is or may be made for hiring the goods, together with *any other amount payable under the contract* (including an amount to purchase the goods or to exercise an option to do so) *exceeds* the *cash price* of the goods.
>
> Note: A contract includes a series of contracts, or contracts and arrangements (see Part 13).
>
> (2) A *debt* is to be regarded as having been incurred, and *credit* provided, in such circumstances.
>
> (3) Accordingly, if because of subsection 5(1) the contract is a *credit contract*, this Code (including Part 6) applies as if the contract had always been a sale of goods by instalments, and for that purpose:
>
> (a) the amounts payable under the contract are the instalments;

and

(b) the credit provider is the person who is to receive those payments; and

(c) the debtor is the person who is to make those payments; and

(d) the property of the supplier of the goods passes under the contract to the person to whom the goods are hired on delivery of the goods or the making of the contract, whichever occurs last; and

(e) the *charge* for providing the credit is the amount by which the charge that is or may be made for hiring the goods, *together with* any other amount payable under the contract (including an amount to purchase the goods or to exercise an option to do so), *exceeds* the *cash price* of the goods; and

(f) …

(g) any provision in the contract for hiring by virtue of which the supplier is empowered to take possession, or dispose, of the goods to which the contract relates is void.

(4) For the purposes of this section, the *amount payable under the contract* includes any agreed or residual value of the goods at the *end* of the hire period or on *termination* of the contract, but does *not include* the following amounts:

(a) any amount payable in respect of services that are incidental to the hire of goods under the contract;

(b) *any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.*

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

[emphasis added]

87 The term *cash price* used in s 9 of the Code has the following definition under s 204:

cash price of goods or services to which a credit contract relates means:

(a) the lowest price that a cash purchaser might reasonably be expected to pay for them from the supplier; or

(b) if the goods or services are not available for cash from the supplier or are only available for cash at the same, or a reasonably similar, price to the price that would be payable for them if they were sold with credit provided – the market value of the goods or services.

88 ASIC contends that s 9(1) *treats* a contract under which goods are hired to a person who has a right (or obligation) to purchase the goods, as a sale by instalments *if* the *charge* that actually is, or may be made, for hiring the goods, together with *any other amount payable under the*

contract, exceeds the cash price (being the lowest price a cash buyer might reasonably be expected to pay, or the market value of the goods). In those circumstances, credit is provided (s 3(1); s 9(2)) and the contract, so treated, is a *credit contract*. Section 9(1) contemplates that a contract, having the character of a contract for the hire of goods coupled with a right or obligation to purchase those goods, is to be regarded as a sale by instalments, **if**, having regard to a *comparison* (required by the section), made between an amount payable under the contract (made up of the *charge* that is or may be made for the *hiring*, together with *any other amount* payable under the contract) on the one hand, and the *cash price* of the goods, on the other, that comparison reveals that the charge taken together with any other amount payable under the contract exceeds the cash price of the goods. In that comparison, *if* the amount *so calculated*, as described in s 9(1), *exceeds* the cash price, the contract is to be taken to be a sale by instalments and, by virtue of ss 3(1), 4 and 5(1), a *credit contract*.

89 However, the point of distinction contended for by R2O and Mr Green is that the calculation of the amount payable under the contract recited in s 9(1) does not include, by reason of s 9(4) of the Code, any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity. R2O and Mr Green contend that, since each of the 2017 and 2018 contracts contained a clause that entitled each customer to terminate his or her contract at any time, including *immediately after* entry into the contract (with the result that the immediate position would then be that no further payments would be payable under the contract), the "amount payable under the contract" would never exceed the cash price of the used car. In that case, s 9(1) would not be *engaged* and the contract, at least by operation of s 9(1), would not be regarded as a sale by instalments and the contract would not be one engaging the provision of credit under s 3(1) (as s 9(2) would also not be engaged), and the contract would not be a *credit contract* within s 4 and s 5(1) of the Code. On that footing, R2O and Mr Green contend that the National Credit Code does not apply to any of the 232 contracts in issue in these proceedings.

90 Section 14 of the Code provides that a credit contract must be in the form required by s 14. Section 17 of the Code provides that the contract document for the purposes of ss 3, 4, 5 and 14 must contain the matters set out in s 17. Section 17(4)(a) provides that in the case of a credit contract other than a small amount credit contract, the "contract document must contain the annual percentage rate or rates under the contract". Section 17(4) is in these terms:

> (4) In the case of a credit contract other than a small amount credit contract, the contract document must contain:

(a) the annual percentage rate or rates under the contract; and

(b) if there is more than one rate, how each rate applies; and

(c) if the annual percentage rate under the contract is determined by referring to a reference rate:

(i) the name of the rate or a description of it; and

(ii) the margin or margins (if any) above or below the reference rate to be applied to determine the annual percentage rate or rates; and

(iii) where and when the reference rate is published or, if it is not published, how the debtor may ascertain the rate; and

(iv) the current annual percentage rate or rates.

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

91 The term "annual percentage rate" has the meaning attributed to it by s 27 of the Code: s 204(1) of the Code. Section 27 provides that for the purposes of the Code: "***annual percentage rate*** under a credit contract means a rate specified in the contract as an annual percentage rate". Accordingly, the annual percentage rate under a credit contract for the purposes of s 17(4) of the Code is the rate specified in the contract as an annual percentage rate.

92 Section 17(5) of the Code provides, under the sub-heading "*Calculation of interest charges*", as follows:

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

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

93 The term "charge" is not defined in the Code. However, it seems clear enough that an amount of interest payable under a credit contract is regarded by s 17 of the Code as a charge and by s 17(5) the contract document must contain the method of calculation of the interest charges payable under the contract and the frequency with which those charges will be debited.

94 Section 23 of the Code addresses the topic of "Prohibited monetary obligations – general". Section 23(1) is in these terms:

(1) A credit contract (other than a small amount credit contract) must not impose a monetary liability on the debtor:

(a) in respect of a credit fee or charge prohibited by this Code; or

(b) in respect of an amount of a fee or charge exceeding the amount that

may be charged consistently with this Code; or

(c) in respect of an interest charge under the contract exceeding the amount that may be charged consistently with this Code.

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

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

95 It should be noted that the term *small amount credit contract* is given, by s 204 of the Code, the same meaning as the term has in s 5(1) of the NCCP Act.

96 Division 4 of Pt 2 of the Code deals with the general topic of "Fees and charges". Section 31 provides that the Regulations may specify credit fees or charges or classes of credit fees or charges that are prohibited for the purposes of the Code.

97 Division 4A of Pt 2 deals with the topic of "Annual cost rate of certain credit contracts". Section 32A of the Code within Division 4A provides by s 32A(1) as follows:

32A Prohibitions relating to credit contracts if the annual cost rate exceeds 48%

Entering into a credit contract

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

Criminal penalty: 50 penalty units.

98 Section 32A(4) contains an application of laws provision. It provides that s 32A does not apply if the credit provider is an "ADI" (a term which has the same meaning as that given to it in the *Banking Act 1959* (Cth)), or the credit contract is a small amount credit contract ("SACC") or bridging finance contract. R2O is not an ADI and none of the contracts in issue in these proceedings fall within the definition of a SACC. Nor do the contracts fall within the definition of a *bridging finance contract* within s 204 of the Code.

99 The prohibition in s 32A(1) upon a credit provider is concerned with not entering into a credit contract if the *annual cost rate* of the contract exceeds 48%. The "annual cost rate" of a credit contract must be calculated "as a nominal rate per annum, together with compounding frequency" using the formula set out in s 32B of the Code. The formula is in these terms: "n" x "r" x 100% where "n" is the number of repayments per annum to be made under the credit contract (subject to the particular precision identified for the unit "n" in s 32B) and where "r" is the solution of the equation set out in s 32B(2). There is little to be gained by reciting that equation in these reasons. For present purposes, it is sufficient to note that ASIC contends

that, in essence, the formula giving rise to the calculation of the annual cost rate incorporates both the number of repayments, the amount of each repayment and any fees, charges or commissions to be paid under the credit contract. The formula is said to take into account all of the costs to the consumer under the credit contract, expressed as an annualised percentage.

100 ASIC contends that the purpose of the provision, and the formula contained within it, is to prevent credit providers from circumventing the prohibition upon charging an annual interest rate in excess of 48% by imposing fees and charges on the consumer which would then have the practical effect (when converted into an annualised percentage) of delivering to the credit provider an effective interest rate in excess of a 48% annual interest rate.

101 R2O and Mr Green do not contest ASIC's formulation of the role s 32B plays in the context of s 32A of the Code. However, they do challenge aspects of Mr Hill's calculations.

102 As to that, as mentioned earlier, Mr Hill has provided an expert report which calculates the annual cost rate for each of the 232 credit contracts the subject of the proceeding, using the formula set out in s 32B of the Code. In the case of R2O, there are no additional fees and charges imposed on the consumer for the purposes of the formula in s 32B with the result that the "credit cost amount", item "$\boldsymbol{C_j}$" in the formula is $0. ASIC contends that, as a result, the total cost to the consumer can be determined based on the amount of the deposit plus the repayments over the term of the loan. The formula in s 32B has a further item "***F***". That item is to be subtracted from the outcome of the sigma calculation with the result that in calculating the annual cost rate for medium amount credit contracts, an amount of $400 is to be excluded. Mr Hill, in undertaking his calculations for the purposes of s 32B, has adopted the $400 amount for item "***F***" and excluded that amount for any R2O credit contract which falls within the definition of a medium amount credit contract (which is a term defined in s 204 of the Code).

103 Sections 32A and 32B of the Code were introduced into the Code by amendments made by the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) (the "Amendment Act 2012") which commenced operation on 17 September 2012. When the *Consumer Credit and Corporations Legislation Amendment (Enhancements) Bill 2011* (Cth) (the "Amendment Bill") was presented for the first time in the House of Representatives, the proposed s 32B did not contain subsection (4A) as it appears in the Amendment Act 2012 and now as it appears in the Code. This may explain why there is an Explanatory Memorandum ("EM") in support of the Amendment Bill and also a Revised Explanatory Memorandum ("REM"). Many of the

paragraphs of the EM also appear in the REM. As to s 32A and s 32B, these matters should be noted based on the REM (with cross-references to the EM):

> 5.46 The Enhancements Bill introduces a cap on costs for all other contracts other than small amount credit contracts. Section 32A will introduce a prohibition on a credit provider entering into a credit contract where the annual cost rate exceeds 48 per cent [5.29, EM].
>
> 5.47 As with the caps on small amount credit contracts, strict penalties are introduced for providers of credit assistance where they suggest or arrange a credit contract, and they either know or are reckless as to whether the cost charged under that contract will exceed the cap. [5.30, EM]
>
> 5.48 [5.48 addresses the circumstances in which the cap does not apply as earlier described in the course of these reasons].
>
> 5.49 [5.49 contains an explanation of the term *bridging finance contract*].
>
> …
>
> 5.54 Section 32B sets out the formula for calculating whether or not the 48 per cent annual cost rate has been exceeded. This formula largely adopts the model currently in force in New South Wales, pursuant to the *Credit (Commonwealth Powers) Amendment (Maximum Annual Percentage Rate) Act 2011*. [5.33, EM]
>
> 5.55 The use of an existing formula avoids the need for changes by credit providers who currently have developed practices to comply with the New South Wales cap on costs. [5.34, EM]
>
> 5.56 Section 32B will, however, allow for amounts to be prescribed by regulation that would need to be taken into account in calculating the annual cost rate. The introduction of this regulation-making power will enable the government to quickly respond to attempts to circumvent the object of these reforms. [5.35, EM]
>
> 5.57 Subsection 32B(4A) provides the flexibility to exclude, by regulations, certain fees or charges from a class of credit contracts that would otherwise be required to be included in the credit cost amount. …
>
> 5.58 This regulation-making power is included in recognition, in the Australian jurisdictions that have a cap on costs, of the development of a diverse range of methods of charging the borrower additional amounts that do not meet the definition of costs to be included in calculating the cap in State or Territory legislation. Credit providers have adopted a range of practices in order to be able to generate a return of more than 48 per cent while still complying with the cap. [In almost identical terms, 5.36, EM]
>
> 5.59 A contravention of the annual cost rate requirement in section 32A will be a consequential breach of the current prohibition in section 23 on credit providers charging amounts in excess of the monetary liabilities allowed under the Code. [5.37, EM]

104 As earlier mentioned, Mr Hill's calculations reveal that as to the first tranche of contracts, the annual cost rate of 48% has been exceeded in 108 of the 142 credit contracts and as to the second tranche, Mr Hill has concluded that the annual cost rate of 48% has been exceeded in

32 of the 90 credit contracts, resulting in 140 of the 232 credit contracts exceeding the annual cost rate cap of 48%, in contravention of s 32A of the Credit Code.

105 Part 6 of the Code addresses the topic of "Penalties for defaults of credit providers". Division 1 of Part 6 addresses the topic of "Penalties for breach of key disclosure and other requirements". Section 111 within Division 1 is, relevantly for these proceedings, in these terms:

> (1) For the purposes of this Division, a ***key requirement*** in connection with a credit contract (other than a continuing credit contract) is any one of the requirements of this Code contained in the following provisions:
>
> …
> (b) subsection 17(4);
> (c) subsection 17(5);
> …
> (i) subsection 23(1) – but only at the time the credit contract is entered into;
> (j) subsection 32A(1);
> …

106 Section 111(2) provides that for the purposes of Division 1 of Part 6, a key requirement in connection with a continuing credit contract includes ss 17(4), 17(5), 23(1) and 32A(1).

107 Section 112 provides that ASIC may apply to the Court for an order under Division 1. Section 113 provides that the Court must, on an application being made, by order declare whether or not the credit provider has contravened a *key requirement* in connection with the credit contract(s) the subject of the application. Section 113(2) provides that the Court may make an order requiring the credit provider to pay an amount as a penalty if the Court is of the opinion that the credit provider has contravened a key requirement. Section 113(4) provides that the Court, in considering the imposition of a penalty, must have regard to the factors at s 113(4)(a) to (i). Section 116 provides for a total penalty not exceeding the prescribed amount. Section 122 provides that nothing in Division 1 affects the liability of a person for an offence against the Code or the Regulations.

108 Division 2 of Part 6, by s 124, provides for the civil effect of contraventions by a credit provider of a requirement of, or a requirement made under, the Code. Remedies might be sought under that section by a person affected by the contravention or by ASIC in its own right.

109 Division 4 of Part 12 addresses the topic of "Provisions relating to offences".

110 ASIC seeks the following relief against R2O by its Amended Originating Application:

> (a) declarations pursuant to section 113(1) of the Credit Code, that the first

respondent contravened sections 32A, 23(1), 17(4) and 17(5) of the Credit Code in respect of the credit contracts set out in the schedule to the amended concise statement;

(b) an order pursuant to section 113(1) of the Credit Code that the first respondent pay a pecuniary penalty in respect of the contraventions of sections 32A, 23(1), 17(4) and 17(5) of the Credit Code;

(c) an injunction pursuant to section 177(1) of the [NCCP Act], restraining the first respondent from further contraventions of sections 32A, 23(1), 17(4) and 17(5) of the Credit Code;

(d) an injunction pursuant to section 177(1) of the [NCCP Act], restraining the first respondent from engaging in credit activity for a period the Court sees fit;

(e) declarations pursuant to section 12HD of the ASIC Act that the first respondent, in respect of the credit contracts set out in the schedule to the amended concise statement, in trade or commerce, and in connection with the supply of financial services:

(i) by stating the relevant annual interest rate in the credit contract under the heading "Summary of Proposed Repayment Arrangements" (**the stated annual interest rate**); and

(ii) by stating in the credit contract that "A [sic] annual interest rate of a maximum of 45% per year will be added to the stipulated Comparison Price of the Vehicle should you elect to rent your vehicle for the full term that you have specified in this agreement. This annual interest rate is included in your rental payments and is disclosed above in 'Payment Arrangements'";

and thereby representing that:

(iii) the stated annual interest rate was the annual interest rate used to calculate credit charges under the contract;

and in circumstances where it was in fact the case that:

(iv) the stated annual interest rate was not the annual interest rate used to calculate credit charges under the contract;

has in relation to each credit contract set out in the schedule:

(v) engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of section 12DA [of the] ASIC Act;

(vi) made a false or misleading representation that its services were of a particular standard, quality, value or grade in contravention of section 12DB(1)(a) of the ASIC Act; and

(vii) made a false or misleading representation with respect to the price of the services in contravention of section 12DB(1)(g) of the ASIC Act.

(f) an order pursuant to section 12GBA(1)(a) of the ASIC Act that the first respondent pay a pecuniary penalty in respect of the contraventions of sections 12DB(1)(a) and 12DB(1)(g) of the ASIC Act; and

(g) an injunction pursuant to section 12GD of the ASIC Act, restraining the first

respondent from further contraventions of sections 12DA, 12DB(1)(a) and 12DB(1)(g) of the ASIC Act; and

(h) costs.

111 As against Mr Roberts, ASIC seeks the following relief:

(a) declarations pursuant to section 21 of the Federal Court Act, that [Mr Roberts] was involved (within the meaning of section 5(1) of the [NCCP Act]) in the first respondent's contraventions of sections 32A, 23(1), 17(4) and 17(5) of the Credit Code;

(b) an injunction pursuant to section 177(1) of the [NCCP Act], restraining [Mr Roberts] from being involved in further contraventions by the first respondent of sections 32A, 23(1), 17(4) and 17(5) of the Credit Code;

(c) an injunction pursuant to section 177(1) of the [NCCP Act], restraining [Mr Roberts] 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 the Court sees fit;

(d) declarations pursuant to section 12HD(1)(a) of the ASIC Act, that [Mr Roberts] was involved (within the meaning of section 79 of the Corporations Act) in the first respondent's contraventions of sections 12DA, 12DB(1) and 12DB(1)(g) of the ASIC Act;

(e) an order pursuant to section 12GBA(1)(e) of the ASIC Act that [Mr Roberts] pay a pecuniary penalty in respect of his involvement in the contraventions by the first respondent of sections 12DB(1)(a) and 12DB(1)(g) of the ASIC Act;

(f) an injunction pursuant to section 12GD of the ASIC Act, restraining [Mr Roberts] from being involved in further contraventions by the first respondent of sections 12DA, 12DB(1)(a) and 12DB(1)(g) of the ASIC Act; and

(g) costs.

112 As against Mr Green, ASIC seeks the following relief:

(a) declarations pursuant to section 21 of the Federal Court Act, that [Mr Green] was involved (within the meaning of section 5(1) of the [NCCP Act]) in the first respondent's contraventions of sections 32A, 23(1), 17(4) and 17(5) of the Credit Code;

(b) an injunction pursuant to section 177(1) of the [NCCP Act], restraining [Mr Green] from being involved in further contraventions by the first respondent of sections 32A, 23(1), 17(4) and 17(5) of the Credit Code;

(c) an injunction pursuant to section 177(1) of the [NCCP Act], restraining [Mr Green] 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 the Court sees fit;

(d) declarations pursuant to section 12HD(1)(a) of the ASIC Act, that [Mr Green] was involved (within the meaning of section 79 of the Corporations Act) in the first respondent's contraventions of sections 12DA, 12DB(1) and 12DB(1)(g) of the ASIC Act;

(e) an order pursuant to section 12GBA(1)(e) of the ASIC Act that [Mr Green] pay a pecuniary penalty in respect of his involvement in the contraventions by the first respondent of sections 12DB(1)(a) and 12DB(1)(g) of the ASIC Act;

(f) an injunction pursuant to section 12GD of the ASIC Act, restraining [Mr Green] from being involved in further contraventions by the first respondent of sections 12DA, 12DB(1)(a) and 12DB(1)(g) of the ASIC Act; and

(g) costs.

113 It is necessary to say something further about the claims for relief made against Mr Roberts and Mr Green to be "involved in" the contended contraventions of ss 32A, 23(1), 17(4) and 17(5) of the National Credit Code.

114 ASIC makes no claim in the amended originating application for an order that either Mr Roberts or Mr Green pay a pecuniary penalty on the footing that either or both of those respondents were "involved in" R2O's contraventions of ss 32A, 23(1), 17(4) and 17(5) of the National Credit Code. That no doubt follows for the reasons mentioned below. However, ASIC seeks a declaration that each of those Respondents were involved in, within the meaning in s 5(1) of the NCCP Act, the contraventions by R2O of those sections of the Code. That declaration is sought pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth). An injunction is sought against each of Mr Roberts and Mr Green pursuant to s 177(1) of the NCCP Act should the Court be satisfied that either or both of them has engaged in conduct falling within any of the subparagraphs of s 177(1). Those subsections include, being in any way, directly or indirectly, knowingly concerned in, or party to, the contraventions by a person (R2O) of the NCCP Act.

115 In examining the question of whether a declaration ought to be made that Mr Roberts and Mr Green were "involved in" R2O's contraventions of ss 32A, 23(1), 17(4) and 17(5) within the meaning of s 5(1) of the NCCP Act, these things need to be kept in mind.

116 *First*, Mr Roberts is unrepresented and is abiding by any decision the Court makes in the proceeding. For that reason, it is necessary to explain some aspects of the statutory scheme so far as the scheme relates to persons being involved in contraventions by another and the character of the contraventions and the relationship between those contraventions and the defined term "involved in".

117 *Second*, s 5(1) of the NCCP Act, which contains a definition of the term "involved in", is a definitional provision *only*, not one which, by itself, gives rise to a liability in a person in respect of any particular conduct.

118 *Third*, the provisions of the NCCP Act (including the National Credit Code) relevant to the conduct of R2O and Mr Roberts and Mr Green are those provisions of the NCCP Act (and the Code as schedule 1) as it stood during the period of the conduct giving rise to the 232 contracts in issue in the proceedings. The relevant period governing the conduct of the respondents is 1 March 2017 to 18 June 2018, the period of the two tranches of contracts earlier described.

119 The NCCP Act and the National Credit Code were amended in significant respects by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth) (the "TLA Act"), which commenced on 13 March 2019. Although the changes made to the NCCP Act and the Code by that Act do not govern the legality or otherwise of the conduct of the Respondents said to contravene the NCCP Act and the Code as it stood in the relevant period, the changes made to the NCCP Act and the Code may be relevant to questions of construction of the provisions as they stood in the relevant period.

120 The following discussion concerns the provisions as they stood in the relevant period unless otherwise mentioned.

121 Because s 5(1) is a definitional provision only, its role is to give defined statutory content to terms used in sections of the NCCP Act. Section 169 of the NCCP Act provides that a person who is *involved in* a *contravention* of a *civil penalty provision* is *taken* to have contravened *that provision*. Section 169 is the source of a liability imposed upon a person who is "involved in" a contravention of "a civil penalty provision". Section 169 will engage with contraventions of ss 32A, 23(1), 17(4) and 17(5) so as to render each of Mr Roberts and Mr Green persons "involved in" R2O's contraventions of those sections of the Code if those sections are "civil penalty provisions". The term *civil penalty provision* is given a definition in s 5(1) of the NCCP Act. That definition provides that "a subsection of this Act (or a section of this Act that is not divided into subsections) is a ***civil penalty provision***" if either one of two limbs of the definition is satisfied. The first limb is if the words "civil penalty", and "one or more amounts in penalty units are set out at the foot of the subsection (or section)". The second limb is if *another provision* of the NCCP Act "specifies" that the subsection (or section) "is a civil penalty provision". The term "this Act" includes all of the provisions of the NCCP Act including the provisions of the National Credit Code at Schedule 1 to the Act. Section 13 of the *Acts Interpretation Act 1901* (Cth) provides that all material, from and including the first section of an Act to the end of the last schedule of the Act, is part of the Act. Accordingly, putting to one side for the moment any engagement or operation of the first limb of the

definition, a provision of the National Credit Code will constitute a civil penalty provision of the NCCP Act (and Code) if another provision of the NCCP Act (including the National Credit Code) "specifies" that a particular subsection or section "*is* a civil penalty provision".

122 The method selected by the Parliament of designating a section or subsection of the NCCP Act as a civil penalty provision, evident from an examination of all of the provisions of that Act, is the first limb of the definition of civil penalty provision: that is, using at the foot of the section or subsection, the words "civil penalty" and a nominated number of penalty units. That approach can be seen in the *National Credit Code* as well. I will return to aspects of the Code shortly. As to the NCCP Act apart from the Code, there are many examples of the Parliament adopting the mechanism of the first limb of the definition of civil penalty provision: ss 29(1), 30(1), 30(2), 31(1), 32(1), 49(6), 50(2), 51(1), 52(2), 53(1), 69(1), 70(1), 71(1), 71(2), 71(4), 73(3), 73(5), 88(1), 95(1), 98(1), 99(1), 99(2), 99(3), 100(1), 100(2), 102(3), 113(1), 114(1), 114(4), 114(5), 114(6), 115(1), 115(2), 117(1), 118(1), 119(1), 120(1), 120(3), 121(1), 122(1), 123(1), 124(1), 124A(1), 124B(1), 126(1), 127(1), 128, 130(1), 131(1), 132(1), 133(1), 133AC(2), 133AD(2), 133AE(2), 133BC(1), 133BD(1), 133BE(1), 133BG(1), 133BH(3), 133BO(1), 133CA(1), 133DB(1), 133DC(2), 133DD(2), 133DE(1) and (2), 137(1), (4), (5) and (6), 138(1) and (2), 140(1), 141(1), 142(1), 143(1) and (3), 144(1), 145(1), 146(1), 147(1), 149(1), 150(1), 151(1), 153(1), 154(2), 155(1), (2) and (4), 156(1), 158(1), 160(1), 160(2), 160B(1), 160C(1), 160D(1). In every one of these examples, the method adopted by the Parliament of designating the section or subsection as a civil penalty provision is the method set out in the first limb of the definition. That is also true in relation to s 72(4) and s 177B(4) of the National Credit Code. It is also true in relation to every provision designated as a civil penalty provision pursuant to the TLA Act.

123 The sections relied upon by ASIC of the Code, ss 32A, 23(1), 17(4) and 17(5) are not civil penalty provisions by operation of the first limb of the definition. Nor is there any other provision of the NCCP Act (including the Code) which "specifies" those provisions as "civil penalty provisions". Had the Parliament intended the relevant provisions to operate as civil penalty provisions, it would either have adopted the mechanism contained in the first limb, which appears to be the preferred mechanism adopted by Parliament, or alternatively, it would have expressly specified, with precision, that each provision "is a civil penalty provision".

124 It is of course true that ss 111 and 112 designate any one of the requirements of ss 32A, 17(4), 17(5) and 23(1) (and as to s 23(1), for the purposes of s 111(1)(i), "only at the time the credit

contract is entered into") as "key requirements" in connection with a credit contract, for the purposes of Division 1 of Part 6 of the Code. Section 113(1) provides for a declaration as to whether or not a credit provider has contravened a key requirement, and s 113(2) confers power on the Court to order a credit provider to pay an amount as a penalty if the Court is satisfied that the credit provider has contravened a key requirement. The factors to be taken into account in considering the imposition of a penalty are set out at s 113(4). Section 116 provides that the maximum total penalty cannot exceed $500,000. Section 116 has been amended by Item 31 of Schedule 3 to the TLA Act to now provide, by s 116(2), that s 167B of the NCCP Act applies "in the same way in relation to the contravention of a key requirement as it would apply in relation to a civil penalty provision under that Act".

125 The treatment adopted for contraventions of ss 32A, 23(1), 17(4) and 17(5) of the Code is the mechanism of designating the provisions as key requirements and engaging with the particular treatment contained within the provisions of Part 6 of the Code. This method of treatment is entirely different to the mechanism of designating particular provisions of the NCCP Act and the Code as civil penalty provisions with a nominated number of penalty units. Moreover, no provision of the NCCP Act "specifies" that the relevant subsection in question "is a civil penalty provision".

126 The point of this discussion is that because ss 32A, 23(1), 17(4) and 17(5) are not specified as civil penalty provisions, s 169 does not operate to render either Mr Roberts or Mr Green as persons "involved in" R2O's contraventions of those provisions and thus persons taken to have contravened any of those particular sections.

127 There is no other provision of the NCCP Act or the Code that provides that a person who is "involved in" a contravention of ss 32A, 23(1), 17(4) and 17(5) or any of the provisions of Division 1 or Division 2 of Part 2 of the Code (where those provisions are not civil penalty provisions) is taken to have contravened the relevant provision.

128 Thus, there is no provision of the NCCP Act or Code that engages with the defined term "involved in" so far as a contravention of ss 32A, 23(1), 17(4) and 17(5) is concerned so as to render a person falling within the defined term "involved in", a contravener of the provision contravened by the credit provider.

129 Even assuming that a person's conduct falls within an integer of the definition of "involved in" in the context of a consideration of another person's contravention of a section of the NCCP

Act or Code, it would not be appropriate to make a declaration that such a person was "involved in" that contravention simply for the purposes of the Dictionary section of the NCCP Act. It would only be appropriate to make a declaration that a person was involved in a contravention of a particular provision, for the purposes of a provision of the NCCP Act (and the Code) that *engages* with the defined term, such provision being the *source* of a legal *obligation* or *liability*. Otherwise, a declaration resting solely on, and for the purposes of, a defined term, is detached from any statutory nexus engaging liability on the part of the relevant person.

130 Section 177(1) of the NCCP Act falls into a different category. It confers power to grant an injunction in such terms as the Court considers appropriate, against a person engaging in conduct constituting a contravention of the NCCP Act (and the Code) *or* engaging in any one or more of the five classes of conduct set out in the section. Sections 177(1)(c), (d), (e) and (f) are in substantially the same terms as (a), (b), (c) and (d) of the definition of "involved in".

131 If Mr Roberts and Mr Green have engaged in conduct falling within any integer of s 177(1), it may be appropriate to make a declaration as to that conduct, as found, as *explanatory* of the making of an injunction under s 177(1) framed in terms of the particular conduct finding. However, it would not be a declaration framed in terms of either respondent being "involved in" conduct for the purposes of s 5(1) of the NCCP Act, for the reasons mentioned.

132 The first question to be determined is whether the NCCP Act and the National Credit Code apply to any of the contracts in issue in the proceeding. Before turning to that question, it is necessary to note some further aspects of the contract made between R2O and Ms Abbott on the one hand and R2O and Ms Abraham on the other, as each contract is emblematic of the tranche of contracts within which it falls, in issue in the proceeding.

The contract with Ms Abbott and the contract with Ms Abraham

133 Some aspects of the contract with Ms Abbott have already been noted at [37] and [38] of these reasons. The contract with Ms Abbott sets out financial information at page 4 under the heading "Summary of Proposed Repayment Arrangements" (the "Summary PRA") and at page 15 under the heading "Payment Arrangement" as part of the "Contract Schedule" (the "CS"). Page 2, which is a Pre-Contract Disclosure Statement, recites that the "Contract Price" is calculated using "a researched full retail market price of the vehicle". That seems to be a reference to research based upon prices obtained from internet searches of the site "carsales.com". Page 4 of the contract describes Ms Abbott as the "Hirer". The CS at page 15 describes her as the "Renter". The CS sets out the "Payment Arrangement". The term "Contract Price", referred to

at page 2, appears under that heading and it nominates an amount of $11,188.44. Page 2 of the Disclosure Statement immediately after the topic "Contract Price" addresses the topic of "Markup or Interest Charges" and it provides as follows: "Included in your contracted payments is a markup/interest which is disclosed in your contract charged ONLY on the based fair market price of the vehicle". Accordingly, the "markup or interest charge" seems to be based on the notion of the "fair market price of the vehicle" and the Contract Price is "calculated using a researched full retail market price of the vehicle". As mentioned, the "Contract Price" recited at page 15 is $11,188.44 and at page 4, that amount is described as the "Contract Cash Price". At page 4 the Summary PRA refers to a "Comparison Price" nominated as $5,900 which seems to be the market price based on interrogating the carsales.com internet site. The Summary PRA recites a warranty cost of $1,000. It also recites under the reference "Repayments" an amount of $118.91. It recites an "Interest" rate of 45% per annum. It also recites "Total Interest Payable" of $4,288.44. The CS under the heading "Payment Arrangement" recites a rental amount of $118.91 payable by weekly rental payments over a period of 84 weeks giving rise to total rental of $9,988.44 ($118.91 multiplied by 84). The Payment Arrangement section of the CS also recites that the "First Payment", sometimes called a deposit, is $1,200. The Summary PRA suggests that the Comparison Price of $5,900 plus the Warranty Cost of $1,000 and the Total Interest Payable of $4,288.44 gives rise to the Contract Cash Price of $11,188.44. The Payment Arrangement Schedule as part of the CS at page 15 suggests that the Contract Price is also reached by the addition of the first payment of $1,200 and the Total Rental amount of $9,988.44, constituting $11,188.44.

134 The weekly rental amount of $118.91 is calculated by reference to a "Price Calculator". The particular schedule which illustrates the operation of the Price Calculator is at tab 81 of exhibit ITS-1 to Ms Schoch's affidavit of 18 March 2019. That Price Calculator is the version dated 19 January 2017 which was the last Price Calculator distributed by Mr Green to the franchisees immediately before R2O entered into the 2017 contracts (tranche 1). The Price Calculator operates on the basis that the franchisee will enter data into a series of fields.

135 *First*, the calculator requires the "Cash Price" to be inserted into the Cash Price field. The calculator recites that the "Cash Price" is the "high retail price you source from the internet – 'carsales.com'". In the case of Ms Abbott, the Cash Price is $5,900.

136 *Second*, the calculator requires the "Deposit" to be inserted into that field. The Deposit, as mentioned, is also described as the "First Payment". In Ms Abbott's case, that amount is $1,200.

137 *Third*, the calculator requires the warranty cost to be inserted in the Warranty field and in Ms Abbott's case, that amount is $1,000.

138 *Fourth*, the calculator requires the number of weekly payments or repayments to be inserted and in Ms Abbott's case, the contract nominates 84 weekly repayments.

139 *Fifth*, the calculator requires the franchisee to select an interest rate and in the case of Ms Abbott, the interest rate recited in the contract is 45%, with the result that 45% is entered into the calculator.

140 Having taken all of those steps of entering that data, the Price Calculator then calculates the amount of the weekly repayment and in Ms Abbott's case, the calculator derived a weekly payment having regard to all of those factors of $118.91 which over 84 weeks amounts to "Total Rental" of $9,988.44 which, taken together with the "First Payment", gives rise to total repayments of $11,188.44 otherwise described as the "Contract Price" and also otherwise described as the "Contract Cash Price".

141 It should also be noted that in the case of Ms Abbott's contract, the First Payment seemed to have been due on 8 June 2017. There is a handwritten change to this effect: "First payment Fortnightly 21/6/17". It may be that the First Payment was to be made two weeks after entry into the contract on 7 June 2017, with payments weekly thereafter.

142 As to Ms Abbott's contract, Mr Hill has produced a report, as mentioned earlier, dated 23 March 2018 to which he attaches a number of appendices. One is appendix E which deals with an analysis of all of the contracts so as to identify in the form of a schedule an answer to the question which Mr Hill was required to address as "Question 1". That question was whether, in Mr Hill's opinion, having regard to each of the "Data Sets" available to him, R2O has exceeded the annual cost rate of 48% having regard to s 32A of the National Credit Code. At page 55 of Appendix E (p 67 of the Court Book), Mr Hill sets out these factors in the case of Ms Abbott: the Cash Price, the Deposit, the Warranty, the number of Repayments, the Repayment Amount and the Total Contract Price, in the amounts earlier described. Mr Hill also sets out the loan amount of $5,700 and calculates that the annual interest rate amounted to

77.11% with a periodic interest rate of 1.48%, with the result that the annual cost rate of 48% was exceeded in the case of Ms Abbott.

143 Mr Hill also conducted a calculation for the purposes of s 17(4) of the Code which provides that the credit contract document must contain the annual percentage rate or rates under the contract. In Ms Abbott's case, the rate recited in the contract was 45%. Mr Hill's calculation is contained in appendix D (p 27; p 116 of the Court Book) which demonstrates that the actual annual percentage rate was 77.11%, not 45%.

144 Ms Abraham's contract is representative of the 2018 contracts (tranche 2). The Payment Arrangement part of the Contract Schedule (CS) for her contract recites these matters: Contract Price $7,175.22; First Payment $1,200; Total Rental $7,175.22; Rental Amount $91.99; Number of Rental Payments 78. The Summary PRA for Ms Abraham's contract recites this information: Car Rental Price $5,500; Deposit/Bond $1,200; Warranty $0.00; Interest 35% p.a.; Total Interest Payable $1,602.32; Contract Total $7,175.22. The payment period is weekly and the Summary PRA recites repayments of $91.99. Mr Hill's analysis shows that the annual cost rate was 60.68% rather than any amount up to 48% and although the interest rate recited in the contract was 35%, the actual annual percentage rate was 74.90%.

145 Returning to Ms Abbott's contract, the document consists of a sheet at page 2 under the heading "Pre-Contract Disclosure Statement". The credit contract itself seems to begin at page 4 under the heading "Credit Contract". Part 1 provides details of the credit provider, the hirer and the repayment arrangement as earlier mentioned. Part 1 also contains statements about fees and commissions. It contains a statement about the maximum annual interest rate as set out at [37] of these reasons. Part 2 of the contract addresses the topic of "Information About Our Obligations to You and Your Obligations to Us". Part 3 addresses the topic of how R2O can deal with the customer's personal and credit information. Part 4 bears the heading "Contract" and an "Information statement". That statement addresses 25 topics which are not necessary to mention here. The remaining part of the contract sets out the "Contract Conditions".

146 Clause 1 of the Contract Conditions recites that the customer understands that he or she is renting the vehicle and that ownership of the vehicle will be transferred only after the customer has requested to make a purchase of the vehicle and has made the full agreed payment of the vehicle. That clause recites that the renter is aware that the vehicle will remain registered to the company until all purchase payments are completed. The clause recites that the contract rental

price will be the basis of the full cash purchase price of the vehicle should the renter exercise the option to purchase the vehicle.

147 Clause 2 of the contract is in these terms:

> The Renter is NOT obliged to make full purchase of the vehicle and may surrender it at any time without penalty at such time the foregone payments shall be deemed as rental payments for the time the vehicle has been used. Any outstanding payments must be paid up to date at the surrender of the vehicle. Any damage to the vehicle will be charged to the Renter. The contract will be terminated. Returning the [vehicle's] keys is NOT an act of surrendering the vehicle. The vehicle must be returned to the office of purchase or another R2O office by agreement.

148 In the case of Ms Abraham's contract, it too contains the annual interest rate clause and clause 2 of the contract conditions quoted above.

149 As earlier mentioned, the term "cash price" of goods is defined in s 204(1) of the Code as the lowest price that a cash purchaser might reasonably be expected to pay for the goods or the market value of the goods. This definition is engaged by s 9(1) of the Code. In these contracts, the corresponding cash price sourced from carsales.com is, in the case of Ms Abbott, the "Comparison Price" of $5,900 and in the case of Ms Abraham, the "Car Rental Price" of $5,500.

Principles governing the approach to construction of the statutory text

150 In *Application by Isentia Pty Limited* [2020] ACopyT 2, I expressed the following observations about the principles governing statutory construction and I apply those principles in construing the statutory text in issue in these proceedings. I have also had regard to other authorities mentioned at [151] of these reasons.

> 60 In *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22] ("Thiess"), French CJ, Hayne, Kiefel, Gageler and Keane JJ observed that statutory construction involves "attribution of meaning to statutory text", and emphasised the methodology for doing so by reference to the observations of the Court in *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39] ("*Consolidated Media Holdings*"), mentioned later in these reasons. The modern quest is not so much one of trying to discover the "intention of the legislature" which is a common but "very slippery phrase" (*Wilson v Anderson* (2002) 213 CLR 401, Gleeson CJ at [8] adopting the description by Lord Watson in *Salomon v A Salomon & Co Ltd* [1897] AC 22 at 38, "a common but very slippery phrase") and, "as everyone knows, the intention of Parliament is somewhat of a fiction" [emphasis added] (*Mills v Meeking* (1990) 169 CLR 214, Dawson J at 234; *Zheng v Cai* (2010) 239 CLR 446, French CJ, Gummow, Crennan, Kiefel and Bell JJ at [28]), or a "convenient phantom" (*Sloane v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 443), or a "metaphor" (*Momcilovic v The Queen* (2011) 245 CLR 1, Gummow J at [146](v)).

61 Rather, "intention" is a "conclusion" reached about the proper construction of the law in question and "nothing more": *Momcilovic*, Hayne J at [341]. In *Thiess* at [23], the Court also observed that objective discernment of the statutory purpose is "integral to contextual construction" and also observed that s 15AA of the *Acts Interpretation Act 1901* (Cth) (the "*AIA Act*"), which requires that the interpretation that would best achieve the purpose or object of an Act be preferred to each other interpretation, is a "particular statutory reflection of a *general systemic principle*" [emphasis added].

62 Parliament *manifests* its intention by the use of language, "and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the [fiction of] legislative will": *Wilson v Anderson*, Gleeson CJ at [8]. Ascertainment of the meaning to be attributed to statutory text is "asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts": *Lacey v Attorney General for the State of Queensland* (2011) 242 CLR 573, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [43], reaffirming the observations in Zheng v Cai at [28]. There are many *particular* rules of construction which are engaged in the task of attributing meaning to statutory text, but the critical governing principles are these.

63 In *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408 ("CIC"), Brennan CJ, Dawson, Toohey and Gummow JJ said this:

> It is well settled that at common law, apart from any reliance upon s 15AB of the *Acts Interpretation Act 1901* (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the *modern approach* to statutory interpretation (a) *insists* that the context be considered *in the first instance*, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its *widest sense* to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.
>
> [emphasis added]

64 The observation that the "modern approach" to statutory construction "insists" that context be considered "in the first instance", using context in the "widest sense", was also reflected in the observations of McHugh, Gummow, Kirby and Hayne JJ a year later in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] ("*Project Blue Sky*") where their Honours said that the process of construction "*must always begin* by examining the context of the provision that is being construed" [emphasis added]. That was thought to be the emphatic imperative of the "process of construction" having regard to the observations and influence of Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 who said at 397 that "the *context*, the *general purpose* and *policy* of a provision and its *consistency* and *fairness* are *surer guides* to its *meaning* than the logic with which it is constructed" [emphasis added]. Seeking out those surer guides is the very process of attribution of meaning.

65 In *Project Blue Sky*, the plurality also said at [69] that the "primary object of statutory construction" is to construe the relevant provision so that it is

consistent with the language and purpose of all the provisions of the statute; that a legislative instrument "must be construed" on the prima facie basis that its provisions are intended to give effect to harmonious goals; and that where conflict appears to arise from the language of particular provisions, the conflict must be resolved, if possible, by adjusting the meaning of the competing provisions to achieve that result which will "best give effect to the purpose and language of the provisions while maintaining the unity of all the statutory provisions".

66 At [71], the plurality observed that "[f]urthermore, a court construing a statutory provision must strive to give meaning to every word of the provision". At [78], the plurality said this:

> However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is *taken* to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.
>
> [emphasis added]

67 A decade later, in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] ("*Alcan*"), Hayne, Heydon, Crennan and Kiefel JJ said this:

> This Court has stated on many occasions that the task of statutory construction *must begin* with a consideration of the *text itself*. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has *actually been employed in the text* of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.
>
> [emphasis added]

68 In *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, the Court, French CJ, Hayne, Crennan, Bell and Gageler JJ at [39] said this:

> 39 "This Court has stated on many occasions that the task of statutory construction *must begin* with a consideration of the [statutory] text [quoting the passage from *Alcan* at [47], quoted at [64] of these reasons]". So must the *task* of statutory construction *end*. The statutory text must be considered *in its context*. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.
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> [emphasis added]

69 More recently, in *SZTAL v Minister for Immigration and Border Protection*

(2017) 262 CLR 362 ("SZTAL"), Kiefel CJ, Nettle and Gordon JJ at [14] said this about ascertaining the meaning of a statutory provision:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, *at the same time*, regard is had to its *context* and *purpose*. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood *in discourse*, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> [emphasis added]

70 In *SZTAL*, Gageler J emphasised, at [35], the observation of Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 ("*K&S*") that the modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might arise and, at [36], Gageler J emphasised the observations of the plurality in *CIC* at [408] (quoted at [63] of these reasons). At [37], Gageler J said this:

> Both of those passages [in *K&S* and *CIC*] have been "cited too often to be doubted". Their import has been reinforced, not superseded or contradicted, by more recent statements emphasising that statutory construction involves attribution of meaning to statutory text. The task of construction *begins, as it ends, with the statutory text*. But the statutory text *from beginning to end* is construed *in context*, and an understanding of context has utility "if, and only in so far as, it assists in fixing the meaning of the statutory text" [citing *Thiess* quoting the passage in *Consolidated Media Holdings* at [39]].
>
> [emphasis added]

71 At [38] [40], Gageler J also said this:

> 38 The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from "a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural", in which case the choice "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies" [quoting *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [66]].
>
> 39 *Integral* to making such a choice is discernment of *statutory purpose*. The unqualified statutory instruction that, in interpreting a provision of a Commonwealth Act, "the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation" [citing s 15AA of the *Acts Interpretation Act 1901* (Cth)] "is in that respect a particular statutory reflection of a general

systemic principle" [citing *Thiess* at [23]].

> 40 Exactly the same process of contextual construction is involved when the question is one of what content is to be given to a statutorily invoked concept which is expressed in words the ordinary or grammatical meaning of which is well enough understood but insufficiently precise to provide definitive guidance as to how the concept is to be understood and applied in the particular statutory setting. …
>
> [emphasis added]

> 72 Mention has already been made in these authorities of s 15AA of the *Acts Interpretation Act 1901* (Cth). That section is in these terms:
>
> **15AA Interpretation best achieving Act's purpose or object**
>
> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

> 73 Section 15AB sets out the range of extrinsic material to which reference might be made if it is capable of assisting in "the ascertainment of the meaning of the provision". Reference to the relevant material may be made to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act or to determine the meaning of the provision when the provision is ambiguous or obscure or when the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act and the purpose or object underlying the Act, leads to a result that is manifestly absurd or unreasonable. Section 15AB(2) sets out the relevant material. It is not necessary to recite that subsection in these reasons.

151 I have also taken into account the observations of French CJ, Hayne, Kiefel and Nettle JJ in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57] and 29 [59]; the observations of Higgins J in *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129 at 161 – 162; and the observations of Mason J and Wilson J in *Cooper Brookes (Wollongong) Proprietary Limited v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320 and 321.

Does the NCCP Act (and the National Credit Code) apply to the contracts in issue in the proceedings

152 The contracts in issue are properly characterised as contracts for the hire of goods under which the hirer has a right to purchase the goods, in this case the used car. Such a contract is to be regarded as a "sale" of the used car "by instalments" if the comparison required by s 9(1) of the Code demonstrates that two things described by s 9(1), taken together, exceed the "cash price", so defined, of the used car.

153 The two things are, first, the "charge" that is made, or may be made, "for hiring the goods", taken together with, second, "any other amount payable under the contract (including an amount payable to purchase the goods or exercise the option to do so)".

154 None of the contracts in issue provide for an amount payable by the hirer to purchase, or to exercise an option to purchase, the goods.

155 Section 9(1) provides a mechanism for quantifying one side of the statutory comparison required by that subsection. That quantification is derived by identifying the "charge" that "is or may be made for hiring the goods" and although the term "charge" is not defined by the Code, two things should be noted. *First*, the character or content of the "charge" takes its colour from the descriptive words "that is or may be made for hiring the goods". *Second*, the construct adopted by s 9(1) is that the hire, with periodic hiring payments (weekly in the course of these contracts) is to be regarded (there being an option to purchase the goods), as a sale of the goods "by instalments" and thus s 9(1) treats the "charge" that is or may be made for hiring the goods (the periodic payments) as the constructive purchase "instalments". There can be little doubt therefore that the character of the "charge" is the periodic hire payments treated as constructive purchase instalments as an element of the statutory comparison required by s 9(1).

156 The second component of the quantification is "any other amount payable under the contract". Once the instalments that are or may be made for hiring the goods are taken together with any other amount payable under the contract, the statutory comparison required by s 9(1) can be undertaken.

157 The "cash price" side of the comparison is also determined by the Code by reason of the definition of that term in s 204(1) of the Code. Section 9(1) operates to characterise the hire contract as a sale of goods by instalments (if the relevant comparison brings about the statutory result contemplated by s 9(1)) from the moment the contract is made as, in this case, all contracts contained the option to purchase from the moment the contract was signed. Each contract identifies the cash price of each used car in terms of the definition in s 204(1) by reference to the market value for the vehicle indicated on carsales.com.

158 If the "charge", so understood, taken together with any other amount payable under the contract exceeds the cash price, the contract is regarded as a sale by instalments and a "debt" is regarded as having been incurred, and credit is regarded as having been provided, in such circumstances: that is, in the circumstances contemplated by s 9(1). As a debt is regarded as having been

incurred and credit provided, the contract will be a "credit contract" under s 4 of the Code *if* the credit provided is "the provision of credit to which this code applies": s 4. Section 5(1) determines whether the Code "applies to the provision of credit (and to the credit contract and related matters)". That is why s 9(3) provides that "if because of subsection 5(1) the contract is a credit contract", the Code applies as if the contract had always been a sale of goods by instalments and, for that purpose, the matters at s 9(3)(a) to (g) follow. Section 9(3)(a) and (e) provide that the amounts payable under the contract are the "instalments" (s 9(3)(a)); and the "charge" for "providing the credit" is the amount by which the charge that is or may be made for hiring the goods, together with any other amount payable under the contract (including an amount to purchase or exercise the option to purchase) exceeds the cash price of the goods: s 9(3)(e).

159 Thus, the amount of the *excess* is the measure of the *charge* for *providing* the credit.

160 The matter at s 9(3)(e) concerning the charge for providing the credit is the quantification, in the circumstances of s 9(1) and s 9(2), of the charge described at s 5(1)(c) of the Code. Section 5(1)(c) is one of the integers to be considered in determining whether the Code "applies" to the provision of credit, having regard to s 9(2) and (3) in the circumstances of s 9(1). Section 5(1)(c) provides that the Code applies to the provision of credit if when the credit contract is entered into or is proposed to be entered into, a charge is or may be made for providing the credit.

161 However, s 9(4) of the Code does two things for the purpose of s 9. *First*, it provides that the amount payable under the contract includes a particular amount, and *second*, it provides that the amount payable under the contract does not include two particular amounts.

162 Section 9(4) includes, within the amount payable under the contract, any agreed or residual value of the goods at the end of the hire period or on termination of the contract.

163 Section 9(4) provides that the "amount payable under the contract" does not include any amount payable in respect of services that are incidental to the hire of the goods under the contract: s 9(4)(a).

164 Nor does the amount payable under the contract include "any amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity": s 9(4)(b).

165 A right conferred on the hirer to surrender the vehicle at any time without penalty, as conferred on each hirer by clause 2 of the contracts in issue in these proceedings, which has the effect recited in the contract that "the contract will be terminated" (clause 2) ought to be regarded or construed, for all practical purposes, as a "right of cancellation" in the hirer exercisable, as clause 2 provides, "at any time".

166 The statutory role of s 9(4)(b) of the Code needs to be kept in mind in construing the language of the text in the context of s 9 and particularly s 9(1), s 9(2) and s 9(3). Section 9(4)(b) seeks to engage with s 9 of the Code for the purpose of the statutory construct of regarding a contract for the hire of goods (coupled with a right to purchase those goods) as a sale of the goods by instalments if a very particular statutory comparison demonstrates that the charge that is or may be made for hiring the goods, together with any other amount payable under the contract, exceeds the cash price of the goods.

167 Although it is true that under any of the contracts in issue in these proceedings, a hirer might, immediately after entering into the contract, think better of it, and after a very short time (perhaps two or three days or less quite apart from any cooling off period), cancel the contract (as the hirer has the right to do "at any time") with the result that none of the weekly payments contemplated by the contract (the instalments) would then be payable, a literal application of the language of s 9(4)(b) to the statutory comparison required by s 9(1) (of not including in the amount payable under the contract any amount that ceases to be payable following the exercise of a right of cancellation by the hirer at the earliest opportunity), would entirely defeat the statutory purpose of the construct contemplated by s 9(1) by defeating the utility of the statutory comparison by which the statutory construct is effected.

168 The statutory purpose of s 9(1) is to bring contracts for the hire of goods coupled with a right in the hirer to purchase those goods, within the "protective" measures provided for by the *National Consumer Credit Protection Act 2009* (Cth) and the *National Credit Code* for those consumers (see s 5(1) of the NCCP Act and s 5(1)(a) and (b) of the Code) *incurring a debt* and being *provided with credit*, by contract, in relation to that debt.

169 In attributing meaning to the statutory text, s 9(1) recognises that a contract for the hire of goods (containing the relevant purchase option or right) provides for a charge that is or may be made for hiring the goods. It looks to a charge that is made, or may be made, for hiring the goods and treats those payments made, or to be made, as an analogue of instalments of a sale contract. Apart from the "charge" so understood, "other amounts" may be payable under the

contract and the statutory comparison calls for "any" other amount payable under the contract to be brought to account together with the charge, so understood, to enable the comparison with the cash price to be made.

170 Section 9(4)(b) removes from the statutory notion of "the amount payable under the contract" any amount that ceases to be payable following the exercise of a right of cancellation by the hirer at the earliest opportunity, and the construction of s 9(4)(b) must take into account that s 9(1) contemplates two categories of financial obligations under the contract addressed by s 9(1). The first is the "charge" comprising the periodic hire payments or obligations or "instalments" and the second is "an amount" payable under the contract and for the purposes of the statutory comparison, the relevant amount is "any other amount payable under the contract". The "charge" is, of course, an amount payable under the contract, but taxonomically that amount is treated discretely as a "charge", and other amounts payable under the contract are not treated as part of the charge but characterised as "any other amount payable under the contract".

171 When s 9(4)(b) refers to "the amount payable under the contract" as not including any amount falling within the description in subparagraph (b), s 9(4)(b), if understood to be properly addressed to the financial obligation in s 9(1) other than the "charge" component (thus engaging with that component of s 9(1) addressed to other amounts payable under the contract), the purpose of s 9 remains served by the section, and sections 9(1) and 9(4)(b) engage *coherently* with the *evident* statutory purpose of the section.

172 If, on the other hand, s 9(4)(b) is construed as addressed to amounts including, taxonomically, the "charge" component, the construct contemplated by s 9(1) is entirely defeated by removing from the statutory comparison *all* of the payments constituting the *charge component*, thus having the effect of removing the contract addressed by s 9(1), from s 9(2), s 4, s 9(3) and s 5(1) and, in consequence, removed from all of the protective provisions constituting the *normative* scheme for regulating credit contracts and the conduct of credit providers.

173 Such a result would be absurd.

174 Section 9(4)(b), properly understood, is confined in its operations to not including amounts within the second element of the financial obligation contemplated by s 9(1). All of the payments representing the weekly charges referred to in each of the contracts in issue in these

proceedings remain included within the statutory comparison for the purposes of s 9 of the Code.

175 In considering the construction to be attributed to s 9 of the Code, I have taken into account the submissions of the parties and particularly those on behalf of R2O and Mr Green on the various instruments that may have influenced the Parliament's adoption of the present text of s 9 of the Code.

176 The history seems to be this.

177 Prior to the adoption of a uniform credit law throughout the Australian States and Territories in the form of the *Uniform Consumer Credit Code* (the "UCCC"), each State and Territory had enacted a *Credit Act*. In Queensland, the Act was the *Credit Act 1987* (Qld). The UCCC was adopted throughout Australia as a result of a co-operative scheme by which each of the State jurisdictions (and Territories) adopted a uniform or model law based on model legislation first enacted by the Queensland Parliament as the *Consumer Credit (Queensland) Act 1994* (Qld). In order to establish the present scheme governing the provision of consumer credit and related matters contained in the NCCP Act and the National Credit Code, each State jurisdiction referred the necessary scope of legislative power to the Commonwealth for the purposes of s 51(xxxvii) of the *Constitution*.

178 The starting point then, in the history, is s 15(1) of the *Credit Act 1987* (Qld) which provided that a contract for the hiring of goods was deemed to be a credit sale contract if the cash price of the relevant goods at the time when the contract was made was not more than $40,000 and under the contract, the hirer had a right or obligation to purchase the goods. In 1992, the Governor in Council made an Order in Council entitled the *Credit (Rental Purchase Exemption) Order 1992*, under the provisions of the *Credit Act 1987*. Clause 2(1) of the Order in Council provided that s 15 of the *Credit Act 1987* did not have effect in relation to a contract for the hiring of goods "unless the amount payable under the contract is more than the cash price of the goods". Clauses 2(2) and 2(3) of the Order in Council provided that the term "amount payable" included the agreed or residual value of the goods, but did not include, as to clause 2(3)(b), the amount that ceases to be payable on the termination of the contract following the exercise of a right of cancellation by the hirer at the earliest opportunity.

179 The idea, at least, in s 9(4)(b) of the Code can be seen in clause 2(3)(b) of the order in Council.

180 The formulation in clause 2 of the Order in Council, subject to what follows, seems to have been adopted as s 10 of the UCCC.

181 Clause 2(1) of the Order in Council contemplated a statutory comparison between "the amount payable under the contract" and the "cash price" of the goods, and in that comparison, clause 2(3)(b) of the Order in Council provided that the "amount payable" under the contract did not include "the amount" that ceases to be payable (in the circumstances described above). Clause 2 of the Order in Council was coherent because 2(1), 2(2) and 2(3) spoke in terms of the "amount payable" under the contract.

182 Any taxonomic concept of "the charge that is or may be made for hiring the goods" was foreign to the Order in Council.

183 That concept, however, formed part of s 10 of the UCCC. Section 10 of the UCCC is in almost identical terms to s 9 of the National Credit Code. It seems that the model UCCC legislation at s 10 made a deliberate distinction between the approach of a ubiquitous notion of the "amount payable" including or not including particular amounts as adopted by the Order in Council, on the one hand, and the notion of a "charge that is or may be made for the hiring of the goods", and "amounts" payable engaging the phrase "any other amount payable", as adopted in s 10 of the UCCC, on the other hand.

184 The distinction emerging in s 10 of the UCCC was preserved in s 9 of the National Credit Code. There must have been a reason for adopting the distinction in s 10 of the UCCC (and departing from the formulation in the Order in Council) and a reason for preserving the distinction in s 9 of the Code. The task, however, is not one of searching for meaning, but one of attributing meaning to the text, and the text reflects a distinction between that which went before and that which emerged in the UCCC and was then preserved in s 9 of the Code. The text differentiates the hiring charge from the notion of other "amounts payable" under the contract. That differentiation contained in the text, although unexplained, seems to confine the role of what is now s 9(4)(b) to the field of the other amount payable under the contract and not to the field occupied by payments falling under the description "the charge that is or may be made for the hiring of the goods", for the purposes of s 9(1).

185 Accordingly, having regard to all these considerations, the NCCP Act and the Code apply to each of the contracts in issue in these proceedings.

186 It follows that R2O and Mr Green accept that R2O has contravened ss 32A(1), 17(4) and 17(5) of the National Credit Code "in the respects alleged".

187 Mr Green concedes that if the Code applies to the contracts in issue (as it does), the evidence supports a finding that he was "involved in" R2O's contravention of s 17(5) of the Code. I proceed on the basis that that concession should be understood as a concession that Mr Green was "knowingly concerned" in R2O's contravention of s 17(5) for the purposes of s 177(1) of the NCCP Act, which would support a declaration to that effect for the purposes of an order contemplated by s 177(1).

188 As to the contraventions of ss 32A, 23(1), 17(4) and 17(5), I accept the evidence of Mr Hill, Ms Schoch and Mr De Waard. I accept the evidence of Mr Ashe. I will address the evidence of Mr Green later in these reasons. The evidence adduced by ASIC supports the conclusion, which I find, consistent with the concession made by R2O, that R2O has engaged in contraventions of ss 32A, 23(1), 17(4) and 17(5) of the Code. Mr Roberts does not contest any aspect of the case advanced by ASIC or the evidence adduced by ASIC on any matter.

189 Apart from these matters, R2O and Mr Green concede that R2O contravened ss 12DA(1) and 12DB(1)(g) of the ASIC Act. The concession that R2O has contravened those two provisions of the ASIC Act is made by R2O and Mr Green (as the source of the instructions on behalf of R2O), in what is said to be a "recognition" that ASIC's evidence establishes that in respect of 177 of the 232 contracts in issue, the annual interest rate actually charged to the hirer/buyer (consumer) was higher than the annual interest rate recited in those 177 contracts.

190 R2O accepts that this conduct constitutes conduct, in trade or commerce, in relation to financial services, that is misleading or deceptive or is likely to mislead or deceive in contravention of s 12DA(1), ASIC Act.

191 R2O also accepts that the conduct described at [189] is conduct constituting the making of a false or misleading representation with respect to the price of services in trade or commerce in connection with the supply or use of financial services, in contravention of s 12DB(1)(g) of the ASIC Act.

192 I am satisfied that those concessions were correctly made having regard to ASIC's evidence of the 177 examples of an annual interest rate charge being made or charged to the hirer greater than the rate recited in each case in the relevant hirer's contract. Having regard to ASIC's

evidence on these matters, I find that R2O has contravened, in the respects alleged, s 12DA(1) and s 12DB(1)(g) of the ASIC Act.

193 In the contracts in issue in these proceedings, the annual interest rate is central to the price of the provision by R2O of the credit service. The insertion of the interest rate into the price calculator is one of the essential features of the determination of the amount of the periodic repayment over the term. Thus, the interest rate is one of the essential factors that determines, over the life of the credit facility, the cost of the provision of credit, otherwise understood as the price of the service.

194 As to ss 12DA(1), 12DB(1)(a) and 12DB1(g) and the supply of "financial services", these statutory matters should be noted: s 12BAB(1) provides, subject to the Regulations, that a person provides a "financial service" if they provide financial product advice (s 12BAB(1)(a)), deal in a financial product (s 12BAB(1)(b)), or provide a service that is otherwise supplied in relation to a financial product (s 12BAB(1)(g)), among other matters contained in the subsection; s 12BAA(7)(k) provides that a *credit facility* (within the Regulations) is a *financial product*; reg 2B(1)(a) provides, for s 12BAA(7)(k) that the *provision of credit* for any period (and subject to reg 2B(1)(a)(ii) and (iii)) is a credit facility and thus a financial product for the purposes of Division 2 of Part 2 of the ASIC Act (within which ss 12DA and 12DB fall); as to the *provision of credit* for the purposes of reg 2B(1) and s 12BAA(7)(k) of the ASIC Act, reg 2B(3) provides that *credit* means a contract, arrangement or understanding under which the payment of a *debt* by one person to another is deferred or a debt is incurred by a person to a credit provider, and includes a hire purchase agreement: reg 2B(3)(b)(ii).

195 Accordingly, each of the contracts in issue as between R2O and the hirer engage the supply of a *financial service* within s 12BAB(1) because they engage the provision of *credit* by R2O, which is a *credit facility* concerning a *financial product*, all as defined.

196 The next question that falls for determination is whether R2O has contravened s 12DB(1)(a).

Section 12DB(1)(a)

197 Although this section has been described earlier, it is convenient to identify the text of the section here. It is in these terms.

> **12DB False or misleading representations**
>
> **12DB(1)** A person must not, in trade or commerce, in connection with the supply or possible supply of financial services, or in connection with the promotion

by any means of the supply or use of financial services:

(a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

…

198 ASIC's contention is that the same facts which give rise to a contravention of s 12DB(1)(g) also give rise to a contravention of s 12DB(1)(a) because the misleading representation as to the centrally important matter of the interest rate is a false or misleading representation that the financial service provided by R2O has, or the services are, of a particular "quality" or "value".

199 ASIC contends that the statutory term "quality" in s 12DB(1)(a) means an attribute or property or special feature.

200 The contention is that because the interest rate nominated in each contract over the life of the credit facility is a centrally important matter, actually charging *that rate* instead of a higher rate in the case of 177 contracts is a matter, feature or attribute of the financial service which goes to the quality of the service, not just a matter going to the price of the service. ASIC also contends that the inaccuracy in the rate charged compared with the contract rate also goes to "value". In other words, notions of "quality" and "value" are broader than the notion of "price".

201 R2O and Mr Green contend that the "standard, quality, value or grade" of financial services are to be distinguished from the price of those services, and because the prohibition in s 12DB(1) is addressed *separately* to standard, quality, value or grade on the one hand, and price on the other, a false or misleading representation as to the price of services is not one which can also fall within the statutory description of a false or misleading representation as to standard, quality, value or grade.

202 The term "quality" means "the standard of something as measured against other things of a similar kind; the degree of excellence of something; a distinctive attribute or characteristic possessed by someone or something": *The New Oxford Dictionary of English*.

203 In *Given v C V Holland (Holdings) Pty Ltd* (1977) 15 ALR 439, Franki J considered whether a representation by conduct that a motor vehicle had travelled 23,700 miles, when in fact it had travelled "substantially in excess of that mileage" (69,012 miles), engaged a contravention of s 53(a) of the *Trade Practices Act 1974* (Cth). The relevant phrase was "falsely represent that goods were of a particular standard, value, grade or composition." Franki J adopted "an attribute, property, special feature" as the appropriate meaning of "quality" in s 53(a) and

concluded that a representation as to distance travelled was a representation as to a particular attribute or special feature of the vehicle and thus a representation as to quality.

204 The view that "quality" in s 53(a) means an attribute or special feature was followed in ("*Ducret*").

205 One of the representations in issue in *Ducret* was that the respondent had represented that a Princess Bokhara rug had a particular quality because it had a current value of $1,675, when it did not. In *Ducret*, Ryan J concluded at 199 that the words in s 53(a) "standard, quality, value, grade, composition, style or model" are not mutually exclusive ("and indeed one can think of many instances where they [overlap]") and, at 199, although "standard" is a narrower term than "quality", a representation that goods have a value expressed as an amount of money is capable of being characterised as *both* a representation as to a particular standard and a representation as to a particular quality of the goods, subject to the facts of each case.

206 Ryan J also concluded that the authorities (some of which are mentioned earlier) suggest that "a wide meaning has been given to "quality" in s 53(a)" and, at 199, that the term "standard" ought to be understood as "a definite degree of any quality, viewed as a prescribed object of endeavour". That view as to "standard" was adopted by French J in *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415 at 423.

207 Section 53(a) contained, as s 12DB(1) contains, prohibitions upon making representations of a particular kind characterised by particular language, one aspect of which, in addition to the language of s 53(a), was a prohibition upon making a false or misleading representation as to price. Just as the "components" of s 53(a) (as Ryan J in *Ducret* describes the elements of s 53(a)) are not mutually exclusive and in many cases, are likely to overlap, the statutory text of s 12DB(1)(a) does not suggest that the components of s 12DB(1)(a) are mutually exclusive. Moreover, there is nothing in the text of s 12DB(1) that suggests that each of the *subparagraphs* of the subsection are mutually exclusive.

208 A representation that a credit provider provides credit for the purchase of a used car on the critically important matter of an interest rate of 45% (or some other particular figure) as the cost of the credit over the period of the credit contract when in fact the rate actually charged was, from the very outset of the contract, going to be significantly higher than the nominated figure, is a matter that goes to price, but also to the very quality of the financial service.

209 A credit provider that actually charges more than it has told the credit customer it will charge (and bound itself to charge), is engaged in conduct of making a false or misleading representation that the financial services are of a particular quality, whatever other characterisation the representation might bear. The matter as to "quality" is consistency with the promise as to the rate. The representation also goes to the value of the financial services, as charging a higher rate of interest than that provided for by the contract is conduct in connection with the supply of the services that suggests that the services have a value to the hirer/debtor that they do not have, due to the higher rate of actual charge.

210 I am satisfied that R2O has contravened s 12DB(1)(a) of the ASIC Act in respect of all of those contracts where the interest rate actually charged to the customer/hirer is greater than the rate nominated in the contract.

211 It follows that R2O has engaged in conduct in contravention of s 12DA(1), s 12DB(1)(a) and s 12DB(1)(g).

Principles in relation to the notion of whether a person is "knowingly concerned" in the contravention of another

212 The questions to be determined are: whether the Court is satisfied that Mr Green is a person who has engaged in conduct that constitutes being in any way, directly or indirectly, knowingly concerned in, or a party to, the contraventions by R2O of ss 32A, 23(1), 17(4) and 17(5) of the *National Credit Code*, for the purposes of s 177(1)(e) of the NCCP Act; and whether the Court is satisfied that Mr Green is a person who has engaged in conduct that constitutes being, in any way, knowingly concerned in, or party to, the contraventions by R2O of ss 12DA(1), 12DB(1)(a), and 12DB(1)(g) of the ASIC Act for the purposes of s 12GBA(1)(e) of that Act.

213 Section 177(1) of the NCCP Act confers power on the Court to grant an injunction in such terms as the Court considers appropriate if satisfied that Mr Green has engaged in s 177(1)(e) conduct, and s 12GBA(1) confers power to order Mr Green to pay a pecuniary penalty if the Court is satisfied that Mr Green has engaged in s 12GBA(1)(e) conduct. In both cases, the reach and source of the power, so far as it engages the conduct of a person knowingly concerned in the conduct of another, is found in the section, not in a provision dealing only with definitional matters.

214 The principles to be applied in determining whether a person has been knowingly concerned in the contravening conduct of another are said by Mr Green to be the subject of some debate in the authorities.

215 The principles to be applied are these.

216 In *Yorke v Lucas* (1985) 158 CLR 661, Lucas was the managing director of a company (the "Lucas Company") that carried on business as a real estate and business agent. The Lucas Company acted for the vendor ("Treasureway") in the sale of that company's business to Yorke and others. Yorke claimed damages under s 82 of the *Trade Practices Act 1974* (Cth) ("*TPA*") against Treasureway, a director of Treasureway (Mahoney), the Lucas Company and Lucas based on contended contraventions of s 52 of the *TPA* on the footing that representations as to the weekly turnover of the vendor's business in a particular period were both misleading and deceptive. Section 82 provided that a person who suffered loss or damage by conduct of another done in contravention of s 52 (among other provisions) of the *TPA* was entitled to recover the amount of that loss or damage against "any person involved in the contravention". Lucas was said to have been "involved in" the contravention for the purpose of s 82 having regard to s 75B(a) and (c) of the *TPA*. Relevantly for present purposes, Lucas was said to have been "knowingly concerned in, or party to" the contravention: s 75B(c), which is in the same terms as s 177(1)(e) and s 12GBA(1)(e). Lucas was also said to have aided, abetted, counselled or procured the contravention: s 75B(a).

217 The primary judge found that Treasureway (the vendor) engaged in the contravening conduct; that the Lucas Company engaged in the contravening conduct as agent for Treasureway (although its conduct was said to be "unwitting"); and that Treasureway's director, Mahoney, was knowingly concerned in Treasureway's contravention by virtue of s 75B(c). The primary judge dismissed the claim against Lucas on the footing that Lucas was "insufficiently aware of the relevant facts" for him to be knowingly concerned in the contraventions by Treasureway (and, it seems the Lucas Company).

218 The Full Court dismissed Yorke's appeal from the dismissal of the claim against Lucas. The Lucas Company did not appeal from the finding against it. The question to be determined by the High Court was what state of knowledge must a person have for the purposes of s 75B(c) to be knowingly concerned in (or party to) the contravention of another (and whether Lucas was a person whose conduct fell within s 75B(a) of the *TPA*).

219 As to the state of knowledge, the High Court made a number of observations.

220 At the outset, the plurality, Mason ACJ, Wilson, Deane and Dawson JJ, observed at 666 that *notwithstanding* that the Lucas Company had *not* appealed, the facts as found by the primary judge raised the question of *whether* the Lucas Company was "guilty of any contravention of s 52".

221 Reflecting on the scope of the conduct contemplated by s 52, the majority said this at 666:

> It is, of course, established that contravention of [s 52] does not require an intent to mislead or deceive and even though the corporation acts honestly and reasonably, it may nonetheless engage in conduct that is misleading or deceptive or is likely to mislead or deceive. That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive.

222 As to persons who are said to have been in any way, directly or indirectly, *knowingly concerned* in, or party to, the contravention of another (the s 75B(c) ground), the majority said this at 670:

> There can be *no question* that a person *cannot* be knowingly concerned in a contravention unless he [or she] has knowledge of the *essential facts constituting* the contravention. It cannot, therefore, be suggested that Lucas falls within the first limb of par. (c) [knowingly concerned].
>
> [emphasis added]

223 Although a different limb of s 75B(c), as to the notion of "party to" a contravention, the majority also said this at 670:

> In the context of the paragraph [s 75B(c)], a person could only properly be said to be "party to" a "contravention" if his [or her] participation was in the context of knowledge of the essential facts constituting the particular contravention in question… In our view, the proper construction of par. (c) requires a party to a contravention to be an intentional participant, the necessary intent being based upon knowledge of the essential elements of the contravention.

224 In *Yorke v Lucas*, Brennan J said this at 675 and 676:

> When the conduct constituting the contravention is the making of a false representation, it is immaterial that the corporation did not know that the representation was false when it was made. The essential facts to be established in sheeting home liability to a corporation under s 52 include the *making* of the representation and the *falsity* of the representation but not the corporation's knowledge of the falsity.
>
> [emphasis added]

225 Turning then to s 75B(a), Brennan J observed at 676 that construing that provision *as though* it were imposing criminal liability for aiding, abetting, counselling, or procuring an offence, a person cannot be made liable under that paragraph concerning a contravention of a provision of Part IV or V of the *TPA unless* he or she has knowledge of the essential matters that constitute the offence, observing that in *Giorgianni v The Queen* (1985) 156 CLR 473 at 506, their Honours held that intentional participation in a crime was necessary to make a person criminally liable for aiding, abetting, counselling or procuring its commission. Brennan J observed that their Honours had confined the requirement of intention and thus the requirement of knowledge to the commission of the acts which constitute the offence.

226 In considering s 75B(a), Brennan J observed at 677 that in determining who is *civilly liable* for a s 52 contravention under s 75B(a) "no question arises as to whether the person upon whom liability is sought to be imposed knew that another person would or might be misled or deceived by the contravening conduct". However, Brennan J observed at 677 that s 75B(a) does require *knowledge of the acts* constituting the contravention and of the *circumstances* which give *those acts the character* which s 52 defines, namely, "misleading or deceptive or… likely to mislead or deceive" [emphasis added]. Brennan J also observed at 677 that the "operation of s 75B(a) in conjunction with s 52 may be incongruous, for s 52 throws a strict liability on a corporation, but s 75B(a) does not extend liability for a s 52 contravention to a person who procures the corporation to engage in contravening conduct *if* that person is *honestly ignorant* of the circumstances that give that conduct a contravening character" [emphasis added]. Brennan J also observed at 677 that "the requirement of knowledge under par. (a) is no less stringent under par. (c)".

227 As to the state of knowledge of Lucas, having regard to the test identified by the majority at 670, the undisputed findings of fact and accepted evidence make it clear why Lucas was not knowingly concerned in Treasureway's contravention (and nor clearly enough, in the view of the majority, was the Lucas Company so engaged, even though the question was not alive before the High Court). As to those findings and that evidence, the evidence was that Lucas had told the purchaser that he (Lucas) "had no figure work to confirm" the gross receipts or trading profit and had no statement prepared by an accountant. Lucas told the buyer that he "only had answers to questions he had asked" of the director of Treasureway (Mahoney) and that he, Lucas, as director of the Lucas Company, had not verified the profit and turnover amounts.

228 In other words, Lucas had no knowledge (and said so) of whether the turnover and profit figures were correct or incorrect. He merely knew that they were the figures said by Mahoney to be the trading figures: see *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 ("*Google*"), Hayne J at [106] and [107].

229 Two things should be noted. *First*, there was no suggestion that Lucas had made an independent representation that the trading figures identified by the vendor's director were, in fact, the true trading figures. *Second*, as to the claim that Lucas was knowingly concerned in the vendor's contravention, Lucas did not know the "essential facts constituting the contravention", or put another way, he did not know the essential circumstances that gave the vendor's conduct a contravening character: that is, that the trading figures said by the vendor to be the turnover and profit figures were incorrect and misstated the correct position by exaggerating, favourably to the vendor, the trading performance. In other words, one of the essential facts to be known was that the trading figures *were incorrect*.

230 It seems clear enough from the observations in *Yorke v Lucas* that a party seeking to establish that a person has been knowingly concerned in the contravention of another (at least in terms of the language of s 75B(c), s 177(1)(e) and s 12GBA(1)(e)) need not establish that the person knew that the conduct in which he or she is said to have been concerned had a particular legal character or that the person knew that the conduct of that other engaged a particular sequence of integers of a statutory provision rendering that other's conduct contravening conduct. Put another way, it is not necessary that the person know that the conduct is "misleading or deceptive" which is a conclusion about the import or legal consequences of the facts and circumstances giving rise to the contravention. It is enough if the person knows the essential facts giving rise to the contravention, one essential fact being, however, knowledge of the correctness or incorrectness of the relevant representation, which in the case of Lucas, was absent.

231 What is essential is that the person knows the essential facts and circumstances constituting the contravention by that other which gives the conduct the character of a contravention. The critical matter in all such cases is the content of the "statutory text" that governs the contravention (in which the person is said to be knowingly concerned) because "each case must be understood by reference to the statutory text and the particular facts that were identified as relevant to the application of that text": *Google*, Hayne J at [101]. It is those particular "facts and circumstances" that bear upon *whether* the conduct is contravening conduct (in the case of

Yorke v Lucas and *Google*, misleading and deceptive conduct in contravention of s 52), and which determines the essential facts and circumstances the relevant person must know in order to be knowingly concerned in the contravention.

232 In *Google*, the question was whether Google had engaged in misleading and deceptive conduct contrary to s 52 of the *TPA* by displaying misleading and deceptive "sponsored links" in response to a user's insertion of a search term into the google search engine. Because Google was not the "maker, author, creator, or originator" of the information in any of the sponsored links (advertisements), Google was not endorsing but merely passing on the sponsored links "for what they were worth". Although the question in Google was one of whether Google engaged in a contravention of s 52 rather than whether it was knowingly concerned in the conduct of the advertiser, the unchallenged finding that Google was not the "maker, author, creator, originator or endorser" of the sponsored links seems to have put Google in the same position, as a matter of principle, as Lucas: that is, insufficiently knowledgeable of the essential facts and circumstances as to incorrectness in the content of the material in issue in the case: see the explanation in *Milorad Trkulja (aka Michael Trkulja) v Google LLC* [2018] HCA 25; (2018) 263 CLR 149, the Court at [58].

233 *Yorke v Lucas* is a case in which Lucas, as director of the agent entity, was at least once removed from the conduct of the vendor Treasureway by the conduct of its director (Mahoney).

234 Three years later, the Court in *Hamilton v Whitehead* (1988) 166 CLR 121 ("*Hamilton*") was concerned with the conduct of a person in the position of Mahoney in *Yorke v Lucas*. The Court, constituted by Mason CJ, Wilson and Toohey JJ, affirmed aspects of the observations of the majority in *Yorke v Lucas*.

235 In *Hamilton*, Company E was charged with offering or issuing to the public a prescribed interest in a trust called the Class European Restoration Syndicate Trust in contravention of provisions of the *Companies (Western Australia) Code* (the "Code"). Whitehead, the managing director of Company E, was charged with being knowingly concerned in the company's contraventions of the Code in reliance on s 38(1) of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Western Australia) Code* which rendered a person knowingly concerned in the commission of an offence against the Code, a person deemed to have committed the relevant offence. The primary judge had concluded that it was "clearly wrong and offensive" to proceed against Whitehead for "the identical acts and decisions" relied upon as the acts of the company. The Court at 126 emphasised the importance attaching to properly

characterising the respective liabilities that rest upon a company and its officers. The Court observed that the relevant provisions of the Code spoke "directly" to the company and the provisions did not render the company vicariously liable for an act of the managing director as servant.

236 In that context, the Court said this at 127 and 128:

> There can be no doubt, on the facts of the present case, that the respondent [Whitehead], in placing the advertisement and in dealing with those who replied to it, was the company. He was its managing director and his mind was the mind of the company. The company therefore was liable as a principal for the breaches of s 169 of the Code. The liability was direct, not vicarious. It is against this background that the liability of the respondent falls to be considered. As we have said, the applicant relies upon s 38(1) of the Interpretation Code, the terms of which have been set out. Since the respondent was the *actor* in the conduct constituting the offences and had *knowledge of all the material circumstances*, it must follow, according to the applicant, that the respondent was "knowingly concerned" in the commission of the offences committed by the company. In our opinion, the submission is plainly right.
>
> [emphasis added]

237 The Court also made the following observation at 128:

> Indeed, the fundamental purpose of the companies and securities legislation – to ensure the protection of the public – would be seriously undermined if the hands and brains of a company were not answerable personally for breaches of the Code which they themselves have perpetrated. Section 38 plays a vital role in the whole scheme of the legislation and the legislative intention is plainly expressed in its words.

238 The Court also returned to some observations the plurality had made in *Yorke v Lucas* (at 671) about *Mallan v Lee* (1949) 80 CLR 198. Mason CJ (as his Honour was in *Hamilton*) and Wilson J formed part of the majority in *Yorke v Lucas* and two of the three members of the Court in *Hamilton*. The Court in *Hamilton* reflected on the outcome of the Court's decision in *Yorke v Lucas* and observed at 129 that the appellants had failed in the claim against the managing director, Lucas, "for the reason that he was insufficiently aware of the facts to be "involved in the contravention" within the meaning of ss 75B and 82 of the Act". The Court also observed at 129 that "the sole issue that required the consideration of this Court was the question whether it was necessary in order for a person to be involved in a contravention that the person have knowledge of the essential matters that make up the contravention" and "the Court answered that question in the affirmative".

239 Intermediate courts of appeal have expressed observations about the principles identified by the majority (and Brennan J) in *Yorke v Lucas* (although little has been said about the Court's endorsement of those principles in *Hamilton*). Of course, I am bound by the expression of

principle identified by the High Court in circumstances where observations of an intermediate Court of Appeal might be thought to be inconsistent with the principles established by the High Court.

240 The respondents have made submissions about a decision of the Full Court of this Court, *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 ("*MBF v Cassidy*") in the context of references to that authority in a decision of White J relied upon by ASIC, *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 235 FCR 181 ("*ActiveSuper*").

241 In *MBF v Cassidy*, the essential facts were these. In 2002, the appellant, MBF, caused a number of television, newspaper and billboard advertisements to be published. There was much competition between health funds to attract subscribers and, in the case of benefits relating to obstetrics services, the MBF advertisements suggested that the usual waiting periods for eligibility for benefits would not apply. The slogan was "Join today. Claim tomorrow". However, in fact, waiting periods did apply in relation to pregnancy services and thus particular rights and benefits would not accrue immediately to those subscribing for insurance services with MBF. The television and billboard advertisements were created by an advertising agency called "Bevans". Bevans arranged for the advertisements to be published. The primary judge found that MBF had engaged in a contravention of the *ASIC Act* (provisions that are now s 12DA(1) and s 12DB(1)(g) of the *ASIC Act*) and found that Bevans was knowingly concerned in MBF's contraventions: s 12GD(1)(e) of the *ASIC Act*.

242 Bevans appealed from that finding.

243 Moore J concluded at [13] and [14] that there were at least three "essential matters" that needed to be within the knowledge of Bevans for the purpose of applying the principle in *Yorke v Lucas*. The first was "publication" of the advertisements. The second was that the "content of the advertisements (being the visual images, the sound and the way they were formatted and sequenced) might lead members of the public to believe that certain benefits would be enjoyed or rights conferred by taking out insurance with MBF". The third matter was that, in fact, those rights or benefits "would not be [so enjoyed]".

244 Moore J observed at [14] that Bevans knew that the advertisements were being prepared for publication and knew that they had been published. Moore J also observed that the primary judge seemed to have found that "Bevans knew… that waiting periods did apply in the case of

pregnancy [services] and thus the contentious rights and benefits would not accrue". Moore J also observed at [14] that the primary judge appeared to have found that Bevans did not "understand" that "*members of the public might be led to believe*, having regard to the content of the advertisements, that certain benefits would be enjoyed or rights conferred by taking out insurance with MBF": [emphasis added]. Moore J also observed at [14] that although the primary judge appeared to have found that Bevans "knew that waiting periods did apply in the case of pregnancy", the primary judge seemed to have accepted that Bevans, knowing that waiting periods did apply, "did not appreciate that the advertisements might be understood as indicating the waiting periods did not apply".

245 Thus, for Moore J, Bevans was not aware of the second of the matters his Honour had earlier mentioned, that is, Bevans, although it knew that waiting periods did apply before the contentious rights and benefits would accrue, was not aware that the content of the advertisements might lead members of the public to believe that those benefits would be enjoyed or conferred by taking out insurance with MBF. As a result, Bevans was not liable as an accessory (that is, a person falling within s 12GD(1)(e) of the ASIC Act). Mansfield J agreed with Moore J.

246 However, at [15], Moore J also observed that accessorial liability, where the contravening conduct of the principal contravener involved engaging in misleading and deceptive conduct, does *not depend* upon a party establishing that the accessory "knew that the representations were false or misleading". However, Bevans was found not to be knowingly concerned in MBF's contravention (notwithstanding that it knew the falsity of the advertisements), because it did not "understand" or "appreciate" that members of the public might be led to a false belief about the benefits. Moore J also said at [15] that "all that would be necessary would be for the accessory to know of the matters that enabled the representations to be characterised in that way". That is precisely what Bevans did know. In order to be consistent with the principle in *Yorke v Lucas*, the position is that it is not necessary to show that the contended accessory knew that the conduct of the principal contravener attracted the legal conclusion or description of being misleading or deceptive conduct or conduct likely to mislead or deceive. What is necessary is that the contended accessory knew the essential fact, that is, that the representation *was incorrect*. The circumstance that Bevans did not know or "appreciate" or "understand" that the incorrectness of the statements in the advertisement might lead a consumer to a false belief about the rights and entitlements under the policy, or did not know that making the incorrect statements bears the description or *characterisation* of being a misleading or deceptive

representation or a representation likely to mislead or deceive, was irrelevant to the question of whether Bevans was knowingly concerned in MBF's contravention, and inconsistent with the principle in *Yorke v Lucas*.

247 The reason Lucas was *not* knowingly concerned in the vendor's contravention was that Lucas did not know, and had no basis for knowing, that the turnover and other trading figures *were incorrect*. Had Lucas known the figures to be incorrect, he would have been liable as an accessory, not for the reason that he knew the conduct to be "misleading" (which is a characterisation of the conduct), but rather because he knew the representation to be wrong, incorrect, or false. That is what is required to be shown.

248 In *MBF v Cassidy*, Stone J also found that Bevans was not knowingly concerned in MBF's contravention. Stone J considered at [85] that in *Yorke v Lucas* the High Court "interpreted the accessory liability provisions not as requiring that the accessory know the essential elements of the contravening *conduct* but that he or she knew the essential elements of the *contravention*" [original emphasis].

249 If her Honour is suggesting that the contended accessory must know that the conduct of the principal contravener *is* a contravention of the relevant provision or know that the impugned conduct is *characterised* as a contravention of the relevant section, I would respectfully disagree that *Yorke v Lucas* requires that state of knowledge.

250 The principle in *Yorke v Lucas* certainly requires the accessory to know, as a fact essential to a contravention, the *incorrectness* of the representation. Her Honour's quoted premise led her Honour to observe: "as earlier stated this involves knowing, in addition to what happened, the fact that the relevant conduct is misleading or deceptive or likely to mislead or deceive". That is not so because that is the characterisation of the conduct, that is to say, a conclusionary characterisation of the essential facts.

251 *Yorke v Lucas* requires a party who asserts that a person is knowingly concerned in the contravention of another to demonstrate that the contended accessory *knew* the *essential facts* or *essential circumstances* of the conduct of the principal actor said, in that case, to engage a contravention of s 52. One of the essential facts, in a matrix of fact going to that question is (and was in that case) whether the contended accessory knew, having regard to all the essential facts and circumstances, that the content of the statement or the representation in question was incorrect, that is, that the trading figures were wrong. If the representation is known by the

contended accessory to be incorrect, in the context of the essential facts and circumstances known to the accessory as to the relevant subject matter, and those facts are capable of bearing the *conclusionary characterisation* that the conduct of the principal actor bears the legal description of misleading or deceptive conduct, or conduct likely to mislead or deceive, the *circumstance* that the accessory does not know that the conduct bears that description or that he or she does not believe that anyone would be misled, is irrelevant.

252 The critical matter is whether the contended accessory knows that the representation is wrong or incorrect. Sometimes, the authorities describe the question as whether the contended accessory knows the content of the representation to be false, that is, incorrect.

253 The difficulty here may be one of similarity of language in describing the underlying conduct in the language of the character of the contravention itself.

254 When Stone J observes that the contended accessory must know that the conduct of the principal actor is misleading or deceptive or likely to mislead or deceive, Stone J is using the language of the section contravened to describe the state of knowledge of the contended accessory. That is a difficulty. The contended accessory must know that the content of the statement or representation is wrong or incorrect (sometimes said to be false). Describing the contended accessory as needing to know that the representation is misleading or deceptive or likely to mislead or deceive may be, in the way expressed by her Honour, another way of saying that the contended accessory must know that the statement is incorrect. If so, use of the language of the section to convey that notion about an essential fact is apt to confuse the identification of the principle in *Yorke v Lucas* and its application to the facts.

255 Whether her Honour approached the matter in that way or not, what *Yorke v Lucas* requires is that the contended accessory must know the essential facts or essential circumstances which bear the characterisation of conduct in contravention of the relevant provision. The essential fact, or at least one of the essential facts, is whether the contended accessory knew the content of the representation to be wrong.

256 The Full Court of this Court in *Quinlivan v Australian Competition and Consumer Commission* (2004) 160 FCR 1, Heerey, Sundberg and Dowsett JJ, correctly, with respect, observed at [10] that the *Yorke v Lucas* principle requires that if s 75B of the *TPA* is to apply (being the relevant provision engaged in that case) "actual knowledge of the essential elements of the contravention is required". Their Honours also observed that "where the contravening conduct

involves misrepresentation, whether as to a future matter or not, [the *Yorke v Lucas*] principle requires *actual knowledge* by the accessorial respondent of the *falsity of the representation*": [emphasis added]. In other words, the contended accessory must know that the representation is wrong, incorrect or false. Their Honours observed that falsity of the representation is an essential matter which must be alleged and proved. Thus, falsity (incorrectness) of the representation is an essential fact that, in the context of the essential circumstances of the case, gives the making of the representation the *character* of misleading and deceptive conduct. It is not necessary to prove that the contended accessory knows that the conduct bears that characterisation and nor is it an answer to say that the contended accessory did *not believe* that the representation, that he or she knew to be wrong, was misleading or deceptive or likely to mislead or deceive.

257 In *Downey & Anor v Carlson Hotels Asia Pacific P/L* [2005] QCA 199, Keane JA, Williams JA and Atkinson J agreeing, observed that for liability to be imposed for being "knowingly concerned in" a contravention, "it is necessary to show that the alleged accessory had knowledge of the 'essential matters' making up the contravention": at [378]. Keane JA also said this:

> In [*MBF v Cassidy*] Moore J, with whom Mansfield J agreed, defined the "essential matters" in relation to a television advertisement as being the fact of publication, knowledge of the content of the advertisement and an awareness of matters that would allow the content to be characterised as misleading…

258 In *MBF v Cassidy*, however, Moore J observed that Bevans was not knowingly concerned in MBF's contravention not because it was not aware of "matters" that would allow the content of the advertisements to be "characterised" as misleading, but rather because it did not "understand" or "appreciate" that the matters of which it was aware (the incorrect statements in the advertisements about rights and entitlements to immediately make claims on the policy in relation to pregnancy services) might mislead consumers about the available benefits. Bevans certainly knew essential matters about the incorrectness of the statements in the advertisements that gave MBF's conduct the characterisation of misleading and deceptive conduct in contravention of s 52.

259 The New South Wales Court of Appeal in *CH Real Estate Pty Ltd v Jainran Pty Ltd; Boyana Pty Ltd v Jainran Pty Ltd* [2010] NSWCA 37, Basten JA (Beazley JA agreeing) observed that "the authority of *Yorke v Lucas* at 666-670 (Mason ACJ, Wilson, Deane and Dawson JJ) and at 677 (Brennan J) confirms that involvement for the purposes of s 75B depends upon knowing

involvement of the person said to have procured or otherwise been involved in the conduct, with knowledge, in the case of a representation, *of its falsity*.

260 In other words, the contended accessory must be shown to know that the content of the representation is false, incorrect or wrong.

261 The Court of Appeal in Victoria in *Body Bronze International Pty Ltd v Fehcorp Pty Ltd* (2011) 34 VR 536, Macaulay AJA (Harper JA and Hansen JA agreeing) observed at [73] that the primary judge's findings did not justify the conclusion that either contended accessory was relevantly involved in any contravention. That was said to be so because the primary judge "made no findings that either of them knew or believed the representation to be false either at the time it was made or at the time when the franchise agreement was entered into".

262 Again, the critical essential fact was whether the contended accessory knew the content of the representation to be incorrect or false.

263 In *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd* (2011) 196 FCR 212, Logan J observed that in order to establish accessorial liability against the relevant individual, in respect of the relevant representations, the ACCC must show that the individual had "actual knowledge" that the representation was made; that it was misleading; or that the maker of the representation had no reasonable grounds for making it.

264 As to the second matter, that element would only be correct if the reference to "misleading" is understood as a reference to the contended accessory knowing, as an essential fact, that the representation was untrue, incorrect or false. It is not necessary that an applicant show that the contended accessory knew the representation to be of a characterisation of misleading or deceptive conduct.

265 The critical matter is the underlying factual matter of whether the contended accessory knew the content of the representation to be incorrect.

266 It should also be noted that in *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) ATPR 40-940; (1989) 16 IPR 189 at 209, Lee J observed that s 75B(c) has been interpreted in *Yorke v Lucas* to require a party to a contravention to be an intentional participant in the sense that he or she possesses knowledge of the essential elements of the contravention. Lee J observed that the knowledge required "is not knowledge or awareness that the conduct has the capacity to mislead nor knowledge that it may be a contravention of s 52 of the Act". His Honour observed that "what must be shown to be possessed is knowledge of the elements of a contravention".

Those comments need to be understood in the context of his Honour's observations about the findings of the primary judge. His Honour observed that the acts which constituted the contravention of s 52 were the appellant's statement to potential investors in the course of inviting such persons to invest in the special units of the trust that such investors would receive a return of the premiums paid on their investment within a few months, without informing those potential investors of any qualifications on the prospect of repayment of the premiums. Lee J observed that obviously Collins (the contended accessory) *was aware*, prior to the meeting, that such a statement would require *qualification* because Collins had participated in a resolution of the board of directors that the speculative nature of the investment should be continually stressed to prospective unit holders. Lee J observed that it followed from that finding of the primary judge that Collins *possessed knowledge of the circumstances* that gave the conduct of the appellant *a misleading character*. Lee J observed that "it is immaterial whether Collins understood the import of those circumstances or held a positive belief as to the truth of the assertion he had made for the appellant". These observations reinforce the notion that it is not necessary to show that the contended accessory knew that the conduct had the capacity to mislead nor that the contended accessory knew that the conduct may be a contravention of the Act. These two matters are conclusionary matters about the character of the primary conduct. What is necessary is possession of knowledge of the circumstances including the critical fact that gave the conduct a misleading *character*, namely that the representation was simply wrong or false.

267 In *ActiveSuper* (2015) 235 FCR 181, White J makes a number of observations about claims that particular defendants were knowingly concerned in the contraventions of the primary defendants. It is not necessary to explain the content of all of the claims made in those proceedings. It is sufficient to note that ASIC contended that the primary defendants had engaged in contraventions of ss 727(1) and (2), s 911A and s 1041H of the *Corporations Act 2001* (Cth) and s 12DA(1) of the *ASIC Act*.

268 Those sections are concerned with a prohibition upon offering securities or distributing an application form for an offer of securities which requires disclosure to investors unless a disclosure document for the offer has been lodged with ASIC (s 727(1)); a prohibition upon carrying on a financial services business without holding an Australian Financial Services Licence (s 911A(1)); a prohibition upon engaging in conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive; and, as

already mentioned, a prohibition upon engaging in conduct in relation to financial services that is misleading or deceptive or likely to mislead or deceive.

269 As to the claims that particular defendants were knowingly concerned in those contraventions, White J sets out a number of "general principles" in relation to involvement as an accessory in the contraventions of others at [398] – [411]. I respectfully generally agree with those observations.

270 At [456], White J expresses further observations specifically about the question of the elements ASIC would need to establish to show that the particular defendants were knowingly concerned in the contraventions of s 1041H and s 12DA. As to those matters (which address the topic of misleading or deceptive representations or representations likely to mislead or deceive), White J said this.

> In a case of misleading or deceptive conduct by representation, the applicant must establish that the alleged accessory knew that the representation was being made and had knowledge of the *matters making* the representation… *false*. However, ASIC does not have to establish that the MOGS defendants [the contended accessories] knew that the representations *were false or misleading*, only that they knew of the *matters* which warrant the representations being *characterised* in that way: *Cassidy* at [15]… Although Stone J took a different approach and there have been differing views about the correctness of the majority decision in *Cassidy*, it has generally been followed.
>
> [emphasis added]

271 These observations, with respect, do not accurately state the *Yorke v Lucas* "principle" or the precise formulation of the reasoning of Moore J in *MBF v Cassidy*.

272 ASIC must show that the contended accessory knew the "essential facts" or "essential circumstances" constituting the contravention and in a case based on representations made by the "primary defendants", the contended accessory must be shown to know that the content of the representation was incorrect (or, put another way, "false" in the sense of being incorrect). Knowledge of the incorrectness of the representation is critical. It must be pleaded and proved. It is not necessary to show that the contended accessory knew that the making of the representation was, in fact, "misleading" of anyone or that he or she knew that the representation bore the characterisation of being a misleading or deceptive representation, or a representation likely to mislead or deceive. Nor does it matter that the contended accessory did not believe that the matters it knew to be incorrect would mislead anyone.

273 What matters, and what is critical, is whether the contended accessory knew that the content of the representation was incorrect in the context of the essential circumstances shown to be known by the contended accessory.

274 The next question is, was Mr Green knowingly concerned in the primary contraventions of R2O. As already mentioned, Mr Roberts abides by any decision of the Court and thus it is necessary to determine whether ASIC has established, as against Mr Roberts, that he was knowingly concerned in the primary contraventions. I propose to principally focus upon the state of the evidence concerning Mr Green and then make observations about the position of Mr Roberts.

The evidence in relation to the involvement of Mr Green in the primary conduct

275 In determining the question of whether Mr Green was knowingly concerned in any of the contraventions by R2O, it is necessary to keep firmly in mind the "statutory text" of the primary contraventions. The text of each of the provisions of the National Credit Code contravened by R2O is set out at [90] – [97] of these reasons. Aspects of the formula set out in s 32B of the Code are discussed at [98] – [103] of these reasons. I do not propose to repeat the statutory text here. Although the provisions of the ASIC Act contravened by R2O have been discussed extensively in these reasons, it is convenient to set out the text of those provisions here. Section 12DA(1) is in these terms:

> **12DA(1)** A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or likely to mislead or deceive.

276 Section 12DB(1)(a) and (g) is in these terms:

> **12DB(1)** A person must not, in trade or commerce, in connection with the supply or the possible supply of financial services, or in connection with the promotion by any means of the supply or use of financial services:
>
> (a) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
>
> …
>
> (g) make a false or misleading representation with respect to the price of services.

277 See also [194] – [211] of these reasons.

278 It is also necessary to examine the extent to which Mr Green was, put simply, at the centre of the events involving the conduct of R2O's operations. Thus, it is necessary to examine Mr

Green's evidence about these matters, the documents relevant to Mr Green's engagement in the affairs of R2O and Mr Green's evidence given in cross-examination.

279 The company search concerning R2O suggests that the company was registered on 20 May 1998 and changed its name to R2O on 18 July 2008. Mr Green was a director of the company for the period between 3 February 2014 and 8 December 2014. However, he was again appointed director on 27 April 2015. Mr Roberts was a director from 18 May 2012 to 4 February 2014, but appointed again on 10 June 2014. In the case of Mr Green, there was a period from 8 December 2014 to 27 April 2015 when he seems not to have been a director of R2O and in the case of Mr Roberts, there was a period from 4 February 2014 to 10 June 2014 when he appears not to have been a director.

280 As earlier mentioned, it is uncontroversial that R2O operated a business as a credit provider for the purchase by consumers of used cars. R2O held an ACL for that purpose as from 24 December 2012. As an indication of the scale of the business, R2O entered into 5,930 contracts, otherwise called credit contracts, in the period 1 July 2012 to 26 July 2018 and as at 19 April 2018, R2O had 2,239 credit contracts on foot. R2O operated its business through a network of franchise agreements. As at 17 July 2017 and 26 July 2018 there were 21 franchisees operating in Queensland, New South Wales, Victoria, South Australia and Western Australia. Mr Green, in the course of an examination pursuant to s 253 of the NCCP Act, said that R2O began to expand into the franchising model in 2011. Each franchisee (or a person employed by the franchisee) held a motor dealer licence for the relevant jurisdiction and R2O authorized either the franchisee or a person employed by the franchisee to be a credit representative of R2O under the provisions of the NCCP Act.

281 As to the franchise agreement, the document recites that R2O carries on the business of undertaking, as franchisor, motor vehicle sales by credit contracts throughout Australia and New Zealand. Mr Green emphasises that clause 10.7 of the franchise agreement provides that the franchisee must at all times operate the franchise strictly in accordance with all of the standards, practices and obligations "set forth in the Manual" which presumably is a reference to the "Operations Manual". Clause 10.13 provides that the franchisee must comply with all applicable "federal, state, local laws and regulations and other enactments or requirements" of all governmental bodies, and comply with R2O's risk and compliance policies. A failure to do so is to be regarded "as a major breach of this contract and result in immediate Franchise termination". Mr Green also emphasises clause 10.13 which provides that the franchisee must

comply with all written directions and procedures given by R2O from time-to-time concerning the operation and management of the franchise area, including directions relating to standards, techniques, methods and procedures for rendering services.

282 As to the Operations Manual (the "Manual"), there were a number of such documents. One version is the Manual marked "2015.13" which Mr Green accepted commenced operation from 19 November 2015. Another version is the Manual of May 2017. Another version is the Manual of August 2017.

283 As to the May 2017 Manual as an example, it recites that the "objective of the franchise Operations Manuals [is] to ensure uniformity and high standards of quality and service amongst all [R2O] office premises, in order to create and maintain the goodwill, reputation and consumer acceptance of the system…". It also recites that the policies and procedures set out in the Manual are the "culmination of the Franchisor's experience in the business over the past combined 50 years (that is, the combined business experience of Mr Green and Mr Roberts)". Part of the business method described at section 3 of the Manual is the approach to the purchase of "stock" (vehicles). The Manual says that when purchasing stock "DO NOT pay over $3,000.00 for a vehicle unless you have a client with this much deposit. Stock purchases should be between $800 - $2,000 per vehicle. This will ensure that in most cases you will retrieve 75% of your stock purchase cost back through deposits". The Manual also tells franchisees that "…for the same outlay you could buy three cars for $1,000 each [and], you are going to make three times the profit and get 75% or more as deposits on each car." The Manual then sets out an example of what a basic 12 month contract might look like. The example is this.

Basic 12 month Contract Formula (example)	
Vehicle purchase	$1,500.00
Contract deposit	$1,200.00
Average repayment $100.00 p.w. (52 weeks)	$5,200.00
Total Repay	$6,400.00
Gross Profit	$4,900.00

284 The first thing to note about this example is that although the example uses the term "deposit", that term is not used in an orthodox way. It is not a deposit which results in a reduction in the balance payable for the goods. It is a first payment which is a measure of, a part of, total payments to be made for the vehicle. In the example, the total payments will be the first

payment of $1,200 and the payments over 52 weeks amounting to $5,200, resulting in a gross return of $6,400 with the result that the postulated gross profit is the total receipts (payments) less the cost to the franchisee of purchasing the vehicle. This becomes immediately relevant because any interest payable by the hirer/buyer is not paid on a balance after payment of a deposit and nor does it appear to be calculated on a reducing debt (balance) taking account of incremental reductions in the debt over the 52 week period.

285 As to the "pricing", by which the Manual seems to mean the quantification of the weekly repayment over whatever might be the nominated period of weeks in the relevant transaction, the Manual says that R2O's intranet has a "Car Pricing Calculator". The Manual gives guidance about pricing in this way:

> To estimate the sale price of a car go to "carsales.com". Search for your car from "Research" tab then take the Highest Retail sale price. This researched car MUST be similar to the car you are selling in regards to year, make, model, mileage. Add this price into the Car Pricing Calculator "Cash Price" field along with the amount of "Weeks" and the system will generate your maximum contract price and payments for the term required. You have a choice of mark-up percentages to suit your deal up to a maximum of 45% p.a.

286 I have already discussed in these reasons the elements of the contract with Ms Abbott and the contract with Ms Abraham at [133] – [149], emblematic of the two tranches of contracts in issue in these proceedings. In terms of the guidance quoted above, the price inserted into the calculator as the "Cash Price" is the so-called "Car Retail Price" or "Comparison Price" which, in the case of Ms Abbott and Ms Abraham, were $5,900 and $5,500 respectively. The "maximum contract price" (in the guidance statement above, or "Contract Cash Price" or "Contract Price" in the Abbott and Abraham contracts respectively) is the total of the repayments (the first payment sometimes called a deposit, and the total rental) which in the case of Abbott and Abraham, respectively, were $11,188.44 and $7,175.22. The August 2017 Manual does not recite the example but does recite the pricing guidance quoted at [285]. As to the August 2017 Manual, Mr Green was asked questions about the document in the course of an examination under the provisions of the NCCP Act. He said that the Manual had been created by him and Mr Roberts and that they received a "bit" of advice from Mr Latham at MinterEllison, but no other advice.

287 The May 2017 and August 2017 Manual had its origins in the 19 November 2015 Manual. That Manual recites the example quoted at [283] and frames the pricing guidance in this way.

> To estimate the sale price of a car go to "carsales.com.au". Search for your car from "Research" tab then take the Highest Private Saleprice. Add $1,500.00 for Dealer retail

price markup. Then add $2,000.00 for ASIC allowable mark up for Rent 2 Own.

To simplify, add $3,500.00 to each vehicle above the highest retail price.

288 It can be seen that the pricing guidance in 2015 contemplated that there would be a price mark-up or margin for the dealer of $1,500 and a mark-up for R2O of $2,000. The aggregated mark-up of $3,500 would cover a dealer margin and a credit provision margin for R2O.

289 This question of adding an amount such as $3,500 was the subject of evidence in the proceeding directed to explaining a number of things. *First*, the evidence goes to the contextual evolution of the price calculators which were used for the purposes of the contracts in issue in the proceeding. *Second*, the evidence goes to showing the continuity of engagement by Mr Green and Mr Roberts in the development of the versions of the Operations Manual ultimately leading to the emails sent by Mr Green to franchisees by which he, on behalf of R2O, supplied the franchisees with price calculators for calculating total repayments in connection with each of the contracts in issue in the proceedings. R2O and Mr Green object to any evidence of pricing practices used by R2O prior to the implementation of the Microsoft Excel price calculator in August 2016, which is the first of the "Price Calculators". The objection as to para 49 of Ms Schoch's first affidavit is conceded, but objections to other paragraphs on this topic are maintained. The relevant paragraphs are pressed. I admit this evidence as it goes to the two matters identified above.

290 As to this topic, Mr Green said in a document addressed to ASIC dated 30 June 2016 that ASIC had recommended a "mark-up" which would be acceptable in the range $500 - $3,000 for vehicles of the same type which gave "approximately a 30% mark-up rate over the term of the contract which in most circumstances never exceeds 18 months". On 25 October 2016, ASIC sought from Mr Green copies of documents that demonstrate the implementation of a mark-up limited to 30%. An advisor to R2O, Mr Wills sent an email on 7 November 2016 to ASIC attaching a "Price Guide Calculator" which Ms Schoch says seems to be identical to Price Calculator 1, which is dated 16 August 2016. The mark-up was said to be calculated in accordance with the Price Calculator. Mr Green, in an examination under the NCCP Act, said that before the Price Calculator was used, the mark-up was in the range of $500 - $3,000 or 30% over the term of the contract with the result that if the cash price of the car was, for example, $10,000, 30% would be $3,000 (in that case) resulting in $13,000 divided by 100 equal weekly instalments (if that was the nominated period), resulting in a weekly payment of $130. Mr Green was also asked, in the course of the examination, about the nature of the

difference between "mark up" and "interest". Mr Green said that "we anguished over this since these… credit laws came in". He said that:

> We prefer to operate that way, with a mark up. With all the credit laws that came in and the more work that we had to do, employing QED Risk or all these new procedures it sort of – Tim and I spoke about it and we decided well we are better off, we need to charge more for our services to cover these costs and that is why we went from this way to charging up to 45 per cent.

291 On 16 August 2016, Mr Green sent an email to the franchisees (copied to Mr Roberts) attaching an excel spreadsheet Price Calculator (Calculator 1). On 10 November 2016, Mr Green sent another email to the franchisees attaching Price Calculator 2. In that email of 10 November 2016, Mr Green said this:

> I have just completed a new "Pricing Calculator" (Delete old Calculator) this calculates on a weekly basis at 45% plus adds the cost of warranty at $1,000 up to 52 weeks then $1,500 over 52 weeks.
>
> All you need to do is insert the high retail price (Cash Price) Deposit and any number of weeks which do not have to be multiples of 6 months now.
>
> The "CASH PRICE" is the high retail price that you have researched and decided on, NOT the Contract price !
>
> This tool will be implemented into the intranet when inputting new stock and will transfer figures into the price fields.

292 As mentioned earlier, Mr Green also sent an email to the franchisees on 14 December 2016 attaching Price Calculator 3. He developed Price Calculator 4, and on 19 January 2017, he sent an email to the franchisees attaching Price Calculator 5. He sent an email to the franchisees on 25 January 2017 attaching another Price Calculator (number 6) and another Price Calculator (number 7). He sent an email to the franchisees on 1 November 2017 attaching another Price Calculator.

293 As to these emails, Mr Green told the franchisees that they could select varying percentages having regard to the term of the contract, but the formula would ensure that franchisees were kept "well under the ASIC recommended rates". He told the franchisees that R2O had decided to "go with a set price for warranty of $1,000 per contract up to 18 months and $1,500 for 24 months". He told the franchisees that all they would need to do is put the figures into "car pricing and contracts". In Mr Green's email of 14 December 2016 concerning Price Calculator 3, he told the franchisees to delete version two. He said that the new version was easier to read with particular designations around the various cells in the calculator. Price Calculator 4 was a further version of that calculator. In the email of 19 January 2017, Mr Green said that this version of the calculator "is simpler and gives more flexibility to your contracts with variable

interest, warranty amount or no warranty and term". Mr Green said "the main thing as you know – do not go over 45% per annum". Again, changes were made to the cells making up the module. On 25 January 2017, Mr Green sent another email to the franchisees advising that the Price Calculator had been modified so that it provided for "mark ups from 15% - 45% maximum". He said that the amounts charged for warranties were to be added into the calculation after the calculation of the mark up.

294 In his examination pursuant to the NCCP Act, Mr Green was taken to Price Calculator 4 and was asked, "where did this come from?". Mr Green said that QED Risk "helped us put this together". Mr Green was then asked: "And so the actual formulas in it though, as best you know, was it QED who did that or you guys?". Mr Green responded by saying: "it was mainly us instructing them what we wanted the outcome to be."

295 As to Price Calculator 1, Mr Green was taken to that Price Calculator and was asked, as to the calculations in the spreadsheet, "who wrote these?". Mr Green said that he wrote them. He said that he obtained "some guidance from QED". Mr Green was asked whether that guidance was in the form of actually giving Mr Green a formula. Mr Green said that it was not, and that the guidance came from "talking to Greg" and that there was "nothing actually written". Mr Green said that he spoke to Greg [QED] and said that R2O wanted to stay well under the 48% cap and that R2O was happy to have a maximum of 45%.

296 As to Price Calculator 2, Mr Green said that he worked out the formulas for that calculator. He said that he was not sure whether he took any advice, but that it was based on the original calculator (number 1). Mr Green said that the formulas in that calculator were written by him. Mr Roberts in his examination said that, in answer to the question of whether he had had any involvement in determining the formulas for the calculations in spreadsheet 4, that he had left that matter to "Paul" (Mr Green) because "Paul is more expert in the end of the field".

297 As to Price Calculator 1, Mr Green said that the email attaching the Price Calculator was sent to franchisees because QED had recommended that R2O "start standardizing the pricing" because "before it was a bit scattered, I guess". As to Price Calculator 2, Mr Green accepted that the change was designed to enable the franchisee to insert any number of weeks rather than a set number of weeks determined by the previous calculator at 52, 78 or 104 or some other precise number.

298 As to Price Calculator 4, Mr Green was asked why interest in Price Calculator 4 was being applied to the cost of the motor vehicle prior to deducting the deposit. Mr Green was given the example of a vehicle with a cash price of $7,900 which, under the formula, was then multiplied by 0.865 which is a weekly interest rate charge of 45% on a per annum basis, but in the example the hirer/buyer had paid a deposit or first payment of $1,500. Mr Green thought that taking account of the deposit was represented by "the minus [$1,500] there". Mr Green's attention was again taken to the proposition that if an interest charge was to be applied, it would be applied to the cost of the car after taking off the deposit, but that interest seemed to have been applied to the full cost of the car for the period and then the deposit was deducted after that. Mr Green said that he could not answer that concern. It was put to him: "You don't know why?"; answer: "No."

299 As to Price Calculator 5, Mr Green accepted that the change introduced an option to select an interest rate of either "15, 20, 25, 30 and so on up to 45 per cent". Mr Green said that he thought the franchisees had requested a greater degree of flexibility.

300 As to the email of 11 April 2018 attaching two electronic excel spreadsheets, being the 2018 calculator and a copy of an "Amortising Calculator", the email says that the 2018 calculator is simpler, with new formulas, and the franchisees can put any interest rate into the calculator from 1% to 45% maximum and that interest was allowed to be charged on amounts relating to warranty, registration and servicing. Mr Green said that the amortising calculator was to be uploaded to the intranet for downloading to a franchisee's desktop and the tool was to be used to show the balance on a loan *after every payment* and that all that the franchisees needed to do was establish how many payments have been made and then go to the corresponding number in the calculator.

301 The references to responses by Mr Green are all references to his answers in the course of the examinations under the ASIC Act.

302 It should be noted that ASIC, by letter dated 21 March 2016 to Mr Roberts, raised a number of concerns about R2O's compliance with the NCCP Act and, in that letter, raised a number of questions about data, measurements, formulae or other factors used to determine the price of the vehicle, the market value of the vehicle and any additional charges imposed in the transaction for sale of the vehicle. On 13 December 2016, ASIC was still engaged in exchanges with QED Risk on behalf of R2O as to the basis upon which R2O arrived at the market price of the car and how any "mark up" was determined. ASIC was still asking for information that

demonstrates how the contract price is reached. On 18 January 2017, ASIC sent an email to Mr Wills observing that information about those matters was still outstanding. On 13 February 2017, Mr Wills responded by email explaining the process undertaken by a franchisee to determine current pricing for a similar vehicle by going to carsales.com.au and "setting" the market price in that way. Mr Wills said that the market value is entered into the pricing guide to assist in determining the maximum amount chargeable [under the NCCP Act and Code] and that the "actual price" comes as a result of negotiations with a consumer by meeting both their overall needs and affordability requirements. Mr Wills said that "the price guide calculator is utilised to ensure that the maximum prescribed amount is never exceeded". On 15 February 2017, ASIC asked to be provided with copies of printouts and calculations which demonstrated that the maximum prescribed amount is never exceeded. Mr Green sent an email to Mr Wills on 25 February 2017 in which he said this.

> This is the formula used in our Pricing Calculator the percentage shown is a weekly mark up of 0.865384 x 52 = 44.999968% p.a. the calculator works on the number of weeks that are put in, it processes the % for the contract based on the Cash Price entered, then takes off the deposit, then adds the warranty cost, then divides by weekly or fortnightly payments. The warranty or any other costs are NOT added prior to any mark up.

303 This formulation calculates, weekly, an interest rate of 45% p.a. based on the cash price across the period of the "number of weeks" put into the calculator. Mr Green accepts that this formula cannot be correct. This formulation was then forwarded to ASIC.

304 In March 2017, R2O generated for franchisees a document called "Mark Up Procedure". That document sets out the steps to be implemented in using the calculator of January 2017. The *first step* involves a franchisee researching the comparative retail price of a vehicle by going to a site such as carsales.com. *Step two* is to insert the selected retail price into the calculator which, in the example, is $7,990.00. That price is regarded as the market price. *Step three* is to insert any "deposit", otherwise called the first payment, paid by the consumer, into the calculator. *Step four* is to insert a warranty amount. *Step five* is to insert the term in weeks. As to steps three, four and five, the relevant entries are $1,500, $1,000, and 78 weeks in the example. The document then says that the calculator will now produce the numbers needed for the contract with the mark up being calculated only using the cash price of $7,990.00. The document says that the calculator gives franchisees a choice of mark up rates from 15% to 45% maximum. It also says that by implementing the calculator, franchisees "cannot overcharge on the cap interest rate of 48%".

305 On 9 March 2017, Mr Green and Mr Wills attended a meeting with representatives of ASIC at which a number of matters were discussed. ASIC observed that despite raising the matter previously, the issue of the contracts had not been addressed in the sense that the individual contracts did not disclose all of the Code's disclosure requirements. ASIC also raised "another issue of concern" about whether R2O's charges exceeded the cap and ASIC observed that it had "information to suggest it does and if that's the case then another factor to consider is remediation for those who paid in excess".

306 Mr Wills observed that he had done calculations which indicated that the 48% cap had not been exceeded. Mr Jordan Sugunasingam (of ASIC) observed that he had undertaken calculations "that indicate it has, which is why I have asked Julian (Wills) to provide me with his calculation to see how he reached his conclusions". Mr Wills said that he would provide calculations for vehicles where R2O had provided QED Risk with the documents. Mr Wills said that he would forward to ASIC calculations he had undertaken.

307 On 14 March 2017, Mr Wills sent documents to ASIC. In response, by email on 16 March 2017, Mr Sugunasingam responded with a number of important observations as follows.

> 2. The information you provided about the calculation of the charge, what you term as mark up or interest raises the following queries:
>
> (i) Is the deposit amount deducted from the cash price for the purpose of working out the mark up or interest (it doesn't appear to be) and if not, why not;
>
> (ii) How does your client's calculations reconcile with the calculation of annual cost rate prescribed by s 32B of the Code, particularly as the formula you provided us doesn't seem to match the one prescribed by the Code.
>
> …
>
> Could you come back to me early next week with the above clarifications and information as we need to deal with these issues on an urgent basis.

308 On 21 March 2017, Mr Wills responded by saying that as to point 2, he would discuss those items with Paul and Tim (Mr Green and Mr Roberts) and respond to ASIC early in the following week.

309 On 31 March 2017, Mr Sugunasingam responded to Mr Wills, making observations in relation to issues of "disclosure" and the "annual cost rate". ASIC had been advised that R2O's solicitor was reviewing the contracts and ASIC asked Mr Wills to ensure that the review addressed disclosure obligations under s 17 of the Code as, despite previously raising the disclosure issue

with Mr Green and Mr Roberts, ASIC's view was that the obligation under the Code was not being met.

310 As to the annual cost rate, ASIC observed that there was a concern that R2O may be exceeding the cap set by the legislation and questions had been raised in relation to the accuracy of the calculations put to ASIC. ASIC observed that Mr Wills needed to respond to the *earlier* questions and in the event that R2O accepts that the cap has been exceeded, remedial action would need to be proposed. ASIC requested that Mr Wills respond by 6 April 2017.

311 On 6 April 2017, Mr Wills responded to ASIC on a number of matters, including the disclosure question and the issues in relation to the annual cost rate. As to disclosure, Mr Wills referred ASIC to pages of the contract which contained particular information and as to the topic of the "method of calculation" and frequency of payments, Mr Wills said that those matters were being assessed by Mr Latham of MinterEllison lawyers. It was not until 18 April 2017 that instructions were sent to MinterEllison about that matter.

312 As to the annual cost rate, Mr Wills said that R2O undertook to review a sample of ten percent of the contracts written for every month within the regulated period and that if the cost rate had been breached, then all contracts for that month would be reviewed applying the formulas "as previously outlined" (among other matters).

313 On 12 April 2017, ASIC responded in relation to the disclosure topic and the annual cost rate. As to the disclosure issue, ASIC observed that the language of the document did not address the requirements of the legislation and the Code. ASIC observed that Mr Wills had not confirmed if the template for current contracts is the same template about which concerns had been raised. As to the annual cost rate, ASIC said this.

> You were asked to confirm if R2O had exceeded the caps and charged more than they were entitled to. If so, what will they do [to] remedy this overcharge and what will they do to ensure it doesn't reoccur.
>
> R2O's proposal does not address the issues raised. They have not even told us if they have taken steps to determine if R2O's customers have been and are being overcharged.
>
> The above are the concerns we have raised with you to date and might have further issues to raise. R2O do not appear to have taken sufficient steps to address the issues raised to date and ASIC may contemplate further action.
>
> I will be on leave from tomorrow until the end of next week. I will consider any information you provide in the interim on my return and before we make a decision on what further action to pursue. Therefore if you wish to respond please do so by the end of the week.

314 The email from Mr Green to Mr Latham, seeking Mr Latham's advice, is dated 18 April 2017. In that email, Mr Green makes observations about requests made by ASIC (which, as the chronology reveals, had been going on for a long time) and then said this.

> I have included the latest email requests from Jordan and the remedies put forward and implemented as he requested and again they are not acceptable, we are more than happy to comply with what we have [to] and I believe that our system is compliant save for a few minor touch ups, we are more than happy to make any changes necessary but we need to know what the problem is if any. I believe what we now need is to get you involved with a legal point of view, review our Contract so that it is compliant, this was another issue that he said the Contract was compliant except for checking the "Codes method of calculation" which we have informed him you are currently doing, but now as you can see in the emails he is not happy with a lot more of the contract.
>
> So basically mate we need your help combined with Julian, he knows this bloke quite well, to get him off our back!

315 Obviously enough, this email understates both the seriousness of the concern put to Mr Green and Mr Roberts by ASIC and the period of time over which the issues had been agitated with the directors. Moreover, there is no reference in this email to the particular concern which had been put by ASIC repeatedly concerning the method of determining the mark up, the question of the basis for the calculation of the interest and the treatment of the "deposit".

316 Mr Wills responded on 24 April 2017. As to disclosure, Mr Wills observed that the inconsistency in the language used stems from the fact that the legislation does not "specifically identify the [R2O] process" and that R2O is the "industry leader" and therefore sets the benchmarks. As to the annual cost rate, Mr Wills said that "R2O does not believe that it has exceeded the annual cost rate". Mr Wills said that QED Risk's review is designed to "further substantiate this position". He observed that if the review finds that R2O has exceeded the cost rate, R2O will make its best efforts to provide the consumer with a full refund. Mr Wills advised that the "new contracts" are with R2O's solicitors and "we believe that everything should now be in order".

317 On 5 May 2017, Mr Green asked Mr Latham to advise whether R2O's contracts were compliant with the Code's method of calculation. Mr Green said that our calculations are: "Researched retail price + 45% p.a. then the warranty cost is added giving a total amount which is divided by the number of weeks the customer requests (have attached our "Pricing Calculator")". On 5 May 2017, Mr Latham responded saying "…I am not sure what ASIC are on about re the '*Code method of calculation*'". Mr Latham asked, "is there an email or letter from ASIC that gives some more detail about that specific concern?". On 5 May 2017, Mr Green sent an email to Mr Wills forwarding on the email from Mr Latham and asked Mr Wills: "Mate can you answer

this for Steve?". Mr Wills responded on 8 May 2017 to Mr Latham saying that he had no idea what ASIC was referring to and was not aware of any method of calculation in the Code or Regulations. On 8 May 2017, Mr Latham asked Mr Wills whether he might want to ask ASIC what the problem was.

318 On 22 May 2017, Mr Latham sent an email to Mr Green observing that s 32B of the Code contains a complicated formula for determining the annual cost rate. He advised that s 32A provides that the annual cost rate for a credit contract cannot exceed 48% and s 32B prescribes a formula for calculating what the annual cost rate of a credit contract is. He observed that ASIC's point was that R2O needed to ensure that the annual cost rate of the relevant contract did not exceed 48% and in order to ensure that that is so, R2O would need to work through the formula in s 32B to calculate R2O's annual cost rate. Mr Latham observed that the formula is quite complicated and was beyond his mathematical ability. He attached the section outlining the formula for Mr Green's reference. Mr Latham then made some observations about his suspicion as to the way the calculator works out different prices based on an annual cost rate of up to 45%. He suggested that if his suspicion about it was correct, then Mr Green should be able to go back to ASIC and confirm that R2O is compliant with s 32A because it never nominates a total contract price that has an annual cost rate of more than 45%. However, this was simply a hypothesis on Mr Latham's part, and he observed that there would need to be further analysis of the excel spreadsheet calculator "to determine whether it does in fact calculate the annual cost rate (and that probably is a job for a numbers person)".

319 Various exchanges took place throughout the period between 22 May 2017 and early August 2017. Early August proved to be an important period in these events because by then, Mr Wills was no longer with QED Risk, and his role had been taken over by Mr Ashe. Exchanges between Mr Ashe and Mr Sugunasingam began in June 2017 as Mr Ashe sought to become familiar with the outstanding matters.

320 Mr Ashe undertook an analysis and did indeed establish a "key flaw" in what Mr Green and thus R2O had been doing. Mr Ashe said this in an email to Mr Green on 2 August 2017:

> I've finally worked out the best way to explain this to you. The key flaw in what you've been doing is in charging 45% per annum and then charging that twice.
>
> The thing is that, after one year, they don't owe you the entire amount anymore, because they've been paying you throughout the first year. So a closer approximation for what you **should** have been doing is to apply the 45% for the second year on some **lesser** amount. The trick is to work out what is the

> correct repayment to charge the equivalent of 45% p.a. over two years and end up with a zero balance at the end of the two years.
>
> The old fashioned way was to pull out what we called "amortisation tables" to work out the correct repayment. I'm not going to bore you with that as it's quite complicated. Nowadays we have tools like excel that can help us work this out. There is a formula called PMT that calculates the correct repayment for a given principal, interest rate and loan term. If you look at the yellow highlighted cell in the attached spreadsheet, you can see this formula in action.
>
> The PMT formula requires you to line everything up right. It works like this: = PMT ("correct periodic interest rate", "number of repayments", "principal amount at start of loan"). In the case of the attached example, the correct periodic interest rate is 45/52 = 0.8653% per week, the number of periods is 104 weeks.

321 In that email, Mr Ashe goes on to explain that R2O was entitled to be charging interest on the warranty premium as well, and does some calculations about that matter. Mr Ashe attached a spreadsheet explaining the proper operation of a repayment schedule based on a case in which the vehicle has a relevant price of $4,500, the interest rate is 45% and the period is 104 weeks with a warranty amount of $1,500, making in effect a $6,000 loan.

322 On 8 August 2017, Mr Ashe advised ASIC that it would be necessary to undertake a 100% case-by-case calculation since the date of the change, by which R2O adopted a so-called "mark up" of 45% rather than 30%, so as to establish whether the contracts were "definitely under the 48% cap".

323 On 23 August 2017, Ms Denes of ASIC had a telephone discussion with Mr Green. The file note from Ms Denes says that Mr Green said that "they were halfway through checking the contracts, and wanted to let me know because he was aware that Greg Ashe had originally told me that it would take about two weeks". Mr Green said that the review was being undertaken to see if there had been a breach of the 48% cap. Ms Denes asked Mr Green if they were checking about 1,900 contracts. Mr Green said that it was about 1,400 contracts, but that they were checking the month before R2O increased the mark-up amount as well. Mr Green said that he could not recall exactly when the change to 45% occurred, perhaps in October or November 2016. Mr Green said that he thinks it was in November, but that he would check the October client files as well. He said that his "wife was doing the review" and "she's halfway through".

324 As to Mr Green's primary evidence-in-chief given in his affidavit sworn 5 June 2019, Mr Green gave this evidence.

325 At paragraph 3, Mr Green says that he became aware that ASIC was questioning R2O's compliance with the 48% cap in about early 2017 after Mr Wills sent him an email dated 31 March 2017 from Mr Sugunasingam in which Mr Sugunasingam said things, quoted earlier, about ASIC's concern that R2O may be exceeding the cap. At paragraph 4, Mr Green says that prior to that time, he had never had cause to suspect that R2O might be exceeding the 48% cap.

326 As to the period prior to August 2016, Mr Green at paragraph 5 says that R2O simply applied a 30% mark-up on the purchase price of the vehicle to obtain the total contract price to be recovered over the life of the contract. He gives an example where the retail price of the vehicle is $10,000 and a consumer agrees to pay weekly instalments over 2 years. In that case, the consumer would be charged $13,000 in total by way of 104 weekly payments of $125. He says that this calculation was conceived by Mr Green and Mr Roberts to give customers a fair deal in light of other companies which were charging a much higher mark-up.

327 At paragraph 6, Mr Green says that "we decided" (which I take to mean Mr Green, Mr Roberts and thus R2O) that franchisees would be given the ability to charge a higher mark-up in the contracts. He says that using the 48% cap as a yardstick, "we implemented a 45% interest model within our contracts rather than the previous 30% mark-up model". At paragraph 7, he says that the reason "we fixed upon" a maximum rate of 45% was to ensure that none of the franchisees would accidentally breach the 48% cap.

328 At paragraph 8, Mr Green says that he produced an excel spreadsheet containing a formula for use by the franchisees which set the interest rate at 45% per annum so that no franchisee could breach the 48% cap. That was Price Calculator 1. Mr Green says that he sent the calculator to the franchisees by email on 16 August 2016 with the instructions quoted earlier. He says that the interest rate of 45% per annum applied to the "retail price" of the vehicle and was set at that rate for contracts of 52 weeks, 78 weeks and 104 weeks.

329 At paragraph 12, Mr Green says that when creating the first Price Calculator, he did not know about the complex formula contained in the Code for the provision of credit. He says that he believed that the "interest method" that he had adopted would comply with the requirements of the Code because he thought that his calculator could never allow the interest charged to be higher than 45%. He says at paragraph 13 that he is "now aware" that ASIC has identified "numerous faults with this formula". He says that one of those faults is that the deposit paid by the consumer was not deducted from the retail price before the interest rate was charged, with the result that interest was charged on an amount that had already been paid. Mr Green, at

paragraph 13, observes that Mr Ashe later told him that the interest rate was not amortised over the period of the loan. Mr Green says that he is not now defending this formula as accurate, but says that at the time he designed the calculator, and throughout the period in which it was used, he honestly and genuinely believed that its use would ensure that the 48% cap would not be breached.

330 At paragraph 14, Mr Green says that on 10 November 2016 he sent an email to all franchisees enclosing an amended Price Calculator he had created (otherwise described as the second Price Calculator). He says that the difference between this calculator and the previous one is that the per annum interest rate of 45% was converted to a weekly rate. He says that he thought that this charge would make the calculation more precise. He says at paragraph 16 that he now realizes that the change "did not address the faults since identified by ASIC and referred to at paragraph 13". He says that at the time he designed the second price calculator and throughout the period in which it was used, he honestly and genuinely believed that its use would ensure that the 48% cap would never be breached.

331 He says that on 14 December 2016, he sent an email to all franchisees enclosing an amended Price Calculator and directing the franchisees to delete the "old version". He says that the statements he has made at paragraph 16 (as I have described) apply equally to this third calculator.

332 He says that on or about 19 January 2017, he sent a further email to franchisees enclosing another amended Price Calculator which was said to be simpler and more flexible. Again, he says that the statements he has made at paragraph 16 (quoted above) about the second calculator apply equally to this calculator.

333 Mr Green says that in January 2017, he liaised with Mr Wills in order to comply with requests from ASIC and that on 25 January 2017, he sent Mr Wills an email attaching a copy of a further Price Calculator (described by Ms Schoch as calculator number 6). Mr Green says that this calculator was modified so as to provide for mark-ups from 15% to 45%, with amounts charged for warranties added into the calculation after the calculation of the mark-up.

334 Mr Green says, at paragraph 23, that he acknowledges that he did not specifically ask Mr Wills to check the calculator. However, Mr Green observes that at no time did Mr Wills suggest to him that there was "anything wrong with the structure of the calculator". Mr Green says that in

the absence of some such correction, he continued to assume that the calculator was effective in preventing any breach of the 48% cap.

335 At paragraph 24, Mr Green says that he has reviewed the content of what is described by Ms Schoch as the fourth, fifth and sixth Price Calculators and can confirm that they are the same calculator using the same formula (that is, with no difference between them).

336 At paragraph 25, Mr Green says that he sent a further email to Mr Wills on 25 February 2017 explaining the operation of the Price Calculator. Aspects of that email have been quoted earlier. At paragraph 26, Mr Green says that at no time did Mr Wills suggest to him that there was "anything wrong with the structure of the calculator and that in the absence of 'some such correction' I continued to assume that the calculator was effective in preventing any breach of the 48% cap".

337 At paragraph 27, Mr Green again observes that it was not until Mr Wills forwarded to him a copy of Mr Sugunasingam's email dated 31 March 2017 that he became aware "of any suggestion" that R2O might be breaching the 48% cap. Mr Green says that he "had absolutely no idea" why Mr Sugunasingam was questioning whether R2O might be breaching the 48% cap.

338 At paragraph 28, Mr Green says that on 18 April 2017 he sent Mr Latham an email seeking advice about R2O's compliance systems. Mr Green quotes aspects of the text of that email earlier quoted in these reasons. Mr Green then describes the email exchanges of 5 May and 8 May involving Mr Latham, Mr Green and Mr Wills mentioned earlier in these reasons.

339 At paragraph 34, Mr Green refers to an email he sent to Mr Latham on 15 May 2017 observing that there had been no response from ASIC to matters put to ASIC concerning the method of calculation required by the Code and the incorrect reference by Mr Sugunasingam to s 34B of the Code, rather than s 32B of the Code.

340 At paragraph 35, Mr Green refers to Mr Latham's advice of 22 May 2017 mentioned earlier and quotes from it extensively in his affidavit.

341 At paragraph 36, Mr Green says that nothing in Mr Latham's advice caused him to "reconsider my assumption that the calculators used by [R2O] would ensure that it did not breach the 48% cap", although Mr Green observes that he noted that the calculators did need to be checked by a "numbers person" in light of the complicated formula in the Code.

342 At paragraph 37, Mr Green says that Mr Wills left QED Risk in late May 2017 and Mr Green then began dealing with Mr Ashe. Mr Green asked Mr Ashe to check R2O's contracts for any potential breaches. At paragraph 38, Mr Green refers to the email from Mr Ashe of 2 August 2017 earlier mentioned in these reasons. Mr Green quotes the email extensively. At paragraph 39, Mr Green says that receipt of Mr Ashe's email was "the first time that I became aware that there was a flaw in the formulae that I had used in [R2O's] various price calculators".

343 Mr Green says that, even so, having regard to Mr Ashe's explanation that Mr Green's decision to not include the warranty payment in the contract price seemed actually to result in lower repayments than would have been payable had the formula been applied properly, Mr Green "still did not consider either that customers were being charged more than the interest rate stated in the contract, [or] that the 48% was being breached".

344 At paragraph 40, Mr Green says that that belief was further reinforced in his mind when he read an email sent by Mr Ashe to ASIC on 2 August 2017, which was copied to him. In that email, Mr Ashe said that the interest rate had not been applied to the warranty amounts. He also said that his initial calculations were showing that if the warranties were properly capitalised to the loans and amortised over the term, the loans seem to come in well under the 48% cap. Mr Ashe described this as a "fluke" brought about by R2O's "sense of 'fairness' to their clients!"

345 Mr Green says that having regard to the issues raised in Mr Ashe's email, Mr Green undertook to review all of R2O's current contracts.

346 At paragraph 42, Mr Green refers to an email to him from Mr Ashe dated 14 August 2017 which contained an excel spreadsheet entitled "Loan difference calculator". The email provided instructions on how to use the calculator. In the email, Mr Ashe said, in relation to the review by Mr Green of "every file since you made the change to 40 – 45%", Mr Green should do the following:

> 1. Type in the file name and date.
> 2. Type in the car purchase amount (as per the [hire] contract).
> 3. Type in the warranty price and any deposit paid upfront (you had this listed as "first repayment" on the files I looked at).
> 4. Type in the number of payments from the file, as well as selecting whether it's weekly or monthly (all the ones I saw were weekly).
> 5. Type in the interest rate listed on the [hire] contract.

6. Type in the ACTUAL repayment amount that the client was paying under the contract.

   What the calculation then gives you on the last line is whether the client was better off or worse off. If the number at the bottom is negative and Red, then you owe the client money. If the number is positive and Green, then you're all good. Technically, in the latter case, the client really owes you money but I don't think we want to go there in the circumstances.

347 At paragraph 44, Mr Green says that following receipt of Mr Ashe's email, he used the "Loan difference calculator" to review 1,267 contracts, being all current contracts between consumers and R2O. He says that of the 1,267 contracts that he reviewed, only one contract was identified in which the interest actually charged exceeded the interest that should have been charged had the "contracted interest rate been correctly applied". Mr Green says that as a result of finding only one such contract, he says that he "assumed that the formulas used in [R2O's] price calculators were correctly calculating interest".

348 At paragraph 46, Mr Green refers to giving evidence at an ASIC examination on 10 October 2017 at which he was shown the Price Calculator described by Ms Schoch as Price Calculator 4. He says that counsel for ASIC pointed out to him that the Price Calculator did not deduct the deposit from the cash price against which the interest rate was applied. He observes that counsel for ASIC pointed out to him that Mr Green's calculator was applying interest to the full cost of the car with the deposit being deducted later. Mr Green observes that in response, he had said that he could not answer why that was so and had said that he did not know why that was so. At paragraph 47, Mr Green says that he reviewed the calculator as a result of that exchange with counsel, and came to realise that counsel for ASIC was correct. He says that "until then I had never realised that the calculators contained this flaw, and nobody, including anyone at QED risk had ever pointed that out to me". Mr Green says that Mr Ashe's calculator does deduct the deposit from the contract price prior to applying the interest rate percentage. Mr Green says that Mr Ashe did not draw Mr Green's attention to "that aspect of his calculator, or the fault in mine, at the time". Mr Green says that had he realized the flaw pointed out to him by counsel for ASIC, he would have changed the calculator earlier. Mr Green says that, as it happens, in light of the discussion at the examination on 10 October 2017, Mr Green created, on 31 October 2017, what is described by Ms Schoch as the ninth Price Calculator. Mr Green emailed that Price Calculator to the franchisees on 1 November 2017. He says that the major difference between this calculator and earlier calculators was that he factored into the new calculator any deposit paid by the consumer such that interest was only paid on "the sum that

was remaining after payment of the deposit". He says that car registration and servicing costs were included as well.

349 At paragraph 51, Mr Green says that he attended a further examination conducted by ASIC on 29 March 2018, at which he was told that ASIC had cause to be concerned that R2O's Price Calculators were not "calculating in accordance with the Code". Mr Green was shown a report by McGrath Nicol in support of that concern. Mr Green says that he was told that ASIC had reviewed the "Amortising Loan Calculator" created by Mr Ashe and, using a sample of the same contracts used by McGrath Nicol, the conclusion was that the calculators were not making calculations in accordance with the requirements of the Code. Mr Green says that "this came as a huge surprise to me". Mr Green says that he told ASIC that he had used the loan difference calculator to check the contracts. He says that although he nominated that he had reviewed 200 contracts over a period of months, he wasn't really sure how many contracts he had checked or over what period he had checked them, when he was being examined. He says that, looking back now, the correct position on his investigation into the R2O contracts is that set out at para 44 of his affidavit. That is the paragraph where he says that he used the loan difference calculator to review 1,267 contracts and found that only one contract was identified in which the interest actually charged exceeded the interest that should have been charged under the contract had interest been correctly applied.

350 At paragraph 54, Mr Green says that following the examination on 29 March 2018, it became apparent to him that he must not have used the loan difference calculator correctly and, as a result, he decided that he would create a new calculator and would ask the franchisees to rewrite all existing contracts in accordance with the formula contained in the Amortisation Loan Calculator. At paragraph 55, he says that on 11 April 2018, he sent an email to all franchisees attaching what Ms Schoch describes as the "New Calculator 2018". He notes that on 30 May 2018, Mr Roberts sent an email to all franchisees asking them to implement the new calculator. He says that on 1 June 2018, he sent an email to all franchisees enclosing the loan difference calculator with instructions on how to use that calculator to conduct a recalculation of the existing contracts. On 7 June 2018, he sent an email to all franchisees providing them with a template letter to go to each existing customer whose contract required recalculation.

351 At paragraphs 60 to 64, Mr Green explains that the franchisees were instructed to use the "Ezi Debit" system. That system provided each of the franchisees, in respect of their own customers,

and R2O with access to records of all of the repayments made by customers. Mr Green explains that he has reviewed the history of payments by particular consumers as set out in his affidavit.

352 It is now necessary to examine the criticism made of Mr Green's evidence by the applicant.

353 Although Mr Green said in his affidavit at paragraph 5 that R2O simply applied a 30% mark-up on the purchase price of the vehicle to obtain the contract price to be recovered, Mr Green conceded that R2O added $3,500 to the purchase price of a vehicle.

354 At paragraph 6, Mr Green says that a decision was made to allow franchisees to charge a higher mark-up in contracts, and thus a 45% interest model was adopted rather than the previous 30% mark-up model. However, Mr Green accepted that this was not accurate as one element was an interest rate and the other was a mark-up amount.

355 At paragraph 3, Mr Green said that the first time that he became aware that ASIC was questioning R2O's compliance with the 48% cap was in early April and, at paragraph 4, he said that prior to that time, he had no cause to suspect that R2O might be exceeding the 48% cap. However, Mr Green accepted that the file note dated 9 March 2017 earlier described concerning the discussions with ASIC reflected fairly the matters discussed at that time; that the reference to disclosure obligations in the file note was a reference to s 17 of the Code; and he knew at the meeting on 9 March 2017 that ASIC, having undertaken its own calculations by reference to the calculator, had formed the view that the calculations using that calculator breached the cap.

356 In his affidavit at paragraph 27, Mr Green says that it was not until Mr Wills forwarded to Mr Green a copy of Mr Sugunasingam's email dated 31 March 2017 that he "became aware" of "any suggestion" that R2O might be breaching the cap, and that he had "absolutely no idea" why Mr Sugunasingam was questioning *whether* R2O might be breaching the 48% cap. ASIC says that these statements are not correct and that under cross-examination Mr Green conceded that they were not accurate having regard to Mr Green having been present when ASIC made its concerns on this topic known.

357 At paragraph 36, Mr Green said that nothing in the advice from Mr Latham caused him to "reconsider my assumption that the calculators used by [R2O] would ensure that it did not breach the 48% cap". However, ASIC observes that Mr Green conceded that Mr Latham's advice was that he could not advise him on that question (not being a "numbers man"), and that the legal advice did not provide an answer concerning the very question of whether R2O had

breached the cap in the relevant contracts. Also, Mr Green conceded that he knew that what needed to be done was to perform calculations consistent with s 32B of the National Credit Code. Moreover, Mr Green conceded that prior to receiving Mr Latham's advice by email, he was aware that ASIC had been provided with his Price Calculator; that calculations had been performed consistent with s 32B of the Code; that ASIC was of the view that the method of calculation effected by the formulas in the Price Calculator was not consistent with s 32A and s 32B of the National Credit Code; and, having received Mr Latham's advice, Mr Green was extremely concerned that his method of calculation was not compliant with the Code.

358 In paragraph 39, Mr Green says that Mr Ashe's email of 2 August 2017 was the "first time" that he became aware that there was a flaw in the formulae he had used in R2O's various Price Calculators. However, under cross-examination, he said that Mr Ashe's email was the first time that someone independent of ASIC had confirmed ASIC's view that there was a flaw in the formulae. Mr Green accepted that that was not the way he had put that matter in paragraph 39 of his affidavit. In addition, at paragraph 39, Mr Green added that after Mr Ashe's explanation in the email to the effect that warranty payments had not been included, he "still did not consider either that customers were being charged more than the interest rate stated in the contract [or] that the 48% was being breached". ASIC observes that under cross-examination, Mr Green accepted that he knew when he received Mr Ashe's email that the interest rates would be inaccurate and could be higher or lower than the interest rate stated in the contract.

359 At paragraphs 46 and 47, Mr Green said that he was shown Price Calculator 4 in his examination in October 2017 and that "until then" he had never realised that the calculators contained the flaw of not deducting the deposit from the cash price. However, ASIC note that under cross-examination, Mr Green conceded that he was aware of this issue from his communication with Mr Wills on 25 February 2017, seven to eight months earlier.

360 ASIC is particularly critical of Mr Green's evidence about the steps he took having received Mr Ashe's email on 14 August 2017 attaching the loan difference calculator. Mr Green gave evidence that he used the calculator to review 1,267 contracts, "being all current contracts between consumers and [R2O]". At paragraph 44, he says that of those 1,267 contracts that he reviewed, only one contract was identified in which the interest actually charged exceeded the interest that should have been charged if the rate in the contract had been correctly applied. ASIC observes that the loan difference calculator, properly used, would have produced the same results in relation to the credit contracts the subject of these proceedings as set out in the

report of Mr Hill. ASIC says that follows because the calculator created by Mr Ashe and the calculations performed by Mr Hill both used the correct formula in accordance with the requirements of the Code. ASIC points out that Mr Hill's report reveals the difference between what the consumers were required to pay pursuant to their contracts and what ought to have been paid if the correct interest rate had been applied. ASIC observes that using the Abbott contract as an example, the loan difference calculator, if properly used by Mr Green, would have revealed, if her contract interest rate of 45% had been used, that she would have been required to repay $95.66 per week, rather than $118.91 according to her contract.

361 ASIC emphasises that under cross-examination, Mr Green said that using the Abbott contract as an example, instead of entering the input described in the contract as the "Comparison Price" of $5,900 into the field of the calculator, described as the car price as demonstrated and disclosed (by reason of the research conducted to determine that price by going to sites such as carsales.com), Mr Green entered the input of the "Contract Price" or "Compact Cash Price" of $11,188.44 into that field. According to Mr Green's evidence, he undertook this exercise using Mr Ashe's calculator on 1,267 occasions. ASIC's ultimate contention on this matter is that Mr Green's evidence at paragraph 44 of his affidavit ought not to be accepted. ASIC contends that it is "almost inconceivable" that Mr Green would enter an incorrect input into the loan difference calculator, having regard to his deep understanding of the business undertaking and business model. ASIC says that Mr Green was the director of a franchisor whose business was to sell cars to consumers on a hire purchase style arrangement where franchisees were directed to identify a car for sale at a retail price or comparison price based on research on sites such as carsales.com, and then add a mark-up on *that price* which would reflect the interest charged on the so-called comparison price such that the consumer would pay, over the periodic weekly term of the contract, the combined comparison price plus the so-called mark-up (together with any warranty amount also charged to the consumer, where relevant). ASIC says that Mr Green knew this business well and knew the model for deriving a profit from it. He had written the Price Calculators.

362 On this topic, ASIC observes that Mr Green accepted under cross-examination that he knew that the purpose of the exercise Mr Ashe had undertaken, in creating the loan difference calculator, was to create a calculator that required Mr Green, in reviewing the contracts, to enter into the relevant fields the very same inputs as he had instructed his franchisees to enter when using Mr Green's own Price Calculator, for the very purpose of arriving at outputs which would demonstrate repayable amounts in accordance with the Code and using the correct

formula prescribed by the Code. ASIC observes that the directions contained in Mr Ashe's email of 14 August 2017 were the very same inputs that Mr Green had directed the franchisees to enter when using his Price Calculator. The emblematic example of that is the document described as "Mark Up Procedure", described earlier in these reasons, which set out the various steps franchisees were to take. Step one involved researching the "retail price" in the manner already described. In that document, great emphasis is placed upon the mark-up being calculated only upon the Cash Price based on the step one price. Moreover, ASIC observes that in the directions to franchisees about how to use the Price Calculator, set out in the email of 10 November 2016 (described earlier), Mr Green directed the franchisees to insert the high retail price ("Cash Price"). More particularly, Mr Green emphasised that the "Cash Price" is the high retail price the franchisee has researched and decided upon, "NOT" the Contract price. In this context, ASIC notes that Mr Green's evidence was that he emphasised these matters "to enforce that that was the price to go in there, not the total price of the… contract". ASIC observes that without properly entering the Cash Price or Comparison Price or Researched Retail Price of the car into the calculator, there would be no base figure upon which the calculations would operate. ASIC observes that Mr Green's evidence would have him entering the higher contract price (in Ms Abbott's case $11,188.44) into the relevant field rather than $5,900, and that he took that step in respect of the 1,267 contracts that he says he reviewed following receipt of Mr Ashe's email.

363 ASIC's ultimate submission is that Mr Green well understood that the critical figure to enter into the calculator, using the Abbott example, was $5,900.

364 A further criticism of Mr Green's evidence on this topic is that, in his affidavit, he said that he reviewed 1,267 contracts, and yet during the course of an ASIC examination on 29 March 2018, he said that he had reviewed 200 contracts. ASIC observes that under cross-examination, Mr Green accepted that he had been asked if he had reviewed all the contracts and in response, he told ASIC that he had examined 200 contracts. ASIC contends that if Mr Green had examined 1,267 contracts, he would have been well familiar of that and would have been able to so advise ASIC of that matter. ASIC contends that Mr Green was not able to do so because the correct position is that he had not reviewed 1,267 contracts. Moreover, ASIC observes that in the file note of Ms Denes, Ms Denes records the conversation with Mr Green in which he told her that his wife was conducting the review of about 1,400 contracts and that she was about halfway through the review.

365 Other anomalies in the evidence of Mr Green are said to have been revealed in cross-examination and they are identified in the submissions of ASIC. I do not propose to detail every one of them.

366 There is much force in the criticism ASIC makes of the accuracy of the evidence given by Mr Green in his affidavit. This is particularly so as to the statements about when he first became aware of the contention that the method of calculating the weekly repayment amount failed to properly apply the method prescribed by the Code in ss 32A and 32B, and in relation to the evidence he gave about the review he said he undertook of the contracts following receipt of Mr Ashe's email. I am not willing to accept Mr Green's evidence on these matters. I accept that ASIC had been raising concerns about the method of determining price; the question of calculations exceeding the 48% cap; and concerns going to matters contemplated by s 17 of the Code, for some considerable time, and before the time when Mr Green said he first became aware that his calculator was not compliant with the Code. I also accept that Mr Green's evidence about his contended review of the 1,267 contracts is unreliable. It is also true that Mr Green sought to attribute to Mr Latham advice or propositions said to support Mr Green's "comfort" with his calculator's compliance with the Code, which Mr Latham did not give or adopt and, in fact, expressly disavowed. Mr Green also sought to attribute to Mr Wills a failure to advise him of problems with his calculator. However, Mr Green did not expressly ask Mr Wills to validate the calculator, and Mr Wills's engagement in these questions only arose as a result of ASIC's agitations about the problems with the calculator and the contracts. In these and other ways, Mr Green has obfuscated the real position. This is no doubt explained (but, of course, not answered) in part at least by the difficult position Mr Green found himself in as a director of R2O and one of the two primary actors in the conduct of the company in bringing into existence a sequence of calculators that manifestly failed to comply with the requirements of those provisions of the Code expressly designed to protect the interests of consumers in entering into "credit contracts" for the "provision of credit".

367 It is now necessary to return to aspects of the relevant facts concerning the engagement of Mr Green and Mr Roberts in the conduct of the company and the state of knowledge of those individuals in relation to the contraventions of the Code and the ASIC Act by R2O.

368 Before turning to that matter, it is useful to keep in mind some further principles relevant to those questions.

369 *First*, the essential facts or essential circumstances required to be known by the person said to be knowingly concerned in R2O's contravention is determined by the statutory text governing the contravention.

370 *Second*, in order to know the essential facts or essential circumstances isolated by reference to the statutory text, it is not necessary that the person, said to be knowingly concerned, know that those facts are capable of being characterised in the language of the statutory text. Nor is it necessary that the relevant person be shown to have known that the conduct was unlawful in terms of the statutory text. That principle is best illustrated in the following observations of Gummow, Hayne and Heydon JJ in *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at [58]:

> The trial judge rightly held that it was necessary to find that McAuliffe and Law participated in, or assented to, the companies' contraventions with actual knowledge of the essential elements constituting the contraventions. The Rural Press parties complained that he failed to make particular findings, but they are in fact inherent in his reasoning. In the end the argument was only that McCauliffe and Law "did not know that the principal's conduct was engaged in for the purpose or had the likely effect of substantially lessening competition… in the market as defined". It is *wholly unrealistic* to seek to *characterise knowledge of circumstances* in that way. Only a handful of lawyers think or speak in that fashion, and then only at a late stage of analysis of any particular problem. In order to know the essential facts, and thus satisfy s 75B(1) of the Act and like provisions, it is not necessary to know that those facts are *capable of characterisation in the language of the statute*.
>
> [emphasis added]

371 *Third*, in order to be knowingly concerned in each contravention by R2O, it is necessary to demonstrate that each contended accessory had *actual knowledge* of the essential facts.

372 Constructive knowledge is not sufficient. However, actual knowledge may be inferred from wilful blindness or from dishonest or deliberate ignorance. In *Young Investments Group Pty Ltd v Mann* (2012) 293 ALR 537, Emmett, Bennett and McKerracher JJ said this at [11]:

> For statutory breaches, it is well-established that, in order to be an accessory or to be knowingly involved in a contravention, a person must have intentionally participated, having knowledge of the essential matters constituting the contravention: see *Yorke v Lucas*. That is not imputed or constructive knowledge but, rather, actual knowledge. It would not usually be sufficient to establish a statutory breach to show that a person said to be an accessory to such a breach wilfully shut his or her eyes to the obvious: see *Giorgianni v R* (1985) 156 CLR 473. Actual knowledge of suspicious circumstances and a failure to make enquiry may be different: see *Pereira v Director of Public Prosecutions* (1988) 82 ALR 217 at 219…

373 In *Australian Competition & Consumer Commission v IMB Group Pty Ltd* [2003] FCAFC 17, Cooper, Kiefel and Emmett JJ observed at [135] that before any accessorial liability will arise

in a person, it is necessary to establish the subjective element of knowledge of each of the essential elements of the contravention. Their Honours observed that that knowledge may arise because it is possible to show wilful blindness in relation to the elements of a contravention. Their Honours also observed that absent a finding of wilful blindness, it is necessary to establish actual knowledge on the part of a person to whom it is sought to "sheet home accessorial liability in respect of a contravention" (with their Honours referring, in that case to a contravention arising under Pt V of the *TPA*).

374 In *Giorgianni v The Queen* (1985) 156 CLR 473, Gibbs CJ made these observations at 482:

> However, some cases suggest that some qualifications should be admitted to the general principle that a person cannot be found guilty of having aided, abetted, counselled or procured an offence unless he had actual knowledge of all the essential matters which made the act done a crime. One qualification that must be accepted is that wilful blindness, the deliberate shutting of one's eyes to what is going on, is equivalent to knowledge.

375 Gibbs CJ at 482 observed that Lord Devlin had said in *Roper v Taylor's Central Garages (Exeter) Ltd* [1951] 2 T.L.R. 284 at p 288 that a person who has shut his eyes to an obvious means of knowledge may be described as having "knowledge of the second degree". At 495, Mason J observed in relation to the question of establishing secondary participation that "it is enough if the defendant has deliberately shut his eyes to a relevant fact or has deliberately abstained from obtaining knowledge by making an enquiry for fear that he may learn the truth." Mason J also observed (together with related observations) that his Honour was in agreement with the observations of Gibbs CJ.

376 At 505, Wilson, Deane and Dawson JJ said this:

> Secondly, although it may be a proper inference from the fact that a person has deliberately abstained from making an enquiry about some matter that he knew of it and, perhaps, that he refrained from enquiry so that he could deny knowledge, it is nevertheless actual knowledge which must be proved [of the essential facts] and not knowledge which is imputed or presumed.

377 In *Pereira v Director of Public Prosecutions* (1988) 82 ALR 217, Mason CJ, Deane, Dawson, Toohey and Gaudron JJ (the Court) at 220 observed that in cases where actual knowledge must be established, "it is never the case that something less than knowledge may be treated as satisfying a requirement of actual knowledge". Their Honours also made the following observations at 220:

> Finally, where knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. All that having been said, *the fact remains that a combination of suspicious*

> *circumstances and failure to make enquiry* may sustain an inference of knowledge of the actual or likely existence of the relevant matter. In a case where a jury is invited to draw such an inference, a failure to make enquiry may sometimes, *as a matter of lawyer's shorthand*, be referred to as wilful blindness. Where that expression is used, care should be taken to ensure that a jury is not distracted by it from a consideration of the matter in issue as a matter of fact to be proved beyond reasonable doubt.
>
> [emphasis added]

378 The principles identified by their Honours at 220, of course, apply to a judge who is undertaking the process of fact-finding, and in civil proceedings where proof of actual knowledge of the essential facts must be established, the question of the standard of proof, subject to the statute, will be the civil standard.

379 *Fourth*, *Hamilton v Whitehead*, as earlier discussed, is a decision which concerned the conduct of Whitehead as Managing Director of the relevant company engaging in the contravention. It is an illustration of a case in which the person said to be knowingly concerned was at the centre of the conduct of the company. At 127, Mason CJ, Wilson and Toohey JJ observed that on the facts of the case, there could be no doubt that Whitehead, in placing the advertisement and in dealing with those who responded to it, "was the company". Whitehead was its Managing Director and his mind was the mind of the company. The particular statutory provisions in question had, as their essential elements, a prohibition upon offering or issuing to the public interests in the relevant trust. Whitehead was found to be knowingly concerned in the commission of the offences by the company because of two factors. First, he was the "actor" in the conduct constituting the offences and, second, he "had knowledge of all the material circumstances", having regard to the statutory text, constituting the commission of the offences. Like Mr Whitehead, Mr Green was the "actor" in the conduct constituting the contraventions by R2O (along with Mr Roberts, particularly since Mr Roberts had elected to leave to Mr Green all matters relating to the creation of the calculators), and the question to be determined was whether he "had knowledge of all the material circumstances" constituting the commission of the offences, having regard to the essential facts determined by reference to the statutory text in relation to each contravention.

The essential facts concerning each of the contraventions by R2O

380 It is now necessary to identify the essential facts of each contravention by R2O and examine the extent to which the directors had knowledge of the essential facts. As to s 32A of the Code, I have already accepted Mr Hill's evidence, which establishes that in relation to the first tranche of contracts, the annual cost rate exceeded 48% in 108 of those 142 contracts. As to the second

tranche, Mr Hill has concluded that the annual cost rate was exceeded in 32 of those 90 contracts. In the first tranche, 15 of those contracts exceeded an annual cost rate of 80% and 80 of the contracts exceeded an annual cost rate of 60%. Mr Hill's analysis shows that in the case of the contract for Ms McKenna and the contract for Mr Blacker, the annual cost rates were 96.88% and 96.02% respectively. In the second tranche of contracts, in the case of the contract with Ms Hamilton, and the contract with Ms Graty, the annual cost rates were 87.41% and 79% respectively.

381 As to s 32A, the essential elements are that R2O was providing credit to a person; that it did so by entering into a contract with that person; and that the annual cost rate of the contract exceeded 48%. It is not necessary to show that Mr Green (or Mr Roberts) knew of the legal characterization of the facts that establish that R2O is a "credit provider" or that the contract in fact entered into is characterised as a "credit contract". As to the so-called 48% cap, as Mr Green describes it, it is sufficient if Mr Green knew the foundation fact that something the legislation chooses to call the "annual cost rate" exceeded 48%. The circumstance that a large number of credit contracts in the first tranche of contracts had an annual cost rate in excess of 48% was a function of applying the Price Calculators developed or created by Mr Green and the formulas contained in them for calculating the weekly repayment amount. The features of each calculator have been described extensively in these reasons, including the fields involved and the way in which those calculators produced an output in the form of the weekly repayment amount. When those contracts were analysed and reconciled with the method adopted and required by s 32B of the Code, the relevant number of contracts deploying Mr Green's formula, contained within his calculators, failed to conform to the statutory standard for the calculation of what the legislation chooses to call the "annual cost rate". Mr Green was at the absolute centre of the writing of those calculators. He was responsible for them. Mr Roberts left the issue of the creation of the calculators, and their distribution to franchisees, to Mr Green. Moreover, Mr Green and Mr Roberts were responsible for the Operations Manuals distributed to franchisees, and they provided training and direction as to how the repayment amounts were to be calculated. I have already discussed extensively the features of the Manuals. It is notable that Mr Green embarked upon the conduct of the business undertaking of a credit provider, in his capacity as a director of R2O, without making any serious attempt to come to grips with the statutory scheme, and particularly the relationship between s 32A and s 32B.

382 It is no answer for Mr Green to say that the formula in s 32B was complicated. When the question arose about the role of s 32B in the context of s 32A, as can be seen in the exchanges

between Mr Green, Mr Latham and Mr Wills, it can be seen also that Mr Green had no understanding of s 32B. He did not know or have the slightest idea of what ASIC was talking about when it was putting to him, over a considerable period of time in 2016 and especially at the meeting of 9 March 2017, that R2O's contracts did not comply with s 32A and did not comply with the Code because "his" contracts exceeded the 48% cap. They were "his" contracts in the sense that they were based on his calculator. Mr Green's conduct is emblematic of a person who failed to come to grips with the obligations imposed upon R2O in respect of s 32A and 32B and did so in a way which could only be described as framing, with eyes tightly closed to the fundamental obligations set out in s 32A and s 32B of the Code, the calculators used to determine the consumer's repayment obligation which, in so many examples, failed to comply with the annual cost rate cap. Mr Green was put on notice by ASIC of what could only be described as "serious concerns" about R2O's compliance with the Code. At the meeting on 9 March 2017, ASIC told Mr Green that R2O's contracts (the repayment obligations of which were based on his calculators) did not comply with the Code and exceeded the cap. In fact, Mr Green, in his exchanges with Mr Wills and Mr Latham, ridiculed Mr Sugunasingam as a person who was creating problems where none existed so far as Mr Green and Mr Wills were concerned. No serious attempt was made by Mr Green to get to the bottom of ASIC's concerns about the flaws in the calculators leading to the contraventions by R2O *until* Mr Ashe undertook his analysis and identified the clear flaw in the calculator in his explanatory email of 2 August 2017, extensively discussed earlier. Mr Ashe, in an email to ASIC on his assuming the role at QED risk after Mr Wills ceased to be involved, said that he understood from Mr Wills that the issues were resolved and also said that he could see that they were not, as ASIC pressed for answers to its earlier queries.

383 I am satisfied that Mr Green and Mr Roberts were both knowingly concerned in R2O's contraventions of s 32A of the Code. As indicated earlier, I am not willing to accept the evidence of Mr Green as to the moment in time when he first became aware of the problem with these contracts by reason of s 32A of the Code (contracts exceeding the cap). Nevertheless, ASIC must establish that Mr Green knew, in the sense described in the authorities, of facts that the cap was being exceeded by reason of the use of his flawed non-compliant calculators so far as they related to the contracts falling within the tranche 1 contracts. I am satisfied that they have done so.

384 The second tranche of contracts comprises those 90 contracts entered into between 25 May 2018 and 18 June 2018. As discussed earlier, Mr Green sent a new Price Calculator to the

franchisees by his email of 11 April 2018, as he describes at paragraphs 55 and 56 of his affidavit: see [350] of these reasons.

385 As ASIC notes, Mr Hill's evidence is that the new April calculator was largely correct. Nevertheless, 32 of the 90 second tranche contracts exceeded the 48% cap on the annual cost rate. ASIC accepts, however, that the April 2018 calculator was capable of performing correct "interest calculations". ASIC contends that Mr Green and Mr Roberts were knowingly concerned in the second tranche contraventions of s 32A (32 contracts or 36% of them exceeding the cap, with the two earlier mentioned contracts having an annual cost rate of 87.41% and 79%), because Mr Green "set the conditions for non-compliance" and both Mr Green and Mr Roberts were "intimately involved in the operation of the business"; they provided the training and directed the procedures to be adopted by franchisees; and they were able to monitor contracts and carry out "spot checks" of particular contracts.

386 Apart from these matters, ASIC makes a point about timing and its relationship with an earlier culture of non-compliance fostered by Mr Green and Mr Roberts. The point is this. ASIC says that although the new calculator was sent to franchisees on 11 April 2018, all of the breaches of s 32A in the second tranche occurred after 28 May 2018, more than six weeks later, and most of the breaches occurred in early June 2018, some 8 weeks after 11 April 2018. What is said to follow from the timing is that although a correct Price Calculator was sent to the franchisees in April, it is clear that Mr Green and Mr Roberts had, by their earlier conduct, "set the conditions" for further contraventions of s 32A in many of the second tranche contracts. That is said to be so because *first*, Mr Green and Mr Roberts had established a pattern of behaviour by reference to incorrect calculators thus leading to error and *second*, they "had not established the procedures to ensure compliance".

387 ASIC says that the earlier culture of non-compliance permeated the later conduct of calculating the weekly repayments according to inputs into the fields, reflecting an annual cost rate in excess of the 48% cap when the calculation was undertaken.

388 The email to franchisees asking them to implement the new calculator was sent by Mr Roberts on 30 May 2018. This, in part, explains the elapsed time between 11 April 2018 and the beginning of June 2018 when, in the main, the contracts began to be entered into.

389 In order to examine the claim that Mr Green and Mr Roberts knew the essential facts of R2O's contraventions of s 32A in respect of the second tranche contracts, it is necessary to examine a little further the context of the exchanges.

390 Mr Green's evidence is that a critical matter occurred on 29 March 2018. That was the date when he was called to give further evidence at the ASIC examination under the NCCP Act. On that date, he was told by counsel for ASIC that ASIC had concerns that R2O's Price Calculators were not in compliance with the Code. Mr Green says that he was advised by counsel for ASIC that ASIC had reviewed the "Amortization Loan Calculator" created by Mr Ashe and using a sample of the same contracts used in the analysis undertaken by McGrath Nicol, ASIC had reached the same conclusion reflected in that report, namely, that R2O's calculators were not undertaking the task in accordance with the Code. Mr Green said that that came as a "huge surprise" to him.

391 In this context, Mr Green gave evidence that he advised ASIC that he had used the loan difference calculator sent to him by Mr Ashe with the instructions of 14 August 2017 to "check contracts". He said that although he had "nominated" that he had reviewed 200 contracts over a period of months, he was not really sure "how many contracts I had checked or over what period I had checked them when I was being examined". Mr Green affirmed at paragraph 53 the matters recited at paragraph 44 of his affidavit, which were that using Mr Ashe's loan difference calculator, he had reviewed 1,267 contracts and only one contract was identified where the interest rate had not been correctly applied. Mr Green, at paragraph 53, engages with that matter as contextually relevant matters in relation to ASIC's criticism that the calculator used by Mr Green was not undertaking calculations in accordance with the Code.

392 At paragraph 54, Mr Green says that following this examination on 29 March 2018, it became apparent to him that he had not used Mr Ashe's Loan Difference Calculator correctly and it was this matter that caused him to decide that he would create a new calculator and would ask the franchisees to rewrite all the existing contracts in accordance with the formula contained in the Amortization Loan Calculator.

393 Mr Green says that in or around 11 April 2018, he sent an email to all franchisees attaching the new 2018 calculator and the price guide calculator. On 30 May 2018, Mr Roberts sent an email to all franchisees asking them to implement the new calculator. In that email, Mr Roberts said this.

> In keeping with the regulations of ASIC we have to re-calculate ALL current Contracts with the new calculator, then you must email the pages 3 & 15 as below samples to each customer with a good news message saying "there has been an error in calculating your payments please see attached amendments to your contract, in most cases this will be in your favour with reduced payments or contract term"
>
> Then you MUST amend the Ezidebit payments to match
>
> I understand this is a big undertaking but we must fully comply
>
> Tim Roberts

394 On 1 June 2018, Mr Green sent an email to the franchisees attaching a Loan Difference Calculator. Mr Green referred to the email from Mr Roberts requesting everyone to recalculate any current contracts. Mr Green attached to his email a "checking calculator to simplify the task". Mr Green instructed the franchisees to take these steps: enter the retail car price as demonstrated and disclosed; put in the warranty; put in the deposit; enter the length of the contract in weeks; and leave the interest rate at 48% regardless of the rate that might be recited in the contract. The instruction was that if the difference is negative, the calculator would show the negative amount in red, and in that case the contract would be incorrect. If the difference appeared in green, the contract would be regarded as correct and falling under the cap in s 32A. An example was set out in the email under the name "Smith", which in fact recites the transactional circumstances applying in the case of Ms Abbott's contract. In her case, the calculator demonstrated that although her contract repayment amount was $118.91, it ought to have been $86.85, with a negative difference of $32.06.

395 On 7 June 2018, Mr Green sent the franchisees the text of a letter or email to be sent to the customer advising the customer of any adjustment to the customer's contract.

396 I do not accept that the failure of Mr Green's calculator to properly calculate the annual cost rate came as a huge surprise to him on 29 March 2018. I have already rejected, as earlier explained, Mr Green's evidence of having checked 1,267 contracts.

397 ASIC says that Mr Green and Mr Roberts, as company directors and the guiding minds of the "R2O ACL", had responsibilities to ensure that R2O complied with its general conduct obligations, including ensuring that its credit representatives complied with credit legislation: s 47(1)(e), NCCP Act. The particular contravention relied upon, presently in issue, is that R2O as a credit provider contravened the prohibition in s 32A of the Code (as informed by s 32B of the Code).

398 The question in issue is whether Mr Green and Mr Roberts *knew* each of the essential facts going to those contraventions by R2O of s 32A in respect of the particular contracts falling within the second tranche of contracts (that is 32 contracts out of 90 contracts which involved a contravention), so as to give rise to the conclusion that they were knowingly concerned in the particular s 32A contraventions by R2O, constituted by R2O entering into contracts after 11 April 2018 and particularly 30 May 2018 where the annual cost rate exceeded 48%.

399 I am not satisfied that Mr Green and Mr Roberts did know the essential fact. The prohibition in s 32A is a prohibition upon a credit provider entering into a credit contract if the annual cost rate of the contract exceeds 48%. It is critical therefore that each director knew that the annual cost rate of the relevant contract exceeded 48% on entry into the contract by the credit provider. Thus, Mr Green and Mr Roberts must be shown to have known that fact. I am not satisfied that the evidence establishes that they knew that fact. Mr Green and Mr Roberts had caused a calculator to be distributed to the franchisees to enable the relevant statutory calculation to be conducted. That calculator is not shown to have contained the earlier flaws. I am not satisfied that the relevant state of knowledge is established by reason of an historical culture of non-compliance by reference to the earlier calculators which had the effect that franchisees continued to bring contracts into existence in breach of the cap. Nor am I satisfied that that circumstance, taken together with contended inadequate training, is sufficient to establish actual knowledge. The evidence suggests that Mr Green sought to address the flaws in the earlier calculators and sought to make adjustments in relation to current contracts within the scope of the Ezidebit arrangement. Moreover, the "serious concerns" put to Mr Green and Mr Roberts were the things which the new calculator sought to resolve. Thus, the earlier obfuscation by Mr Green of ASIC's concerns was no longer the characterising feature of the conduct of the directors. Contraventions by R2O undoubtedly occurred in relation to the number of the second tranche contracts as ASIC contends, but I am not satisfied that each of Mr Green and Mr Roberts are shown to have known the essential fact at the moment in time when R2O entered into the contracts in contravention of the prohibition.

400 As to s 23(1), I am satisfied that Mr Green and Mr Roberts were knowingly concerned in R2O's contraventions of s 23(1)(c) as to the relevant first tranche contracts for the same reasons that they were knowingly concerned in R2O's contraventions of s 32A. I am also satisfied that Mr Green and Mr Roberts were not knowingly concerned in R2O's contraventions of s 23(1) as to the relevant second tranche contracts for the same reasons that they were not knowingly concerned in R2O's second tranche contraventions of s 32A.

401 As to s 17(4) of the Code, the subsection provides that in the case of a credit contract, the contract document must contain the "annual percentage rate", which is the rate specified in the contract as *the* annual percentage rate: s 17(4)(a); s 27 [emphasis added].

402 The annual percentage rate is a charge for the provision of credit, generally expressed as an annualized rate struck as a percentage of the debt owing from time to time (or, for example, from week to week). The "annual percentage rate" is an interest charge made or to be made for providing the credit. That follows because the credit contract must contain the annual percentage rate charged by the credit provider for providing the credit: s 4, s 5(1)(c) and s 17(4)(a).

403 Each of the 232 contracts recites an annual interest rate on the face of the contract. However, Mr Hill's report demonstrates that as to the first tranche of contracts, the annual percentage interest rate actually charged to the consumer is a different rate for all 142 contracts, and in 133 of them, the rate charged is higher than the rate contained in the contract. As to the second tranche of contracts, the rate actually charged is different to the stated rate in 45 of the 90 contracts, and in 44 of those contracts, the rate charged is higher than the recited rate. As already mentioned, Ms Abbott's rate was actually 77.11% rather than 45% and in the case of Ms Abraham, the actual rate was 74.9% rather than 35%.

404 In the case of a contravention of s 17(4), it is sufficient to establish a contravention by R2O as to the element of the stated rate, to establish that the contract does not "contain" an annual percentage rate (interest charge) *or* that the annual percentage rate contained in the contract is *incorrect* having regard to the rate actually charged. In the number of contracts already mentioned, the annual percentage rate was incorrect.

405 For Mr Green and Mr Roberts to be knowingly concerned in R2O's contravention, knowledge of these facts needs to be established: each hirer/buyer was entering into an arrangement (characterised as a matter of law as a credit contract, although the characterisation is not itself an essential fact) which required repayments to be made by a person to R2O; the quantum of the repayments was determined by applying a formula taking account of the method already extensively described based on the nominated cash price, the deposit, a warranty (if any) and the nominated term of the repayments (the period of weeks); and the calculators created by Mr Green applying the formula just described produced outputs which gave rise to weekly repayments that failed to provide for an annual percentage rate (interest rate) in accordance with the rate in the contract. For all the reasons mentioned in relation to s 32A, having regard

to the chronology of events extensively described, Mr Green knew that there were serious concerns agitated by ASIC concerning the accuracy of the calculations arising out of the use of his calculators, the treatment of the deposit, the failure to calculate the interest rate on the basis of diminishing balances having regard also to the treatment of the deposit, and issues of amortization. The result was that although Ms Abbott's contract, for example, recited an annual percentage rate of 45%, she was charged an effective interest rate of 77.11%. I have already identified the respects in which Mr Green failed to come to grips with the inadequacies and flaws in his calculators and the obligations in relation to matters such as the annual cost rate and the imperative of ensuring that the annual percentage rate (interest rate) charged to consumers was correct in terms of the rate recited in the contract.

406 In the number of contracts already mentioned, it was not.

407 The effective interest rate was significantly different. Mr Green knew there were serious concerns consistently being pressed by ASIC about this very matter. I have already explained the respects in which Mr Green approached the creation of his calculators and the formulas within them, with eyes tightly closed, notwithstanding that he had been put on notice of serious concerns by a regulator charged with the responsibility of highlighting the very matter now in question. Moreover, I am reinforced in my view that Mr Green was conscious of these difficulties by the manner in which he approached the checking of the contracts later in time and the issue about the 1,267 contracts. I am satisfied that Mr Green was obfuscating the position as to that matter, as undertaking the matter properly would have been likely to reveal his state of knowledge about non-compliance with the requirements of the Code on this issue.

408 Mr Roberts was knowingly concerned because he chose to leave the entire question to Mr Green and Mr Green's calculators and the method contained within them.

409 As to those contracts falling within the second tranche of contracts where the interest rate charged was different and higher than the rate recited in the contract, a different position applies. As mentioned earlier, Mr Green formulated the 2018 calculator and ASIC accepts that the 2018 calculator correctly calculated the interest rate. Nevertheless, there were contracts where the rate charged was different and higher than the rate contained in the contract. However, I am not satisfied that the evidence demonstrates that Mr Green and Mr Roberts knew that the effective rate being charged to the hirer was incorrect in relation to those contracts entered into after the commencement of the new 2018 calculator on 30 May 2018.

410 As to s 17(5) of the Code, Mr Green does not contest the proposition that he was knowingly concerned in a contravention of s 17(5). Section 17(5) of the Code provides that in the case of a credit contract, the contract document must contain the method of calculation of the interest charges payable under the contract and the frequency with which the interest charges are to be debited under the contract. Thus, the credit contract must contain the method of calculation and the frequency with which interest charges are to be debited. I am satisfied that the contracts do not set out those matters. The "Annual Interest Rate" clause already quoted in these reasons is not sufficient to satisfy the requirements of s 17(5) and thus R2O failed to meet the requirement of that subsection in respect of all 232 credit contracts the subject of the proceeding. Mr Roberts has elected to abide by a determination of the Court on all issues in these proceedings. As to this issue of s 17(5), I am satisfied, having regard to the position of Mr Roberts as a director and his engagement directly in the affairs of the company, that he was knowingly concerned in these contraventions of s 17(5) of the Code.

The ASIC Act contraventions

411 As to R2O's contraventions of ss 12DA, 12DB(1)(a) and 12DB(1)(g) of the ASIC Act, those provisions of the legislation are concerned with prohibitions upon engaging in conduct in relation to, or in connection with the supply of, financial services, that is *misleading* or *deceptive* or is likely to mislead or deceive (s 12DA); or the making of a *false* or *misleading* representation that services are of a particular standard, quality, value or grade (s 12DB(1)(a)); or the making of a *false* or *misleading* representation with respect to the price of the services (s 12DB(1)(g)). In order for Mr Green and Mr Roberts to be knowingly concerned in R2O's contraventions of those sections of the ASIC Act, Mr Green and Mr Roberts must be shown to have had knowledge of the essential facts which give the conduct of R2O, giving rise to the contraventions, the character of misleading or deceptive conduct or conduct likely to mislead or deceive, or a false or misleading representation concerning the subject matter of ss 12DB(1)(a) and (g) respectively.

412 ASIC's contention is that as to the first tranche of contracts, the annual percentage rate actually charged to the consumer/hirer/buyer in 133 of the 142 contracts was higher than the rate recited in the credit contract, and in 44 of the 90 second tranche contracts, the annual percentage rate actually charged was higher than the rate recited in the contract. Thus, 177 contracts recited a lower annual percentage rate than that actually charged to the contracting party.

413 ASIC relies on this conduct as containing a representation which bears the statutory characterisation in ss 12DA, 12DB(1)(a) and 12DB(1)(g). I have already examined and found that R2O contravened each of these sections.

414 ASIC contends that Mr Green and Mr Roberts were knowingly concerned in *that* conduct.

415 In order for that to be so, ASIC must prove that Mr Green and Mr Roberts knew that the credit contracts contained a representation as to an annual interest rate (whatever that rate may have been in the particular individual contract in question), and that they knew that the representation was incorrect.

416 They may be shown to have known that the rate charged to the contracting parties was higher than the rates recited in the contracts, and thus the rate recited in the contracts was incorrect (a falsity) as a matter of direct evidence, or they may be shown to have conducted themselves in such a way that inferences arise from primary facts such that they knew that the annual percentage rates actually charged to the relevant consumers were higher than the rates stated in the contracts.

417 As mentioned earlier, it is not necessary for ASIC to show that the directors knew that the conduct of charging an annual percentage rate higher than the contract rate bears *any particular statutory characterisation*.

418 In this case, for all the reasons mentioned earlier, Mr Green and Mr Roberts knew that there were serious concerns that the Price Calculators created by Mr Green did not calculate a weekly repayment obligation that reflected an annual percentage rate in compliance with the Code. The flaws were fundamental in so many respects, as described earlier. They were the work of Mr Green. They were the subject of well-placed concern, agitation and criticism by officers of ASIC. When those concerns were raised, Mr Green sought to obfuscate the position and diminish the concerns. When the time came for later checking the contracts, Mr Green gave the evidence I have rejected concerning his checking of the contracts.

419 Lest there be any doubt about the matter, these matters of foundation fact should be noted again in this context.

420 ASIC emphasises that Mr Green and Mr Roberts were the sole directors and owners of R2O during the relevant period relating to the contracts in issue. Mr Roberts was the responsible manager for the R2O ACL as from 24 December 2016. Both Mr Green and Mr Roberts were listed as fit and proper persons for the purposes of the R2O ACL. It is correct to say that they

were both intimately involved in the operation of the company and, as ASIC observes, they were the only people working in the company until September 2017. They provided the franchisees with a template of a credit contract. That was done through R2O's intranet. It was included in the Operations Manual. The franchisees were instructed as to its use. Mr Green and Mr Roberts were the authors of the Operations Manual and carried out the training. Moreover, the franchisees were required to use the template for each individual contract entered into with a consumer. Those details were saved onto R2O's intranet. In addition, franchisees were not able to sell a car without using the R2O intranet system and without R2O knowing about it. The evidence is that Mr Green and Mr Roberts carried out spot checks of about 40 contracts per month entered into by R2O through the franchisees. Apart from this, Mr Green created and distributed the Price Calculators to the franchisees.

421 Having regard to all of these facts, it is perfectly clear that Mr Green and Mr Roberts knew the terms of the credit contracts and knew that they contained statements about the annual percentage interest rate the consumer would be charged under the contract.

422 As to the contracts, Mr Green and Mr Roberts directed the franchisees about the mechanism for using the calculator, which engaged directions about how to determine the cash price of the vehicle. He directed the franchisees about the matters of the deposit (first payment), the warranty (if any), the term of the contracts in weeks and the activation of the calculator to determine, as an output, the quantum of the weekly payment over the term.

423 Thus, it can be seen that Mr Green and Mr Roberts were at the epicentre of the conduct of this business.

424 Nevertheless, one of the essential facts which Mr Green and Mr Roberts must be shown to have known, in order to be knowingly concerned in R2O's contraventions, is that the rates recited in the relevant contracts were incorrect. As earlier mentioned, Mr Green and Mr Roberts knew that to be the position, having regard to the fundamental flaws in the calculators and in failing to come to grips with ASIC's serious concerns. I have already addressed much of the evidence concerning the treatment of the deposit, the application of interest to the debt without accommodating the deposit, the failure to apply interest to reducing balances and the failure to deal with amortisation. These are the facts which give rise to the inference of knowledge, having regard to the gravity of the matters, and the failures of Mr Green and Mr Roberts to address such fundamental problems especially in the face of ASIC's serious concerns. However, ASIC emphasises the following particular facts.

425 *First*, on 25 February 2017, Mr Green sent the email earlier mentioned in these reasons to Mr Wills providing a description of the formula used in his pricing calculator. The email has been quoted earlier. The description of the formula shows that Mr Green understood that interest was being applied by R2O to the cash price before taking into account and subtracting the deposit.

426 *Second*, ASIC emphasises the conference of 9 March 2017 between ASIC officers, Mr Green, Mr Roberts and Mr Wills. It was a teleconference. As earlier mentioned, the minutes of the meeting record the serious concerns identified by ASIC in relation to the calculation of charges and whether the charges being imposed on the consumer entering into the credit contract were within the 48% rate cap. As mentioned earlier, ASIC officers told Mr Green, Mr Roberts and Mr Wills in the plainest terms that R2O was not calculating its charges correctly, and that based on ASIC's analysis, R2O was exceeding the 48% cap.

427 *Third*, on 16 March 2017, ASIC sent an email to Mr Wills seeking further information about R2O's calculation of charges under the contracts. That email was subsequently sent to Mr Green. The email tells R2O, in relation to pricing calculations, that the deposit was not being deducted from the cash price of the car and that the calculation was not in conformity with s 32B of the Code.

428 *Fourth*, on 31 March 2017, ASIC sent an email to Mr Wills seeking answers to earlier queries and pursuing ASIC's concern about two things. First, R2O's disclosure requirements, and second, the annual cost rate of R2O's contracts. That email was also subsequently sent to Mr Green. The email expressly raises non-compliance with s 17 of the Credit Code and again informs R2O of ASIC's view that the credit provider was exceeding the 48% cap. ASIC expressed concerns about the accuracy of R2O's interest calculations.

429 *Fifth*, on 12 April 2017, ASIC sent an email to Mr Wills chasing up a response to previous concerns ASIC had raised concerning R2O's contracts exceeding the annual cost rate.

430 *Sixth*, on 31 May 2017, ASIC sent a further email to Mr Wills, which was copied to Mr Green, observing that ASIC's concerns had not been addressed. Those concerns were questions raised earlier by ASIC about whether the formula R2O had adopted to calculate charges did so in accordance with the Code, and whether the methodology used to make calculations was not in accordance with the Code.

431 These are the matters of fact described earlier, all of which I find as facts, which give rise to an inference that Mr Green knew that the business method and calculators used to implement the business method were not in conformity with the Code and were giving rise to incorrect outputs in the annual percentage rate charges to consumers, with the result that the rate recited in the contracts in issue was incorrect. On this footing, Mr Green and Mr Roberts knew that the rate in the contracts was incorrect.

432 That state of knowledge, as to that matter, is the position in relation to 133 of the first tranche contracts.

433 It is not the position, however, in relation to all of the 44 second tranche contracts in issue because by the time of entry into many of those contracts, Mr Green had developed his new 2018 calculator which correctly calculated the interest rate and which was his attempt to address the fundamental flaws in the earlier calculators, as described earlier in these reasons.

434 Accordingly, I am not satisfied that Mr Green and Mr Roberts knew of the incorrect essential fact in relation to many of the contracts within the second tranche contracts entered into after 30 May 2018.

435 Accordingly, the position is this. R2O has contravened the four provisions of the Code in suit in these proceedings and the three provisions of the ASIC Act in suit in these proceedings in relation to the contracts (first and second tranche) in suit as contended by ASIC. Mr Green and Mr Roberts were knowingly concerned in each of R2O's contraventions so far as the contravening conduct concerned the first tranche contracts in issue. Mr Green and Mr Roberts also were knowingly concerned in R2O's contraventions of s 17(5) concerning the second tranche contracts. The intervention of the new calculator devised by Mr Green means that neither he nor Mr Roberts were knowingly concerned in R2O's contraventions of ss 32A, 23(1) and 17(4) of the Code concerning those second tranche contracts entered into after 30 May 2018 where the rate was incorrect. Nor were they knowingly concerned in R2O's ASIC Act contraventions concerning the second tranche contracts in issue in the proceedings entered into after 30 May 2018 because as R2O entered into those contracts, through the franchisees, they are not shown to have known that the annual percentage rate (interest rate) was, so far as the relevant contracts are concerned, incorrect, and nor was there an ignored serious concern to which Mr Green and Mr Roberts each turned a blind eye as to those post-30 May 2018 contracts.

436 The following relief is to be granted, framed in appropriate terms:

(1) A declaration that R2O contravened ss 32A, 23(1), 17(4) and 17(5) of the *National Credit Code* by engaging in particular conduct framed to take account of the findings in these reasons.

(2) A declaration that Mr Green and Mr Roberts were knowingly concerned in the contraventions by R2O of ss 32A, 23(1), 17(4) and 17(5) of the Code framed according to the findings in these reasons.

(3) A declaration that R2O contravened ss 12DA, 12DB(1)(a) and 12DB(1)(g), framed according to the findings in these reasons.

(4) A declaration that Mr Green and Mr Roberts were knowingly concerned in the contraventions by R2O of the ASIC Act provisions in suit framed according to the findings in these reasons.

(5) Injunctions restraining R2O, Mr Green and Mr Roberts from, respectively, engaging in contraventions of ss 32A, 23(1), 17(4) and 17(5) of the *National Credit Code* or being knowingly concerned in the contravention of any of those provisions of the Code by another. ASIC seeks an injunction restraining the respondents from engaging in credit activity, or being involved in a business engaged in a credit activity for a particular period as the Court determines appropriate. An injunction directed to this conduct is to be granted. However, the parties will be given an opportunity to be heard further on the question of what is an appropriate period for such a restraint.

(6) An injunction restraining R2O from engaging in further contraventions of ss 12DA, 12DB(1)(a) and 12DB(1)(g) of the ASIC Act and an injunction restraining Mr Green and Mr Roberts from engaging in conduct constituting being knowingly concerned in contraventions of those provisions of the ASIC Act.

(7) As to the question of a pecuniary penalty, ASIC seeks an order against R2O for payment of a penalty in relation to its contraventions of ss 32A, 23(1), 17(4) and 17(5) of the Code. ASIC also seeks a pecuniary penalty order in respect of R2O's contraventions of ss 12DB(1)(a) and 12DB(1)(g) of the ASIC Act. ASIC also seeks a pecuniary penalty order against Mr Green and Mr Roberts in respect of their conduct of being knowingly concerned in R2O's contraventions of ss 12DB(1)(a) and 12DB(1)(g) of the ASIC Act.

437 The question of the determination of an appropriate penalty will be the subject of further directions in relation to a further hearing on the separate question of penalty.

438 The applicant will be directed to submit proposed forms of relief consistent with these reasons, within 14 days. The parties will be directed to put on submissions within 14 days as to the period of the restraint contemplated by point 6 at [436] of these reasons. The parties will be directed to conduct discussions with a view to recommending further procedural orders in relation to the separate question of penalty leading to a hearing on that matter.

I certify that the preceding 438 (four hundred and thirty-eight) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Greenwood.

Associate:

Dated: 11 September 2020