FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Green County Pty Ltd [2025] FCA 367

File number(s):	NSD 204 of 2023
Judgment of:	**SHARIFF J**
Date of judgment:	15 April 2025
Catchwords:	**CONSUMER LAW –** alleged contraventions of National Consumer Credit Protection Act 2009 (Cth) (**NCCP Act**) and National Credit Code (**Code**) – where first and second respondents engaged in "credit activity" associated with the provision of credit to small business borrowers – where credit was provided to two consumers who asserted that they were establishing small businesses – application of the Code to the circumstances of those two consumers – examination of divergent judicial views as to the operation of s 5(1)(b) of the Code – whether first and second respondents engaged in credit activity without a licence – whether credit provided for wholly or predominantly domestic, household or personal purposes – operation of statutory presumptions in s 13 of the Code – whether "business purpose declarations" effective – making of "reasonable inquiries" – whether "reasonable inquiries" would have disclosed the true loan purpose – whether the two consumers had entered into multiple contracts or single contract – where resolution of the question of the number of contracts is dependent on identification of the relevant contract(s) under which debt is deferred – contraventions established in most part subject to hearing from the parties as to the application of s 183 of the NCCP Act **CORPORATIONS** – alleged contraventions of director's duty of care and diligence under s 180(1) of the Corporations Act – where third respondent a director of first respondent and officer of second respondent – where it is alleged that policies, procedures and systems did not accord with a "Required Framework" and "Minimum Arrangements" based on the opinions of an expert – limited weight to be given to expert's opinions – whether essential elements of risk calculus established – essential aspects of the pleaded case not established
Legislation:	*Corporations Act 2001* (Cth) ss 180(1), 180(2) *Crimes Act 1914* (Cth) s 4AA

	Evidence Act 1995 (Cth) s 140
	Federal Court of Australia Act 1976 (Cth) s 37AF(1)(a)
	National Consumer Credit Protection Act 2009 (Cth) ss 5, 5(1)(b), 5(1)(b)(i), 5(1)(b)(ii), 5(4), 6(1), 29, 29(1), 183, 183(1), 306; Schedule 1 (*National Credit Code*) ss 3, 3(2), 4, 11(1), 13, 13(1), 13(2), 13(3), 13(3)(a), 13(3)(b), 13(4), 13(5), 17(4), 17(6), 32A, 32A(1), 40
	Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth)
	National Consumer Credit Protection Regulations 2010 (Cth) reg 68
	Consumer Credit (New South Wales) Act 1995 (NSW) s 5
	Consumer Credit (Queensland) Act 1994 (Qld) app (repealed)
	Consumer Credit (South Australia) Act 1995 (SA) s 5
	Consumer Credit (Victoria) Act 1995 (Vic) s 5
	Legal Practice Act 1996 (Vic) (repealed)
	Consumer Credit (New South Wales) Code ss 5, 6, 11
	Consumer Credit (Queensland) Code ss 6(1)**,** 6(5)
	Consumer Credit (South Australia) Code s 6
	Consumer Credit (Victoria) Code s 4(1)
	Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth)
Cases cited:	*Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023*;* 336 ALR 209
	Australia and New Zealand Banking Group v Fink [2015] NSWSC 506
	Australian Securities and Investments Commission v Rich [2009] NSWSC 1229; 236 FLR 1
	Australian Securities and Investments Commission v Adler [2002] NSWSC 171; 168 FLR 253
	Australian Securities and Investments Commission v Healey [2011] FCA 717; 196 FCR 291
	Australian Securities and Investments Commission v King [2020] HCA 4; 270 CLR 1
	Australian Securities and Investments Commission v Mariner Corporation Ltd [2015] FCA 589; 241 FCR 502
	Australian Securities and Investments Commission v Maxwell [2006] NSWSC 1052; 59 ACSR 373
	Australian Securities and Investments Commission v Mitchell (No 2) [2020] FCA 1098; 382 ALR 425
	Australian Securities and Investments Commission v Money3 Loans Pty Ltd (Expert Evidence Admissibility) [2025] FCA 75

Axon v Axon [1937] HCA 80; 59 CLR 395

Bahadori v Permanent Mortgages Pty Ltd [2008] NSWCA 150

Balanced Securities Limited v Dumayne Property Group Ltd [2017] VSCA 61; 53 VR 14

Bank of Queensland Ltd v Dutta [2010] NSWSC 574

Beckley v Consumer, Trader and Tenancy Tribunal [2009] NSWSC 703

Benjamin v Ashikian [2007] NSWSC 735

Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1

Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336

Brown v New South Wales Trustee and Guardian [2012] NSWCA 431; 10 ASTLR 164

Cassimatis v Australian Securities and Investments Commission [2020] FCAFC 52; 275 FCR 533

Citadel Financial Corporation Pty Ltd (admin apptd) v Action Scaffolding & Rigging Pty Ltd (in liq) [2019] FCAFC 145

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission [2007] FCAFC 132; 162 FCR 466

Conway v O'Brien 111 F 2d 611 at 612 (2nd Cir, 1940)

Dale v Nichols Constructions Pty Ltd [2003] QDC 453

Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd [2000] HCA 35; 201 CLR 520

G v H [1994] HCA 48; 181 CLR 387

Geeveekay Pty Ltd v Director of Consumer Affairs Victoria [2008] VSC 50; 19 VR 512

George v Rockett [1990] HCA 26; 170 CLR 104

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32; 97 ALJR 857

Hawkes Menangle Pty Ltd v Brennan [2023] NSWSC 1095

Haynes v St George Bank [2018] SASCFC 51; 130 SASR 551

Hillam v Iacullo [2015] NSWCA 196; 90 NSWLR 422

Husqvarna Forest & Garden Ltd v Bridon NZ Ltd [1997] 3 NZLR 215

Jones v Dunkel [1959] HCA 8; 101 CLR 298

Jonnson v Arkway Pty Ltd [2003] NSWSC 815; 58 NSWLR 451

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11; 243 CLR 361

Lauvan Pty Ltd v Bega [2018] NSWSC 154; 330 FLR 1

Linkenholt Pty Ltd v Quirk [2000] VSC 166; ASC ¶155–040

Mag Financial Investment Ventures Pty Ltd v El-Saafin [2022] VSCA 286; 70 VR 400

Martin v Osborne [1936] HCA 23; 55 CLR 367

MB v Protective Commissioner [2000] NSWSC 717; 217 ALR 631

Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2020] HCA 29; 271 CLR 495

Morley v Australian Securities and Investments Commission [2010] NSWCA 331; 274 ALR 205

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd [2015] HCA 37; 256 CLR 104

NOM v DPP [2012] VSCA 198; 38 VR 618

Ozzy Loans Pty Ltd v New Concept Pty Ltd [2012] NSWSC 814

Park Avenue Nominees Pty Ltd v Boon (on behalf of Weir) & Anor [2001] NSWSC 700

Park Avenue Nominees Pty Ltd v Boon [2001] NSWSC 700

Permanent Building Society (in liq) v Wheeler (1994) 11 WAR 109

Permanent Trustee Australia Ltd v Boulton (1994) 33 NSWLR 735

Power v Hamond [2006] VSCA 25

Queensland Bacon Pty Ltd v Rees [1996] HCA 21; 115 CLR 266

Rafiqi v Wacal Investments Pty Ltd [1998] ASC ¶155–024

Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd [2011] FCAFC 53

Shafron v Australian Securities and Investments Commission [2012] HCA 18; 247 CLR 465

Shakespeare Haney Securities Limited v Crawford [2009] QCA 85; 2 Qd R 156

State of Queensland v Ward [2002] QSC 171

Story v National Companies and Securities Commission (1988) 13 NSWLR 661

Toll (FGCT) Pty Ltd Alphapharm Pty Ltd [2004] HCA 52; 219 CLR 165

Vrisakis v Australian Securities Commission (1993) 9 WAR 395

WA Pines Pty Ltd v Bannerman (1980) 30 ALR 559; 41 FLR 175

	Wyong Shire Council v Shirt [1980] HCA 12; 146 CLR 40
	Bolitho H, Howell N and Patterson J, *Duggan & Lanyon's Consumer Credit Law*, (2020) 2nd Edition, LexisNexis Butterworths
	Edwards and Sweeney, *Application of the Consumer Credit Code and the Purpose Test* (1996) 11 Australian Banking Law Bulletin 85
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	519
Date of last submission/s:	25 September 2024
Date of hearing:	9–13, 17–18 September 2024
Counsel for the Applicant:	Mr J Giles SC with Ms K Morris
Solicitor for the Applicant:	Clayton Utz
Counsel for the Respondents:	Mr J Williams SC with Mr B Hancock
Solicitor for the Respondents:	Ronayne Owens Lawyers

ORDERS

NSD 204 of 2023

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**GREEN COUNTY PTY LTD ACN 619 832 816** First Respondent
	MAX FUNDING PTY LTD ACN 616 549 725 Second Respondent
	MS IVY TANG GY NG Third Respondent

ORDER MADE BY: **SHARIFF J**

DATE OF ORDER: **15 APRIL 2025**

THE COURT ORDERS THAT:

1. By 5 pm on 29 April 2025, the parties are to provide the Associate to Shariff J competing or consent short minutes of order to deal with the case management matters relating to the next steps arising in the proceedings as a result of the reasons published today in *Australian Securities and Investments Commission v Green County Pty Ltd* [2025] FCA 367.

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

REASONS FOR JUDGMENT

SHARIFF J:

1. INTRODUCTION

1 This case involves an examination of the conduct of two companies engaged in the business of lending to small businesses. The two companies are the first respondent (**Green County**) who provided credit to small business borrowers and the second respondent (**Max Funding**) who referred prospective borrowers to Green County. The case also involves an examination of the conduct of the third respondent (**Ms Ng**) who was a director of Green County and an officer of Max Funding.

2 Max Funding operated a website which stated that it was involved in providing "Small Business Loans" in Australia. It made available an online application form for prospective borrowers to complete, which represented to them that a decision could be made within "3 minutes (24/7)" and could give rise to "same-day funding". It was further represented that applications would be accepted even if prospective borrowers had "bad credit" or were seeking to establish a "new business". If a loan application was approved, Max Funding would refer

the prospective borrowers to a lender, including Green County, who would then enter into loan agreements with the borrowers.

3 Neither Green County nor Max Funding (who I have from time to time referred to as the **corporate respondents**) hold a credit licence under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**). Nor do they seek to comply with the National Credit Code (**Code**) which forms Schedule 1 to the NCCP Act. That is because, by way of shorthand, the relevant parts of the NCCP Act and Code only apply when credit is provided wholly or predominantly for "personal, domestic or household purposes" and do not apply when it is declared by a borrower that the credit is to be used wholly or predominantly for business purposes (unless the declaration is found to be ineffective). Neither Green County nor Max Funding purported to be involved in the provision of credit for "personal, domestic or household purposes". Green County made it a condition of the provision of credit to borrowers that they made a "business purpose declaration" by which they declared that the purpose for which they were seeking credit and the purpose for which it would be applied was wholly or predominantly for business purposes.

4 Despite this, in its Amended Statement of Claim (**ASOC**), the Australian Securities and Investments Commission (**ASIC**) alleged that, during the period from 19 June 2017 to 4 May 2021 (the **Relevant Period**), Green County and Max Funding contravened the NCCP Act and the Code. ASIC's case against Green County and Max Funding focusses upon their respective activities in relation to two consumers who, for convenience, I have referred to as **Consumer 1** and **Consumer 2**. Consumer 1 is a person who at the relevant time was suffering from a gambling addiction. Consumer 2 is a person who at the relevant time was under financial distress. Both Consumers 1 and 2 submitted online application forms to Max Funding asserting that they were seeking loans to establish new businesses. Consumer 1 represented that he would be starting up a concreting business and Consumer 2 represented that she would be starting up a retail business selling seafood. Both Consumers 1 and 2 signed declarations confirming they were seeking loans for business purposes. ASIC's case is that both Consumers 1 and 2 lied, but that these lies would have been detected had Green County and Max Funding made "reasonable inquiries" of both of them.

5 As a result, ASIC alleges that, in fact, Green County and Max Funding were involved in providing credit to Consumers 1 and 2 for wholly or predominantly "personal, domestic or household purposes" within the meaning of s 5 of the Code. It contends that Green County and

Max Funding thereby each contravened s 29(1) of the NCCP Act by engaging in a credit activity without holding a licence authorising them to do so in respect of the entry into three credit contracts with Consumer 1 and two credit contracts with Consumer 2. ASIC further alleges that Green County contravened ss 17(4), 17(6) and 32A of the Code by entering into the credit contracts with Consumers 1 and 2 which did not comply with certain requirements of the Code, namely, the cap on maximum interest rates that could be charged as contained in s 32A(1) of the Code and the prescribed disclosures as to interest rate charges as required by ss 17(4) and (6) of the Code.

6 A central issue in the case against the corporate respondents is whether the credit arranged by Max Funding and ultimately provided by Green County to Consumers 1 and 2 was for "personal, domestic or household use" (which, as explained below, is referred to as a "Code purpose") or for business purposes (which is a "non-Code purpose"). The determination of this aspect of the case involves an examination of interrelated provisions of the Code, including the operation of statutory presumptions that apply when a lender obtains "business purpose declarations" from a borrower and what, if anything, would have been revealed about the borrower's purpose had "reasonable inquiries" been made.

7 A further substantive issue between the parties relates to the number of credit contracts that Consumers 1 and 2 entered into. The resolution of that issue turns upon a determination of the contractual source of the respective debts that were incurred by Consumers 1 and 2. The resolution of that question also has an impact upon the operation of the statutory presumptions contained in the Code.

8 The case against Ms Ng alleges that, as a director of Green County and an officer of Max Funding, she failed to discharge the statutory duty contained in s 180(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) by failing to take the steps that a reasonably careful and diligent person in her position would have taken to have in place policies, procedures, guidelines and frameworks the object of which was to ensure that Green County and Max Funding did not engage in credit activities that they were not licenced to provide. ASIC's case in this respect focusses upon the "business model" that it claims was operated by Green County and Max Funding whereby credit was provided to borrowers in respect of whom they had, amongst other things, obtained little information as to business purpose, where those borrowers had bad credit histories and found themselves in circumstances of financial distress, especially where those borrowers were claiming to "plan" or "set up" a new business. This aspect of the

case involves close attention being paid to the case pleaded by ASIC and the evidence upon which it relied. In a defence filed by her after the close of ASIC's case on 2 July 2024, Ms Ng foreshadowed that if an adverse finding was made under s 180(1), she relied upon the business judgment rule in s 180(2). Ms Ng also contended that Green County had resolved to ratify her conduct such that she could not be liable for a contravention of s 180(1), if such a finding was made by the Court.

9 Separately, the corporate respondents pleaded in their defence that if either of them are found to have contravened the NCCP Act or the Code, they relied upon s 183(1) of the NCCP Act to relieve them wholly or partly from any liability that would otherwise be imposed on them because of the contravention(s). Ms Ng in her defence relied upon ss 1317S and 1318 of the Corporations Act to contend that she should be fairly excused from liability.

10 The parties agreed that the question of whether the corporate respondents had contravened the NCCP Act and the Code and whether Ms Ng had contravened the Corporations Act should be determined prior to the determination of any other questions that would thereafter arise such as to the determination of the appropriate penalty, if any, to be imposed or the application of the statutory provisions invoked by the respondents to relieve or excuse them from any liability that might be imposed on them. I have proceeded on that basis.

11 For the reasons that follow, I have concluded that ASIC has established its case against Green County and Max Funding in part in relation to Consumer 1 and in whole in respect of Consumer 2. However, ASIC has not established its case against Ms Ng and the claims against her should be dismissed.

12 For convenience, I have organised my reasons as follows:

- **Part 2** which addresses the applicable statutory provisions including the circumstances in which the Code applies and the operation of the statutory presumptions;
- **Part 3** sets out my factual findings including in relation to Consumers 1 and 2;
- **Part 4** addresses whether Consumers 1 and 2 entered into a single credit contract or multiple credit contracts;
- **Part 5** addresses the contraventions pleaded against Green County and Max Funding in relation to Consumers 1 and 2;
- **Part 6** addresses the contraventions pleaded against Ms Ng; and

- **Part 7** sets out my proposed disposition of the proceedings.

13 Before turning to address the substantive matters, it is necessary to observe that during the course of the proceedings I made suppression and non-publication orders under s 37AF(1)(a) of the *Federal Court of Australia Act 1976* (Cth) in respect of information that reveals the names of Consumer 2 (including any names associated with Consumer 2 and where her names, or parts thereof, are included in phrases). No such order was made in relation to Consumer 1, Mr Brady. However, during the course of writing my reasons, it became more convenient to refer to Mr Brady as Consumer 1. I have in the course of these reasons redacted parts of the judgment which disclose Consumer 2's identity, or which disclose the signatures of either Consumers 1 and 2 or any of their more personal details.

2. THE APPLICABLE STATUTORY PROVISIONS

2.1 Overview of Salient Provisions

14 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". It is a civil liability provision. For convenience, I have referred to such a licence as a "**credit licence**" or an "**ACL**" (meaning an Australian Credit Licence).

15 There was no dispute between the parties that Green County was engaged in a "credit activity" because it provided credit to borrowers. Nor was there any dispute that Max Funding is engaged in credit activity by providing a "credit service" by way of providing credit assistance or acting as an intermediary in respect of the credit contracts pertaining to Consumers 1 and 2.

16 The critical issues in dispute between the parties related to whether the Code applied and, if so, how many credit contracts were entered into by Green County with each of Consumers 1 and 2. For this purpose, relevantly, "credit activity" is defined in s 6(1) of the NCCP Act to include being a credit provider under a "credit contract" or the carrying on a business of providing credit. For the purpose of s 6(1) of the NCCP Act, "credit contract" has the same meaning as in s 4 of the Code, which provides.

> **4 Meaning of credit contract**
>
> For the purposes of this Code, a credit contract is a contract under which credit is or may be provided, being the provision of credit to which this Code applies.

17 "Credit" is defined by s 3 of the Code as follows:

> (2) For the purpose of this Code, ***credit*** is provided if under a contract:

(a) payment of a debt owed by one person (the ***debtor***) to another (the ***credit provider***) is deferred; or

(b) one person (the ***debtor***) incurs a deferred debt to another (the ***credit provider***).

(Emphasis in original.)

18 The Code applies to the provision of credit in the circumstances set out in s 5, which provides as follows:

5 Provision of credit to which this Code applies

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

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

(b) the credit **is provided or intended to be provided wholly or predominantly**:

(i) for **personal, domestic or household purposes**; or

(ii) to purchase, renovate or improve residential property for investment purposes; or

(iii) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes; and

(c) a charge is or may be made for providing the credit; and

(d) the credit provider provides the credit in the course of a business of providing credit carried on in this jurisdiction or as part of or incidentally to any other business of the credit provider carried on in this jurisdiction.

(2) If this Code applies to the provision of credit (and to the credit contract and related matters):

(a) this Code applies in relation to all transactions or acts under the contract whether or not they take place in this jurisdiction; and

(b) this Code continues to apply even though the credit provider ceases to carry on a business in this jurisdiction.

(3) For the purposes of this section, investment by the debtor is not a personal, domestic or household purpose.

(4) For the purposes of this section, the predominant purpose for which credit is provided is:

(a) the purpose for which more than half of the credit is intended to be used; or

(b) if the credit is intended to be used to obtain goods or services for use for different purposes, the purpose for which the goods or services are intended to be most used.

(Emphasis added.)

19 Section 13 of the Code contains statutory presumptions as to "Code purpose". It provides as follows:

> **13 Presumptions relating to application of Code**
>
> (1) In any proceedings (whether brought under this Code or not) in which a party claims that a credit contract, mortgage or guarantee is one to which this Code applies, it is presumed to be such unless the contrary is established.
>
> (2) It is presumed for the purposes of this Code that credit is not provided or intended to be provided under a contract wholly or predominantly for any or all of the following purposes (a Code purpose):
>
> (a) for personal, domestic or household purposes;
>
> (b) to purchase, renovate or improve residential property for investment purposes;
>
> (c) to refinance credit that has been provided wholly or predominantly to purchase, renovate or improve residential property for investment purposes;
>
> if the debtor declares, before entering the contract, that the credit is to be applied wholly or predominantly for a purpose that is not a Code purpose, unless the contrary is established.
>
> (3) However, the declaration is ineffective if, when the declaration was made, the credit provider or a person (the prescribed person) of a kind prescribed by the regulations:
>
> (a) knew, or had reason to believe; or
>
> (b) would have known, or had reason to believe, if the credit provider or prescribed person had made reasonable inquiries about the purpose for which the credit was provided, or intended to be provided, under the contract;
>
> that the credit was in fact to be applied wholly or predominantly for a Code purpose.
>
> (4) If the declaration is ineffective under subsection (3), paragraph 5(1)(b) is taken to be satisfied in relation to the contract.
>
> (5) A declaration under this section is to be substantially in the form (if any) required by the regulations and is ineffective for the purposes of this section if it is not.
>
> (6) A person commits an offence if:
>
> (a) the person engages in conduct; and
>
> (b) the conduct induces a debtor to make a declaration under this section that is false or misleading in a material particular; and
>
> (c) the declaration is false or misleading in a material particular.

Criminal penalty: 2 years imprisonment.

(7) Strict liability applies to paragraph (6)(c).

Note: For strict liability, see section 6.1 of the Criminal Code.

20 For the purposes of sections 13(3) and 13(5) of the Code, reg 68 of the *National Consumer Credit Protection Regulations 2010* (Cth) (**Regulations**) provides as follows:

68 Declaration of purposes for which credit provided

(1) For subsection 13(5) of the Code, the form of the declaration is:

'I/We declare that the credit to be provided to me/us by the credit provider is to be applied wholly or predominantly for:

- business purposes; or
- investment purposes other than investment in residential property.'

(2) The declaration must contain the following warning immediately below the words of the declaration mentioned in subregulation (1) or, if the declaration is to be made by electronic communication, prominently displayed when (but not after) the person signs:

IMPORTANT

You should **only** sign this declaration if this loan is wholly or predominantly for:

- business purposes; or
- investment purposes other than investment in residential property.

By signing this declaration you may **lose** your protection under the National Credit Code.

(3) The declaration must contain:

(a) the signature of each person making the declaration; and

(b) either:

(i) the date on which the declaration is signed; or

(ii) the date on which it is received by the credit provider.

Note: The Code applies only to credit provided or intended to be provided for:

(a) personal, domestic or household purposes; or

(b) the purchase, renovation or improvement of residential property used for investment purposes; or

(c) the refinancing of credit that has been provided wholly or predominantly for the purchase, renovation or improvement of residential property used for investment purposes.

2.2 Application of the Code

21 Section 5(1)(b)(i) is expressed such that the Code is to apply in respect of the *provision of credit* if that credit is *provided* or *intended to be provided* wholly or predominantly for personal, domestic or household purposes or to purchase, renovate or improve residential property for investment purposes. The focus of this subsection is upon the purpose of the provision of the credit. There is also a temporal aspect to the determination of whether the Code applies. Namely, the focus in this regard is the time *when the credit contract is entered into*, or, in the case of a proposed contract, *when* it is *proposed to be entered into*.

22 Despite the apparently obvious text of s 5(1)(b)(i), which directs attention to ascertaining the purpose of the provision of the credit, or proposed provision of credit, at the point in time it is provided or proposed to be provided, there have been divergent views expressed as to the appropriate legal test by which such a purpose is to be determined. Is the purpose to be determined by reference to purpose of the credit provider or the debtor, or both? Is the purpose to be determined by undertaking an objective or subjective assessment of the facts known to the credit provider or the debtor, or both? Does the purpose have to be ascertained by reference to the facts known to all parties to the credit contract or proposed credit contract? And, relatedly, is purpose able to be ascertained by reference to what the borrower actually (or subjectively) intended to do with the credit (even if undisclosed to the credit provider) and by reference to how the credit is then actually used by the debtor (even if that too is not disclosed to the credit provider)?

23 One reason for the divergent views that have been expressed is because s 5(4) of the Code provides that, for the purposes of s 5 of the NCCP Act, the predominant purpose for which credit is provided is the purpose for which more than half of the credit is "*intended* to be used" or, where it is intended to be used to obtain goods or services for different purposes, the purpose for which the goods or services are "*intended* to be most used".

24 Many of the divergent views have been expressed in the context of predecessors to the Code including the *Uniform Consumer Credit Code* (**UCCC**) enacted under State laws. Whilst the relevant provisions have changed somewhat over time (especially as to the operation of the statutory presumptions to which I will return), the governing provisions as to the application of the Code remain largely the same.

25 One such view was expressed by Brabazon QC DCJ of the District Court of Queensland in ***Rafiqi*** *v Wacal Investments Pty Ltd* [1998] ASC ¶155–024, which was a case concerning the

application of s 6(1) of the *Consumer Credit (Queensland) Code*, as set out in the Appendix to the (now repealed) *Consumer Credit (Queensland) Act 1994* (Qld) (**Queensland Code**). His Honour relevantly stated (at ¶148,574) that in determining whether "credit is provided or intended to be provided wholly or predominantly for personal, domestic or household purposes" an "objective approach" should be adopted, which involves assessing what a reasonable person standing in the shoes of the *credit provider* would have understood to be the provision of the credit. This approach was reasoned to be consistent with the necessity for examination as to "what was communicated to the credit provider by the debtor": at ¶148,574, relying upon Edwards and Sweeney, *Application of the Consumer Credit Code and the Purpose Test* (1996) 11 Australian Banking Law Bulletin 85. Brabazon QC DCJ further observed that "any other interpretation would place an intolerable burden on the credit provider". The decision in *Rafiqi* was followed in *Park Avenue Nominees Pty Ltd v Boon* [2001] NSWSC 700 (Harrison M).

26 A different view was taken in a later decision of the District Court of Queensland in ***Dale** v Nichols Constructions Pty Ltd* [2003] QDC 453, with McGill DCJ observing (at [23]) that: "whether credit is provided for a particular purpose for the purposes of s 6(1) depends on *the intention of the borrower at the time the credit is provided*" (emphasis added). McGill DCJ stated that the reference to the actual intention of the borrower did not mean the test is subjective (at [31]). In coming to this conclusion, McGill DCJ accepted that s 6(1)(b) of the Queensland Code (which was similar to s 5(1)(b)(i) of the Code) was not "framed by reference (relevantly) to the use to which the money is ultimately put" and was "framed by reference to the purpose for which the credit is provided or intended to be provided". However, his Honour relied upon s 6(5) (which was similar to s 5(4) of the Code) to reason that the relevant test depended on "the purpose or the intended purpose of the borrower at some particular time…[which] can only be a reference to the borrower's intention at the relevant time as to the use to be made of the money when borrowed". His Honour further reasoned that an interpretation focussing upon the purpose of the debtor not only did not impose an "intolerable burden" on the credit provider, contrary to what was stated by Brabazon QC DCJ in *Rafiqi*, but also fit more readily with the statutory presumptions then contained in s 11(1) because, *inter alia*, it would otherwise be possible for a credit provider to avoid the operation of the Code merely by ensuring that it never became aware of the purpose for which the debtor was borrowing the money. Thus, on this interpretation, the credit provider could manage its burden by requiring the debtor to make and provide a business purpose declaration.

27 These authorities brought to attention a sharp tension in the application of the UCCC. In ***Linkenholt*** *Pty Ltd v Quirk* [2000] VSC 166; ASC ¶155–040 at ¶200,341, Gillard J of the Supreme Court of Victoria took a different approach altogether. His Honour was there dealing with an application to set aside a default judgment and, in doing so, was called upon to consider the merits of a defence that asserted that the relevant loan the subject of the claim was governed by the *Consumer Credit (Victoria) Code* as enacted by the *Consumer Credit (Victoria) Act 1995* (**Victorian Code**). By s 5 of this Act, the Victorian Code was prescribed to be that which was set out in the Appendix to the *Consumer Credit (Queensland) Act 1994*—ie, the Victorian Code was an adoption of the Queensland Code: *Linkenholt* at [53]. Turning to consider whether the Victorian Code applied to the loan, Gillard J stated at [98]:

> **[I]t is appropriate to consider what the money was used for** in order to determine the purpose of the provision of the credit. In considering the question it is important to consider **the substance of the transaction in the context of its performance.**
>
> (Emphasis added.)

28 As this passage reveals, the approach taken by Gillard J not only called for an examination of the substance of the transaction, but also an examination of the context of its performance, including the use of the credit by the debtor as one aspect of the overall context. In *Jonnson v Arkway Pty Ltd* [2003] NSWSC 815; 58 NSWLR 451, Shaw J considered the New South Wales counterpart of the same provision, being s 6 of the *Consumer Credit (New South Wales) Code,* as implemented by s 5 of the *Consumer Credit (New South Wales) Act 1995* (**NSW Code**). As in Victoria, the Queensland Code was adopted as law in New South Wales. His Honour observed (at [28]) that "divergent views" had been expressed, but preferred the approach taken by Gillard J in *Linkenholt* and reasoned that "insufficient attention has been given to the need to broadly and liberally interpret beneficial legislation of this kind".

29 In *Benjamin v Ashikian* [2007] NSWSC 735, Smart AJ at [74] also agreed with Gillard J in *Linkenholt* that the court must consider "the substance and the reality of the transaction". This is also the approach that Davies J preferred in ***Beckley*** *v Consumer, Trader and Tenancy Tribunal* [2009] NSWSC 703 at [76] and in *Bank of Queensland Ltd v* ***Dutta*** [2010] NSWSC 574 at [120]. In *Beckley*, Davies J stated at [76] that an "examination of what the money was used for produces the result that the credit was provided wholly or predominantly for personal, domestic or household purposes".

30 Subsequent intermediate appellate authorities have expressed a preference for an objective test in *dicta*, albeit considered *dicta*. In ***Shakespeare*** *Haney Securities Limited v Crawford* [2009]

QCA 85; 2 Qd R 156, Muir JA (with whom Mullins and Douglas JJ agreed) observed at [31]-[36], in relation to s 6(1)(b) of the Queensland Code that:

> An approach to the construction of s 6(1)(b) which considers the substance of the subject transaction and requires an objective assessment would, in my view, be preferable to one which looks to the actual intention of either the borrower or the lender. Plainly, "the purpose" for which credit is provided or intended to be provided has nothing to do with the lender's general commercial purposes: the reference is to the use to which the credit is to be put. In the great majority of transactions there would be no difficulty in determining the relevant purpose by reference to the terms of the application for credit and of the approval. If the borrower requests credit for a stated purpose and the lender approves the request and makes the loan, there should be no difficulty in concluding that the purpose for which the loan was made was the purpose for which it was requested.
>
> The focus of s 6(1)(b) is on the provision of credit rather than on the obtaining of credit. That is inconsistent with a construction which looks to the debtor's state of mind. Also, one would think that if the legislature had in mind that, in determining the purpose for which credit was provided, the debtor's intention was the governing consideration, s 6(1)(b) would have been worded along these lines:
>
> > "The debtor intended to apply the credit wholly or predominantly for personal, domestic or household purposes."
>
> Section 6(1)(b) however cannot be construed in isolation. Section 6(4), in effect, deems an "investment" not to be "a personal, domestic or household purpose". It is consistent with the view that the "purpose" is to be determined objectively by reference to the substance of the transaction. Sections 6(5) and 11, however, may cast doubt on the correctness of this construction. The focus of s 6(5) is on the use rather than the provision of credit. Section 6(5)(a) deems the predominant purpose for which credit is provided to be "the purpose for which more than half of the credit is intended to be used". Where "the credit is intended to be used to obtain goods or services for use for different purposes", subs (5)(b) deems "the predominant purpose for which [the] credit is provided" to be "the purpose for which the goods or services are intended to be most used".
>
> It is arguable that the intention with which each limb of s 6(5) is concerned is that of the debtor. It may be thought exceedingly rare that a debtor would not have an intention to use credit acquired by him or her in a particular way but that is not necessarily true of the lender. Particularly in small transactions, the lender may be indifferent to the use to which the subject monies may be put.
>
> It may be arguable that the intentions to which subs (5) refers are the intentions of the parties to be objectively ascertained as if ascertaining the intention of the parties in construing a contract. But the intentions referred to in subs (5) are intentions as to use of credit in the case of subs (5)(a) and as to the use of goods and services in the case of subs (5)(b). If the words of these paragraphs are construed literally they appear to relate to the actual intention of the debtor. In the case of subs (5)(b), in many cases, the lender would not know or care about the intended differing uses of goods and services but, presumably, the provision is intended to operate even if a lender has no relevant knowledge and the loan documentation does not address the matter.
>
> Subsections (2) and (3) of s 11 also seem to make relevant the debtor's intention. The declaration by the debtor that the purpose or purposes to which the debtor intends to apply the credit are wholly or predominantly for business or investment purposes is a

> combined statement of the debtor's intended conduct and an expression of opinion. In subs (3) the reference to the credit provider's knowledge "that the credit was in fact to be applied … for personal, domestic or household purposes" would appear to refer to the credit provider's knowledge of what was intended by the debtor. Arguably s 11, in itself, does not provide much support for the view that the purpose for which credit is provided depends on the debtor's state of mind: it merely provides a mechanism by which a credit provider may ensure that the Code has no application to a proposed credit transaction as long as it and its agents are unaware that the credit is in fact to be applied "wholly or predominantly for personal, domestic or household purposes". Where no declaration pursuant to s 11(2) is obtained, the Code is presumed to apply in proceedings in which a party claims that the Code applies.

31 Ultimately, Muir JA concluded at [37] that the provisions gave rise to considerable difficulty, which it was unnecessary to resolve because the same outcome would be reached irrespective of the approach that was applied.

32 It will be apparent that Muir JA preferred the application of a test that involved an objective assessment of the subject transaction, albeit with attention needing to be paid to the intention of the debtor given the existence of s 6(5) of the Queensland Code (the equivalent of which is now contained in s 5(4) of the Code).

33 In ***Bahadori*** *v Permanent Mortgages Pty Ltd* [2008] NSWCA 150, Tobias JA (with whom Giles and Campbell JJA agreed) also considered the divergent views which have emerged: see [132]-[138], [148]-[154] and [182]-[186]. In relation to the operation of ss 5 and 11 of the NSW Code, Tobias JA observed (at [183]-[186]) that an approach which focussed on the objective circumstances known to the credit provider had "force":

> In this context, s 11(1) is relevant insofar as it provides that in any proceedings in which a party claims that a credit contract is one to which the Code applies, it is presumed to do so unless the contrary is established. It follows that for the purposes of s 6(1)(b) of the Code, there is a rebuttable presumption that when the subject credit contracts were entered into, the credit to which they referred was intended to be provided wholly or predominantly for personal, domestic or household purposes. The issue which then arises is whether Permanent and Conway have established the contrary. In my view they have not.
>
> I accept for the purposes of this exercise that the test most favourable to Permanent and Conway is an objective one based upon what a reasonable person would, in all the circumstances, consider to be the purpose for which the loans were intended to be provided. Such a person would be entitled to take into account all the objective circumstances which would otherwise fall for consideration under s 11(3).
>
> Conway submitted that the use of the expression "provided or intended to be provided" required the issue to be determined from the perspective of the credit provider. This was because a lender "provides" credit whereas a borrower "obtains" it. Accordingly, it was contended that the only objective circumstances which are relevant are those known to the credit provider.
>
> There is some force in this submission and for present purposes I am prepared to accept

it. However, in my view it makes no difference to the outcome.

34 Tobias JA's reasons may be taken as expressing a preference for the application of an objective assessment to be applied from the perspective of, and to the facts known to, the credit provider.

35 In ***Haynes*** *v St George Bank* [2018] SASCFC 51; 130 SASR 551, the Full Court of the Supreme Court of South Australia (Kourakis CJ, Blue and Doyle JJ) considered the construction of s 6 of the *Consumer Credit (South Australia) Code*, as implemented by the (now repealed) *Consumer Credit (South Australia) Act 1995*. By s 5 of that Act, the Queensland Code was adopted as law in South Australia which was in materially the same terms as s 5 of the Code, but did not include the same statutory presumptions as now apply in s 13: see [41]. Kourakis CJ (with whom Blue and Doyle JJ agreed) said at [44]-[45]:

> Section 6 is the primary provision governing the applicability of the UCCC. Section 6 of the UCCC must be read distributively to apply to both entering into a credit contract and to pre-contractual obligations. The opening lines of s 6(1) of the UCCC operate differentially to fix the relevant time for the application of the criterion in subpara (b) to the time of entry into the contract or to the time at which a contract is proposed. Accordingly, in the case of a contract that has been entered into, the question is whether the credit is provided wholly or predominantly for personal, domestic or household purposes and not whether it is "intended" to be so provided. **The question of intention arises only in the application of the UCCC to a proposed credit contract. In the case of the actual provision of credit pursuant to credit on a contract, the test is whether on an objective assessment the credit was provided for the prescribed purpose**.
>
> **The intention of the debtor is not determinative**. As Gillard J observed in *Linkenholt Pty Ltd v Quirk* **"the substance of the transaction in the context of its performance" must be considered**.
>
> (Footnotes omitted; emphasis added.)

36 Thus, the Court in *Haynes* also expressed a preference for the application of an objective assessment and stated in this regard that the intention of the debtor is not determinative (but did not say that it was irrelevant).

37 Subsequently, and more recently, in ***Mag Financial*** *Investment Ventures Pty Ltd v El-Saafin* [2022] VSCA 286; 70 VR 400 the Victorian Court of Appeal (constituted by McLeish, Sifris and Walker JJA) considered the operation of the Code in its current form. In examining s 5(1)(b)(ii), their Honours stated at [112]:

> The text of s 5(1)(b)(ii) of the Code requires attention to the use to which the credit is to be put: the credit must be provided 'to purchase, renovate or improve' residential property, 'for investment purposes'. **The word 'to' shows that this sub-paragraph turns on the immediate purpose for which the credit is provided**. We accept that the section does not in terms identify, restrict or place any limitation on who ultimately makes use of the funds for the identified purpose. However, **in our opinion, when**

> **read as a whole the section is inextricably tied to the debtor — that is, it is directed to the provision of credit to the debtor (as identified in para (a)) and it is implicit in para (b)(ii) that the credit is provided for use by the debtor to purchase, renovate or improve residential property for investment purposes**.
>
> (Emphasis added.)

38 Their Honours then stated at [118] that:

> The parties submitted, and we accept, that **s 5(1)(b) requires consideration of the substance of the transaction and requires an objective assessment of whether the provision of credit has the relevant immediate purpose**. The bulk of the authorities to which we were referred, and which were discussed by the trial judge, adopted that objective approach.
>
> (Emphasis added.)

39 Their Honours did not regard the actual or ultimate use of the funds as being determinative and relevantly stated at [121]:

> As we have said, **the statutory question is not directed to the ultimate use of the funds**, but to whether the immediate purpose of the loan is to provide funds which are themselves to be used by the debtor for the relevant purpose. **The ultimate use to which the funds are actually put may be relevant in ascertaining the purpose of the loan, but it is not determinative.**
>
> (Emphasis added.)

40 In a footnote to the last sentence of [121] (being footnote 31), their Honours further stated:

> Indeed, it cannot be determinative, because the relevant time for assessing whether the credit contract is one to which the Consumer Credit Act applies is the date on which the contract is entered into, a time at which the ultimate use to which the funds are put will not be known.

41 However, it is necessary to observe that in *Mag Financial* their Honours were dealing with s 5(1)(b)(ii) of the Code and considered that little assistance could be obtained from cases dealing with s 5(1)(b)(i): at [125]. Their Honours stated at [125(a)] that "s 5(1)(b)(i) is framed differently from s 5(1)(b)(ii); it does not require that the credit be provided for the immediate purpose of undertaking a particular activity for a particular ultimate purpose. Rather, it is solely directed to the purpose for which the credit was provided". Despite the reservations there expressed, in my view, their Honours' approach has some relevance to the approach to be taken to s 5(1)(b) of the Code.

42 Thus, a line of intermediate appellate authorities across different States have expressed a preference for the application of an objective assessment as to the purpose for which the credit is provided, without regarding the intention of the debtor or the use to which the funds are ultimately put as being determinative. There, however, remain nuanced differences between

the appellate authorities as to whether the focal point should be on the purpose of the credit being provided as being viewed from the perspective of the credit provider or the debtor, and separately whether the objective assessment is limited to the facts known only to the credit provider.

43 Other than *Mag Financial*, none of the appellate authorities have considered the operation of the Code in its present form. When Parliament came to enact the NCCP Act, the Explanatory Memorandum to the *National Consumer Credit Protection Bill 2009 (Cth)* (**NCCP EM**) stated at [8.34] that:

> The question of whether or not credit is provided or intended to be provided wholly or predominantly for a purpose which will result in the credit being regulated by the Code is to be determined consistently with the objectives of the Code. **It would not be expected that it can be resolved simply by considering either the actual use of the credit by the borrower or by the purpose of the credit provider**.
>
> (Emphasis added.)

44 It has been observed that this passage of the NCCP EM "specifically rejects both the *Rafiqi* and *Linkenholt* formulations": Bolitho H, Howell N and Patterson J, *Duggan & Lanyon's Consumer Credit Law*, (2020) 2nd Edition, LexisNexis Butterworths at p 70. In cases that have involved the application of the Code in its present form, it has been concluded that it was strictly unnecessary to decide upon the correct approach: see eg *Australia and New Zealand Banking Group v Fink* [2015] NSWSC 506 at [90]-[98] (Adamson J); *Lauvan Pty Ltd v Bega* [2018] NSWSC 154; 330 FLR 1 at [256] (Gleeson JA).

45 In the present case, the evidence indicated, and it was not in dispute, that both Consumers 1 and 2 applied the credit provided by Green County for personal purposes and not for any business purpose. Thus, the application of a test that regards the actual use of the credit as being relevant and determinative would be dispositive of an issue before me. The respondents urged against the application of this test. They contended that I should apply an objective test. The respondents submitted as follows:

> Three key propositions emerge from consideration of the authorities considering s 5(1)(b) and its analogues. *First*, the analysis required by s 5(1)(b) is as to the objective purpose for which credit is provided. *Secondly*, in conducting that analysis, regard should be had to the substance of the transaction, including the surrounding circumstances known to both parties. The Court is not limited to considering the text of the agreement, the way it may be in construing a contract, but an objective analysis requires that, for a matter to be relevant, it must be known to both parties. *Third*, a transaction involving a request for credit for a stated purpose that is then approved, is strong evidence that the credit was provided for that purpose.

46 ASIC's submissions as to these points ultimately contended that the proper construction of s 5(1)(b)(i) had to take into account the existence of the statutory presumptions in s 13 of the Code. ASIC submitted as follows:

> The language of section 13(3) is important both in considering the proper construction of the section (and sections 4 and 5) and in considering the significance of authorities directed to the predecessor legislation. Section 5 of the Code is directed to the purpose for which credit is provided or intended to be provided. That has led to debate as to whose purpose is relevant. The lender's purpose has been rejected (*Shakespeare Haney* tentatively at [31], and more conclusively *Haynes* at [46]). The preference was generally but not conclusively, for the anthropomorphic construct of the purpose of the transaction. However, in a case on the current form of the legislation, but without reference to section 13 (or suggesting a departure from relevant authority), the Victorian Court of Appeal in *Mag Financial* held that it was the use or proposed use by the borrower which was determinative: *Mag Financial* at [112] (although *Mag Financial* at [118] cites the earlier authorities).
>
> At least where a declaration has been obtained, section 13(3) necessarily resolves that issue as it is directed to how the credit is "in fact to be applied". It looks to the application (i.e. use) of the credit (considered at the time the declaration was made which is no later than the time of entry into the credit contract: section 13(2)). Care must be taken to recognise this distinction when considering the application of authorities directed to the assessment of purpose in section 5 (and its predecessor – section 6 UCCC); noting that it is in that context that the debate as to the subjective or objective test has primarily arisen.
>
> Before turning to that distinction, section 13(3) should be construed in accordance with the language used. The relevant actual or attributed state of mind of the lender is as to whether "the credit was in fact to be applied wholly or predominately for a Code purpose". The section is directed to something that the borrower was to do, which necessarily directs attention to the borrower's intention (putting to one side how that is determined). In light of section 13(4) it might be thought to be coherent that section 5(1)(b)(i) also direct attention to the borrower's intention, although it is not necessary to take that step for the purpose of these proceedings which involve circumstances in which the Corporate Respondents did obtain declarations substantially in the form prescribed for the purpose of section 13(2) (but only for the initial credit agreements). Nonetheless, it is relevant to observe that construction does give s 5(1)(b)(i) a grammatical construction: "provided" is agnostic as to whether the "stipulation" or "understanding", or "condition" or "supposition" (Macquarie Dictionary (8th edn at 1227) is that of the lender or borrower, and is consistent with the use of "intended" in section 5(4). But as already observed, it is unnecessary to resolve that question. If the lender has the state of mind as to the use to be made (by the borrower) as identified in section 13(3), then the credit is conclusively deemed to be for personal, domestic or household purposes: section 13(4).
>
> (Footnotes omitted.)

47 As ASIC's submissions pointed out, at least in relation to the *initial* contracts (referred to below as the First Credit Contracts for each of Consumers 1 and 2), the result is governed by whether the "business purpose declarations" made by Consumers 1 and 2 were effective and, if not, the result would be deemed by the operation of s 13(4). However, the position is different in relation to the subsequent credit contracts if they were, as I have found them to be, separate

credit contracts. That is because in relation to those subsequent credit contracts, the corporate respondents did not obtain "business purpose declarations", but relied upon the fact of those declarations as evidencing the stated purpose of the respective borrowers. Hence, in relation to these subsequent credit contracts, the governing presumption was that contained in s 13(1) of the Code and raises a question as to whether the corporate respondents rebutted the presumption for the purpose of these proceedings. That does require resolution of the question raised by s 5(1)(b)(i) of the Code. Necessarily, that question needs to be resolved with regard to the existence of ss 13(2), (3) and (4) of the Code, but with the obvious limitation that those subsections do not govern the outcome in respect of the subsequent contracts.

48 In my view, the preferred approach to be taken for the purpose of s 5(1)(b)(i) involves an objective assessment of the facts and circumstances of the *provision of the credit* **and** its *intended* use at the time that the credit contract is entered into or proposed to be entered into. I do not regard the dichotomy between the provision of the credit and its intended use as being in tension, but one that is necessitated by the operation of s 5(1)(b)(i) and s 5(4). This approach accounts for the bilateral concepts that emerge from s 5(1)(b)(i) which is focussed upon the purpose of the provision of the credit and s 5(4) which is focussed upon the *intended* use of the credit. It thereby marries the duality involved being, on the one hand, the *provision of credit* and, on the other, its *intended* use. The ultimate question to be answered by the objective assessment is the purpose as divined from that assessment. In the application of this approach, the focus is not myopic to the perspective of only the credit provider or only the debtor, but involves an objective assessment of the substance of the transaction between the credit provider and the debtor including the surrounding circumstances (as contended for by the respondents). The substance of the transaction between the credit provider and debtor and its surrounding circumstances would include an objective assessment as to the dealings and communications, as well as the contractual terms, as between those parties.

49 In my view, the task of ascertaining the relevant purpose for s 5(1)(b)(i) is not a task in respect of which authorities addressing the objective theory of contract strictly apply (as was urged upon me by the respondents), but I accept that those authorities provide some guidance as to the objectively divined intention of the parties: cf *Toll (FGCT) Pty Ltd Alphapharm Pty Ltd* [2004] HCA 52; 219 CLR 165 at [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ *per curiam*); *Ozzy Loans Pty Ltd v New Concept Pty Ltd* [2012] NSWSC 814 at [47]-[49] (Campbell J). That objective purpose ordinarily is the purpose of a reasonable person in the position of the contracting parties. As I have already indicated, the objective purpose may need

to be divined from matters that extend beyond the four corners of a written credit contract and include an examination of the dealings and communications between the parties, including the terms of the contract between the parties. In this regard, it is to be recalled that s 5(1)(b) and s 5(4) are also applicable to credit contracts that are not yet entered and therefore apply to the *proposed* provision and use of credit. In that instance, it will follow that regard will need to be had to matters that extend beyond the contractual terms in ascertaining purpose.

50 I do not regard the actual use to which the credit is put or expended as being determinative of the objective assessment that is required, which is consistent with what was said in *Mag Financial*. It is important to bear in mind that s 5(4) is concerned with the *intended* use of the credit, as opposed to its *actual* use. However, it may be that in some cases, consideration may be given to the debtor's actual use of the funds as an evidentiary matter, to shed light on or from which to infer matters that are relevant to an objective assessment of the purpose in question. In this regard, it is important to reiterate that the task involves ascertaining the purpose for which the credit is provided including by reference to the *intended* use of that credit.

51 There is considerable force in the position advanced by the respondents that the objective assessment should be limited to the facts known to both the credit provider and the debtor, and must exclude the undisclosed intentions on the part of the debtor. However, at least one difficulty with this contention is that it runs the risk of tending towards a subjective assessment of the facts the particular credit provider has elected to consider which was a vice that McGill DCJ adverted to in *Dale*. As McGill DCJ pointed out, such a contention runs contrary to the way in which the statutory presumptions are intended to operate. What is called for is an objective assessment of all of the facts including those which a reasonable person in the position of the credit provider would have known or is likely to have known, even if the particular credit provider did not advert to or recognise them. Thus, for example, the fact that a debtor asserts the intended use of the credit is for a business purpose would need to be objectively assessed as against the other material and information provided by the debtor to the credit provider and which was in the possession of the credit provider, though not adverted to or considered by the credit provider. There may be cases where the debtor's asserted business purpose is falsified by other information provided by the debtor to the credit provider. And, equally, there may be cases where the debtor's falsely asserted business purpose governs the outcome. As I return to below in **Part 2.4**, these observations are no more than to say that it is

not possible to state a governing rule or organising principle as to how the objective assessment would be affected by what are, quintessentially, fact dependent assessments.

52 Further, as I explain below, in the present case, the outcome largely depends on the application of the statutory presumptions and whether one or other party has been able to rebut them. It is now necessary to examine those presumptions.

2.3 The Statutory Presumptions

53 Section 13 of the Code is concerned with matters of presumption and onus.

54 Section 13(1) of the Code applies in the context of "proceedings" and has the effect of creating a presumption that is rebuttable (that is, it operates "unless the contrary is established"). Notably, the presumption in s 13(1) does not operate by reference to a declaration of the kind contemplated in s 13(2). Section 13(1) thereby envisages that a credit provider may have other means of displacing the presumption that the Code applies in "proceedings".

55 The presumption in s 13(2) is directed to "*the purposes of the Code*". It operates if, prior to the entry into a credit contract, the debtor declares (for convenience, referred to as a "**business purpose declaration**") that the credit is to be applied wholly or predominantly for a purpose that is not a Code purpose. The presumption applies unless the contrary is established (subject to a finding that the declaration is ineffective by reason of s 13(3)). Once this presumption arises, it is for the party claiming the declaration is ineffective (usually the debtor) to make good their claim: *Ozzy Loans* at [41]. For the purpose of s 13(2), the declaration is not effective unless it is substantially in the form required by the regulations: s 13(5); r 68 of the Regulations. If a declaration is ineffective, s 13(4) deems s 5(1)(b) to be satisfied in relation to the credit contract.

56 The interaction between ss 13(1) and 13(2) is that, in proceedings, absent a business purpose declaration that is substantially in the required form, the credit provider bears the onus of rebutting the presumption contained in s 13(1).

57 It is important to bear in mind that the present form of s 13 of the Code is different to its predecessors in relation to the circumstances in which a business purpose declaration is not effective. The predecessors to s 13 of the Code were limited to circumstances where the credit provider "knew, or had reason to believe…that the credit was in fact to be applied wholly or predominantly [for Code purposes]". Section 13(3)(b) expands the operation of the provision by extending the circumstances in which the declaration is ineffective to include cases where

the credit provider "would have known, or had reason to believe, if the credit provider or prescribed person had made reasonable inquiries about the purpose for which the credit was provided, or intended to be provided…".

58 Section 13(3) in its current form was enacted to address what were considered "abuses" of business purpose declarations: NCCP EM at [8.56]. Such abuses were considered by Ambrose J in *State of Queensland v* ***Ward*** [2002] QSC 171: see NCCP EM [8.61]. The NCCP EM relevantly stated at [8.59], [8.60], [8.64] and [8.65]:

> 8.59 Under the UCCC the presumption was conclusive, except in limited circumstances. The decisive effect of the presumption enabled credit providers to rely on it as an effective means of excluding the application of the UCCC; borrowers were not readily able to set side the effect of the declaration as they needed to argue that the credit was for personal use, and therefore that they had signed a false declaration.
>
> 8.60 The result was that the declaration could be largely relied upon by credit providers to prevent borrowers being able to exercise rights under the UCCC, even where the credit was used for personal, domestic or household purposes…
>
> …
>
> 8.64 This amendment will provide an effective response to the problems previously associated with the abuse of declarations as:
>
> - where, before the contract was entered into, the credit was to be applied for a Code purpose it would be unlikely that this would not be known or ascertainable by reasonable inquiry by the credit provider; and
> - credit providers who do not make any reasonable inquiries into the use of the credit will find it difficult to rely on a declaration where the credit was in fact applied for a Code purpose.
>
> 8.65 It is specifically provided that if a declaration is ineffective under subsection 13(4), that paragraph 5(1)(b) of the Code is taken to be satisfied in respect of the contract, that is, the borrower does not still need to establish that the credit was provided for a Code purpose. The Code still may not apply to the credit contract, but only where it fails to meet some other criteria.

59 ASIC submitted that the examples provided by the NCCP EM "plainly contemplate that a credit provider must proactively take steps to make reasonable inquiries if it wishes to avoid the consequences of sections 13(3)-(4)". In support of this submission, ASIC pointed to the following examples contained in the NCCP EM:

> ***Example 8.1: Whether the lender made reasonable inquiries***
>
> The borrower obtains a loan of $250,000 from Lender A, with $200,000 used to pay out their existing home loan, and with the further $50,000 to be used for a business purpose. Lender A makes reasonable inquiries to establish that the $50,000 is for a

> business purpose, but makes no inquiries into the purpose of the remainder of the funds. Lender A would not meet the criteria for making reasonable inquiries.
>
> ***Example 8.2: Whether the lender made reasonable inquiries***
>
> The lender receives an application submitted by a finance broker seeking a loan of $50,000 for business purposes. The application form is signed by the borrower and states that the borrower has an Australian Business Number (ABN), acquired two days before the loan application. The date an ABN was issued can be easily checked. The application gives no details of the business. In fact, the borrower uses the money to pay arrears on their home loan. It is unlikely that the lender would meet the criteria for making reasonable inquiries if it failed to verify the existence of any business said to be carried on by the borrower.
>
> (Emphasis in original.)

60 Whilst these examples are useful indicators as to purpose, the task remains to give effect to the statutory text and purpose as divined from the Act. Explanatory memoranda are potentially useful for discerning the mischief to which legislation is directed, but they cannot displace the meaning of the statutory text and cannot be substituted for the text: *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; 271 CLR 495 at [70] (Gageler J).

61 Section 13 does not impose any positive statutory obligation on a lender to make reasonable inquiries. Rather, the concept of reasonable inquiries operates as a mechanism to render ineffective a declaration as provided for by s 13(3)(b).

62 Section 13(3)(a) provides for the circumstances in which a declaration will be ineffective. It focusses upon the knowledge of the credit provider. Relevantly, for the purpose of this limb, the declaration is ineffective where the credit provider has *actual knowledge* that, despite the declaration, the credit was to be applied wholly or predominantly for a Code purpose. It also applies to, what has been conveniently described as, *constructive knowledge*: *Ozzy Loans* at [49]. That is because the text of s 13(3)(a) (as with the text of s 13(3)(b)) contains the words *"had reason to believe"*. The label of "constructive knowledge" needs unpacking.

63 ASIC submitted that the words *"had reason to believe"* require an objective assessment of the state of mind of the credit provider by reference to the facts known by the credit provider. In support of this contention, ASIC relied upon the unanimous decision of the High Court in ***George v Rockett*** [1990] HCA 26; 170 CLR 104 at 112 and 116 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) to contend that the words "had reason to believe" direct attention to whether, on such an objective assessment, the facts were sufficient to *"incline the mind"* of the credit provider towards accepting rather than rejecting a particular

proposition. For their part, the respondents urged caution in applying *George v Rockett*. That is because *George v Rockett* examined legislation involving the circumstances where a warrant could be issued. The relevant legislation provided that a warrant could be issued if it appeared to the relevant person that there were "*reasonable grounds for suspecting*" that, in a relevant location, there was anything "as to which there [were] *reasonable grounds for believing* that it will … afford evidence as to the commission of any offence": at 107. The respondents submitted that care should be exercised in distinguishing between reasonable grounds for *believing* something and reasonable grounds for *suspecting* something. This was a distinction to which the High Court was alive in *George v Rockett*. At 115-116, the High Court quoted with approval the reasons of Kitto J in *Queensland Bacon Pty Ltd v Rees* [1996] HCA 21; 115 CLR 266 at 303, where his Honour had said:

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust … Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes…

64 By contrast to a suspicion, the High Court in *George v Rockett* reasoned as follows in relation to the words "reasonable grounds for believing":

> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

65 The words "reason to believe" are commonly used in different statutory contexts: eg, see *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 674 (Young J); see also *WA Pines Pty Ltd v Bannerman* (1980) 30 ALR 559; 41 FLR 175 at 184 (Lockhart J). In *Power v Hamond* [2006] VSCA 25, Chernov JA (with whom Maxwell P and Ormiston JA agreed on this aspect) considered the use of these words in the *Legal Practice Act 1996* (Vic) (repealed) as relevantly applicable to the circumstances in which the Legal Ombudsman could commence an investigation. His Honour stated:

> 105 …It is now settled law that the question whether there is "reason to believe" a specific matter in a context such as the present is to be determined by the person concerned on an objective basis and that the correctness of the

> conclusion may be tested in court. Thus, for example, it was said in *George v Rockett* that "[w]hen a statute prescribes that there must be 'reasonable grounds' for a state of mind — including suspicion and belief — it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person." Consequently, in order to have launched the impugned investigation lawfully the Ombudsman had to conclude, on an objective basis, that Power's failure to obtain insurance might amount to misconduct or unsatisfactory conduct. The question, therefore, is whether, in all the circumstances, a reasonable Ombudsman would have so concluded.
>
> 106 …the belief must rest on objective facts that would induce the relevant state of mind in a reasonable person.

66 Care must of course be exercised in examining the statutory context. That is particularly the case where the words "reason to believe" are used in other contexts as a condition to the exercise of a statutory or administrative power. The respondents submitted that the words "reason to believe" did "not pose a negligence test" and that "knowledge of facts from which a reasonable person might suspect the relevant conclusion cannot be enough": citing, in a different statutory context, *Husqvarna Forest & Garden Ltd v Bridon NZ Ltd* [1997] 3 NZLR 215 at 226. It was further submitted that the "relevant constructive knowledge is not constructive knowledge on the basis of negligence" and that "[r]eason to believe" is not to be equated with "reasonable grounds to suspect".

67 I accept that the words "reason to believe", as contained in s 13(3), require a state of knowledge beyond that of a suspicion. In my view, the words require an objective assessment of the facts known to the credit provider and whether those facts incline the credit provider's mind as to whether the debtor would be using, or proposing to use, the funds for a Code purpose. This requires a state of satisfaction that is more than a suspicion, and more than an apprehension, though it does not require conclusive proof and leaves some room for "surmise or conjecture".

68 Section 13(3)(b) poses a hypothetical question. As I have already observed, it does not impose a positive obligation to undertake reasonable inquiries. The question that arises here is what *would* the credit provider have known or have reason to believe *if* it made reasonable inquiries, and, relevantly, would it have known or had reason to believe that the credit was in fact to be applied for a Code purpose. The parties accepted that this posed a counterfactual as to what would have been conveyed to the credit provider if it had made *objectively* "reasonable inquiries". The parties agreed that this calls for an objective analysis, but were in dispute as to the application of that approach to the facts.

69 Much will depend on what reasonable inquiries are, which will in turn depend on the facts. The word "reasonable" is adjectival and indicates that the relevant inquiries are those that would

have been made by a "reasonable person" in the circumstances of the credit provider. The inquiries are not limited to those that the particular credit provider might have subjectively regarded as "reasonable". The standard of *reasonable inquiries* is in this sense objective and fact dependent.

70 The legislature has neither defined nor prescribed what inquiries are "reasonable" for the purpose of s 13(3)(b) of the Code. However, it is an expression that appears elsewhere in the NCCP Act and, in particular, is a core component of "responsible lending" obligations imposed under Chapter 3 of the NCCP Act: see, for example, ss 117, 130, 140 and 153 of the NCCP Act, each of which obliges licensees to make reasonable inquiries about, and to take reasonable steps to verify, a consumer's financial situation.

71 In that context, the content of the obligation to make "reasonable inquiries" has been considered on several occasions. For instance, in *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liquidation)* [2014] FCA 926 at [28], Davies J observed in relation to s 117 that "'reasonable' inquiries about, and 'reasonable' steps to verify, the consumer's financial situation must be such inquiries and steps as will be sufficient to enable to the credit assistance provider to make an informed assessment as to whether the consumer will be able to comply with the consumer's financial obligations under the contract without substantial hardship" (referring to and relying on ss 118(2)(a) and 123(2)(a)). Consistent with this, Perram J separately observed that "the purpose of s 130 is to ensure that credit providers put themselves in an informed state about the financial position of the consumer before making an assessment of the suitability or otherwise of the loan": *Australian Securities and Investments Commission v Westpac Banking Corp (Liability Trial)* [2019] FCA 1244; 139 ACSR 25 at [59]. On appeal, the Full Court affirmed the decision of Perram J: see *Australian Securities and Investments Commission v Westpac Banking Corp* [2020] FCAFC 111; 277 FCR 343 (Middelton, Gleeson and Lee J). Relevantly, Gleeson J noted (at [141]) that the NCCP Act is not overly prescriptive as to what "reasonable inquiries" entail before observing that:

> the Act leaves it open to the licensee to decide:
>
> (1) what inquiries it will make under s 130(1)(a) and (b), provided that those inquiries are reasonable;
>
> (2) what steps it will take to verify the consumer's financial situation under s 130(1)(c), provided that those inquiries are reasonable;

72 In separate reasons, Lee J described the overarching operation of Divs 3 and 4 of Pt 3-2 of the responsible lending regime and observed (at [170]) that "s 130 imposes an initial duty to

undertake inquiries and investigations into the consumer's requirements and objectives, and financial situation (obligations directed to 'knowing the customer')". In this, it can be seen that the investigative exercise contemplated by provisions such as ss 117 and 130 is multi-faceted in nature and obliges licensees to undertake processes of inquiry and verification.

73 Returning to s 13(3) of the Code, Green County and Max Funding submitted that ASIC's contentions effectively converted an obligation to make "reasonable inquiries" into a process of verifying loan purpose. It was contended that there was no express obligation to do so, as contradistinct from the obligations imposed by the responsible lending provisions considered above.

74 I do not regard s 13(3)(b) as requiring a process of verification. Rather, it requires a process of inquiry that is fact dependent. In some cases, it may be that a singular act or process of inquiry will suffice and in others an iterative process may be required. The content and scope of the reasonable inquiries will depend on the facts. For these reasons, I do not accept the respondent's criticism of ASIC's submissions. I do not regard ASIC's submissions as involving a contention that s 13(3)(b) introduces a process which obliges the credit provider to engage in a process of verification in the same sense as that contemplated in the context of responsible lending obligations, but instead, correctly, as being a fact dependent exercise. That is a result that is compelled by the word "reasonable" which necessarily involves a consideration of the applicable facts and circumstances.

75 Section 13(3)(b) requires more than simply ascertaining what inquiries were reasonable in the circumstances. It also requires an assessment as to the likely information that would be provided in response to the reasonable inquiries. That is because s 13(3)(b) is concerned with what the credit provider would have known, or would have had reason to believe, as a result of making the reasonable inquiries. An example of such an approach is the decision of Campbell J in *Ozzy Loans*. There, his Honour rejected a submission that had the credit provider made further inquiries of the borrower, it would have elicited any information as to the true purpose of the borrowing in circumstances where the borrower was pursuing an "improper purpose": at [45].

76 Thus, the content of s 13(3)(b) calls for a hypothetical and counterfactual evaluation as to what information reasonable inquiries would have elicited in the circumstances of a particular borrower.

2.4 False or Misleading Conduct of Prospective Borrower or Debtor

77 There was a deal of contest between the parties as to the significance to be attached to false or misleading conduct on the part of a prospective borrower as to the true purpose for seeking the credit in question.

78 The respondents placed considerable reliance on the decision of Muir JA in *Shakespeare* at [31] where his Honour stated that "[if] the borrower requests credit for a stated purpose and the lender approves the request and makes the loan, there should be no difficulty in concluding that the purpose for which the loan was made was the purpose for which it was requested". This position also accords with the decision in *Park Avenue Nominees Pty Ltd v Boon (on behalf of Weir) & Anor* [2001] NSWSC 700 (Harrison M), where precedence was given to the purpose positively conveyed by the prospective borrower to the credit provider, even though the borrower had a different purpose in mind.

79 ASIC placed reliance upon the decision of Davies J in *Dutta*. There, Davies J was dealing with a case where the debtor had provided two business purpose declarations to the effect that the credit was not to be applied for wholly or predominantly personal, domestic or household purposes. The borrower's claimed purpose was misleading. However, the lender conceded that both the declarations were invalid because one declaration was not witnessed or dated and the other had been provided *after* entry into of the credit contract: at [113]. In addition to providing a false business declaration, Davies J made findings that the debtor had provided "misleading and false" information to the lender including as to the purpose of the loan: at [46]. The case was determined under the then provisions of the NSW Code. As the declarations were invalid, it fell to Davies J to determine whether the NSW Code applied on the operation of the primary statutory presumption contained in s 11(1) (the equivalent of s 13(1) of the Code) and its interaction with s 6 (1)(b) (the equivalent of 5(1)(b) of the Code). His Honour reasoned (at [123]) that the test in *Linkenholt* should be applied and then turned to address whether the presumption as to Code purpose could be rebutted where a debtor has misled the lender as to the purpose of obtaining the credit. On this topic, his Honour stated at [124]-[125]:

> It does not seem to me appropriate to approach the legislation from a different point of view dependent upon whether the borrower tells the truth to the lender. The legislation has a particular meaning which must be construed independently of the facts that give rise to the need to understand its meaning in any given case. In my view, Shaw J was right when he said in *Jonsson v Arkway* at [28] that the legislation needs to be broadly and liberally interpreted as beneficial legislation. Section 11(2) enables the credit provider to protect itself against all sorts of borrowers including untruthful ones. If the credit provider does not avail itself of that sub-section it takes the risk that the

> presumption in subs (1) will operate against it because it cannot prove that the funds were used for purposes other than the purposes for which the borrower proves they were in fact used.
>
> In the present case, the Bank obtained Business Purpose Declarations but did not ensure that they were obtained in a way that gave rise to the conclusive presumption that s 11(2) anticipates. It is necessary, therefore, to examine the evidence to see if the Bank can displace the presumption in s 11(1). In that regard, I can accept that the signing of the Declarations may amount to some admission that the loans were not for personal, domestic or household purposes. On the state of the evidence I do not consider that the mere proof that they were signed carries much weight. Mr Dutta's evidence was that he did not recall signing a Business Purpose Declaration in respect of the loans in May 2005. In relation to the increased Line of Credit in April 2006 Mr Dutta said that when he had completed signing the documents he mentioned to Ms Merta "there is $20,000 towards the business" and she then gave him the business declaration to sign, which he did.

80 There are three things to be observed about Davies J's reasoning. The first is that they adopt an approach that focusses upon the actual use of the credit which is an approach that has since been said not to be determinative (as addressed at [35]-[42]). The second is that, despite their invalidity, Davies J nevertheless regarded the business purpose declarations as having some evidentiary weight (ie, as "some admission"). The third matter to observe is that Davies J was not there considering the provisions of the Code, but of its predecessor, the UCCC (in particular, the NSW Code). As a result, his Honour did not have to consider the operation of s 13(4) of the Code. As already mentioned, the effect of that provision is that if a "business purpose declaration" is ineffective, s 5(1)(b)(i) is taken to be satisfied. This reflects a significant alteration to the operation of the provisions when comparing the UCCC against the Code.

81 In my view, the correct approach is to give weight to the purpose conveyed by the debtor to the credit provider as part of the objective assessment of the transaction as between the credit provider and debtor (as set out above). However, in most cases under the Code, the resolution of the question as to purpose will depend on whether a business purpose declaration has in fact been made and obtained. If it is ineffective, the result is likely to be determined by the operation of s 13(4) of the Code. Further, for the reasons I have outlined above, the fact that the debtor has conveyed a false position to the credit provider may well inform the assessment of the hypothetical and counterfactual analysis required by s 13(3)(b) and, where applicable, by the objective assessment called for by s 5(1)(b)(i) of the Code when read together with s 5(4).

3. FACTUAL FINDINGS

3.1 Onus and approach to fact finding

82 In a proceeding seeking the imposition of penalties for contraventions of a civil penalty provision, the case had to be proved on the balance of probabilities taking into account the gravity of the matters alleged: s 140 of the *Evidence Act 1995* (Cth). The onus in meeting this standard of proof is borne by ASIC and it is required to make out each allegation "to the reasonable satisfaction" of the Court: ***Briginshaw*** *v Briginshaw* [1938] HCA 34; 60 CLR 336 at 361-2 (Dixon J); see also *Axon v Axon* [1937] HCA 80; 59 CLR 395 at 403 (Dixon J). Reasonable satisfaction is not reached "by inexact proofs, indefinite testimony, or indirect inferences": *Briginshaw* at 362. Nor is it reached "as a result of a mere mechanical comparison of probabilities independently of any belief in its reality": *Briginshaw* at 361; see also, *NOM v DPP* [2012] VSCA 198; 38 VR 618 at [123] (Redlich, Harper JJA and Curtain AJA); *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331; 274 ALR 205 at [749]-[751] (Spigelman CJ, Beazley and Giles JJA); and *Citadel Financial Corporation Pty Ltd (admin apptd) v Action Scaffolding & Rigging Pty Ltd (in liq)* [2019] FCAFC 145 at [57].

83 However, the general onus cast on ASIC is affected by the operation of the statutory presumptions. As noted above, depending on which presumption is enlivened or invoked, on or the other party may carry the onus to rebut the relevant presumption to the satisfaction of the Court on the balance of probabilities.

84 When the law requires proof of any fact, the tribunal of fact "must feel actual persuasion of its occurrence or existence" before it can be found: *Briginshaw* at 361-363 (Dixon J); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* [2007] FCAFC 132; 162 FCR 466 at [31]-[32] (Weinberg, Bennett and Rares JJ).

85 As Kiefel CJ, Gageler and Jagot JJ observed in *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; 97 ALJR 857 at [60] (quoting from *Brown v New South Wales Trustee and Guardian* [2012] NSWCA 431; 10 ASTLR 164 at [51] (Campbell JA, Bergin CJ in Eq and Sackville AJA agreeing) and *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 (Dixon, Williams, Webb, Fullagar and Kitto JJ *per curiam*)):

> "To satisfy an onus of proof on the balance of probabilities is not simply a matter of asking whether the evidence supporting that conclusion has greater weight than any opposing evidence … It is perfectly possible for there to be a scrap of evidence that favours one contention, and no countervailing evidence, but for the judge to not regard

> the scrap of evidence as enough to persuade him or her that the contention is correct." The evidence must "give rise to a reasonable and definite inference" to enable a factual finding to be made; mere conjecture based on "conflicting inferences of equal degrees of probability" is insufficient
>
> (Citations omitted.)

86 It is also well to remember that in reaching a state of satisfaction as to the existence of a fact, or inferring or deducing the existence of a fact or state of affairs asserted by one or other party, or in resolving questions relating to the credit of a witness, common and ordinary human experience and reason plays a part: *Martin v Osborne* [1936] HCA 23; 55 CLR 367at 375 (Dixon J); *G v H* [1994] HCA 48; 181 CLR 387 (Brennan and McHugh JJ); ***Jones v Sutherland*** *Shire Council* [1979] 2 NSWLR 206 at [227] (Mahoney JA) cited in *Sydney South West Area Health Service v* ***Stamoulis*** [2009] NSWCA 153 at [139] (Ipp JA with whom Beazley JA agreed).

87 I have also taken into account that the respondents did not call any witnesses, and exclusively relied upon the tender of business records. ASIC invited me to draw adverse inferences in accordance with the principle in ***Jones v Dunkel*** [1959] HCA 8; 101 CLR 298: see also ***Kuhl*** *v Zurich Financial Services Australia Ltd* [2011] HCA 11; 243 CLR 361 (Heydon, Crennan and Bell JJ) at [63]. Whilst I have borne this in mind, it is necessary to repeat the observation made by Besanko, Perram and Katzmann JJ in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 at [79] that "the fact that one can infer that a party was afraid to call some particular witness or tender some particular document can take a trier of fact only so far".

88 What follows below are the findings I have made taking into account the above principles. Where there was a dispute as to the facts or the law, I have endeavoured to identify the extent of the dispute and explained my reasons for making the particular finding that I have.

3.2 The evidence and witnesses

89 ASIC read and relied upon the following affidavits:

(a) an affidavit of Consumer 1 affirmed on 12 September 2022;

(b) an affidavit of Consumer 2 affirmed on 25 January 2023;

(c) an affidavit of Steven Andrew Carney affirmed on 9 November 2023;

(d) an affidavit of Joyce Yuezhen Shao sworn on 10 November 2023;

(e) an affidavit of Thomas George Reiske affirmed on 10 November 2023;

(f) an affidavit of Rosemary Joy Steinfort sworn on 24 November 2023;

(g) an affidavit of Carmel Anne Clay (nee Vivian) sworn on 22 November 2023; and

(h) an affidavit of Michael Hartman affirmed on 24 April 2024 annexing his expert report (**Hartman Report**).

90 In addition to the affidavits, the parties relied upon a documentary tender of documents. In ASIC's case, this included notices and responses under s 306 of the NCCP Act.

91 Other than relying upon a documentary tender, the respondents did not adduce any evidence and Ms Ng elected not to give evidence.

92 Consumers 1 and 2, Ms Steinfort, Ms Clay and Mr Hartman were all required for, and subjected to, cross-examination by the respondents. As to the credit of each of these witnesses and the weight to be given to their evidence, it suffices at this juncture to observe as follows.

93 The credit of Consumers 1 and 2 has to be weighed in the context that each of them admitted that they had lied to Green County and Max Funding as to the purpose for which they were seeking credit.

94 I formed the view that Consumer 1 endeavoured to give truthful evidence before me. To his credit, Consumer 1 did so with equanimity despite being interrogated about matters that occurred at an obviously difficult time in his life. It is plain that at the relevant time that he was dealing Green County and Max Funding, Consumer 1 was suffering from an acute gambling addiction and was also at that time or thereabouts separating from his wife, with whom he had a young daughter. The result of this particularly traumatic period of his life was that Consumer 1 was not only prepared to make a false declaration, but he also came to forge his wife's signature. His conduct was of such gravity that it affects my assessment of what he would have done at the relevant time if further inquiries were made of him as to his purpose in seeking a loan from Green County.

95 My assessment of Consumer 2's evidence is different to that of Consumer 1. As I explain further below, the respondents invited me to find (including by reference to evidence she gave in cross-examination) that Consumer 2 did in fact intend to commence a business at the relevant time but that it did not take off due to the onset of the COVID-19 pandemic. Whilst I am prepared to accept that Consumer 2 may have had a *general* intention to commence a business, I am not satisfied that this was the *specific* purpose for which she was seeking credit from Green County and Max Funding at the relevant time. In other respects, my assessment of

Consumer 2's evidence given in cross-examination is that she was visibly distressed by the process of giving evidence. In demeanour, she was at times distressed, defensive and argumentative. I do not raise these matters to be critical of Consumer 2, but to convey that these matters have affected my assessment of the evidence she gave in oral testimony before me. Ultimately, in assessing where the truth lies in respect of her evidence, it has been necessary for me to consider the plausibility of the accounts Consumer 2 gave to Green County and Max Funding, and the evidence she gave in the hearing before me, having regard to the objective facts and based on common and ordinary human experience and reason.

96 The credit of Ms Steinfort and Ms Clay was not in question. Each were financial counsellors who respectively assisted Consumers 1 and 2 at times when they were resisting making payments due to Green County. The respondents relied upon some of the records prepared or retained by Ms Steinfort and Ms Clay as being supportive of the likely responses that would have been given by Consumers 1 and 2 had reasonable inquiries been made of them at the relevant time. I address these matters below.

97 Mr Hartman's credit was not called into question. However, as I explain in Part 6.5, I was not impressed by various aspects of Mr Hartman's evidence which I regard as unsatisfactory and less than compelling in several critical respects. Ultimately, I consider that his evidence is of low weight and provides little assistance in determining the questions that I must decide.

3.3 Background Facts

98 Green County was incorporated on 19 June 2017, and at all material times has had as its sole director and secretary the third respondent, Ms Ng.

99 Max Funding was incorporated on 21 December 2016. From incorporation to 3 July 2018, the sole director and secretary of Max Funding was Mr Hugo Ng. Then, from 3 July 2018 to 9 March 2023, Max Funding's sole director and secretary was Ms Yingjie Chen. On and from 10 March 2023 (which postdates the Relevant Period (see [4])), Ms Ng was a director and secretary of Max Funding: ASOC at [4]; first and second respondents' Defence to the ASOC at [4].

100 ASIC alleged that Ms Ng was an officer of Max Funding on the basis that she was a person who made, or participated in making, decisions that affected the whole or substantially the whole of the business of Max Funding. In response to ASIC issued notices, Max Funding stated that:

(a) during the Relevant Period, only Ms Ng and two other named employees were "processing loan application[s] under Max Funding";

(b) Ms Ng provided "information in regards to product details, features, terms etc [on the Max Funding website] to ensure website content are accurate";

(c) Ms Ng (and Morgan Ng) "provided information in regards to the loan application process to ensure it follows the lending policy set out for Green County";

(d) Ms Yingjie Chen was not involved in the "daily operation" of Max Funding; and

(e) Ms Ng was "responsible for authorising, updating and reviewing Max Funding policies throughout the relevant period".

101 Although Ms Ng initially denied that she was an officer of Max Funding during the Relevant Period, in closing submissions she accepted that there was material before the Court which would allow it to find that she made, or participated in making, decisions that affected the whole or substantially the whole of Max Funding's business during the Relevant Period such that she was an officer of Max Funding within the meaning of the Corporations Act. I accept that the evidence established that Ms Ng was an officer of Max Funding.

3.4 Agreements between Green County, Max Funding and Mutual Mortgage

102 On 19 June 2017, Green County and Max Funding entered a "Referral Agreement" pursuant to which Max Funding was to "*refer potential business client/customers*" to Green County and Green County would pay Max Funding a fee for those referrals.

103 During the Relevant Period:

(a) Max Funding referred approximately 54.1% of the prospective borrowers that contacted Max Funding to Green County; and

(b) referrals from Max Funding accounted for 100% of Green County's clients (that is, all loans ultimately issued by Green County were issued to borrowers referred to it by Max Funding).

104 On 20 June 2017, Green County and Mutual Mortgage Service Pty Limited (**Mutual Mortgage**) entered a "Service Agreement", pursuant to which Mutual Mortgage was to provide services to Green County, including assisting in the settlement of loans and undertaking the maintenance of loans. In substance, Mutual Mortgage provided loan management and

assessment services to Green County, including by providing loan documentation to borrowers and by dealing with borrowers in relation to the maintenance of loans.

105 Mutual Mortgage did not have any of its own employees during the Relevant Period, but rather had individuals assigned to it by Green County to perform certain responsibilities.

106 Green County did not communicate directly with any of its borrowers. All communication was undertaken on its behalf by Max Funding or Mutual Mortgage. However, Green County was responsible for the loan assessment process and for approving or rejecting loan applications. Once the loan was advanced by Green County, either Max Funding or Mutual Mortgage acted as customer service agents and loan managers.

107 On occasions, Max Funding and Mutual Mortgage would respond to requests from borrowers for additional funding, and Mutual Mortgage would issue reminders or default notices to borrowers.

108 During the Relevant Period, the three corporations did not have in person meetings or videoconferences with prospective borrowers, and did not otherwise offer "over the counter services". All client communications were by mail, occasional phone calls, emails or SMS.

3.5 Loans Provided by Green County

109 Green County has provided loans since 21 February 2018.

110 In the period from 21 February 2018 to 4 May 2021, Green County provided a total of 4,150 loans. Those loans:

(a) were on average for a sum of $5,400, with approximately:

  (i) 43% of the loans for less than $3,000;

  (ii) 59% of the loans for less than $4,000;

  (iii) 67% of the loans for less than $5,000;

(b) in 71.6% of cases, had borrowers who defaulted on at least one occasion; and

(c) in at least 22.7% of cases, were loans provided to borrowers who had indicated that they were "planning to start a business" or to "buy a business".

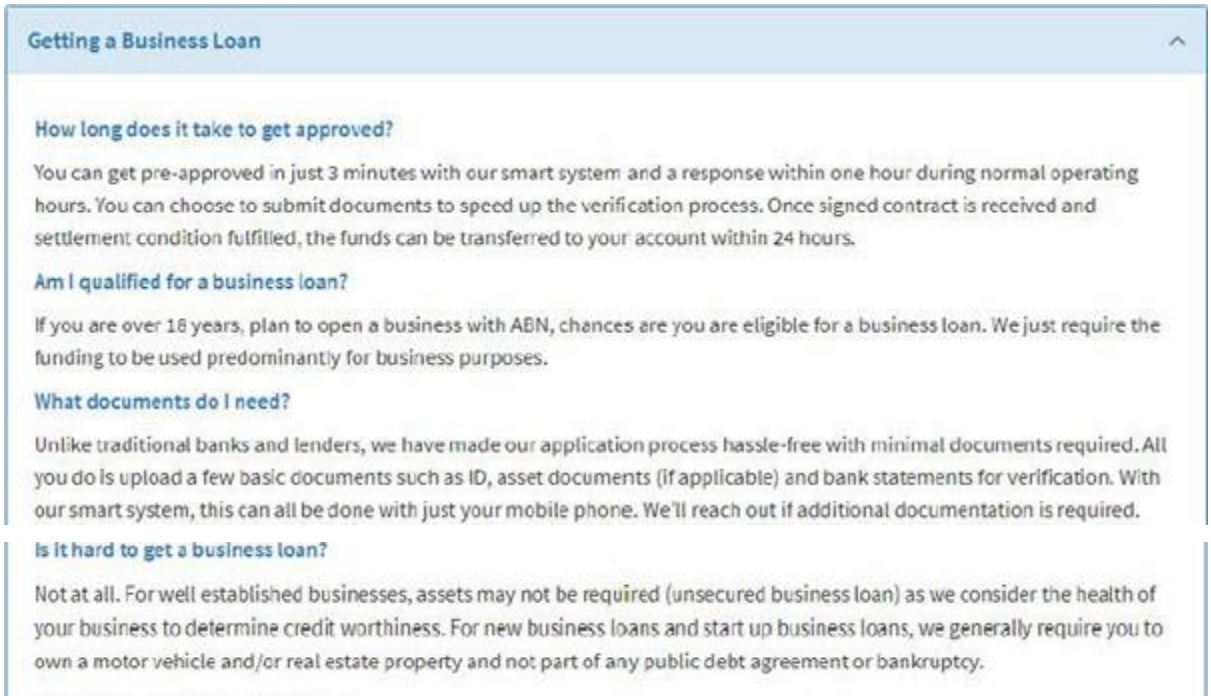
111 The loans offered by Green County were available to be drawn down within a short period of time (typically within 24 hours, but sometimes in two to three days) of receiving documents from loan applicants.

3.6 Max Funding's Website

112 Throughout the Relevant Period, Max Funding operated the website www.maxfunding.com.au. Max Funding's website did not materially change over the Relevant Period. Green County did not operate its own online loan application system during the Relevant Period but provided assistance to Max Funding for its website, including the loan application form that was contained on that website.

113 The Max Funding website variously stated to persons visiting that website that loan applicants for "small business loans" could receive a "Decision in 3 Minutes (24/7)", "Get up to $1,000,000", and receive "Same-Day Funding". An example of these representations, as they appeared on the website, is extracted below:

114 Other representations were made to the effect that an application could be made with no credit check. It was also represented that a "new business" could apply and that "no track record [was] required", "no financial report [was] required", "no guarantor [was] required" and "no business plan [was] required". In essence, it was represented that little documentation was needed to apply and obtain approval for a business loan. In this regard, the website contained the following information in relation to "Getting a Business Loan":



Getting a Business Loan

How long does it take to get approved?

You can get pre-approved in just 3 minutes with our smart system and a response within one hour during normal operating hours. You can choose to submit documents to speed up the verification process. Once signed contract is received and settlement condition fulfilled, the funds can be transferred to your account within 24 hours.

Am I qualified for a business loan?

If you are over 18 years, plan to open a business with ABN, chances are you are eligible for a business loan. We just require the funding to be used predominantly for business purposes.

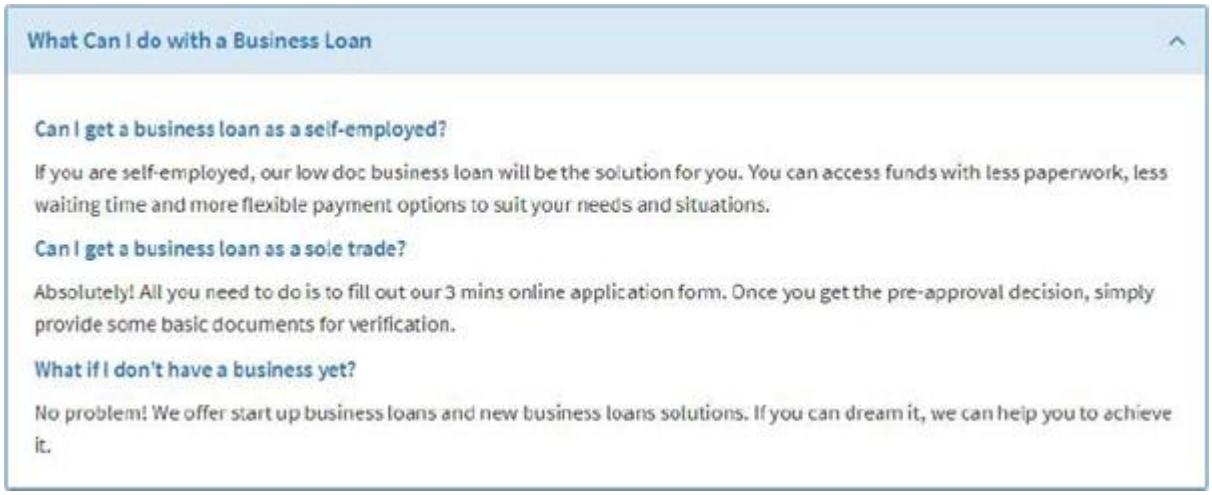
What documents do I need?

Unlike traditional banks and lenders, we have made our application process hassle-free with minimal documents required. All you do is upload a few basic documents such as ID, asset documents (if applicable) and bank statements for verification. With our smart system, this can all be done with just your mobile phone. We'll reach out if additional documentation is required.

Is it hard to get a business loan?

Not at all. For well established businesses, assets may not be required (unsecured business loan) as we consider the health of your business to determine credit worthiness. For new business loans and start up business loans, we generally require you to own a motor vehicle and/or real estate property and not part of any public debt agreement or bankruptcy.

115 The Max Funding website provided the following guidance in a section headed "What Can I do with a Business Loan?":



What Can I do with a Business Loan

Can I get a business loan as a self-employed?

If you are self-employed, our low doc business loan will be the solution for you. You can access funds with less paperwork, less waiting time and more flexible payment options to suit your needs and situations.

Can I get a business loan as a sole trade?

Absolutely! All you need to do is to fill out our 3 mins online application form. Once you get the pre-approval decision, simply provide some basic documents for verification.

What if I don't have a business yet?

No problem! We offer start up business loans and new business loans solutions. If you can dream it, we can help you to achieve it.

116 For prospective borrowers seeking to apply for a loan in relation to the establishment of a new business, the website displayed the following more specific information by way of a "Fact Sheet":

Start up Business Loans - Fact Sheet

Suitable For	✓ Start-ups ✓ Established business owner ✓ Commercial property investors ✓ Bad credit history
Pre-approval Time	1 hour to 2 hours
Settlement Time	1 day to 3 days
Loan Term	1 month - 36 months (including term extension)
Flexible Repayment	We can design a repayment plan that fits your cash flow. This can be a periodical repayment (e.g. monthly), a lump sum payment or a combination of your choosing. To ease your commitment and allow maximum flexibility, a loan term extension may be available.
Indicative Loan Amount	$10,000 to $100,000
Asset Eligibility Criteria	Real estate property (mortgaged OK)
Financial Statement	Optional
Dedicated Account Manager	Yes
Tax Deductible	Yes
Line of Credit	Available
Interest Rate	Our interest rate is as low as 1.50% per month. We are very confident that our rate is one of the lowest in the market, if you do find a lower rate, let us know, we will try to beat it.
Save Interest	✓ Pay-off loan early ✓ Extra repayments lower the balance

*Information provided on fact sheet is for reference only as we can tailor products to your requirement. Please contact us for further information.

117 The website then contained the following further information about start-up business loans:

What is a new business loan or start up business loan?

Start up business loan is very straightforward, it is one of the most popular products we offer here at Max Funding.

Over 80% of Australians dream about owning their own business. However, the first challenge for many of these new business owners is the lack of funding. Typically business owners don't have enough business experience and find it difficult to obtain loans from mainstream banks and lenders in Australia.

Here at Max Funding, we understand these struggles new business owners are faced with. We have revised our criteria so that it is much easier for new businesses to get a loan from us. We are new business-friendly, and unlike traditional banks, we don't require a business plan or a credit check for our pre-approval.

Banks not an option for start-ups

It is clear banks have turned a blind eye to start-ups. To these banks, new businesses are placed under a high-risk category, hence are more inclined to cater towards more well-established businesses that have demonstrated proven profitability within their full financial statements over the past 2-4 years.

Got bad credit record? We can still help.

As you might be aware, having a poor credit history can affect your ability to borrow. But at Max Funding, we would still like to give you a second chance. Whether

3.7 Loan Application Process

118 The Max Funding website included an online loan application form, which was in a template form. It included questions with drop-down lists of pre-filled answers as well as questions with checkboxes. The loan application form could only be completed online. This form remained almost identical throughout the Relevant Period.

119 The template enabled an applicant to specify a loan amount. It then required a loan applicant to identify the loan "Purpose", which consisted of the following drop-down answer options:

(a) "Business cash flow";

(b) "Setup business";

(c) "Buy business stock/equipment";

(d) "Renew business car rego";

(e) "Commercial property use";

(f) "Other business use"; and

(g) "Other personal use".

120 If the loan applicant selected the "Other personal use" option, a message prompt would appear with words to the effect of "We do not offer loans for personal use. Please contact a personal lender".

121 The next series of questions related to the "Stage of business". The options that a loan applicant could select were as follows:

(a) "Trading over 6 months";

(b) "Trading under 6 months";

(c) "Planning"; and

(d) "Buy a business".

122 Where a loan applicant selected "Planning" or "Buy a business" as the "Stage of business", the online application form prompted the following further questions:

(a) "What is your business's proposed name";

(b) "What will the business do";

(c) "How will you use the funds"; and

(d) "Net profit expect".

123 The next question asked was “What is your industry”. In response, the loan applicant could select one of a number of industries specified in a drop-down list.

124 The next series of questions related to Australian Business Numbers (**ABNs**). If the loan applicant had an ABN, they could tick a checkbox and then input the ABN. Alternatively, the applicant could tick a checkbox entitled “No ABN” which, upon selection, would prompt the question “Will you apply ABN” to appear. This could be answered “yes” or “no”.

125 Max Funding used the answers provided by the prospective borrower during the online application form process to generate a document entitled "Business Plan". That "Business Plan" was not created, verified or submitted by the loan applicant.

3.8 CRM: Customer Relationship Management System

126 During the Relevant Period, each of Green County, Max Funding, and Mutual Mortgage had access to a Customer Relationship Management system which they referred to as "**CRM**". The CRM was used by those companies in the following manner:

(a) Max Funding was responsible for adding a prospective borrower to the CRM at the time a loan application was received;

(b) when a prospective borrower completed the online loan application form, that information would be automatically transmitted to, and populated in, the CRM;

(c) phone communications would be manually added to the CRM, whilst email and SMS communications could be stored in the CRM either manually or automatically.

(d) staff were required to ensure communications with borrowers were recorded in the CRM;

(e) Green County would have access to the information in the CRM; and

(f) Mutual Mortgage would also have access to the information in the CRM, and would manually add records of communications with borrowers into the CRM.

127 Additionally, the companies used a local sharing folder to store documents uploaded or provided by borrowers.

3.9 Consumer 1

128 Consumer 1’s evidence, which I accept, was that in early 2020 he was struggling with a chronic gambling addiction. By that time, Consumer 1 had been struggling with gambling for about 20

years, and this addiction was particularly acute in the period between April 2020 and early 2021.

3.9.1 Consumer 1 applies for a loan

129 On 24 May 2020, Consumer 1 accessed the website of Max Funding, after having conducted a Google search for "payday loans" or "payday lending". At about 8.59 am, Consumer 1 submitted an online application for a loan of $2,000 on the Max Funding website. There was no reason why he chose that amount and Consumer 1 thought at the time that $2,000 would be enough to put towards gambling and to assist him pay off some “payday loans” he had already entered into at the time. Consumer 1 also considered that he could comfortably make repayments of $175 per fortnight from his income.

130 At the time, Consumer 1 was employed in a business which manufactured concrete mix and had been working there for nearly 18 months: T158.41-42. In his online application form, Consumer 1 asserted that he was seeking the loan to assist in the setup of a concrete business. He selected the "Setup business" option in the drop-down list titled "Purpose of Loan" and the "Planning" option in the drop-down list titled "Stage of business". Consumer 1 entered “Brady's Concrete Build” as the name of the business he asserted that he wanted to set-up. Consumer 1 thought of this name because he was working at a concrete business at the time. Consumer 1 indicated that he had no ABN, but selected "Yes" in response to the question asking whether he would apply for one.

131 Consumer 1 listed two assets on the application form, being real property he owned jointly with his wife (which he described on the form as being “Partially Owned” by him) and a car that was owned by his wife (which Consumer 1 described as being “Fully Owned” by him). Consumer 1 and his wife have since separated but remain married. Consumer 1 did not seek his wife’s consent to provide the car or house as security for the loan: T156.30-34. At the time of the application, the house was valued at approximately $750,000, with approximately $147,000 remaining unpaid on the home loan. This gave Consumer 1 and his wife equity in the home of more than half a million dollars: T159.27-28.

132 Consumer 1 knew that Max Funding only offered business loans: T155.5-6. When submitting his online application, Consumer 1 was required to agree to Max Funding’s application terms and conditions, including acknowledgements that:

(a) the information provided was truthful, correct and accurate; and

(b) the loan was to be predominantly used for a business purpose.

133 Consumer 1 accepted that he knew, when he submitted his application, that he was confirming the information he provided was truthful: T154.17-21. He also understood at that time that providing false information to obtain credit was a criminal offence: T154.30-34.

134 Based on the information submitted, the CRM system produced a document entitled "Business Plan". As noted earlier, this was not a document that Consumer 1 prepared or submitted, but it contained the substance of the information that Consumer 1 had submitted as part of his online application. The document contained the following information:

What is the main purpose of the loan?
Setup Business
What is the stage of your business
Planning to start business
What is your business's proposed name?
Bradys Concrete Build
What industry do you intend to operate in?
Building And Construction Industry
Will you be applying for an ABN?
Yes
How much net profit do you expect to earn p.a.?
$ 25,000

135 Consumer 1 accepted that he had no intention at the time to start any such business or any other business. He has never held an ABN or any registered business name.

136 Green County and Max Funding accept that Consumer 1 did not intend to start a business at the time he applied for credit, but say that Consumer 1 provided knowingly false information in order to obtain credit. I deal with these matters further below.

137 Shortly after submitting the online application, Consumer 1 received a text message from Max Funding stating that his loan had been "pre-approved" and, separately, received an email requesting that he provide documents to "finalise loan".

138 Over the course of 24 and 25 May 2020, Consumer 1 provided bank statements for a joint account he and his wife held with the Australia and New Zealand Banking Group Limited (**ANZ**). It appears that these documents may also have been requested directly from ANZ by one or more of Green County, Max Funding and Mutual Mortgage. The statements recorded the income and expenses of both Consumer 1 and his wife: T159.6-9. In addition to the income derived from Consumer 1's primary employment, the statements show that Consumer 1 was earning a modest additional income from delivering pamphlets: T159.34-44.

139 ASIC submitted that the bank statements, on their face, recorded:

(a) prior negative account balances;

(b) payments to gambling services; and

(c) payments on account of short term credit facilities.

140 This is certainly the case. However, it is also equally the case that from 25 November 2019 (the earliest entry in the statements) to 5 April 2020, there were no entries for gambling related transactions. Consumer 1 explained that he thought that during that period of four and a half months he had been in rehabilitation from his gambling addiction: T161.6-8. Green County and Max Funding accepted that the "statements undoubtedly showed substantial payments to bookmakers", but submitted that they also "contained significant withdrawals" from betting accounts. Having said that, Green County and Max Funding accepted that the net effect over the whole period of the statements showed substantial payments to bookmakers.

141 Max Funding obtained a "credit report" from a company named as "Equifax". The credit report recorded that Consumer 1 had 19 "Credit enquiries" with the comment "Risky: Dishonour double ⚠" (which indicated a bad credit record). The report also revealed that Consumer 1 had received a personal loan from "Ratesetter Aus" and that he had further:

(a) inquired for personal loans on:

(i) five occasions in late 2019; and

(ii) six occasions since 22 April 2020; and

(b) inquired for a personal loan of:

(i) $10,000 on the same day he applied to Max Funding for a “business loan”, being 24 May 2020; and

(ii) $2,100 on the day after he applied to Max Funding for a “business loan”, being 25 May 2020.

142 At some point, Consumer 1 received a brief phone call from a representative of Max Funding or Mutual Mortgage in connection with his loan application. ASIC drew attention to the fact that Consumer 1 was not asked to supply any detailed information about the purported proposed business such as size, profit, cost projections, timing, operation, management, industry. Nor was he asked about how the funds would be used, or about his personal or business background. I accept that no such inquiries were made at the time, if at all.

143 Max Funding referred Consumer 1’s application to Mutual Support for consideration and assessment. Mutual Support’s “credit assessment” stated:

> Client requesting fund to set up a business operating in building/construction industry. Based on the information from our inquiries and understanding of the industry, we have reason to believe is true and reasonable:
>
> - Business plan provided [this is a reference to the document referred to above, which captured the information provided by [Consumer 1] about his planned business]
> - Reasonable turnover for a small trading practice in the industry
> - The requesting loan amount matches the proposed business size and operation need…

144 The "credit assessment" also noted that Consumer 1 had:

(a) many suspected gambling transactions;

(b) other non-bank loans with "Credit Corp, Virgin Money"; and

(c) a “Credit Score” of 496.

145 Additionally, the CRM system used by Green County and Max Funding recorded in respect of Consumer 1 that:

(a) he had an "Average Credit Score [of] 496";

(b) his "Income/Bank Statement Review" had *crosses* marked against the line items:

(i) "Are there no negative balance? (Discount 10%)";

(ii) "No heaving gambling habit (Discount 10%)";

(iii) "No Short Term Lender or collection debt (Discount 10%)"; and

(iv) "Discount due to credit" with "50%" selected from a drop-down list;

(c) under "Credit Summary", his:

(i) "Risk Discount" was "30%"; and

(ii) "Capacity - Income" was "$-500"; and

(d) the "Assessor: (Final Conclusion)" noted a "low val vehicle, negative balance, gambling and short term lender in statement".

3.9.2 Consumer 1's First Credit Contract

146 At about 12.41 pm on 25 May 2020, Max Funding emailed Consumer 1 advising that his application had been approved for a loan of $2,000. That email listed as a "benefit" to Consumer 1 that he had an "Estimate Line of Credit Limit: $273,000 00 (further verification / different conditions may apply at drawdown)". The email noted that the credit agreement would be emailed to Consumer 1 by the lender's agent.

147 At about 3.58 pm on 25 May 2020, Mutual Mortgage emailed Consumer 1 a "credit agreement". At about 11.03 am the following day, Consumer 1 returned a signed copy of the credit agreement (**Consumer 1's First Credit Contract**).

148 Consumer 1's First Credit Contract:

(a) identified Green County as "Business Loan Lender" and "Credit provider";

(b) identified Mutual Support as "Loan Manager (Agent)";

(c) referred to a "Loan Amount (Principal)" of $2,640, comprising $2,000 "Payable To: Borrower(s)" and $640 in fees;

(d) required repayment over 12 months in weekly repayments of $72.67, comprising $21.89 in "lower rate" interest;

(e) recorded as the applicable interest rate on the loan:

(i) a "lower rate" of 3.56% per month; and

(ii) a "higher rate" of 5.52% per month;

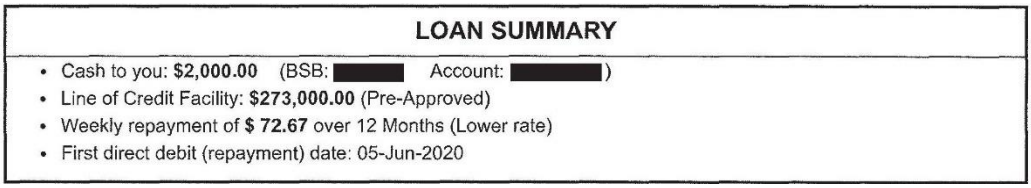
(f) listed as "security" for the loan a motor vehicle and real property identified by Consumer 1 as his "assets" on the original loan application; and

(g) stated that Consumer 1 was "Pre-Approved" for a "Line of Credit Facility" of $273,000;

(h) designated the "first repayment date" as 5 June 2020; and

(i) identified the "contract expiry date" as 28 May 2021.

149 More specifically, as to the "Line of Credit Facility", Consumer 1's First Credit Contract contained a box headed "FLEXIBILITY", which stated that there was an "[o]ption to access line of credit *(up to limit & subject to approval)". There was then a box which appeared as follows:



150 At the bottom of the first page of Consumer 1's First Credit Contract, the following text appeared:

> **A further Line of Credit Facility (LOC)** offers a fast and easy way to access flexible funding for your business when needed. This facility is available to our valued clients during the loan term. Verification and updated documents may be required. For more details, please refer to 1B of the Terms and Conditions.
>
> (Emphasis in original.)

151 The second page of Consumer 1's First Credit Contract contained a declaration of the purpose for which credit is provided in the form prescribed by the Regulations. The declaration was expressed in the following terms and was signed by Consumer 1 (signature redacted):

DECLARATION OF PURPOSE FOR WHICH CREDIT IS PROVIDED

Regulation 68, National Consumer Credit Protection Regulation 2010, Section 13(5), National Credit Code

TO: Green County Pty Ltd ACN: 619 832 816 (Credit provider)

RE: $2,640.00

I/we, Name: Bernard Patrick BRADY

"I/we declare that the credit to be provided to me/us by the credit provider is to be applied wholly or predominantly for: business purposes; or investment purposes other than investment in residential property(or for both purpose)."

IMPORTANT

You should **only** sign this declaration if this loan is wholly or predominantly for:
business purposes; or
investment purposes other than investment in residential property.
By signing this declaration you may **lose** your protection under the National Credit Code.

The fund will be used for: Business operating cash flow for Construction business

This declaration is made **before** I /we signed , or entered into, a credit contract relating to this intended transaction.

I/we acknowledge that the credit provider is relying on the correctness of the above representations and statements; and that it is on the basis of those representations and statements that the credit provider has agreed to provide the credit to me/us.

[redacted]

Signature of Borrower 1 : Bernard Patrick BRADY
Date: 25-May-2020

152 Consumer 1 agreed that it was apparent that it was a matter of importance that he should only sign this declaration if the loan was wholly or predominantly for business purposes, and that he knew this was something that was required to obtain the loan: T174.8-13. Consumer 1 appreciated that Green County was asking for the declaration so it could rely on that declaration: T174.23-24. Consumer 1 accepted that he gave the declaration, knowing at the time that it was false: T174.25-28. He accepted that he engaged in that dishonest conduct in order to obtain the loan funds: T174.28-30.

153 Page 3 of Consumer 1's First Credit Contract recorded that he had received, read, understood and accepted the "Standard Commercial Terms & Conditions FBTC102" (**Standard Terms and Conditions**). Page 4 recorded the terms of the offer of credit Green County made to Consumer 1. Page 5 set out the "Loan Contract & Mortgage Memorandum Schedule". I will return to the Standard Terms and Conditions and these other parts of the Credit Agreement in Part 4.

154 Importantly, page 7 of Consumer 1's First Credit Contract contained a direct debit authority. The account to be debited directly was the joint account of Consumer 1 and his wife: T174.44-175.7. In order to get the loan, both account holders needed to provide authority and, rather

than obtaining his wife's authority, Consumer 1 forged her signature: T175.9-15. He knew at the time that doing so was an offence: T175.22-25.

155 Subsequently, an employee of Green County or Max Funding called Consumer 1 as part of the verification checks undertaken prior to disbursing funds. On that call, Consumer 1 confirmed that he read, understood and signed the "business credit agreement": see also T175.34-35. Then, at about 5.42 pm on 26 May 2020, Mutual Mortgage emailed and texted Consumer 1 advising him that the funds had been sent to him via online banking. Upon receipt, Consumer 1 immediately used the funds for gambling.

3.9.3 Consumer 1 applies for more funds by way of a "line of credit"

156 At about 11.20 am on the following day, 27 May 2020, Consumer 1 received an email from Mutual Mortgage with the subject line "Your $273,000 Line of Credit & Client Portal Login". That email stated:

> **Line Of Credit**
>
> Access funding at your fingertips. With your complimentary Line of Credit (LOC), you can draw funds for your business whenever needed or when you have extra cash, make extra payments to lower your balance.
>
> Estimate Limit: $273,000.00
>
> Estimate Available: $270,360.00
>
> *Line of Credit Facility is subject to lending criteria and market conditions at the point of a funding request. Estimate credit limit and available funds may be adjusted after verification.
>
> For more information, please refer to the loan contract. Draw-down is subject to settlement conditions.
>
> **To access funding, login to your Client Portal.**
>
> (Emphasis in original.)

157 Almost immediately upon receiving that email, Consumer 1 accessed the client portal and applied for a further $3,000. The parties were in dispute as to whether this was an application for a further loan, or a drawdown in accordance with the terms of Consumer 1's Credit Contract. I deal with this issue in Part 4.

158 In completing the application for additional funds, Consumer 1 was not asked to provide any further information in relation to their use. However, Consumer 1 received a brief phone call in connection with this application. He said that he was asked why he needed more money, to which he said he spent the original loan funds on setting up the business. When asked what he

had spent the funds on, he said that he had bought tools. During cross-examination, Consumer 1 gave the following evidence (T177.10-35):

> Yes. Now, what then happened is that somebody from Max Funding called you in relation to this further drawdown request, didn't they?---Yes.
>
> Yes. And the question they asked you was what you had spent the first loan amount on, wasn't it?---I believe so, yes. Yes.
>
> Yes. And you said you had spent it on setting up the business, didn't you?---Correct.
>
> And then they asked you:
>
> *Well, what exactly did you spend it on in setting up the business?*
>
> Correct?---Correct.
>
> And you said you spent it on tools; correct?---Correct.
>
> Yes. And that wasn't true, was it?---Correct.
>
> And it wasn't true that you had spent the money in any way on setting up the business; correct?---Correct.
>
> But you're prepared to lie to the Max Funding representative in response to the direct questions they asked you about purpose and use of the loan funds; correct?---Correct.
>
> Because you knew you had to, to gain access to the money that you have requested; correct?---I wanted more money. Yes

159 ASIC submitted that Consumer 1 was not asked to prove any detailed information about the proposed business, how the funds would be used, or his capacity to make repayments. I accept that, whilst Consumer 1 was asked what he had used the earlier funds for, he was not asked about the purpose of the further funds he was seeking. I accept that Consumer 1's purpose in seeking the additional funds was to use those funds for gambling or to otherwise pay off personal debts.

160 In connection with his application for a further $3,000, information was recorded in the CRM system used by Green County and Max Funding. Among other things, this information included that Consumer 1 had:

(a) an "Average Credit Score" of "496";

(b) a "Risk Discount" of "30%"; and

(c) a "Capacity – Income" of "$-500".

161 Information was also recorded in a section headed "IV. REPAYABILITY – INCOME", which in turn included a sub-section headed "Income/Bank Statement Review". Here, a series of line

items were assessed by way of a tick or cross. Of these line items, the following were marked with crosses:

(a) "Are there no negative balance? (Discount 10%)";

(b) "No heaving gambling habit (Discount 10%)"; and

(c) "No Short Term Lender or collection debt (Discount 10%)".

162 Further information was recorded in a section headed “Credit Summary”, which included a text field headed "Assessor: (Final Conclusion)". In this field, the following text was recorded: "low val vehicle, negative balance, gambling and short term lender in statement". The following emoji was also recorded: 😐.

163 I infer from the abovementioned contents recorded in the CRM system that Green County and Max Funding had obtained further bank statements from Consumer 1 for the purpose of completing the “Income/Bank Statement Review” and concluding in the “Assessor: Final Conclusion” that there was a “…negative balance”.

3.9.4 Consumer 1’s Second Credit Contract

164 That afternoon, Mutual Mortgage emailed Consumer 1 a document entitled “Further Drawdown Facility / Line of Credit Agreement”. At about 9.54 am the following day, being 28 May 2020, Consumer 1 returned a signed copy of the “Further Drawdown Facility / Line of Credit Agreement” (**Consumer 1’s Second Credit Contract**). No business purpose declaration in the prescribed form was obtained in relation to this contract.

165 Consumer 1’s Second Credit Contract:

(a) identified Green County as “Lender";

(b) referred to a “loan amount” of $6,312, comprising a "Further Drawdown Amount" of $3,000, a current loan balance of $2,640 and a further $672 in fees; and

(c) required repayment over 12 months in weekly repayments of $173.39.

166 The information in (b) and (c) was set out in Consumer 1’s Second Credit Contract as follows:

Both Lender and Borrower(s) agree to the new finance facility details as below:

Further Drawdown Amount	$3,000.00
Current balance (as of agreement date)	$2,640.00
Valuation and Verfication Fee	$0.00
Loan Assessment Fee	$0.00
Search, business analysis & data verification	$0.00
Documentation - Contract preparation / legal fee	$134.40
Registration - Misc. Stamp duty, registration, lodgement & processing	$134.40
Line of Credit / Drawdown Fee	$403.20
Origination Fee	$0.00
New Loan Amount (Principal)	$6,312.00

Current and New Loan Details after further drawdown

	Current	**New (updated after drawdown)**
Repayment	$72.58	$173.39
Frequency	Weekly	Weekly
First Repayment Date	05-Jun-2020	05-Jun-2020
No. of Repayments	52	52
Contract Maturity	28-May-2021	28-May-2021
Line of Credit Amount	$273,000.00	$273,000.00
Balloon	$0.00	$0.00

Security Variation

New Security	N/A
Security to be Discharged*	N/A
Exisiting Securities	As per existing Loan Facility

*** Discharge fees & costs may apply as per existing loan facility agreement**

167 The second and final page of Consumer 1's Second Credit Contract contained the following text and was signed by Consumer 1 (signature redacted):

This variation agreement is subject to passing all verification required by the lender and can at any time be varied again and cancelled by the lender prior to settlement of this Further Drawdown Facility.

The Borrower(s) Declare that the drawdown amount will be used for:

Business operating cash flow for Construction business

I agreed to grant the lender/its agent a charge over the above mentioned New Security for the full amount owing under this loan facility and agreed to all terms under the Standard Commercial Terms & Conditions Version FBTC102.

All other terms and conditions of the loan contract & mortgage (Loan ID BRADY200524M) remain unchanged.

The new drawdown finance details may be subject to change due to ongoing repayments or other factors.

ACCEPTANCE

[redacted] ◀ Sign Here Date:27-May-2020

Signature of Borrower: Bernard Patrick BRADY

168 Consumer 1 accepted that the Second Credit Contract required him to declare that the additional funds would be used for "Business operating cash flow for Construction business". Consumer

1 was aware of this declaration when he signed this document and intended to make the declaration: T178.10-20. However, the declaration was false and Consumer 1 knew it to be false at the time: T178.22. Despite its falsity, Consumer 1 made the declaration because he thought he had to make it in order to get access to the money: T178.24-25. This declaration was one that was directed to compliance with s 13(2) of the Code.

169 Consumer 1 subsequently received a deposit of $2,994 into his bank account, which he used for gambling related transactions and to pay back his personal debts.

3.9.5 Consumer 1 seeks assistance from a financial counsellor

170 On 3 June 2020, Green County registered a caveat over real property that was jointly owned by Consumer 1 and his wife, which had been identified in Consumer 1's First Credit Contract.

171 On or about 9 June 2020, Consumer 1 contacted a financial counselling service known as "Connect" for assistance with his gambling problem and debts.

172 On 11 June 2020, Consumer 1 contacted Mutual Mortgage requesting postponement of his payment of the loans with Green County.

173 On 19 June 2020, Consumer 1 provided his financial counsellor with a statement of financial position that he had filled out: T179.5-13. That statement recorded that he was not spending anything on betting and that is consistent with what he told the counsellor at the time. The statement of financial position recorded that Consumer 1 was receiving wages of $1,942 per fortnight, as well as other income of $150 per fortnight from delivering pamphlets: T179.26-27.

174 On 23 June 2020, Consumer 1 again contacted Mutual Mortgage requesting postponement of his payment of the loans with Green County.

175 The following week, on 28 June 2020, Max Funding sent an email to Consumer 1 with a subject line as follows: "Line of credit of $266,900* available for your business". That email stated:

> Thank you for getting a loan with Max Funding and we hope you have been doing well since…
>
> To help you easily access funds, a line of credit facility* has been attached to your loan.
>
> Estimate Limit: $273,000
>
> Estimate Available: $266,900*

> Feel free to draw-down additional funding to grow your business.

176 On 30 June 2020, Consumer 1 responded to Max Funding stating:

> I do not need a credit limit of $273000 i never asked for such a limit can i get it reduced to $7500 as soon as possible

177 Over the following weeks and months, both Consumer 1 and a financial counsellor with Connect made repeated requests to Mutual Mortgage to postpone payments and to impose a moratorium on penalties and charges in respect of the loans.

178 On 2 September 2020, Consumer 1's financial counsellor, Ms Clay, emailed Mutual Mortgage about his loan. In that email, Ms Clay said that the original loan should not have been granted because Consumer 1 "has not and does not intend to have a Business" and that he had a gambling addiction. In the course of those communications, it was also communicated to Green County, Max Funding and/or Mutual Mortgage that Consumer 1 had been in "a gambling spiral" at the time of his loan application and as of early August 2020, had been "stood down from his employment" and would have "no other form of income until" his application with Centrelink was approved.

179 On 10 September 2020, Ms Clay sent a further email stating that Consumer 1 was returning to employment and would be in a position to restart payments to Green County on 25 September 2020. Mutual Mortgage responded, confirming that they had suspended repayments and that the next repayment was scheduled for 25 September 2020.

180 On 29 September 2020, Consumer 1 received a "Notice of Dishonor" regarding the loans.

3.9.6 Consumer 1 seeks further funds by way of a "line of credit"

181 On 16 December 2020, Consumer 1 accessed the client portal and applied for further additional funds in the amount of $1,400.

182 The business records indicate that after he submitted his online application, Consumer 1 received a brief phone call from a representative of Max Funding. In that call, Consumer 1 indicated he needed a "bridging loan of $1,400 until Christmas" and noted that his real property had been sold, with a settlement date in February 2021. Consumer 1 was also asked about his ABN, to which he responded that his application was delayed as there was no urgency to do so until the end of the financial year. In response to a query as to loan purpose, Consumer 1 stated he needed funds "to complete construction projects for the next few months". In cross-examination, Consumer 1 stated that he did not recall having this phone call or providing this

information: T181.1-3; T181.20. However, he nonetheless accepted that this information was "certainly" not true: T181.25 and T181.33. Furthermore, he knew that in applying for the additional funds he would need to say that the predominant purpose of the funds was a business purpose, and that he would need to give a business purpose declaration: T181.8-14; T181.35-37.

183 It appears the corporate respondents (or Mutual Mortgage) requested further bank statements from ANZ directly. On their face, those bank statements recorded:

(a) prior negative account balances;

(b) payments to gambling services; and

(c) payments to short term credit facilities.

184 Additionally, the corporate respondents (or Mutual Mortgage) obtained a second Equifax commercial report and consumer report for Consumer 1, which identified that, since the prior Equifax report, Consumer 1 had made a further four inquiries for personal loans, in addition to seeking an overdraft facility.

185 In connection with Consumer 1's application for $1,400, information was recorded in the CRM system. This information relevantly included that Consumer 1 had:

(a) an "Average Credit Score" of "446";

(b) a "Risk Discount" of "40%"; and

(c) a "Capacity – Income" of "$172".

186 Again, information was recorded in a section headed "IV. REPAYABILITY – INCOME", which in turn included a sub-section headed "Income/Bank Statement Review". Of the line items set out there, the following were marked with crosses:

(a) "Are there no negative balance? (Discount 10%)";

(b) "No heaving gambling habit (Discount 10%)";

(c) "No Dishonour over limit (Discount 10%)";

(d) "No Short Term Lender or collection debt (Discount 10%)";

187 The CRM system also recorded the information provided during the phone call between Consumer 1 and Max Funding (referred to at [54]). Namely, that his real property had been sold on 12 November 2020, the expected settlement date in respect of the sale was 15 February

2021 and that his ABN application was delayed as there was "no urgency to do so until the end of financial year".

188 Information was also recorded in a section headed "Credit Summary". There, in the text field headed "Assessor: (Final Conclusion)", the following was recorded: "loc updated to single app (5900) as requested by lending (273k in contract)".

3.9.7 Consumer 1's Third Credit Contract

189 The following day, on 17 December 2020, Mutual Mortgage emailed Consumer 1 another document entitled "Further Drawdown Facility / Line of Credit Agreement" and, shortly thereafter, Consumer 1 returned a signed copy of this document (**Consumer 1's Third Credit Contract**). Again, no declaration as contemplated by s 13(2) of the Code was obtained in relation to entry into this Contract.

190 Consumer 1's Third Credit Contract:

(a) identified Green County as "Lender";

(b) referred to a loan amount of $6,286.99, comprising a "Further Drawdown Amount" of $1,400, a current loan balance of $4,483.79 and a further $403.20 in fees; and

(c) required repayment over 47 weeks in weekly repayments of $184.34.

191 Consumer 1's Third Credit Contract was on similar terms as Consumer 1's Second Credit Contract, but with amendments to the relevant figures. It provided as follows:

Both Lender and Borrower(s) agree to the new finance facility details as below:

Further Drawdown Amount	$1,400.00
Current balance (as of agreement date)	$4,483.79
Valuation and Verfication Fee	$0.00
Loan Assessment Fee	$0.00
Search, business analysis & data verification	$0.00
Documentation - Contract preparation / legal fee	$80.64
Registration - Misc. Stamp duty, registration, lodgement & processing	$80.64
Line of Credit / Drawdown Fee	$241.92
Origination Fee	$0.00
New Loan Amount (Principal)	$6,286.99

Current and New Loan Details after further drawdown

	Current	**New (updated after drawdown)**
Repayment	$173.25	$184.34
Frequency	Weekly	Weekly
First Repayment Date	05-Jun-2020	18-Dec-2020
No. of Repayments	52	47
Contract Maturity	28-May-2021	05-Nov-2021
Line of Credit Amount	$273,000.00	$6,700.00
Balloon	$0.00	$0.00

Security Variation

New Security	N/A
Security to be Discharged*	N/A
Exisiting Securities	As per existing Loan Facility

192 Page 2 included the following terms and was signed by Consumer 1 (redacted):

This variation agreement is subject to passing all verification required by the lender and can at any time be varied again and cancelled by the lender prior to settlement of this Further Drawdown Facility.

The Borrower(s) Declare that the drawdown amount will be used for:

Business operating cash flow for Construction business

I agreed to grant the lender/its agent a charge over the above mentioned New Security for the full amount owing under this loan facility and agreed to all terms under the Standard Commercial Terms & Conditions Version FBTC102.

All other terms and conditions of the loan contract & mortgage (Loan ID BRADY200524M) remain unchanged.

The new drawdown finance details may be subject to change due to ongoing repayments or other factors.

ACCEPTANCE

[redacted] ◀ Sign Here Date:17-Dec-2020

Signature of Borrower: Bernard Patrick BRADY

193 As will be apparent, Consumer 1's Third Credit Contact also contained a statement that the drawdown amount would be used for "[b]usiness operating cash flow for Construction

business". Consumer 1 accepted that, like the earlier statements made by him, this statement too was knowingly false: T181.39-46.

194 Consumer 1 subsequently received a deposit of $1,400 into his bank account, which he used for gambling related transactions.

195 Less than a week later (on 22 December 2020), Consumer 1 received a further "Notice of Dishonor" regarding the loans.

196 On 23 December 2020, Consumer 1 made a final payout of all the loan funds advanced to him by Green County.

3.10 Consumer 2

197 Consumer 2 is a 64 year old resident of Melbourne, Victoria, who left high school at age 15 without graduating. Consumer 2's evidence, which I accept, was that she has suffered a long history of family violence.

198 Until September 2018, Consumer 2 worked at Coles and worked in the "Deli section". In September 2018, she suffered a workplace injury which left her unable to work. Since that time, she received "WorkCover payments" from Coles and, when those payments ceased, she later received Disability Support Pension payments. It appears that the workers' compensation payments may have been styled as receipt of wages from Coles, with bank statements of Consumer 2 disclosing credits described as "PAY/SALARY" from "COLES GROUP": CB330.

199 During the time of the events relevant to her dealings with the corporate respondents, Consumer 2 was financially supporting her husband and son, neither of whom contributed to household expenses. Consumer 2 also had outstanding debts that she had been unable to pay. I am satisfied she was under financial distress at the time.

3.10.1 Consumer 2 applies for a loan

200 In the early hours of 15 December 2019, Consumer 2 accessed the website of Max Funding, after having conducted a Google search for "loans for people with bad credit". At about 2.32 am that day, Consumer 2 submitted an online application for a loan of $2,000 through the Max Funding website. Consumer 2 estimated that she could comfortably make loan repayments of $500 per month from business and employment income.

201 In completing the online application, Consumer 2 selected the "Business cash flow" option in the drop-down list titled "Purpose of Loan", and the "Planning" option in the drop-down list titled "Stage of business". Consumer 2 provided certain information about the business, including that it was in the planning stage, would be in the business of selling seafood and did not yet have a name as she had not decided on one. Consumer 2 further said she expected the business to make $55,000 per year in profit. Consumer 2 indicated that she had no ABN, but answered "Yes" when prompted to answer whether she would apply for one. Consumer 2 also disclosed that she had "defaults" in her credit history. She also said that she owned a car (which was not subject to any finance) and owned residential property valued at $400,000 (in relation to which she owed $66,000 on a loan from Pepper Finance).

202 In submitting her online application, Consumer 2 also knew that she had agreed to Max Funding's application terms and conditions, including acknowledgements that:

(a) the information provided was truthful, correct and accurate; and

(b) the loan was to be predominantly used for business purpose.

203 Based on the information submitted by Consumer 2, the CRM system produced a document entitled "Business Plan". Again, as with Consumer 1, this was not a document that Consumer 2 prepared or submitted, but it contained the substance of the information that Consumer 2 had submitted as part of her online application. The document contained the following information:

What is the main purpose of the loan?
Business Cash Flow
What is the stage of your business
Planning to start business
What is your business's proposed name?
Not yet decided but will sell seafood
What industry do you intend to operate in?
Retail Industry
Will you be applying for an ABN?
Yes
How much net profit do you expect to earn p.a.?
$ 55,000

204 Unlike Consumer 1, Consumer 2's evidence as to whether she had an intention to commence a business at the time was less clear. ASIC submitted that Consumer 2's true purpose in seeking the loan funds was to use the funds to meet household expenses, including her mortgage and utility bills. It was further submitted that in her loan application, Consumer 2 provided basic information on a proposed business out of desperation for funds.

205 Green County and Max Funding accepted that, prior to and during the time of her dealings with them, Consumer 2 did not hold an ABN or a registered business name. However, they disputed ASIC's contentions as to Consumer 2's purpose for obtaining the loan funds.

206 It is necessary to resolve this dispute between the parties, which I do after setting out the balance of the facts relating to Consumer 2's dealings with Green County and Max Funding.

207 Shortly after submitting the online application, Consumer 2 received a text message from Max Funding stating that her loan had been "pre-approved" and, separately, received an email requesting that she provide documents to "finalise loan".

208 Over the course of 15 and 16 December 2019, Consumer 2 provided the corporate respondents with the bank account details for an account held with ANZ. It appears the corporate respondents (or Mutual Mortgage) subsequently requested statements from ANZ directly. Those bank statements, on their face, recorded low account balances and payments to short term credit facilities. The bank statements also disclosed that Consumer 2 was receiving monthly payments of approximately $3,500 in "pay/salary".

209 Additionally, the corporate respondents (or Mutual Mortgage) obtained a "credit report" from Equifax, which identified that Consumer 2 had a credit score of 161. In the headline items, it was noted that there were adverse events on file and 50 "Credit enquiries" had been made (both of which were marked as "Risky: Dishonour double ⚠"). The credit report disclosed a payment default with her utility provider and a default judgment from February 2016 entered in favour of Hobsons Bay City Council for the amount of $4,566. The credit report further revealed that Consumer 2 had received a personal loan from "Money 3 Corporation" (which she had defaulted on once) and identified that she had further:

(a) inquired for personal loans on:

(i) 38 occasions between August 2018 and November 2019; and

(ii) 6 occasions since 16 November 2019; and

(b) inquired for a personal loan of:

(i) $15,000 in the fortnight prior to her application for a "business loan" with Max Funding; and

(ii) $2,400 on the day after her application for a "business loan" with Max Funding, being 16 December 2019.

210 After submitting her application, Consumer 2 had a phone call with Max Funding in connection with the application and spoke with a representative known as Ms Li. During the call, Ms Li explained that she needed to "clarify a few things" (T385.45) and asked Consumer 2 to confirm that she wished to sell seafood, which she did: T386.1-10. The business records indicate that Ms Li further queried the relatively modest loan amount as being "small for starting up seafood", to which Consumer 2 responded that she wanted to "try small first before committing". Although Consumer 2 did not recall saying this, her evidence in cross-examination was that it was "probably what [she] said": T386.12-18. Consumer 2 agreed that, when inquiries were made of her about her proposed business, she gave answers consistent with her wanting to start a business selling seafood: T386.20-22.

211 Either Green County or Mutual Mortgage completed a "Credit Assessment" for Consumer 2. In that "Credit Assessment", it was noted that Consumer 2 had:

(a) an "Account balance - negative balance more than 3 occasions";

(b) one "short term loan identified: Swoosh Finance";

(c) a "Credit Score [of] 161"; and

(d) not yet generated "Business income…at point of application".

212 Additionally, information was recorded in the CRM system in respect of Consumer 2's application for $2,000. Among other things, this included that Consumer 2 had:

(a) a "Veda Credit Score" of "161";

(b) a "Risk Discount" was "10%";

(c) a "Capacity - Income" of "$0"; and

(d) a debt of $4,566 owing to Hobsons Bay City Council.

213 Again, information was recorded in the sub-section headed "Income/Bank Statement Review" within the section headed "IV. REPAYABILITY – INCOME". Here, Consumer 2's "Income Source" was identified as "PAYG" and the following line items were marked with crosses:

(a) “No Short Term Lender or collection debt (Discount 10%)”; and

(b) “Discount due to credit 100%”;

214 In the “Assessor: (Final Conclusion)” text field located in the “Credit Summary” section, the following note was recorded: “bad credit, old fin car, average income”.

215 At about 3.12 pm on 16 December 2019, Max Funding emailed Consumer 2 advising that her application had been approved for a loan of $2,000. That email listed as a "benefit" to Consumer 2 that she had an "Estimate Line of Credit Limit: $114,000".

3.10.2 Consumer 2’s First Credit Contract

216 At about 11.00 am on 17 December 2019, Mutual Mortgage emailed Consumer 2 a credit agreement. At about 11.58 am the same day, Consumer 1 returned a signed copy of the credit agreement (**Consumer 2’s First Credit Contract**).

217 Consumer 2’s First Credit Contract:

(a) identified Green County as "Business Loan Lender" and "Credit provider";

(b) listed Mutual Support as "Loan Manager (Agent)";

(c) referred to a loan amount of $2,640, comprising $2,000 "Payable To: Borrower(s)" and $640 in fees;

(d) required repayment over 10 months in monthly repayments of $367.80, comprising $103.80 in "lower rate" interest;

(e) recorded as the applicable interest rate on the loan:

(i) a "lower rate" of 3.96% per month; and

(ii) a "higher rate" of 6.9% per month;

(f) listed as "security" for the loan a motor vehicle and real property identified by Consumer 2 as her "assets" on the original loan application; and

(g) stated that Consumer 2 was "Pre-Approved" for a "Line of Credit Facility" of $114,000;

(h) designated the “first repayment date” as 14 January 2020; and

(i) designated the “contract expiry date” as 14 October 2020.

218 As with Consumer 1, Consumer 2’s First Credit Contract dealt with the “Line of Credit Facility” contained a box headed “FLEXIBILITY”, which stated that there was an “[o]ption to

access line of credit *(up to limit & subject to approval)". There was then a box which appeared as follows (sensitive information redacted):

219 At the bottom of the first page of Consumer 1's Credit contract, the following text appeared:

> **A further Line of Credit Facility (LOC)** offers a fast and easy way to access flexible funding for your business when needed. This facility is available to our valued clients during the loan term. Verification and updated documents may be required. required. For more details, please refer to 1B of the Terms and Conditions.
>
> (Emphasis added.)

220 The second page of Consumer 2's First Credit Agreement contained a declaration of the purpose for which credit is provided in the form prescribed by the Regulations. The declaration was expressed in the following terms and was signed by Consumer 1 (with suppressed information redacted):

DECLARATION OF PURPOSE FOR WHICH CREDIT IS PROVIDED

Regulation 68, National Consumer Credit Protection Regulation 2010, Section 13(5), National Credit Code

TO: Green County Pty Ltd ACN: 619 832 816 (Credit provider)

RE: $2,640.00

I/we, Name: [redacted]

"I/we declare that the credit to be provided to me/us by the credit provider is to be applied wholly or predominantly for: business purposes; or investment purposes other than investment in residential property(or for both purpose)."

IMPORTANT

You should **only** sign this declaration if this loan is wholly or predominantly for:
business purposes; or
investment purposes other than investment in residential property.
By signing this declaration you may **lose** your protection under the National Credit Code.

The fund will be used for: Business operating cash flow for Retail business

This declaration is made **before** I /we signed , or entered into, a credit contract relating to this intended transaction.

I/we acknowledge that the credit provider is relying on the correctness of the above representations and statements; and that it is on the basis of those representations and statements that the credit provider has agreed to provide the credit to me/us.

[redacted]

Signature of Borrower 1 : [redacted]

Date: 17-Dec-2019

221 Consumer 2 accepted that when she signed this declaration, she knew it would be dishonest and a criminal offence to give a false declaration in order to obtain a loan by deception: T386.31-34; T387.1-3.

222 Page 3 of Consumer 2's First Credit Contract recorded that she had received, read, understood and accepted the Standard Terms and Conditions. Although the version of Consumer 2's First Credit Contract tendered into evidence did not attach those terms and conditions, it was not in issue between the parties that they did not form part of the agreement and were in the same terms as those applicable to Consumer 1.

223 Later, on 17 December 2019, an employee of Green County or Max Funding called Consumer 2 to verify certain matters. During that call, Consumer 2 confirmed that she had read, understood and signed the agreement with Green County. She did not have any questions about it.

224 At about 5.39 pm on 17 December 2019, Mutual Mortgage emailed and texted Consumer 2, advising that the loan funds had been sent to her via online banking. Consumer 2 received those funds, and used those funds to meet personal debts and household bills and expenses.

3.10.3 Consumer 2 applies for further funds by way of a "line of credit"

225 At about 10.57 am the following day, being 18 December 2019, Consumer 2 received an email from Mutual Mortgage with the subject line "Your $114,000 Line of Credit & Client Portal Login". That email stated:

> **Line Of Credit**
>
> Access funding at your fingertips. With your complimentary Line of Credit (LOC), you can draw funds for your business whenever needed or when you have extra cash, make extra payments to lower your balance.
>
> Estimate Limit: $114,000.00
>
> Estimate Available: $111,360.00
>
> *Line of Credit Facility is subject to lending criteria and market conditions at the point of a funding request. Estimate credit limit and available funds may be adjusted after verification.
>
> For more information, please refer to the loan contract. Draw-down is subject to settlement conditions.
>
> **To access funding, login to your Client Portal.**
>
> (Emphasis in original.)

226 At about 2.29 pm on 9 January 2020, Consumer 2 received an email from Max Funding with the subject line "Line of credit of $111,200* accessible for your business". That email stated:

> Thank you for getting a loan with Max Funding.
>
> To help you easily access funds, a line of credit facility* has been attached to your loan.
>
> Estimate Limit: $114,000
>
> *Estimate Available: $111,200**
>
> Feel free to draw-down additional funding to grow your business.

227 At about 2.20 pm the following day, Consumer 2 called Max Funding to request a further loan amount of $5,000. At that time, Consumer 2 had not yet made any repayments in respect of the first loan advance. The business records document that Consumer 2 said during the call that she needed $5,000 for her business (the notation being "*need $5k for biz*"). Other than this, in completing the application for additional funds, Consumer 2 was not asked to provide any further information in relation to the loan purpose.

228 As usual, information was recorded in the CRM system in connection with Consumer 2's application for $5,000. Much of this information is relevantly the same as that recorded in relation to Consumer 2's initial application for $2,000 (as described at [212]-[214]). However, in a text field headed "Bank Statement (5)" the following text was recorded: "seems like mthly wage on 13 or 14th of the mth, Jan is yet to come". I infer from this that Green County and Max Funding had available to them updated bank statements relating to Consumer 2.

3.10.4 Consumer 2's Second Credit Contract

229 On or about 14 January 2020, Mutual Mortgage emailed Consumer 2 a document entitled "Further Drawdown Facility / Line of Credit Agreement". At or about 11.55 am the following day, Consumer 2 returned a signed copy of this agreement (**Consumer 2's Second Credit Contract**). No business purpose declaration was obtained in relation to this contract.

230 Consumer 2's Second Credit Contract:

(a) identified Green County as "Lender";

(b) referred to a loan amount of $8,696.24, comprising a "Further Drawdown Amount" of $5,000, a current loan balance of $2,736.24 loan and a further $960 in fees; and

(c) required repayment over 6 months in monthly repayments of $490.

231 The information in (b) and (c) was set out as follows:

Both Lender and Borrower(s) agree to the new finance facility details as below:

Further Drawdown Amount	$5,000.00
Current balance (as of agreement date)	$2,736.24
Valuation and Verfication Fee	$0.00
Loan Assessment Fee	$0.00
Search, business analysis & data verification	$0.00
Documentation - Contract preparation / legal fee	$192.00
Registration - Misc. Stamp duty, registration, lodgement & processing	$192.00
Line of Credit / Drawdown Fee	$576.00
Origination Fee	$0.00
New Loan Amount (Principal)	$8,696.24

Current and New Loan Details after further drawdown

	Current	**New (updated after drawdown)**
Repayment	$367.80	$490.00
Frequency	Monthly	Monthly
First Repayment Date	14-Jan-2020	14-Feb-2020
No. of Repayments	10	6
Contract Maturity	14-Oct-2020	14-Jul-2020
Line of Credit Amount	$114,000.00	$7,800.00
Balloon	$0.00	$7,816.81

Security Variation

New Security	N/A
Security to be Discharged*	N/A
Exisiting Securities	As per existing Loan Facility

*** Discharge fees & costs may apply as per existing loan facility agreement**

232 The second and final page of Consumer 2's Second Credit Contract contained the following text and was signed by Consumer 2 (suppressed information redacted):

This variation agreement is subject to passing all verification required by the lender and can at any time be varied again and cancelled by the lender prior to settlement of this Further Drawdown Facility.

The Borrower(s) Declare that the drawdown amount will be used for:

Business operating cash flow for Retail business

I agreed to grant the lender/its agent a charge over the above mentioned New Security for the full amount owing under this loan facility and agreed to all terms under the Standard Commercial Terms & Conditions Version FBTC102.

All other terms and conditions of the loan contract & mortgage (Loan ID [redacted]) remain unchanged.

The new drawdown finance details may be subject to change due to ongoing repayments or other factors.

ACCEPTANCE

[redacted] ◀ Sign Here Date:14-Jan-2020

Signature of Borrower: [redacted]

233 Consumer 2 subsequently received a deposit of $5,000 into her bank account, which she used to pay personal and household bills, expenses and debts.

3.10.5 Consumer 2 seeks assistance from financial counsellor and repayment deferral

234 At about 10.12 am on 16 January 2020, Consumer 2 provided Max Funding and Mutual Support with mortgage statements from her mortgage provider. Those statements recorded:

(a) a number of "default notice fee" and "Pmt reversal fee" on the account;

(b) that of the last seven payments made to the account, four had been subject to "Payment Reversal"; and

(c) that the last payment made was on 18 December 2019 for $300, which was less than the monthly interest charge on the account.

235 The following month, on 17 February 2020, Consumer 2 contacted Max Funding and Mutual Mortgage requesting to postpone her monthly repayments.

236 Over the ensuing weeks and months, Consumer 2 and her daughter made repeated requests to Mutual Mortgage to postpone the monthly repayments and to freeze penalties and charges in respect of the loan. During that time, Consumer 2 received a number of dishonour/default notices. In the course of those communications, it was communicated that Consumer 2 had "no funds coming in" and had insufficient funds to meet her repayment obligations in full. Despite this, on 11 March 2020, Consumer 2 emailed seeking to access a further drawdown. The email stated that the funds were sought "for a cash flows for my business". That request was declined.

237 On 2 April 2020, Consumer 2 sent an email seeking a reduction in her scheduled repayments and explained "[t]he business didn't take off due to me being unwell so I didn't continue as it didn't take off." Consumer 2 said she sent this email to explain why she had not been able to make repayments to that date, and needed a further deferral: T391.15-22.

238 Consumer 2 made similar representations to Mutual Mortgage on 7 April 2020, when she explained that her business "is closed and has been for the past mth or so as [she] was unwell it did not even take off".

239 During cross-examination, Consumer 2 agreed that she had originally planned to start a business, but it never eventuated because her ill-health and COVID intervened (T391.24-30):

> Yes. And the explanation was that the business never really took off because you got sick, and you were in hospital then COVID hit?---That's correct.
>
> Yes. And you weren't lying when you said that, were you?---No, I wasn't.
>
> No. And you did originally have a plan to start a business, but it actually never eventuated because she got sick and COVID hit?---That's correct.

240 The Respondents submitted that this position was consistent with the information that Consumer 2 had given a financial counsellor, as set out below.

241 Consumer 2 made her last repayment to Green County in September 2020. At that time, Consumer 2's loan balance with Green County was $9,954.02.

242 On 23 October 2020, Consumer 2 received an email from Max Funding with the subject line "Tax time stress is real. Here's how to cope", which provided "If you need some extra funds to get on top of your tax payments in the new financial year, we are always here to lend you a helping hand". Consumer 2 responded a few hours later and requested to "take [her] loan up to [$10,000]". Later that same day, Max Funding responded as follows: "We do understand your business requires further funding and would be happy to revisit your application when additional qualified assets can be provided for review."

243 On 18 February 2021, Mutual Mortgage sent a text message to Consumer 2 stating that "Due to your defaults, Debt Recovery Action may occur at your cost[] and without further notice".

244 On 9 April 2021, Mutual Mortgage sent an email to Consumer 2 stating that her account would be handled by a collection agent.

245 On or about 5 July 2021, Consumer 2 was referred to a financial counselling service known as "EACH" for assistance with her loans with Green County. EACH is a not-for-profit organisation operated by the Consumer Action Law Centre.

246 Over the following weeks and months, Consumer 2 and her financial counsellor, Ms Steinfort, made further requests to postpone payments and to freeze penalties and charges in respect of the loans. Ms Steinfort conducted a phone interview with Consumer 2 on 6 July 2021 to obtain background information, including about the state of her finances and the debts that she owed.

247 On 8 July 2021, Ms Steinfort sent an email to Consumer 2 recording her notes of that conversation: T205.6-17. Those notes record that during the initial interview of 6 July 2021, Consumer 2 told Ms Steinfort that the loan with Max Funding "was supposed to be for a business, which never eventuated": T205.35-39. Other records kept by EACH identify that Consumer 2 "has a small business loan and needs advice regarding this." The records also identify that Consumer 2 was a small business owner and had business debts. The respondents relied upon this evidence to support their contention that Consumer 2 did in fact intend to commence a small business and regarded her loan with Green County as a business debt, which she communicated to Ms Steinfort who was seeking to assist her.

248 On 13 September 2021, Ms Steinfort sent a letter to Green County on Consumer 2's behalf. In that letter, Ms Steinfort asserted, on the basis of instructions given to her, that Consumer 2 did not operate a retail business and did not have a business at the time of applying for the loan: T208.37-209.3. The letter did not assert that Consumer 2 had not planned to start a business, and Ms Steinfort agreed that such a claim could not have been made because it would have been inconsistent with what Consumer 2 had told her during the initial conference: T209.32-34.

3.10.6 Subsequent events

249 As at 18 February 2022, Consumer 2's loan balance account with Green County was $22,108.80. On that day, Green County credited Consumer 2's loan account with an "interest reversal" equal to the whole sum owing and discharged the loans.

250 Sometime in March 2023, whilst her son remained unemployed, Consumer 2 assisted her son in establishing and commencing a small business. The business sold tobacco and related products, as well gifts and other items. Consumer 2 applied for an ABN for that business and registered a business name in her son's name. She was able to provide assistance to her son for this purpose from a workers' compensation payout she had received.

3.10.7 Did Consumer 2 intend to commence a retail seafood business?

251 As mentioned above, there was a dispute between the parties as to whether Consumer 2's true purpose in seeking credit from Green County was wholly or predominantly for a Code purpose or a non-Code purpose.

252 In her affidavit, Consumer 2 deposed as follows:

> 23. The third question in the online application was something like "What is the name of your business?". I didn't give a name for the business because I couldn't think of one. I answered the form by saying that the business was going to be in seafood because, years ago, an old manager of mine talked about maybe starting a seafood business. This idea popped into my head while I was filling out the online application and I just put . that in. I never intended on starting a seafood business - I just needed money to live because the WorkCover benefits were not enough for me to pay my mortgage, utility bills and other bills that we had fallen behind on. I was desperate for the money, so I made it up. I didn't really care about what I was writing in the form.
>
> …
>
> 41. In December 2019, the loan funds were deposited into my bank account. This account is a personal account, it was not a business account. I have never had a business bank account. I did not use this money to start a business, I used it to take care of my family's and my personal debt and to live. I remember the

first thing I did when the money was put into my back account was to pay my phone bill because it was overdue. I remember that I spent the loaned funds quickly.

…

Second Loan

43. In early January 2020, I called Max Funding and spoke to an agent about applying for more money. I do not remember the name of the agent.

44. At that time, I needed an extra $5,000 to cover more household debt and expenses. I was receiving the same WorkCover benefit payments, but that was still not enough to cover expenses and to live, and I was still behind on bills. I was behind on and needed to pay my phone bill, as well as the water bill and the Council rates. The water bill and the Council rates were both overdue.

45. At that time, I had not made any repayments to Max Funding for the first loan.

46. I decided to apply for an extra $5,000. I did this because the process to get the first loan was very easy. I thought because it was so easy to get the $2,000, I could try for a bigger amount this time.

47. During the phone call, the agent I spoke to at Max Funding said something like, "for you to be able to get more money, you need to give us a copy of a recent mortgage statement."

48. During the call with the agent from Max Funding, I was not asked any questions about the 'business' that I had said in my first loan application I was going to start, and I was not asked what the further loan funds would be used for. I did not intend to use this second loan for business purposes. I had not set up any business at that time and did not intend to set up a business. The only thing that I recall being told was that I had to put my house up as security.

…

53. I received the money in my account about two or three days after I sent Max Funding the signed contract.. I spent all the money on living expenses. I paid bills, like electricity, water, medical bills, the mortgage, car registration and other debts that I had outstanding. I did not use the money to start up a business and I never intended on starting up a business. I used the money to live.

253 It is plain from this evidence that Consumer 2 had said that the only reason she had asserted that she intended to start a seafood business was because the "idea popped into [her] head" and it had done so because it was something that some years ago that she had discussed with an old manager. The fact that Consumer 2 did not have any intention to commence such a business was consistent with the fact that she took no steps to obtain an ABN or a registered business name, and did not take any other step to in fact plan or prepare for a business. It is further consistent with the fact that she did not use any of the credit advanced by Green County for a business purpose but used it to attend to household and other personal expenses.

254 Despite this, the respondents submitted that I should find that Consumer 2 did in fact have a genuine intention to commence a business which did not eventuate due to the onset of the COVID-19 pandemic. They further said that this was consistent with other evidence. *First*, it was said to be consistent with what Consumer 2 had said in her initial application for a loan. *Second*, it was said to be consistent with her telling a representative of Max Funding in response to a query that $2,000 was "small for starting up seafood" that she wanted to "try small first before committing". *Third*, it was said to be consistent with her telling representatives of the corporate respondents that she was unable to make repayments due to the business not taking off due to ill-health and the pandemic. *Fourth*, it was said to be consistent with what she told a representative of the corporate respondents when she sought to draw on the line of credit for $5,000. *Fifth*, it was said to be consistent with the representations she made to her financial counsellor. *Sixth*, it was said to be consistent with the fact that she did ultimately commence a business with or for her son (by way of a tobacconist and giftware shop). *Finally*, it was submitted that it was consistent with her evidence given in cross-examination that she did in fact intend to commence a business but it did not eventuate because of the onset of the pandemic. And, in this regard, it was again pointed out that Consumer 2 did eventually assist her son in establishing and commencing a small business.

255 I do not accept the respondents' contentions. In making an assessment as to the true position, I have applied common sense and logic based on ordinary human experience and reason in the drawing of an inference or deducing whether this fact existed having regard to the other evidence (based on the principles cited above). The question is this: am I satisfied that at the relevant time Consumer 2 *actually* intended to commence a retail business selling seafood? The question is not answered by the application of a mathematical scale, where one or other items of evidence tip the balance. Rather, it is a question as to whether I am satisfied, in the sense of an actual persuasion that inclines my mind towards finding on balance that Consumer 2 held that intention at the relevant time. The answer to the question on the evidence before me is, no. I am not satisfied.

256 It was undoubtedly the case that Consumer 2 represented to Green County and Max Funding that she intended to commence a retail business selling seafood when she initially sought credit, and made a similar representation that she needed $5,000 for her business when she sought to draw on the line of credit. I also accept that Consumer 2 made representations to the effect that her business had not taken off due to ill health and the COVID-19 pandemic when pressed for repayments. However, my assessment of her evidence in this regard is that, by reason of her

then position of financial distress, Consumer 2 lied in the representations she made when seeking credit. Further, it is my assessment that she maintained that lie when pressed for repayments as an excuse to forestall having to make any such repayments. My assessment of the totality of that evidence was that Consumer 2 was inventing an excuse; it was not true. It is my further view that she also initially presented this false view to her financial counsellor, but later conveyed the true position.

257 I accept that Consumer 2 gave evidence in cross-examination that she did in fact intend to commence a business but that it did not eventuate due to ill health and the pandemic. However, my assessment of that evidence is that Consumer 2 had some general desire to commence a business at some point time, but this was not an immediate intention that she held at the time she sought credit and is not what she intended to use the credit for. My conclusions are consistent with the fact that Consumer 2 did not in fact use any of the credit obtained from Green County for business purposes but did some years later assist her son to commence a business. These conclusions are also consistent with the fact that Consumer 2 did not in fact take any steps at the relevant time to commence a business and instead spent the entirety of the funds advanced to her on personal, household and domestic expenses.

258 The respondents separately relied upon the representations Consumer 2 made to Green County and Max Funding as informing the likely responses she would have given had reasonable inquiries been made of her as to her claimed purpose. However, as I expand upon further below, Consumer 2's likely responses to any reasonable inquiries are likely to have depended on the nature, content and quality of those inquiries. They are not to be governed by the responses that Consumer 2 gave to the questions asked of her about why she was unable to pay her debts given the nature, content and quality of the inquiries made in this regard. It is sufficient to observe here that Consumer 2 was never asked to provide any documents or other information supporting her assertion that her business had not taken off due to ill health and the pandemic.

4. ONE CONTRACT OR MULTIPLE CONTRACTS

259 The parties were in dispute as to whether Consumers 1 and 2 entered into a single "credit contract" or multiple "credit contracts". The significance of the dispute is that Green County and Max Funding only obtained "business purpose declarations" in respect of the initial "credit contracts" and not in respect of the subsequent contracts by which the line of credit / drawdown amounts were advanced to Consumers 1 and 2. The resolution of the question as to the number

of contracts affects the availability of the statutory presumptions contained in s 13(2) of the Code.

260 It will be recalled that s 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". In turn, s 3(2) of the Code provides that credit is "provided" if "under a contract" payment of "a debt owed by one person to another" is "deferred" *or* one person "incurs a deferred debt to another".

261 There was no dispute between the parties that each of the initial credit contracts entered into by Consumers 1 and 2, being Consumer 1's First Credit Contract and Consumer 2's First Credit Contract (for convenience, the "**Initial Credit Contracts**") involved the provision of credit within the meaning of s 3 of the Code on the basis that the respective consumers on each occasion incurred a debt and deferred its repayment under those respective contracts. ASIC submitted that each of the subsequent agreements pursuant to which further funds were advanced were separate "credit contracts" (for convenience, the "**Line of Credit Contracts**"): see 3.9.4, 3.9.7 and 3.10.4. The respondents disputed this to be the case and submitted that each of the Line of Credit Contracts advanced a "line of credit" in circumstances where the source of the relevant debt, and its deferral, remained the Initial Credit Contracts.

262 In support of their submissions, the respondents relied upon the decision of Bell J in ***Geeveekay*** *Pty Ltd v Director of Consumer Affairs Victoria* [2008] VSC 50; 19 VR 512 at [43]-[58]. In this case, his Honour considered the construction of s 4(1) of the Victorian Code (which was similar to s 4 of the Code) and said as follows (at [52]):

> …the Code, in s 4(1), uses "under a contract" in a reasonably specific sense. The subject matter of s 4(1) is the deferring of the payment or the incurring of the legal obligation of debt or deferred debt. The section speaks of credit of that kind being "provided" under the contract, **which means the deferring or incurring must be something for which the contract makes provision**. Where such credit is provided under a contract, the contract is a credit contract, which is regulated in quite specific terms, including its form. Certainly "contract" has been broadly defined to pick up a series of contracts and arrangements. **But "under a contract" in s 4(1) requires the contract to be the source of the right—the root of the title of the right—to defer payment of the debt owed or to incur the deferred debt**. This interpretation is fully consonant with the object and purpose of the legislation and the effective operation of the regulatory scheme; it was the one adopted in *Australian Finance Direct Ltd v Director of Consumer Affairs Victoria* by Kaye J at first instance and the Court of Appeal.
>
> (Footnotes omitted; emphasis added.)

263 Relying upon this reasoning, the respondents submitted that in considering whether credit is provided "under" one or more contracts, it is critical to ascertain the "source of the right" or the "root of the title of the right" to defer the payment of the debt owed or to incur the deferred debt. The respondents further said that the source of this right was the Initial Credit Contracts and that the subsequent advances were lines of credit as provided for under those initial contracts. The respondents submitted that s 40 of the Code contemplated that such advances or drawdowns did not constitute new contracts.

264 I do not accept the respondents' arguments. They do not accord with the terms of the relevant contracts or the facts. In order to explain why this is so, it is necessary to examine the terms of Initial Credit Contracts. In doing so, it is necessary to bear in mind that the rights and liabilities of parties under the Initial Credit Contracts and the Line of Credit Contracts are to be determined objectively by reference to their text, context (being the entire text of the contract as well as any contract, document or statutory provision referred to in the text of the contract) and purpose: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; 256 CLR 104 at [46]-[47] and [51] (French CJ, Nettle and Gordon JJ).

265 Amongst other things, the Initial Credit Contracts each specified the loan amount, the fees payable, the required repayment amount, the frequency and duration of repayments, the applicable interest rates, the interest payable, the first repayment date and the contract expiry date: see [148] and [217]. The Initial Credit Contracts also identified that a line of credit facility was "Pre-Approved" for each of Consumers 1 and 2. However, the quantum of that line of credit was not included as part of the "Loan Amount" and was not included in the calculation of the monthly repayments. This is consistent with the following text that appeared on the first page of each of the Initial Credit Contracts:

> **A further Line of Credit Facility (LOC)** offers a fast and easy way to access flexible funding for your business when needed. **This facility is available** to our valued clients during the loan term. Verification and updated documents may be required. **For more details, please refer to 1B of Terms and Conditions**.
>
> (Emphasis added.)

266 It is apparent from this text that nothing more was said than that the "Line of Credit Facility" was "available".

267 Clause 1B of the Standard Terms and Conditions provided as follows:

> **1B. Line of Credit (LOC) / Further Drawdown Facility (If applicable)**

(a) **The Debtor's Loan may, at absolute discretion of the Lender, have a Line of Credit Facility, up to an approved Line of Credit Amount** / Drawdown Facility Amount as stipulated by the Lender in the Schedule / Finance Table. The Lender however, in its sole discretion, at any time during or after the loan term, may reduce the approved Line of Credit Amount/Drawdown Facility Amount without notice to the Borrower, due to change of Borrower's circumstances and/ or the Lender's policies.

(b) **This Clause 1B does not confer any right to the Debtor to obtain any amount over the Loan Amount and any further drawdown shall only be at sole discretion of the Lender, subject to no default on the existing Loan and verifications by the Lender to its satisfaction**.

(c) For making further drawdown **the Debtor shall, prior to maturity of the existing Loan, make a request in writing** to the Lender/Loan Manager, at least seven (7) days prior to the day the funds are required. The request shall clearly state the required further drawdown amount. The minimum further drawdown amount is $1,000.

(d) **The Lender may, at its absolute discretion, accept or decline or partly accept the said request**.

(e) **If a further drawdown is made, the further drawdown amount plus a further drawdown fee, pre-quote valuation fee, verification fee and any other fees / costs as applicable, may also be debited** to the Debtor's account to form a new loan balance.

(f) **A Line of Credit Drawdown Agreement shall be required to be signed by the Debtor prior to further drawdown. Loan finance details such as the term of the loan, interest, repayment amount, fees, costs and any other details, as applicable, may be varied under this Line of Credit Drawdown Agreement to form the Line of Credit Facility**.

(g) The Lender may decide that instead of approving further drawdown it will approve a new loan and in such a case a new loan contract shall be required to be executed instead.

(h) If there is a Line of Credit Facility available on the Loan, then even when the Loan is paid off or the loan term has expired, the Debtor can apply to extend or reactivate the loan term. The extension / re-activation of loan term shall be at the sole discretion of the Lender. In such a case, the Lender may, at its sole discretion, use any previously registered caveat /mortgage as security without any need to register a caveat /mortgage again for the extended / re- activated loan term.

(i) The new drawdown finance details may be subject to change due to ongoing repayments or other factors.

(Emphasis added.)

268 As will be apparent from cl 1B(b), the debtor was not conferred any right to obtain any amount over the "Loan Amount". The "Loan Amount" was the amount specified on the cover page of the Initial Credit Contracts.

269 Further, both cl 1B(b) and (d) make plain that the grant of the line of credit or drawdown was at the sole or absolute discretion of Green County (as "Lender'). Additionally, cl 1B(f) provided that the debtor would be required to sign a further agreement, described as a "Line of Credit Drawdown Agreement", prior to the drawdown. It was expressly stated that such an agreement would include the term of the loan, interest, repayment amounts, fees, costs and other details as Green County would require.

270 Pausing here, there was nothing within cl 1B of the Standard Terms and Conditions of the Initial Credit Contracts by which the debtors, Consumers 1 and 2, incurred a debt beyond the Loan Amount or by which the repayment of such a debt was deferred. This is reinforced by cl 6.1 of the Standard Terms and Conditions which specified the only fees and charges payable were those set out in the Schedule:

> **6. Fees And Services**
>
> 6.1 You must pay to us the credit fees and charges set out in the Schedule, any government transaction charges where applicable and any other fees or charges, including Enforcement Expenses, that may become due and payable under this Loan Contract at the times (if any) specified in the Schedule.

271 The Schedule made no provision for the charging of any additional fees in respect of the line of credit.

272 I do not accept that the Initial Credit Contracts were the source of a right or title of a right to a debt in the sum of the line of credit amounts or any part of them. Nor do I accept that, on their proper construction, the First Credit Contracts were contracts under which Consumers 1 and 2 incurred a debt in respect of the line of credit amounts or deferred payments of such an apparent debt. As Bell J explained in *Geeveekay* at [68]-[70]:

> The dictionaries define "defer" to mean putting off something to a later date, to postpone or to delay the doing of something.
>
> In para (a) of the definition of "credit", it is payment of a debt owed that is deferred. This component of the definition therefore catches payments of debts owed that, under a contract, are put off to a later time, postponed or delayed.
>
> The subject of para (b) of the definition is the incurring of deferred debt. This component captures the incurring, under a contract, of debts that are put off to a later time, postponed or delayed. At least usually, "incurs a deferred debt" covers the creation of debts that are incurred at the same time that payment is deferred. That this is so is supported by the two considerations mentioned by the Commercial Tribunal of New South Wales in *McKenzie v Smith*; *Lenehan v Smith.* The first is that "incurs a deferred debt" is coupled with the requirement that it be "under a contract". The second is that "incurs a deferred debt" is expressed as a single concept. I would add a third: "incurs a deferred debt" is expressed in the present tense. But there may be cases where a credit contract creates different points of time in which a debtor incurs deferred debts,

> as with a credit contract that is a continuing credit contract under which multiple advances of credit may be provided from time to time. That may be why s 5 defines a "credit contract" to be one under which credit is "or may be" provided.

273 The Initial Credit Contracts were not ones by which Consumers 1 and 2 incurred a debt or deferred a debt in respect of the respective lines of credit. These contracts did no more than recognise a pre-approved amount for a line of credit, which would only be available upon request by Consumer 1 or 2 and would be subject to the sole and absolute discretion of Green County and the execution of another agreement. The Initial Credit Contracts were neither "the source of the right" nor "the root of the title of the right" to incur a deferred debt or defer payment of a debt owed: *Geeveekay* at [52] (Bell J). As ASIC correctly submitted, these arrangements may be contrasted with (at least most) "come and go" facilities such as an overdraft or credit card limit.

274 By contrast, the Line of Credit Contracts created new obligations. They clearly specified the amounts drawn down, the revised repayment amounts, the number and frequency of the payments and the start and end dates of the arrangement: see above at [166], [191] and [231]. Importantly, the Line of Credit Contracts also specified new charges and fees. It was by these later contracts that Consumers 1 and 2 incurred a debt, the repayment of which was deferred.

275 The fact that the Line of Credit Contracts dealt with the same subject matter (the advancement of funds to the consumers) in different and inconsistent ways to the Initial Credit Contracts provides a strong indication that the later agreements supplanted the earlier agreements: *Hillam v Iacullo* [2015] NSWCA 196; 90 NSWLR 422 at [58]-[59] (Leeming JA, Basten and Ward JJA agreeing), *Balanced Securities Limited v Dumayne Property Group Ltd* [2017] VSCA 61; 53 VR 14 at [78]-[81] (Whelan, Ferguson JJA and Cameron AJA). Even if they are to be viewed instead as a "variation" to (and not a replacement of) the Initial Credit Contracts, the latter agreements each gave rise to a new contract: *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* [2000] HCA 35; 201 CLR 520 at [22] (Gleeson CJ, Gaudron, McHugh and Hayne JJ); *Hawkes Menangle Pty Ltd v Brennan* [2023] NSWSC 1095 at [48]-[49] (Richmond J).

276 Whilst it may be accepted that s 204 of the Code defines the word "contract" to include "a series or combination of contracts, or contracts or arrangements", the relevant question remains as to the identification of the contract under which the debt was incurred and/or its payment deferred. In either case, each contract created new or different rights and obligations, and each was a contract (whether in replacement of or variation of the earlier contract). When s 4 is read

together with s 3 of the Code, it becomes clear that, subject to s 5, each of the Line of Credit Contracts met the statutory definition of "credit contract". That is because each resulted in Consumer 1 or 2 incurring a deferred debt to Green County and, accordingly, each was a "contract under which credit" was "provided": s 3(1)(b); s 4.

277 The respondents' reliance on s 40 of the Code does not assist them. Section 40 provides as follows:

> If:
>
> (a) there is:
>
> (i) a change to **an existing *credit contract*** that results in further credit being provided; or
>
> (ii) a deferral or waiver of an amount under **an existing *credit contract***; or
>
> (iii) a postponement relating to an existing credit contract; and
>
> (b) the change, deferral, waiver or postponement is made in accordance with this Code or the existing credit contract;
>
> then the change, deferral, waiver of postponement is not to be treated as creating a new credit contract for the purposes of this Code.
>
> (Emphasis and additional emphasis added.)

278 ASIC submitted that this provision only applied to "an existing credit contract". This meant that each of the Initial Credit Contracts had to be a "credit contract" to which the Code applied (by reason of the definition of that term in s 4) and, if it was found that the Code did not apply to the Initial Credit Contracts, it followed that there was no variation to a contract which fell within the scope of s 40. ASIC submitted that this was consistent with the purpose of s 40 because it is not a provision "directed towards preventing the Code from applying to variations to credit agreements *per se*. Rather, it is directed to imposing different and lesser obligations on the credit provider compared to the obligation of complying with the full suite of responsible lending and disclosure obligations that ordinarily apply in relation to 'credit contracts' (see Chapter 3 of the Credit Act), in circumstances where the existing credit contract is already subject to the Code and the change is otherwise in accordance with section 40".

279 In my view, there is considerable force in this submission, but it is unnecessary to decide that question. That is because I accept ASIC's alternative submission that, even if s 40 applied, s 40(b) could not be satisfied as there was no "change, deferral, waiver or postponement" made in accordance with the existing credit contract. In my view, this submission should be accepted.

It is consistent with the fact that cl 1B(f) of the Standard Terms and Conditions required Consumers 1 and 2 to enter into a new contract. This was not cast in terms of a variation to an existing contract. Nor was it a "change, deferral, waiver or postponement" of a debt or other obligation contained in the Initial Credit Contracts. It follows that s 40(b) was not satisfied.

280 Accordingly, I am satisfied that each of Consumers 1 and 2 entered into multiple contracts. Specifically, Consumer 1 had entered into three credit contracts, and Consumer 2 had entered into two credit contracts.

5. CONTRAVENTIONS ALLEGED AGAINST GREEN COUNTY AND MAX FUNDING

281 ASIC contended that each of the corporate respondents contravened s 29 of the NCCP Act by engaging in a credit activity without holding a credit licence. As for Green County, the relevant "credit activity" that was alleged is the act of entering credit contracts with Consumers 1 and 2, under which it was the credit provider. As for Max Funding, the relevant "credit activity" that was alleged is the act of providing a "credit service" to Consumers 1 and 2 in relation to the credit contracts with Green County.

282 In addition, ASIC pleaded that Green County contravened several provisions of the Code in connection with the credit contracts. In particular, ASIC alleged that Green County infringed ss 17(4) and 17(6) of the Code, each of which is a "key requirement" of credit contracts to which the Code applies. At a high level, these provisions mandate the inclusion in credit contracts of the annual percentage rate and total interest payable. Further, ASIC alleges that Green County infringed s 32A of the Code by entering into credit contracts with Consumers 1 and 2 with an annual cost rate in excess of 48%.

283 None of these contraventions can be sustained unless the contracts between Green County and Consumers 1 and 2 were credit contracts to which the Code applied. The circumstances in which the Code applies was described above: see Parts 2.2 and 2.3. As observed there, whether the Code applies largely depends in this case on the application of the statutory presumptions contained in s 13 of the Code and whether or not the onus can be rebutted by the relevant party upon whom it falls: see [51].

284 I have arranged my analysis below in two sections. In the first section, I focus on Consumer 1 and consider in sequence each of the three credit contracts he entered into with Green County.

Then, in the second section, I address Consumer 2 and analyse both credit contracts she entered into with Green County in turn.

5.1 Application to Consumer 1

285 ASIC accepted that, in relation to Consumer 1's First Credit Contract, Consumer 1 made a business purpose declaration substantially in the form required by reg 68 of the Regulations. However, ASIC contended that the declaration was ineffective by reason of the operation of ss 13(3)(a) and/or (b). If this contention is sustained, then Green County and Max Funding will not benefit from the statutory presumption that the credit provided under Consumer 1's First Credit Contract was for a non-Code purpose. I consider ss 13(3)(a) and 13(3)(b) in turn below.

286 For convenience, it is to be recalled that s 13(3) provided that a business purpose declaration is ineffective if, when it was made, a credit provider or prescribed person:

> (a) **knew**, or **had reason to believe**; or
>
> (b) **would have known**, or **had reason to believe**, if the credit provider or prescribed person had made reasonable inquiries about the purpose for which the credit was provided, or intended to be provided, under the contract;
>
> that the credit was in fact to be applied wholly or predominantly for a Code purpose.
>
> (Emphasis added.)

5.1.1 ASIC's case under s 13(3)(a) in relation to Consumer 1's First Credit Contract

287 ASIC submitted that the correct inference to be drawn from the objective facts was that both Green County and Max Funding *knew* or *had reason to believe* that the credit to be provided to Consumer 1 was in fact to be applied wholly or predominantly for personal, domestic or household purposes.

288 In support of its position, ASIC submitted that Consumer 1's purported business was ill-defined and asserted that the information provided by him referred to no more than a plan to start a business known as "Brady's Concrete Build" in the building and construction industry. ASIC submitted that there was little information as to the purpose for which the borrowed sum of $2,000 would be used and emphasised that Consumer 1 did not have an ABN. It was further contended that there were no other indicia consistent with Consumer 1 establishing or operating a business or proposed business, such as a registered business name, a business website or reserved domain name, a business premises or lease, or business equipment owned by Consumer 1. ASIC placed considerable emphasis on the fact that Consumer 1 had not provided any "business plan" or any documents evincing any "business purpose" for the use of the funds,

such as a proposed budget or plan of action, nor any other evidence of an online presence, or evidence as to how the business was to be commenced.

289 ASIC also submitted that the materials supplied by Consumer 1 indicated that he was not seeking the loan for business purposes. This included bank statements that disclosed that Consumer 1 had engaged in many gambling transactions, including for relatively large amounts of money, such that there was "an obvious warning that Consumer 1 may be borrowing for that purpose" and "a warning that he may not have correctly stated his purpose". These bank statements also showed that at times Consumer 1 had a "negative balance" in his bank accounts. ASIC further pointed out that Green County and Max Funding had also obtained information that Consumer 1 had other non-bank loans, including with short-term lenders, and had recently and repeatedly applied for personal loans. It submitted that this information indicated that Consumer 1 was seeking credit for personal purposes.

290 ASIC also relied upon the credit assessment obtained by Green County and Max Funding indicating that Consumer 1's capacity to service the loan based on his income was "$-500" which meant that there were no indicia as to how Consumer 1 was to meet the costs of commencing the business and the costs of his personal commitments prior to the business generating sufficient income to meet those costs or to repay the short-term loans.

291 It was contended by ASIC that the totality of these materials disclosed that Consumer 1 was experiencing significant financial difficulty in meeting his existing liabilities and expenses. And, that the purpose of Consumer 1's application for a loan had to be informed by the important contextual fact that Consumer 1 was not carrying on a business at the time of his application and had not provided any information that disclosed any "reasonable indicia of either actually intending to operate a business nor ability to commence a business".

292 Relying upon the totality of this evidence, ASIC submitted that Green County and Max Funding therefore *knew* or *had reason to believe* that, at the time he made his business purpose declaration, Consumer 1 would in fact apply the credit wholly or predominantly for Code purposes, being to (a) repay other loans and debts; (b) meet personal and household living expenses; and/or (c) fund a gambling addiction.

293 Green County and Max Funding accepted that Consumer 1 did not intend to commence a business, but denied that they knew or had reason to believe this to be the case at the time that the credit was provided to Consumer 1.

294 I do not accept ASIC's case under s 13(3)(a). I accept that the information and materials provided by Consumer 1 were lacking in detail and called for scrutiny or further inquiry, but I am not satisfied that the totality of the evidence established that Green County and Max Funding *actually knew* or *had reason to believe* that the credit was to be applied wholly or predominantly for a Code purpose. As earlier indicated, s 13(3)(a) operates where, when the declaration is made, the credit provider has *actual knowledge* or has *reason to believe* that, in substance, the credit is to be applied wholly or predominantly for a Code purpose. In either case, the focus is upon the state of mind of the credit provider—ie, what the credit provider actually knew or, based on an objective assessment of the facts, had reason to believe. This state of mind is not established by proof that the credit provider has been negligent or reckless.

295 Green County and Max Funding had been informed that Consumer 1 was planning to start a business in the building and construction industry. He was seeking a small loan of $2,000. He stated that the purpose of the loan was to set up the business. The material provided by Consumer 1 also indicated that at the time he was working on a casual basis in the construction industry (albeit in a customer service role). Although there was scant detail provided about the purpose to which the credit would be specifically applied or the nature of the business, that was not in my view inconsistent with Consumer 1's stated purpose of establishing a small business. ASIC's submissions as to the ill-defined nature of the business and the absence of objective indicia assumed the premise that the business was to be a sophisticated one or one that conformed with a pre-conceived notion of a small business in the construction industry, or what might in the contemporary economy be regarded as a "micro business". A business such as a sole trader seeking to ply his or her trade as a concreter from one site to another is unlikely to have business premises, a website, registered trademarks or other features that might be associated with pre-conceived ideas of a business. Yet, it is no less a small business.

296 Nor do I consider that Green County or Max Funding had actual knowledge or reason to believe that Consumer 1 would in fact be applying the credit for a Code purpose because the information he provided disclosed that he was engaged in gambling or, at times, had negative balances in his bank accounts, or that he had recently and separately applied for personal loans. That Consumer 1 applied for personal loans is equally consistent with Consumer 1 seeking to replace or supplement his income so as to fund his personal expenditure, including for the purposes of gambling, as opposed to using the credit to be supplied from Green County for those purposes.

297 The facts available to Green County and Max Funding may have put it on notice of *a risk* that Consumer 1 would in fact be applying the credit for a Code purpose, but knowledge of the existence of that risk did not equate to knowledge that the risk would materialise or having a reason to believe that it would.

298 Accordingly, I am not satisfied that ASIC has made out its case in relation to s 13(3)(a) in respect of Consumer 1's First Credit Contract.

5.1.2 ASIC's case under s 13(3)(b) in relation to Consumer 1's First Credit Contract

299 ASIC next submitted that Green County and Max Funding *would have known* or *would have had reason to believe* that the credit was in fact to be applied wholly or predominantly for a Code purpose, if it had made *reasonable inquiries* about the purpose for which the credit was provided or intended to be provided.

300 In support of this aspect of its case, ASIC relied upon the same objective facts set out at [288]-[290] above to contend that a reasonable lender and credit service provider with knowledge of those matters would have made further reasonable inquiries. ASIC submitted that the objective facts were such that a reasonable lender would have known that Consumer 1, who was seeking to obtain a loan from a private non-bank, was desperate to obtain funds. ASIC further submitted that a reasonable lender in those circumstances would have known that consumers like Consumer 1 are often left with "not much of a choice" but to sign false declarations as they are desperate to obtains funds by whatever means possible (including by signing false business purpose declarations and claiming a business purpose). In those circumstances, it was submitted that a reasonable lender would have made further reasonable inquiries to verify the true purpose for which Consumer 1 was seeking the loan.

301 As set out above at [69], the operation of s 13(3)(b) is fact dependent. In a case such as this, it requires not only the identification of the reasonable inquiries that would have been made, but also what those reasonable inquiries would have elicited in the particular circumstances. ASIC's pleaded case as to the reasonable inquiries that should have been made was not as clear as it could be. ASIC's pleading as to the reasonable inquiries that should have been made were rolled-up with its pleaded case that Green County did not have adequate policies and procedures in place. Its pleadings in this regard were as follows:

> 17. …if a prospective borrower selected "Planning" in the drop down list titled "Stage of business", Green County and Max Funding:
>
> a. subject to the inquiries and any creditable explanations referred to in

paragraph 17.b below, had reason to believe that the applied for loan was wholly or predominantly for a purpose to which the Code applied, where:

i. the prospective borrower did not have an Australian Business Number (ABN), a registered business name, or an online presence;

ii. the prospective borrower did not provide their own business plan for the business (including a budget and an explanation of what the proposed borrowing was to be used for);

iii. depending on the type of proposed business, there was an absence of evidence of ownership of (or a lease of, an agreement to lease or other right to use) premises, an online presence, or ownership of (or a lease of, an agreement to lease or other right to use) equipment necessary to operate the type of business proposed, or other material showing how the business was to be commenced and carried on;

iv. the prospective borrower failed to show an ability to meet the other costs of setting up the business and meeting the financial obligations of the business until the business was generating sufficient free cashflow to meet the business' financial obligations; or

v. the prospective borrower's bank statements or documentary material showed other likely purposes for the proposed borrowing, such as repayment of other loans, use of all, or a significant portion of, income to meet living expenses, gambling of all, or a significant portion of, income not used to meet living expenses, or other significant financial difficulty in meeting existing liabilities or recurring expenses;

b. did not have in place effective or reasonable arrangements to identify a prospective borrower's true loan purpose **through making further reasonable inquiries aimed at obtaining the information referred to in paragraph 17.a (including, where appropriate, by interviewing the prospective borrower in person or by video-conference and communicating with their accountant or business adviser)** or a creditable explanation for why the information referred to in paragraph 17.a was not available;

c. required no corroborative documentation to be provided by the prospective borrower to verify that the purported business purpose was the purpose for which the loan was in fact sought to be provided or to be applied;

d. where information was collected or received from a prospective borrower that controverted the purported business purpose, did not reasonably consider whether that information gave rise to a belief that the loan was for a purpose regulated by the Code or otherwise verify the true purpose of the loan;

e. placed unreasonable reliance on the purpose of the loan as self-described by the prospective borrower, including that risk assessors responsible for assessing loan applications relied upon (without

> verification) the purported 'Business Plan' document referred to in paragraph 15 above in considering a prospective borrower's loan application, including the prospective borrower's purpose of the loan.

(Emphasis added.)

302 Much of ASIC's case was packed into [17(b)] of the ASOC. During the course of oral argument, and in its written closing submissions, ASIC variously submitted that the reasonable inquiries that Green County and Max Funding should have made were:

(a) asking what the credit would be used for and where it would go in the business;

(b) asking how the loan would be repaid;

(c) requiring proof of a registered business name;

(d) requiring proof of an ABN;

(e) requesting the provision of a "real" business plan and budget for the business;

(f) requesting the provision of "any necessary insurance or licensing";

(g) seeking information about the indicia of the proposed business, such as ownership of, or access to, necessary assets and equipment, marketing strategies, web profiles and the like; and

(h) importantly, verifying each of the above by a process of iterative inquiry.

303 In essence, each of these steps was said to be connected to making reasonable inquiry about the claimed "business purpose".

304 Green County and Max Funding submitted that they did in fact make reasonable inquiries as to Consumer 1's business purpose having regard to the relatively modest quantum of the loan and his stated purpose in establishing a new business. For example, it was submitted that Consumer 1 was asked about the purpose of the loan and had responded that the credit would be used to set up a new business in the building and construction industry. Consumer 1 was asked to provide an ABN and, if he did not have one, he was asked to confirm that he would be applying for an ABN. As to the balance of the reasonable inquiries advanced by ASIC, Green County and Max Funding submitted that having regard to the facts then known to them, it was not reasonable to insist upon the production of evidence of a business plan, marketing strategies, asset ownership, leases, etc. Further, Green County and Max Funding submitted that they were under no obligation to verify the information provided by Consumer 1. It was further submitted that even if they had made such inquiries, Consumer 1 would have maintained that the purpose of the loan was to establish a new business in the building and construction industry

and would have, consistently with his evidence, done whatever was necessary to obtain the funds.

305 I accept that Green County and Max Funding made some inquiries of Consumer 1, but the information they had obtained was scant and called for further scrutiny and inquiry as to Consumer 1's purpose in applying for the loan. That is because the extent of the information that Consumer 1 had provided as to the purpose of the loan was based on the completion of a series of mostly pre-populated drop-down options contained on Max Funding's website. It was represented on that website that the application was capable of completion and approval in "3 minutes". The limited information disclosed that Consumer 1 was planning to start a business known as "Brady's Concrete Build" in the building and construction industry which did not yet have an ABN but was expected to generate $25,000 profit per annum. There was little information as to how the $2,000 in funds sought to be borrowed would be used, other than it would be used for "setting up" the business. This information was provided by the selection of a pre-populated option. Neither Green County nor Max Funding made any further inquiry as to the purpose of the loan or any aspect of the business before advancing funds to Consumer 1.

306 The only further information that Green County and Max Funding requested from Consumer 1 was the provision of bank statements. This information shed no light on the purpose of the loan but raised concerns (which the corporate respondents recognised) as to Consumer 1's expenditure on gambling.

307 On the totality of the limited information that the corporate respondents had obtained, there was little information beyond Consumer 1's assertion that he was intending to establish a business and would be using the loan for that purpose.

308 Whilst I accept that the relatively modest quantum of the loan and the nature of the business are matters that informed the content of "reasonable inquiries", I am satisfied that further reasonable inquiries could and should have been made in the circumstances. The information that Consumer 1 provided was vague. It begged questions, especially in circumstances where other evidence obtained by Green County and Max Funding disclosed that Consumer 1 was in existing employment, had engaged in a range of gambling transactions, had been making inquiries and submitting applications for personal loans, and had done so in the past, and, as a result, there was a risk that he would wholly or predominantly use the credit for Code purposes. In view of this limited information, at the very least, one reasonable inquiry would have been to ask Consumer 1 as to the specific purpose for which the funds were to be used in the context

of the type of business that Consumer 1 was seeking to establish. For example, was the purpose of the loan to purchase tools and equipment and, if so, what type of tools and equipment. Another reasonable inquiry would have been to ask Consumer 1 to outline the features of the proposed concreting business and the basis upon which Consumer 1 expected to generate $25,000 profit per annum. Other lines of reasonable inquiry would have been to ask questions to ascertain whether the concreting business would be one that Consumer 1 was expecting to pursue on a full-time or casual basis, whether he would be ceasing his then current employment, and, if so, how he expected to fund his business or maintain his level of income.

309 I do not accept ASIC's contentions that reasonable inquiries would have involved asking Consumer 1 for the provision of a "business plan" or evidence as to ownership of assets, leases, and the like. However, I do agree that reasonable inquiries as to ownership of assets or the location of business premises may have arisen as part of an iterative process depending on the further information that Consumer 1 would have provided. As reasoned above, I do not regard this as a process of verification akin to other statutory obligations contained in the NCCP Act (as contended by the corporate respondents), but as a process informing the content of reasonable inquiries depending on the facts.

310 The difficulty, however, with ASIC's case in relation to Consumer 1 is that I am not satisfied that the reasonable inquiries made of Consumer 1 *at the relevant time* would have led Green County and Max Funding to know or have reason to believe that the credit would in fact be wholly or predominantly used for Code purposes. My reasons for so concluding are based on my assessment of the likely responses Consumer 1 would have given at the relevant time (ie, the time he made the business purpose declaration). At that point in time, Consumer 1 was desperate to obtain funds for the purpose of gambling. Consumer 1 knew when applying for the loan that, in order to get it, he needed to have a business purpose: T182.15. With that knowledge, Consumer 1 lied on the application form as to his planned business: T182.18-21. This was despite knowing that the information he provided was being relied on for the purposes of deciding whether to offer him a loan, including whether he was eligible for the types of loan offered by Max Funding: T155.28-29; T155.43-47. Consumer 1 found himself in a position where he knowingly provided a false declaration with the knowledge that it was a criminal offence: T154.30-34. And, he also forged his wife's signature, despite knowing it was an offence to do so: T182.31-183.8. Thus, Consumer 1 was prepared not only to lie to Green County and Max Funding as to the purpose for which he was seeking the loan, but also to make a false declaration and forge his wife's signature.

311 ASIC submitted that Consumer 1 would not have propagated the lie if reasonable inquiries were made of him. I do not agree. Consumer 1 had propagated a falsity on multiple occasions. He had done so when completing his initial application. He had done so again when making the declaration and yet again when forging his wife's signature. He continued to propagate the lie when he applied for further funds a few days later. It will be recalled that, at that time, he was contacted by a representative of Max Funding and lied to that representative by saying that he had spent the funds on purchasing tools. Consumer 1 accepted that he thought to himself that he needed to give an answer consistent with conducting a business, so he made one up to fit the story: T184.37-44. Consumer 1 also accepted in cross-examination that if, before the first loan, he had been asked what he intended to spend the funds on, he would have said tools: T184.21-27. Consumer 1 further accepted that, if asked to be more specific, he would have come up with an answer that satisfied the question: T185.17-20; T185.40-186.3.

312 ASIC placed reliance on the fact that, in cross-examination, Consumer 1 did not accept the proposition that he would have applied for an ABN if told he needed to have one: T183.20-44. ASIC also relied on the fact that Consumer 1 did not accept that he would have manufactured receipts so as to be able to provide "proof": T185.11; T185.36-38. Nevertheless, Consumer 1 accepted that, he would have given answers to questions about his proposed business that made Green County and Max Funding think that he actually had a concreting business: T186.41-45. He further agreed that he would have given false answers if queried about his personal loans or the entries in his bank statements showing his gambling activity: T187.1-20.

313 I accept that Consumer 1 said in his oral testimony that he would not have been able to manufacture elements of proof, but that evidence has to be weighed against the fact that Consumer 1 had been prepared to forge a signature at the relevant time. It also has to be weighed against his unequivocal evidence that, if asked to be more specific, he would have come up with an answer that satisfied the question: T185.17-20, T185.40-186.3. This is consistent with the concluding passage of his cross-examination (T187.27-38):

> So you would have said in answer to any question you were asked by Max Funding, whatever you thought you needed to say to get the loan. Do you agree?---To get their loan, yes, the original loan, yes.
>
> Yes. Whether it was true or false?---Yes.
>
> Yes. And that's the case for any question they would have asked you?---That's correct.
>
> Yes. And in answer to none of those questions would you have disclosed the true purpose of the funds which was to use for gambling? Do you agree?---Unless I could – had to provide proof, then I couldn't.

314 This evidence is also consistent with the contemporaneous and objective evidence as to Consumer 1's dealings with other lenders. One of the personal loans obtained by Consumer 1 was from Credit Corp, trading as Wallet Wizard: T165.22-26. On 2 July 2020, in response to an email from Consumer 1's financial counsellor, Ms Clay, Credit Corp sent a letter that explained their approval process for the loan advanced to Consumer 1: exhibit 3. In this letter, Credit Corp noted that it had identified a number of gambling transactions during the assessment process and contacted Consumer 1 to inquire about them: p 2 of exhibit 3. The letter records that Consumer 1 informed Credit Corp that "gambling is not/could not be a problem for him", "no part of the funds would be used for gambling" and "there was no reason we should be aware of that may impact on his ability to meet his loan repayments": p 3 of exhibit 3; T167.13-22. Consumer 1 accepted that he provided these responses because he knew that he had to do so in order to obtain the loan from Credit Corp and that, if he had said the money would be used for gambling, he would not get the loan: T167.24-34. The answers Consumer 1 gave to Credit Corp were false: T167.42-44. Consumer 1 knew the responses were false, but gave them anyway because he knew giving a truthful answer would result in him not getting the loan: T167.46-168.2.

315 Shortly after obtaining the loan from Green County, Consumer 1 also obtained a loan from Ferratum: T170.25-31. Consumer 1's financial counsellor produced on subpoena a credit assessment prepared by Ferratum in respect of his application to them: exhibit 4. That assessment recorded that the stated loan purpose was to purchase a new fridge: p 3 of exhibit 4. Consumer 1 was not truthful about this asserted loan purpose: T171.25-32. Consumer 1 agreed he was willing to provide this knowingly false information in order to obtain the loan: T172.10-11.

316 My assessment is that Consumer 1 found himself in a position where he was acutely affected by the scourge of a gambling addiction, and was also at the time in the process of separating from his wife. It was a period in which Consumer 1 had described himself as being in a gambling spiral. As I have earlier observed, Consumer 1 gave his evidence with equanimity notwithstanding that he was being pressed to cast his mind back to a clearly dark chapter of his life. I do not raise these matters to excuse his conduct, but to explain the profoundly complex psychological, social and economic dimension of the challenges that Consumer 1 was confronting at the time and to record my recognition of them. It is also to explain why I consider that, contrary to ASIC's submissions, I am satisfied that, given his desperate circumstances,

Consumer 1 would have maintained a false position in his dealings with Green County and Max Funding.

317 As a result, I am not satisfied that ASIC has established that the reasonable inquiries that would have been made of Consumer 1 would have resulted in the provision of further information by him that would have led to Green County and Max Funding to know or have reason to believe that the credit would be applied for a Code purpose.

5.1.3 ASIC's case in relation to Consumer 1's Second and Third Credit Contracts

318 In relation to Consumer 1's Second and Third Credit Contracts, Green County and Max Funding accepted that that they had not obtained declarations for the purpose of s 13(2) of the Code.

319 Bearing in mind my conclusion in Part 4 (as to the nature of the Line of Credit Contracts), it follows that the presumption in s 13(1) applied to Consumer 1's Second and Third Credit Contracts. In other words, each of those credit contracts are presumed to have been ones to which the Code applied. Green County and Max Funding carried the onus of rebutting that presumption, but I am not satisfied that they have done so.

320 In relation to Consumer 1's Second Credit Contract, Green County and Max Funding submitted that they were entitled to rely upon all the information that Consumer 1 had provided up to that time, including the "business purpose declaration". In addition, reliance was placed upon the fact that Consumer 1 told a representative of Max Funding that he had spent the earlier funds on purchasing tools when he was contacted. I do not accept these arguments.

321 In determining whether the Code applied to Consumer 1's Second Credit Contract, I have objectively assessed the facts of the transaction as between Green County, Max Funding and Consumer 1: as described at [157]-[163] above.

322 In line with the decision in *Dutta*, I accept that weight is to be given to the business purpose declaration that Consumer 1 had earlier made, together with the statement in Consumer 1's Second Credit Contract to the effect that the loan was intended to be applied for a business purpose. I also accept that weight is to be given to the fact that Consumer 1 had said that he had spent the earlier loan money on purchasing tools. However, another objective fact that was available to Green County and Max Funding was that Consumer 1 sought a further $3,000 on the very next day after receiving the funds under the first loan. Whilst he was asked by Max Funding's representative about how he had used the initial funds, he was not asked to explain

the purpose for the further funds. There is no evidence that any such inquiry was made. In other words, the corporate respondents did not know one way or another the purpose for which the funds were being sought at the time that Consumer 1 sought those additional funds.

323 Further, as set out at [163] above, prior to entry into of Consumer 1's Second Credit Contract, further bank statements were obtained from him. The CRM record of the assessment made of those bank statements discloses that there was a negative balance, together with evidence of gambling transactions and a reference to a short-term lender in the statement. Conspicuously absent from this analysis of the bank statements and other records was any indication that Consumer 1 had either established a business or was taking active steps towards its establishment. Nor was there any indication that he had taken the relatively simple step of applying for and obtaining an ABN. The absence of these facts was part of the objective state of affairs that existed prior to entry into of Consumer 1's Second Credit Contract, and cannot be ignored in the objective assessment of the transaction between the parties. And, these objective facts established that there was no evidence available to the corporate respondents that a business had been "set up" or was in the process of being "set up" despite Consumer 1's assertion to the contrary.

324 The submissions advanced by the corporate respondents boiled down to the proposition that for the purpose of rebutting the applicable presumption under s 13(1) of the Code, it was not necessary for them to make any reasonable inquiries as they were entitled to rely upon the fact that Consumer 1 was applying for further funds in respect of establishing a business in circumstances where he had expressly applied for a business loan and provided a declaration to that effect (despite that declaration being ineffective). However, to accept that argument would be to ignore all of the other information and material that was in the possession of the corporate respondents, which did not establish any connection between, on the one hand, the objective provision of the credit and the objective assessment as to its intended use, and, on the other hand, the business purpose asserted by Consumer 1. Acceptance of the corporate respondents' argument would be to accept the subjective state of mind of the credit provider as informed by the representation of the debtor to the exclusion of an objective assessment of the other relevant materials provided to and in the possession of the credit provider.

325 Having regard to the objective facts, and the paucity of evidence, I am not satisfied that Green County and Max Funding have rebutted the presumption contained in s 13(1) of the Code in relation to Consumer 1's Second Credit Contract.

326 In reaching this conclusion, I have largely relied upon an objective assessment of the facts without considering the precise way in which the credit obtained by Consumer 1 was in fact used.

327 The position in relation to Consumer 1's Third Credit Contract is far more troubling. By the time of this Contract, Green County and Max Funding had received correspondence from Consumer 1's financial counsellor which stated that Consumer 1 did not operate a business and had never done so. It is frankly perplexing that credit was provided by the corporate respondents to Consumer 1 notwithstanding the unequivocal position that had been conveyed. It is no answer to the factual position that prevailed that Green County and Max Funding were entitled to rely upon Consumer 1's earlier business purpose declaration or his signed statement in the text of the Third Credit Contract that he was seeking the funds for a business purpose. That information has to be weighed against the position conveyed by Consumer 1's financial counsellor. Accordingly, I am not satisfied that Green County and Max Funding have rebutted the presumption contained in s 13(1) in relation to Consumer 1's Third Credit Contract.

328 It follows that I am satisfied that Green County and Max Funding contravened the prohibition contained in s 29(1) of the NCCP Act by engaging in a credit activity without holding a licence in respect of Consumer 1's Second Credit Contract and Consumer 1's Third Credit Contract.

329 I am further satisfied that Green County contravened ss 17(4), 17(6) and 32A of the Code in respect of Consumer 1's Second and Third Credit Contracts.

330 However, in light of the corporate respondents seeking to be heard as to the application of s 183 of the NCCP Act, I will not make any declarations to this effect at this stage.

5.2 Application to Consumer 2

331 ASIC's case in respect of Consumer 2 followed the same logic as its case relating to Consumer 1. In relation to Consumer 2's First Credit Contract, ASIC accepted that Consumer 2 made a business purpose declaration substantially in the form required by reg 68 of the Regulations but again submitted that the declaration was ineffective by reason of the operation of s 13(3)(a) and/or s 13(3)(b).

5.2.1 ASIC's case under s 13(3)(a) in relation to Consumer 2's First Credit Agreement

332 ASIC submitted that the objective facts in relation to Consumer 2's application for credit gave rise to an inference that Green County and Max Funding *knew* or *had reason to believe* that the

credit to be provided to Consumer 2 was in fact to be applied wholly or predominantly for personal, domestic or household purposes.

333 ASIC submitted that there was a paucity of information provided by Consumer 2 as to her intention to commence a "retail business" selling "seafood". It was pointed out that Consumer 2 had applied for a loan when she was "planning to start a business" and had not decided upon a business name but was nevertheless seeking funds for "Business Cash Flow". It was further submitted that there was no business plan or any other document evidencing any business purpose for the use of the funds, such as a proposed budget or plan of action, an online presence, or evidence as to how the business was to be commenced. ASIC contended that there were simply no objective indicia of the business that was to be established.

334 It was further submitted by ASIC that other material provided by Consumer 2 established that the credit was to be applied for a Code purpose including that Consumer 2's bank statements disclosed personal and household expenditure that was greater than her income and that this had resulted in her having a "negative balance" in her bank accounts on several occasions. ASIC pointed out that Consumer 2 had defaults in her credit history, was regarded as having a "bad credit" record and a low credit score, as well as having an outstanding debt of "$4,566". The credit assessment indicated that Consumer 2's capacity to service the loan, based on her income, was assessed as "$0" and that this assessment did not take into account the costs of establishing a business or her ability to either meet personal obligations until the business generated income or to repay her (then) short-term loans. Further, it was pointed out that the credit report obtained in relation to Consumer 2 indicated that as a result of "adverse events", her file had been marked as "Risky: Dishonour double ⚠". Consumer 2 also had a personal loan with "Money 3 Corporation" (with one default), a payment default with her utility provider, had made an enquiry for a personal loan of $2,400 the day after her application for a "business loan" with Max Funding, made another inquiry for a personal loan of $15,000 in the fortnight prior to her application for a "business loan" with Max Funding. Furthermore, it was observed that, after that time, Consumer 2 had made a total of 6 inquiries for personal loans with other lenders and had, between August 2018 and November 2019, made a further 38 enquiries for personal loans. It was submitted that, like Consumer 1, this put Green County and Max Funding on notice that Consumer 2 was seeking a personal loan.

335 As with Consumer 1, ASIC relied upon the totality of this evidence to submit that Green County and Max Funding *knew* or *had reason to believe* that Consumer 2's application was so that she could use the credit wholly or predominantly for Code purposes.

336 I do not accept ASIC's arguments.

337 As in the case in respect of Consumer 1, I accept that the information and materials provided by Consumer 2 called for scrutiny and further inquiry but I am not satisfied that they established that Green County and Max Funding actually knew or had reason to believe that the credit was to be applied wholly or predominantly for a Code purpose.

338 Green County and Max Funding had been informed that Consumer 2 was planning to start a business selling seafood in the retail industry. She sought a relatively small loan of $2,000. Although there was (again) scant detail provided about the purpose of the loan or the nature of the business, the detail that was provided was not, in my view, inconsistent with Consumer 2's stated purpose of establishing a small business. Whilst the bank statements and other documents indicated that Consumer 2 was confronting financial stress from living costs and household expenses, that evidence was not inconsistent with her stated purpose of establishing a seafood business. As with Consumer 1, the facts available to Green County and Max Funding may have put them on notice of *a risk* that Consumer 1 would in fact be applying the credit for a Code purpose, but, as I stated earlier, such knowledge does not equate with knowledge as to the materialisation of the risk. Knowledge of the risk that something *might* happen does not equate to knowledge that something *will* happen. Nor can it be said on these facts that Green County and Max Funding had reason to believe that the credit would in fact be applied for a Code purpose, even if the particular circumstances might, with the benefit of hindsight, be seen to be attended by some measure of suspicion.

339 Accordingly, I am not satisfied that ASIC has made out its case under s 13(3)(a) in respect of Consumer 2's First Credit Contract.

5.2.2 ASIC's case under s 13(3)(b) in relation to Consumer 2's First Credit Contract

340 ASIC next submitted that if Green County and Max Funding had made *reasonable inquiries* about the purpose for which the credit was provided or intended to be provided, they *would have known* or *had reason to believe* that the credit was in fact to be applied wholly or predominantly for a Code purpose.

341 Green County and Max Funding again submitted that they did in fact make reasonable inquiries as to Consumer 2's business purpose, having regard to the modest quantum of the loan and the stated purpose of it being to establish a new business. And, again, Green County and Max Funding submitted that even if they had made further reasonable inquiries, Consumer 2 would have maintained that the purpose of the loan was to establish a new business selling seafood. Green County and Max Funding submitted that, unlike Consumer 1, Consumer 2's evidence in cross-examination was that she in fact intended to commence a business and this was consistent with the information she conveyed as part of her loan application and the information conveyed when she sought to defer making repayments of her loan.

342 Green County and Max Funding submitted that they had made all the "reasonable inquiries" that the circumstances required. The following exchange during closing argument identifies the nature of the arguments that were advanced:

> HIS HONOUR: Right. Well, skipping ahead then, you ask a question, and someone tells you, "I need $2000 because I'm going to start a seafood business". On the spectrum of things, isn't that somewhat of a strange purpose?
>
> COUNSEL: Only if one comes at it with a - - -
>
> HIS HONOUR: It begs a lot of questions.
>
> COUNSEL: - - - preconceived – well, yes and no, your Honour. It may to us, but there's a real danger in looking at all of these types of borrowers through a prism of a paternalistic view of how small business is or ought be conducted. Plainly, she wasn't going to open a shop, take out a lease - - -
>
> HIS HONOUR: Well, how do you know that?
>
> COUNSEL: Because the - - -
>
> HIS HONOUR: How did your client know that?
>
> COUNSEL: Well, because it's self-evident from the amount of the loan.
>
> HIS HONOUR: And other things.
>
> COUNSEL: Well, there's all sorts of - - -
>
> HIS HONOUR: So what was she going to do? It's different with Consumer 1 borrowing $2000 to be a concreter or something.
>
> COUNSEL: Well, your Honour might have in your Honour's head that to sell seafood, you need to have a fish and chip shop.
>
> HIS HONOUR: No.
>
> COUNSEL: With respect, no.
>
> HIS HONOUR: I don't.
>
> COUNSEL: There's all – sorry. But there's all sorts - - -

HIS HONOUR: You might have a stall.

COUNSEL: Quite. So it might be nothing more - - -

HIS HONOUR: But where are you going to buy it from?

COUNSEL: Well - - -

HIS HONOUR: Are you going to set up at Paddington Markets on a Saturday morning?

COUNSEL: It could be – it could be.

HIS HONOUR: And you're going to make $55,000 a year in profit.

COUNSEL: Well, it could be, for – almost endless possibilities, right? It could be. And this is nothing other than hypothesising as to possibilities.

HIS HONOUR: Yes.

COUNSEL: Could be she knows people in the trade. She obviously – she worked at Coles, for whom she obtains ..... from wholesale and then she sells it to – if it goes down to local, you know, fete, market, sells it or sells it to friends and family.

HIS HONOUR: She's going to have to sell a lot of flathead to make $55,000 of profit a year. I raise[d] with you in opening there are gradations of this, aren't there? Someone says, "I want $2000 because I'm going to fly a shuttle to Mars." That would be just be a nonsensical stated purpose[].

COUNSEL: Yes.

HIS HONOUR: So isn't it just a question of fact and degree?

COUNSEL: It is but the ultimate question is the purpose of the loan. It's not whether the business is going to be a success.

…

HIS HONOUR: And so I'm saying, on a (3)(b) analysis, I have to ask myself, guided by both of you, well, what are the reasonable inquiries that would have ..... made and what would they have elicited? It's the next bit that we then need to come to. If they had made those reasonable inquiries, what would the responses have been?

COUNSEL: Well, as your Honour appreciates, we say the reasonable inquiries were, in the application process, asking - - -

HIS HONOUR: All right.

COUNSEL: - - - "What's the purpose of the loan? What's it for?"

HIS HONOUR: And you say you didn't need to go beyond asking, "What is the purpose?" They say, "Starting a business."

COUNSEL: Yes.

…

COUNSEL: Reasonable inquiries about the purpose of the loan is all the subsection is concerned with. And, in the application process, there were questions directed to the purpose of the loan. And, yes, they included the nature of the business, state of the business, the industry and answers are given to those questions which are inquiries

> about the purpose of the loan and they're, we say, reasonable. Now, there is then an assessment of the information. And your Honour knows if one looked at the amount of the loan and a follow-up query was made. It's a – in a sense, an illustration of the process.

343 As will be evident from this candid and helpful exchange, the force of Green County and Max Funding's submission was that it had made "reasonable inquiries" through the loan application process and this was the extent of the reasonable inquiries that were called for as to the purpose of the loan.

344 As will be further evident, significant reliance was placed on the fact that loan amount was modest, and the suggestion that further inquiries needed to be made proceeded from preconceived and paternalistic conceptions of small businesses. I accept that the loan amount was modest. I also accept that caution must be exercised not to proceed on preconceived ideas as to the nature of small businesses. That is especially so given the prevalence of "microbusinesses" and modern-day cottage industries that exist within the contemporary economy which provide sources of either primary or supplementary income to those who operate them. However, even accepting these matters, I do not accept that Green County and Max Funding made reasonable inquiries when regard is had to the facts and circumstances of Consumer 2's application.

345 The loan purpose asserted by Consumer 2 was, on any view, objectively, bizarre in the circumstances having regard to the paucity of material Consumer 2 had provided as to that asserted purpose. At the time, Consumer 2 was 64 years of age and had suffered a workplace injury that rendered her unable to work. She had provided no information in her "3 minute" loan application that was in any way consistent with her bare assertion that she would be establishing and operating a "retail business" that would sell seafood. Consumer 2 did not have an ABN and had not yet decided on a business name or obtained an ABN, but claimed that she expected to earn $55,000 in net profit per year. The only information that Green County and Max Funding had as to the purpose for which the borrowed funds would be used was for the purpose of "Business Cash Flow". The only additional information that was subsequently obtained from Consumer 2 was that she only needed a loan of $2,000 because she wanted to "try small first before committing" and this additional information was provided in response to a query from a representative of Max Funding to the effect that "2k seems to be small for starting up seafood?".

346 I accept that neither Consumer 2's age nor apparent injuries necessarily operated as an impediment to her commencing a business. I also accept that many natural persons seeking to commence a business enterprise bring many life experiences to bear in the type and form of business that they wish to pursue. However, all of this has to be assessed in context, especially the circumstances which showed that Consumer 2 was having difficulty making ends meet on the limited income she was receiving at that time. Having regard to those circumstances, Consumer 2's assertion that she would be commencing a retail business selling seafood which was expected to generate $55,000 profit per annum was, as I have said, objectively bizarre and begged many questions. How was she proposing to fund the start-up costs and operation of the business from her limited income? How was she proposing to start small with only $2,000? What type of retail business would it be? Would she have a shopfront with a fit out? Would it be online? Where would she buy seafood from? Where was she going to get other money to establish this business, especially in circumstances where her bank statements revealed that she was struggling to make ends meet on her then income and had other loans she needed to repay? Was she proposing to cease working in her then employment? How was she proposing to generate $55,000 in profit per annum or earn sufficient income to replace her then income? Was she proposing to operate the business part-time and employ staff? Each of these would have been reasonable inquiries by which to ascertain loan purpose, as against the risk that the modest amount of the loan was more consistent in the circumstances would be applied for a Code-purpose.

347 I do not accept that, on the facts here, the questions asked of Consumer 2 during the online loan application process and thereafter were the extent of the reasonable inquiries that should have been made as to loan purpose by Green County and Max Funding. I accept ASIC's case that the circumstances of Consumer 2's loan application warranted further reasonable inquiries, including requesting more information about the business and the purpose for which the funds were to be used in the context of the specific type of business that Consumer 2 was seeking to establish. As with Consumer 1, I do not accept that this would have necessarily entailed asking Consumer 2 to provide a business plan but I accept that it would have involved asking Consumer 2 to provide further details as to the proposed business. And, as with Consumer 1, I accept that reasonable inquiries may have involved an iterative process of inquiry.

348 Green County and Max Funding submitted that, even if they had made reasonable inquiries of Consumer 2, she would have maintained that she intended to commence a retail seafood business. Green County and Max Funding submitted that the true position was in fact that

Consumer 2 intended to commence such a business. For the reasons stated above at [95], whilst I accept that Consumer 2 had a general intention to commence a business, I do not accept that this was her purpose for seeking credit from Green County and Max Funding at the relevant time.

349 The question that arises is whether Green County and Max Funding would have known or had reason to believe that the credit to be provided to Consumer 2 would not be used for the purpose she claimed, if they had made reasonable inquiries. The resolution of this question depends on whether Consumer 2 would have disclosed this to be the case but much would have depended on the nature, content and quality of the reasonable inquiries that would have been made. Green County and Max Funding submitted that Consumer 2's likely responses would have been consistent with the responses Consumer 2 gave when she was pressed for repayments of the loan.

350 I accept that when pressed for repayments of the loan, Consumer 2 sought deferrals on the basis of ill-health and the pandemic (T18.5-T20.30) and later on the basis that the "business didn't take off". I also accept that Consumer 2 later informed a financial counsellor that she had intended to commence a business. However, as I have set out at [256], my assessment of Consumer 2's evidence is that she was at the time creating an excuse to forestall making any repayments. Her responses at the time have to be measured against the nature, content and quality of the questions she was asked and the information she was asked to provide. At no point was Consumer 2 asked to provide any further information supporting her claims that the business did not take off because of ill-health. Nor was she pressed about the circumstances that gave rise to any of her bare assertions as to the excuses she was raising. She was not asked what she had done with almost $7,000 worth of credit she had been provided in respect of a business that had not taken off.

351 Consumer 2 was purporting to commence a retail seafood business. As I have already stated, on any objective view, that claimed business was of a nature and quality that begged many reasonable questions. In assessing whether Consumer 2 would have maintained a lie in the face of reasonable inquiries, it is necessary to again return to the actual inquiries made of Consumer 2. Upon receiving her application for $2,000, a representative of the corporate respondents reviewed the application and contacted Consumer 2 to "clarify a few things". At that time, the representative had two key pieces of information: first, that Consumer 2 was seeking to start up a business selling seafood, and, second, that Consumer 2 was seeking $2,000 for the purpose

of "Business Cash Flow" connected with that purpose. These pieces of information had at the very least raised some questions in the mind of the representative given that, during the phone call, after confirming that Consumer 2 wanted "to sell seafood" it was put to Consumer 2 that "2k seems to be small for starting up seafood?": p 4 of CB190. Concealed beneath this question are a collection of assumptions which underpin it. Plainly, the representative had in mind that starting a retail enterprise selling seafood was in relative terms an expensive exercise as against which an initial outlay of $2,000 was "low".

352 The inquiry made by the representative of the corporate respondents may well have reflected assumptions and preconceived notions that the representative brought to bear. Irrespective of whether those assumptions and notions were properly based or sufficient, what is important is the poor quality of the question asked of Consumer 2 which elicited the response that it did. I do not accept that this was the extent of the reasonable inquiries that were required in the circumstances. Nor do I accept that the quality of the question was such so as to make it a reasonable inquiry in the circumstances. The inquiry made of Consumer 2 did no more than to invite a response to a statement that the loan amount seemed small. It asked for no other explanation or justification. With this in mind, the true issue is whether Consumer 2 would have been able to maintain a lie in the face of inquiries that were of a better quality and that would meet the statutory description of "reasonable inquiries".

353 My overall impression is that whilst Consumer 2 was prepared to make oral and written representations of a highly general nature that she intended to commence a retail seafood business, those general and misleading assertions have to be considered in light of the quality of the questions that were asked. They are relevant but not determinative in assessing the responses that Consumer 2 was likely to give to better quality questions in the nature of reasonable inquiries. In my view, if reasonable inquiries were made of Consumer 2 of a better content and quality than those that were made of her, then, there was no rational or substantive information that Consumer 2 could have provided consistent with a business purpose. For example, if asked (a) to provide further basic information as to the business, such as information about the specific type of retail seafood business she proposed to operate, (b) how she would fund the business, now and into the future, (c) whether she would have staff, (d) how she proposed to generate $55,000 per annum in profit (and indeed how she calculated that figure in the first place) and how should otherwise make ends meet in the meantime, (e) what she intended to use the funds for specifically, (f) whether she would be ceasing her then current employment to work in the business full-time, and (g) whether the business would be operated

from a retail shop or markets, where she would source seafood, etc, it would have become obvious that she did not in fact intend to use the credit for the purpose of establishing a retail seafood business.

354 In a counterfactual scenario where such inquiries were made, I do not consider that Consumer 2 would have been capable of providing any satisfactory response, if any response could be provided at all to reasonable inquiries. In this regard, the corporate respondents' submission that Consumer 2 would have maintained her stated loan purpose, even if reasonable inquiries were made, must be rejected. The circumstances were such that, even on the hypothesis that Consumer 2 could furnish some response to reasonable inquiries made in the counterfactual, in my view Consumer 2 was unlikely to provide any satisfactory response beyond bare assertions which would not withstand scrutiny.

355 I am satisfied that, if reasonable inquiries had been made, the corporate respondents would have known or had reason to believe that Consumer 2 would not be applying the credit towards the purported business and that the credit would be applied wholly or predominantly for a Code purpose.

356 It follows that the business purpose declaration provided by Consumer 2 was ineffective by reason of s 13(3)(b) of the Code. Section 5(1)(b)(i) is therefore taken to be satisfied in relation Consumer 2's First Credit Contract by the deeming effect of s 13(4), with the result that the Code applied to the provision of credit under the contract.

357 Accordingly, I am satisfied that Green County and Max Funding contravened the prohibition contained in s 29(1) of the NCCP Act by engaging in credit activity without holding a licence in respect of Consumer 2's First Credit Contract.

358 I am further satisfied that Green County contravened ss 17(4), (6) and 32A of the Code in respect of Consumer 2's First Credit Contract.

359 However, again, in light of the corporate respondents seeking to be heard as to the application of s 183 of the NCCP Act, I will not make any declarations to this effect at this stage.

5.2.3 ASIC's case in relation to Consumer 2's Second Credit Contract

360 In relation to Consumer 2's Second Credit Contract, Green County and Max Funding accepted that that they had not obtained a business purpose declaration for the purpose of s 13(2) of the Code.

361 It follows that in relation to Consumer 2's Second Credit Contract, the presumption in s 13(1) applied. In other words, Consumer 2's Second Credit Contract is presumed to have been one to which the Code applied unless Green County and Max Funding established to the contrary.

362 In relation to Consumer 2's Second Credit Contract, Green County and Max Funding submitted that they were entitled to rely upon all information that Consumer 2 had provided up to that time, including the "business purpose declaration" provided in respect of Consumer 2's First Credit Contract. It was further submitted that the business records maintained by the corporate respondents accurately documented that Consumer 2 had stated that she needed another $5,000 for "biz" purposes. I do not accept these arguments.

363 Again, as with Consumer 1, the corporate respondents submitted that they were not obliged to make reasonable inquiries to rebut the presumption contained in s 13(1) of the Code and were entitled to rely upon the business purposes stated by Consumer 2 as part of her initial loan application and the (ineffective) business purpose declaration.

364 For the same reasons as those stated above, I reject the corporate respondents' contentions. In my view, on an objective assessment of the facts (even without looking at the use for which the funds were put), I am not satisfied that Green County and Max Funding have rebutted the presumption contained in s 13(1) of the Code.

365 The objective facts of the relevant transaction included Consumer 2's asserted business purpose. However, prior to entry into of the Second Credit Agreement, aside from a single business record documenting a phone call that Consumer 2 was seeking $5,000 for "biz", there is no evidence that Consumer 2 was asked to explain the purpose for seeking the further funds. Further, as set out at [228] above, I have inferred that, prior to the entry into Consumer 2's Second Credit Contract, further bank statements were obtained, and the CRM record of the assessment made of those statements discloses that the only relevant comment made was that Consumer 2 had not yet received her wages for January. There was no examination of the transactions in the bank statements for evidence consistent with Consumer 2 either having established a business or having taking active steps to its establishment. Consumer 2 had entered into the Second Credit Contract about a month after the First Credit Contract, but there was no indication that she had taken the relatively simple step of applying for and obtaining an ABN. As in the case of Consumer 1, the absence of any evidence supporting these steps was also part of the objective state of affairs known to both parties. In the face of that objective

evidence, I am not satisfied that the corporate respondents have rebutted the presumption in s 13(1) of the Code.

366 It follows that I am satisfied that Green County and Max Funding contravened s 29(1) of the NCCP Act by engaging in credit activity without holding a licence in respect of Consumer 2's Second Credit Contract.

367 I am further satisfied that Green County contravened ss 17(4), 17(6), 32A in respect of Consumer 2's Second Credit Contract.

368 Again, in light of the corporate respondents seeking to heard as to the application of s 183 of the NCCP Act, I will not make any declarations to this effect at this stage.

6. CONTRAVENTIONS ALLEGED AGAINST MS NG

369 ASIC's case against Ms Ng is that she failed to meet the standard of care and diligence required by s 180(1) of the Corporations Act. The entirety of this case was focussed upon her alleged failure to have in place policies, procedures, guidelines or frameworks consistent with a "Required Framework" which was drawn from the expert evidence of Mr Hartman.

370 For the reasons set out below, I am not satisfied that ASIC has established its case against Ms Ng. In coming to this conclusion, it is necessary for me to observe at the outset of this Part of my reasons that the findings that I have made in relation to Green County's and Max Funding's contraventions of the NCCP Act and Code are relevant to and inform an assessment as to whether Ms Ng complied with her statutory duty of care and diligence, but they are not determinative.

371 It is also necessary for me to observe at the outset that, based on the findings that I have made in relation to the circumstances pertaining to Consumers 1 and 2, Green County and Max Funding could, and should, have done more by way of reasonable inquiries to ascertain the true loan purposes of those two Consumers and that, more generally, their policies, systems and training could have been better. However, as I explain below, the pleaded case against Ms Ng requires an analysis beyond that which Green County and Max Funding could have done better in respect of Consumers 1 and 2 or more generally, and requires me to accept that Ms Ng failed in her statutory duty of care and diligence by failing to implement a particular "Required Framework".

372 It is the pleaded case that I have to ultimately decide and not some more general or other case. For the reasons that follow, I am not satisfied that the pleaded case has been established.

6.1 Principles Applicable to s 180(1) of the Corporations Act

373 Section 180(1) provides as follows:

> **180 Care and diligence--civil obligation only**
>
> Care and diligence--directors and other officers
>
> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.
>
> Note: This subsection is a civil penalty provision (see section 1317E).

374 The degree of care and diligence that is required by s 180(1) is an objective standard: ***Shafron v Australian Securities and Investments Commission*** [2012] HCA 18; 247 CLR 465 at 476 [18] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). This objective standard requires the Court to consider what an ordinary person, with the knowledge and experience of the defendant, must be expected to have done in the circumstances if he or she was acting on his or her own behalf: *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331; 274 ALR 205 at [807] (Spigelman CJ, Beazley and Giles JJA) citing *Australian Securities and Investments Commission v Adler* [2002] NSWSC 171; 168 FLR 253 at [372(4)] (Santow J) which, in turn, cited *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 109 at 159 (Ipp J).

375 For relevant purposes, and as required by the text of s 180(1), the ordinary person is a director of the corporation "in the corporation's circumstances" and occupying the particular office held by the director, and having the same "responsibilities within the corporation" as the director whose conduct is impugned: *Cassimatis v Australian Securities and Investments Commission* [2020] FCAFC 52; 275 FCR 533 (***Cassimatis FFC***) at [27] (Greenwood J) and at [455]–[457] (Thawley J). The corporation's circumstances include the type of company, the provisions of its constitution, the size and nature of the company's business, the composition of the board, the director's position and responsibilities within the company, the particular function the director is performing, the experience or skills of the particular director, the terms on which he

or she has undertaken to act as a director, the manner in which responsibility for the business of the company is distributed between its directors and its employees, and the circumstances of the specific case: *Australian Securities and Investments Commission v* ***Maxwell*** [2006] NSWSC 1052; 59 ACSR 373; at [100] (Brereton J). The director's responsibilities are not confined to statutory responsibilities and include whatever responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer: *Shafron* at [18]; *Australian Securities and Investments Commission v King* [2020] HCA 4; 270 CLR 1; at [33] (Kiefel CJ, Gageler and Keane JJ) and at [89] (Nettle and Gordon JJ).

376 The statutory obligation imposed by s 180(1) to exercise powers and discharge duties to the requisite standard is a duty owed to the company: *Maxwell* at [104]. However, the duty may encompass conduct that it is reasonably foreseeable "might harm the interests of the company — which means the corporate entity itself, the shareholders, and, where the financial position of the company is precarious, the creditors": *Maxwell* at [102] citing ***Vrisakis*** *v Australian Securities Commission* (1993) 9 WAR 395 at 449–450 (Ipp J).

377 The mere making of a mistake does not suffice to demonstrate a failure to exercise due care and skill: *Australian Securities and Investments Commission v* ***Healey*** [2011] FCA 717; 196 FCR 291 at [167] (Middleton J). Further, as Ipp J reasoned in *Vrisakis* at 449:

> the mere fact that a director participates in conduct that carries with it a foreseeable risk of harm to the interests of the company will not necessarily mean that he has failed to exercise a reasonable degree of care and diligence in the discharge of his duties. The management and direction of companies involve taking decisions and embarking upon actions which may promise much, on the one hand, but which are, at the same time, fraught with risk on the other. That is inherent in the life of industry and commerce.

378 In determining whether the standard mandated by s 180(1) has been met by a director in a case which involves a contravention by the company, it is relevant to balance the foreseeable risk of harm to the company flowing from the contravention with the potential benefits that could reasonably be expected to have accrued to the company from that conduct: *Australian Securities and Investments Commission v* ***Mariner*** *Corporation Ltd* [2015] FCA 589; 241 FCR 502 at [450] (Beach J). In *Mariner*, Beach J explained (at [451]–[452]) that:

> Not only must the court consider the nature and magnitude of the foreseeable risk of harm and degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action, but the court must balance the foreseeable risk of harm against the potential benefits that could reasonably be expected to accrue from the conduct in question.

> After all, one expects management including the directors to take calculated risks. The very nature of commercial activity necessarily involves uncertainty and risk taking. The pursuit of an activity that might entail a foreseeable risk of harm does not of itself establish a contravention of s 180. Moreover, a failed activity pursued by the directors which causes loss to the company does not of itself establish a contravention of s 180.

379 The reference to "harm" is best understood as "referencing harm to any of the interests of the corporation": *Australian Securities and Investments Commission v* ***Mitchell*** *(No 2)* [2020] FCA 1098; 382 ALR 425 at [1431] (Beach J). It is not confined to financial harm and includes harm to all the interests of the corporation. Further, the reference to "balancing" is not to be taken literally but (as Beach J stated in *Mitchell* at [1431]) it:

> should be understood as a reference to Mason J's judgment in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47–8; 29 ALR 217 at 221–2. The balancing exercise is "forward looking" as to what a reasonable person would have done, not an exercise in hindsight and "not amenable to exact calculation".

380 A company's contravention might be a material fact relevant to the question of whether a director failed to meet the standard mandated by s 180(1) by exposing a company to risk, but it is not an essential ingredient of liability in the way it is in a case of accessorial liability. However, s 180(1) does not impose an obligation on directors to conduct the affairs of the company in accordance with law generally or the Corporation Act specifically: *Maxwell* at [104] and [110]; *Mariner* at [444]. Nor does it provide a backdoor method of visiting accessorial liability on directors for breaches by the company of provisions of the Corporation Act: *Maxwell* at [104], [110]; *Mariner* at [446]. As Beach J stated in *Mariner* at [446]:

> It is wrong to assert that if a director causes a company to contravene a provision of the Act, then necessarily the director has contravened s 180.

381 In assessing whether a director has met the requisite standard of care and skill, it may be relevant to have regard to expert evidence. Middleton J stated in *Healey* at [182]:

> The determination of what constitutes due care and skill in any particular field of endeavour, and the assessment of whether it has been breached in a particular case, does not occur in a vacuum. A court assessing those questions, whether they arise in the context of directors' standards of due care and diligence under s 180 of the Act, or in the context of negligence by a medical professional, typically receives evidence from others engaged in that field of endeavour. For instance, acceptable practice is relevant in determining the standard of care, but not decisive.

382 However, the question is one that remains for the Court to determine. In answering this question, the text of s 180(1) dictates that the Court must take into account the corporation's circumstances and the office and responsibilities occupied by the director within the corporation, having close regard to the "circumstances existing at the relevant time, without the benefit of hindsight, and with the distinction between negligence and mistakes or errors of

judgment firmly in mind": *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229; 236 FLR 1 at [7242] (Austin J).

6.2 ASIC's Pleaded Case Against Ms Ng

383 It is necessary to consider precisely how ASIC pleaded its case against Ms Ng.

384 As a starting point, ASIC pleaded that during the Relevant Period (being 19 June 2017 to 4 May 2021), Green County, Max Funding and Mutual Mortgage had a "Business Model" in place that could only operate lawfully if the loans entered into with consumers were not regulated by the Code: ASOC [6]. The elements of this Business Model were said to include an online loan application process, the offering of loans "based on limited documents and information" provided by prospective borrowers and limited interaction between these companies and the prospective borrowers (generally limited to generic emails and text messages with limited telephone conversations): ASOC [7]. It was further said that Ms Ng "devised, approved, implemented" or was otherwise "involved in aspects of the Business Model": ASOC [177].

385 The next essential element of ASIC's case was that in the particular circumstances, including by reason of the Business Model, a "reasonable company" in the position of Green County and Max Funding (neither of whom who held a credit licence) would have had in place "a combination of arrangements, policies, procedures, guidelines or frameworks to avoid contravening" the NCCP Act and the Code and to "ensure (as far as reasonably possible) that loans were only provided in circumstances not regulated" by the NCCP Act and the Code: ASOC [27]. It is this combination of arrangements, policies, procedures, guidelines or frameworks that was defined as the "Required Framework": ASOC [27]. It was pleaded that the Required Framework included having in place one or more of the following (ASOC [27]):

> a. **written** delegations and accountability statements identifying the persons responsible for actions to be taken and outcomes to be measured in relation to the assessment of credit applications, including in respect of the determination of the loan purpose;
>
> b. **written** policies and guidelines directed to the risk that a loan may be for a Code regulated purpose (including that the prospective borrower may misrepresent their stated loan purpose and to deal with the matters set out in paragraph 17 above);
>
> c. **written** guidance to the relevant person considering the loan purpose (and his or her supervisor) as to the matters to be considered, criteria to be satisfied and verification to be undertaken of the information provided in support of the prospective borrower's stated loan purpose, including:

i. the types of information which either ought to result in the loan application being refused or being subject to obtaining further information and material demonstrating loan purpose, because the loan purpose could be reasonably believed to be wholly or predominately for a Code purpose including to deal with the matters set out in paragraph 17 above (where applicable); and

ii. the relevant steps to be taken where those criteria are not satisfactorily addressed or where inconsistencies are identified such as:

A. requiring provision of further information;

B. meeting with the prospective borrower with the object of critically ascertaining the purpose of the loan; and

C. speaking with the prospective borrower's accountant or business adviser to critically assess whether the prospective business was the real purpose of the proposed loan;

d. **a system** (**for example**, controls built into the loan application process computer system) the object of which was to ensure that additional investigation occurred where inconsistencies or information gaps were identified in relation to the assessment of credit applications;

e. **a system** (**for example**, regular audit of loan files by a second person) the object of which was to ensure that the above processes were followed and that no loan was made for a Code purpose or where there was reason to believe that the loan was for a Code purpose; or

f. **a system** (**for example**, by recording the suspected Code purpose on the file kept for the borrower) to record information obtained consistent with the lending being for a Code purpose, the object of which was to prevent loans being made which required an ACL.

(Emphasis added.)

386 The central allegation against Ms Ng was that, as a director of Green County and an officer of Max Funding, she failed to take the steps a reasonable person in her position would have taken to have in place the policies, procedures, guidelines or systems consistent with the Required Framework. Specifically, it was pleaded at ASOC [178] as follows:

> A reasonably careful and diligent person in Ms Ng's position in companies engaged in the business activities of the kind engaged in by, and in the circumstances of, Green County and Max Funding during the Relevant Period, would have taken steps to have in place policies, procedures, guidelines, or frameworks consistent with the Required Framework, including having in place one or more of:
>
> a. **written** delegations and accountability statements identifying the persons responsible for actions to be taken and outcomes to be measured in relation to the assessment of credit applications, including in respect of the determination of the loan purpose;
>
> b. **written** policies and guidelines directed to the risk that a loan may be for a Code regulated purpose (including that the prospective borrower may misrepresent their stated loan purpose and to deal with the matters set out in paragraph 17 above);

c. **written** guidance to the relevant person considering the loan purpose (and his or her supervisor) as to the matters to be considered, criteria to be satisfied, and verification to be undertaken, and of the information provided in support of the prospective borrower's stated loan purpose, including;

i. the types of information which either ought to result in the loan application being refused or being subject to obtaining further information and material demonstrating loan purpose, because the loan purpose could be reasonably believed to be wholly or predominately for a Code purpose including to deal with the matters set out in paragraph 17 above (where applicable); and

ii. the relevant steps to be taken where those criteria are not satisfactorily addressed or where inconsistencies are identified including matters of the kind pleaded at paragraph 27.c.ii above;

d. **a system** (**for example**, controls built into the loan application process computer system) the object of which was to ensure that additional investigation occurred where inconsistencies and/or information gaps were identified in relation to the assessment of credit applications;

e. **processes** the object of which was:

i. to ensure that the processes, policies, guidelines, and systems of Green County, Max Funding and/or Mutual Mortgage (if any) were followed by representatives of those companies, such as for the review of loan assessments by managers and/or authorised staff;

ii. to ensure that no loan was made for a Code purpose or where there was reason to believe that the loan was for a Code purpose;

f. **a system** (**for example**, by recording the suspected Code purpose on the file kept for the borrower) to record information obtained consistent with the lending being for a Code purpose, the object of which was to prevent loans being made which required an ACL.

(Emphasis added.)

387 ASIC claimed that in circumstances where Ms Ng had caused or permitted the adoption of the Business Model for Green County and Max Funding, her failure to take any or all of the measures pleaded in ASOC [178] "exposed Green County and Max Funding to a foreseeable risk of harm, including the risk of reputational harm, litigation or regulatory action for civil and criminal contraventions" of the NCCP Act and the Code: ASOC [179]-[180]. It was these failures that were pleaded to be the basis for the allegation that Ms Ng had contravened s 180 of the Corporations Act as a director of Green County and as an officer of Max Funding.

388 It will be immediately apparent that central to ASIC's case was that companies in the position of Green County and Max Funding, having adopted the Business Model that they did, were required to have implemented the Required Framework. The sole evidentiary basis for this part of ASIC's case was the opinions expressed by Mr Hartman. Further, it was central to ASIC's case that Ms Ng's failure to implement any one or more of the elements of the Required Framework exposed Green County and Max Funding to a foreseeable risk of harm, including the risk of reputational harm, litigation or regulatory action.

389 I do not accept the central premises of ASIC's case in the way that it was advanced. In order to explain why, it is first necessary to set out some observations about the paucity of evidence that was led before me, before turning to examine Mr Hartman's evidence.

6.3 Evidence of Circumstances of Green County and Max Funding (Operations, Policies and Procedures)

390 Although the text of s 180(1) of the Corporations Act requires that attention be given to the "corporation's circumstances", little evidence was adduced by the parties as to the facts and circumstances relating to the operational and other aspects of the businesses conducted by Green County and Max Funding.

391 While ASIC's case emphasised the Business Model implemented by Green County and Max Funding, it did not place a great deal of attention on other aspects of the circumstances of those corporations, such as their respective constitutions, their size and scale, their ownership and other related matters. For her part, Ms Ng emphasised that the two corporations were essentially small family run businesses and that the policies and procedures that were in place were ones which accorded with the size and scale of the respective businesses of Green County and Max Funding.

392 Ms Ng made a number of specific submissions as to the operational aspects of the businesses conducted by Green County and Max Funding which were, for the most part, drawn from a letter of instructions that ASIC had issued to Mr Hartman which was dated 19 December 2022. Annexure 2 to that letter set out a number of detailed assumptions which ASIC asked Mr Hartman to make, which, for convenience I will refer to as the **ASIC Assumptions**.

393 The ASIC Assumptions referred to numerous documents that were briefed to Mr Hartman, but which were not tendered into evidence before me. This position, and the position more generally, is far from satisfactory.

6.3.1 Evidence as to operations, staff, training and supervision

394 ASIC identified facts and circumstances to Mr Hartman which indicated that the businesses of Green County, Max Funding and Mutual Mortgage were operated by one extended family. At [4] of the ASIC Assumptions, the following was stated:

> Generally, the officeholders of Green County, Max Funding and Mutual Mortgage are members of one extended family:
>
> (a) Ivy Ng has been the sole director and secretary of Green County since its incorporation. Ivy Ng has been the sole director and secretary of Mutual Mortgage since 9 June 2022;
>
> (b) Yingjie Chen is the sister-in-law of Ivy Ng and wife of Morgan Ng, and has been the sole director and secretary of Max Funding since 3 July 2018;
>
> (c) Morgan Ng is the brother of Ivy Ng and was the sole director and secretary of Mutual Mortgage from 17 May 2017 until 9 June 2022;
>
> (d) Hugo Ng is the brother of Ivy Ng and was the sole director and secretary of Max Funding from 21 December 2016 to 3 July 2018. Hugo Ng is also involved in Maxiron Asset Management Pty Ltd, Maxiron Wealth Pty Ltd and Maxiron Capital Pty Ltd (see paragraph 22 below);
>
> (e) Paulus Ng is the father of Ivy Ng and is involved in Maxiron Pty Ltd;
>
> (f) Yu May Wu is the mother of Ivy Ng and is involved in Victorium Pty Ltd and Iron Custodian Pty Ltd;
>
> (g) Daniel Tang is the husband of Ivy Ng and has been employed as a Senior Marketer by Green County since March 2020.

395 It was said that the businesses of Green County and Max Funding, as well as that of Mutual Mortgage, were operated from a single floor in an office building located in the suburb of Burwood in the inner-west of Sydney: ASIC Assumptions at [21].

396 ASIC further informed Mr Hartman that Ms Ng "generally occupied a corner office and the open area in front of her office was generally occupied by Max Funding": ASIC Assumptions at [23]. ASIC referred Mr Hartman to hand drawn diagrams prepared by Mr Paulus Ng, Mr Daniel Tang and Mr Charles Sun, but none of these documents were tendered into evidence (though they were briefed to Mr Hartman).

397 There was a contest raised in the parties' written submissions as to persons said to have been employed by Max Funding in the position of "Account Manager" and "Risk Assessors". The contest related both to the number of such employees that were employed by Max Funding and their specific roles. Relying upon the ASIC Assumptions, Ms Ng submitted that loan applications were processed by employees of Max Funding known as "Account Managers", who reviewed loan applications and the material supplied by prospective borrowers, and

contacted the borrower over the phone to discuss the loan application, including to make further inquiries of the applicant as necessary: relying upon ASIC Assumptions at [37]. Ms Ng further submitted that, during the Relevant Period, there were between 3 and 7 Account Managers who processed applications under her supervision. In relation to this proposition, Ms Ng relied upon a document tendered into evidence which set out a list of employees, their positions, their periods of employment and a short statement of their responsibilities: CB 497.

398 ASIC submitted that the records produced by Max Funding identified only that, as to the persons engaged in providing services for Max Funding during the Relevant Period, there were 16 persons said to have been employed as Account Managers, although not all were employed at the same time. ASIC further noted that the responsibility of those "Account Managers" was identified in the document tendered as being to "Provide customer service accordance to guideline".

399 The ASIC Assumptions at [37] only record that two Account Managers employed by Max Funding had "claimed" that their responsibilities included reviewing loan applications and contacting borrowers.

400 Further, the ASIC Assumptions at [44]-[52] set out the role performed by persons employed by Max Funding as "Risk Assessors". ASIC stated that the following individuals were employed as Risk Assessors:

(a) Morgan Ng from 2017 (ongoing);

(b) Mengxia (Fran) Zhou from 26 January 2019 to 24 February 2020; and

(c) Parakh Tandon from 19 October 2020 to 24 September 2021.

401 ASIC further stated that Risk Assessors were "responsible for assessing loan applications submitted to Green County": ASIC Assumptions at [46]. ASIC recorded that Mr Tandon had claimed, amongst other things, that the role of a Risk Assessor involved "confirming the business purpose of a loan by considering whether it was so declared on the Business Plan provided in the Application Documents": ASIC Assumptions at [48(d)]. ASIC stated that the Risk Assessors were "responsible for approving or rejecting loan applications submitted to Green County during the Loan Period, together with Ivy Ng, who was responsible for the same from 2017 to ongoing", but that Mr Tandon had delegated authority to approve loan applications up to $35,000 and loans exceeding that amount were referred to Mr Morgan Ng: ASIC Assumptions at [51].

402 Due to the paucity of the evidence, I am unable on the state of the evidence to make any finding as to the precise role performed by the Account Managers or the Risk Assessors, but I am able to accept that during the Relevant Period, Max Funding employed persons in these roles. I am able to further accept that there appear to have been persons engaged by Max Funding that assessed the information provided by borrowers and, on occasion, made further inquiries with borrowers, as occurred with Consumers 1 and 2. However, I am unable to make any concrete findings about the identities, qualifications, skills and training of the persons who were engaged in these tasks.

6.3.2 Evidence as to the financial accounts of Green County and Max Funding

403 The ASIC Assumptions at [6] identified that the financial statements produced by Green County recorded that its loan book value was as follows (with footnotes omitted):

Financial year ending	**Loan book value**
2018	$1,502,326
2019	$3,100,058
2020	$5,011,866
2021	$3,535,686

404 The evidence before me included financial reports for both Green County and Max Funding. The financial reports for Green County disclosed the following information:

Financial year ending	**Revenue**	**Profit after income tax**
2018	$745,332	$312,737
2019	$2,405,097	$913,135
2020	$5,252,307	$737,263
2021	$4,437,553	$1,040,287

405 The financial reports for Max Funding disclosed the following information:

Financial year ending	**Revenue**	**Profit after income tax**
2017	$187,280	$6,022
2018	$598,266	$9,804

2019	$429,115	$62,808
2020	$1,759,028	$53,013
2021	$527,615	$23,167

406 This limited evidence established that during the Relevant Period, Green County traded at a modest profit and Max Funding's profits were marginal to breaking-even.

6.3.3 Evidence as to Green County's relevantly applicable policies and procedures

407 It was common ground that Green County had a "Risk Assessment Policy". The first section of the Risk Assessment Policy was headed "Loan Purpose and Business Policy" and provided as follows:

Loan Purpose & Business Policy

Applicant must have a genuine business loan purpose and it should be in line with the proposed stated business.

Consider but not limited to the following:

- Business that is trading
  - How long has the applicant been running the business for?
  - Is there an active ABN/ACN?
  - What industry is the business in?
  - What product / service does the business provide?
  - Is the applicant the decision maker of the business?
  - Is the applicant the sole trader / partner / director / shareholder of the business?
- New business that has not yet started trading
  - Does the applicant has an ABN yet? If not, do they intend to apply for one?
  - Is the applicant able to outline a reasonable business plan?
  - What industry is the business in?
  - How is the loan purpose related to the business?
  - Is the loan purpose directly related to the business?

It is not necessary to answer all of the above. However, the presented scenario must be consistent, reasonable and logical based on the given context.

Application should be declined or request for further clarification if in doubt. No further assessment is required if applicant is unable to provide satisfactory information in regards to their loan purpose and business.

408 It will be evident from the above that Green County drew a distinction between applications relating to a business that is trading and one that had not yet started trading. It is also relevant that loan purpose had to be assessed, that further clarification should be sought if there was any doubt, and that applications should be declined if an applicant was unable to provide satisfactory information in relation to loan purpose and business.

409 Green County's Risk Assessment Policy next contained a section dealing with "Serviceability & Exit Strategy Policy", which was again divided as between a business that is trading and one that was not yet trading. In respect of the latter category, the Risk Assessment Policy stated that consideration should be given to a series of matters, such as: "Is the expected turnover

reasonable compare[d] to the business size / trade / industry standard?", "Can the business generate sales immediately once start trading?" and "Does the applicant has any exit strategy e.g. receivables, service/product contracts, sale of personal assets, inheritance, business transactions, investors, refinancing etc?".

410 The Risk Assessment Policy also provided guidance, under the heading of "Credit Policy" as to factors and consideration to be given to credit scores based upon the serviceability factors. It also provided guidance, under the sub-heading "CHARACTER", as to other risks arising from the attributes of the prospective borrower's financial situation (for example, "Negative balance over 3 occasions for last 6 months"), including as to gambling transactions, dishonours and short term or collection loans and receipt of Centrelink payments.

6.3.4 Evidence as to Max Funding's relevantly applicable policies

411 Max Funding had separate policies to Green County.

412 One of Max Funding's policies was entitled "Business Loan Lending Criteria". The first part of this policy provided as follows:

Fundamental Criteria

All application MUST pass all of the following basic of the basics:

1. 18 years old or over
2. Business Loan purpose
    - Genuine intention to use funds for business purposes, e.g. business cash flow, business expansion etc
    - Clarification may be required if it is unclear, ambiguous or inconsistent with business nature/industry
3. Citizen or PR (all other Visa must own real estate property or joint apply with someone who is citizen or PR)
4. Not currently under public Debt Agreement and/or Bankruptcy
5. Not previously blacklisted

413 Max Funding also had a policy entitled "General Guideline: Business Lending". Relevantly, it provided as follows:

Business lending is an enormous sector in the finance market due to the variety of industries in commercial society. Most loan purposes revolve around the following:

- Purchasing existing business / franchise
- Setting up a brand new business
- Resolving cash flow – inventories, overdue receivable, material cost, payroll etc
- Expanding business – premises, equipment, marketing etc
- Business Tax (ATO / BAS) etc

Although all businesses have the above issues, it has very different implication depending on the industry and the size of each business.

Regulation

Max Funding is in the finance industry exposed to legal and credit risk. Legal risk is the legislative requirement that all involved parties must comply with, whereas credit risk is subject to individual lender's own risk consideration.

Before any application is processed, it must first comply with regulated legal requirement.

There are only 2 types of loans in the general finance market: Personal (coded) or Business (non-code). Max Funding only provides business loans.

	Personal (coded)	**Business (non-code)**
Regulation	NCCP (National Credit Code Protection)	Standard business law applies
Licence	Yes, ACL – Australia Credit Licence, apply to to both brokers and lenders.	Optional for Lenders typically for creditability purposes
Loan Purpose	Predominantly use for personal purpose, e.g. bills, household purchases, holidays, medical etc	Predominantly use for business purpose, e.g. start up, cash flow, equipment purchase etc
Approval	Must comply with Responsible Lending as outline in NCCP	As per outlined by Lender's risk assessment
Decision Control	Lenders determine loan suitability for borrowers	Borrowers are responsible for their own commercial decision

414 The policy then set out areas of focus as follows:

Area of Focus

Customer Service	Provide satisfactory services to clients for the completion of loan application. Manipulation on applications and to clients are strictly prohibited.
Legal Compliance	Application must have genuine business purpose. Company to stakeholders general due diligent.
Risk Management	3 Types of Risks: • **Identity fraud risk –** a fraudster using someone else's documents to apply for a loan; real document with fraudulent personnel • **Documentation fraud risk –** providing documents with altered and/or manipulated information; real personnel with fraudulent documents • **Credit risk –** the likelihood of borrower unable to repay loan and result in default Furthermore, to identify conflicting information particular but not limited to client's business and loan purpose presented.

415 Under the heading "Due Diligent" the policy stated:

Due Diligent

Max Funding has a due diligent to all stakeholders, this includes but not limited to all lenders, borrowers, agents, referrers, government bodies and ourselves.

There are two different types of due diligent:

- General due diligent - any matters related to the broad Australia law and regulations, such as criminal activities (fraud included), resident obligation or ethical conducts.
- Loan application specific due diligent – includes but not limited to qualifying the loan purpose, understanding the client's business practice, the consideration of repayment or loan structure etc.

416 The policy then gave guidance about common business types for which applications might be submitted, including as to their practices, income methods and business cycles. The policy also included information as to businesses such as "photographer, coaching, cleaners, entertainment, massage, dog grooming, childcare", in relation to which it was noted that these businesses were "usually pay per jobs/tasks with lower set up costs" where "some are paid in cash" and "some may only [be] operating as a weekend / secondary job".

417 Max Funding also had a policy entitled "Income Verification" which relevantly provided as follows:

Business Loan Purpose

Loan must be predominately used for business loans. The purpose are declared by the applicant at the point of application (e.g. business cash flow, startup funding, buy stock). Substantiation of the genuineness of the loan intention is required via supporting information (e.g. ABN, company statement).

In the following events, further enquiries are warranted:

1. Contradiction on loan purpose (e.g. buy a stock to feed the family)
2. Ambiguity on loan purpose (e.g. renew car rego)

418 The Income Verification Policy then set out common scenarios of declared loan purposes with guidance of examples that would predominantly for a business purpose and those which would be predominantly for personal purposes. It is useful to set out this aspect of the Policy:

Common Scenarios	Business Purpose	Not Eigible
Renew Car rego Repair/purchase vehicle	For vehicle that is: • Part of the business daily operation e.g. courier / delivery / mobile services / carrier etc • Commerical e.g. trucks, buses, equipment etc • Registered under business/company name • Registered for commercial use	Vehicles that are for family / personal use
Renovate property	For property that is: • Business premises e.g. retail / shop / office / warehouse etc • Home based business where legal OH&S must be met e.g. child care / pet care • Residential but owned by company	Property that is leased residential with no business operation at premises and no legal OH&S is required
Purchase property	For property that is: • Commercial in nature, e.g. retail / shop / office / warehouse etc • Purchased by company	For property that is residential in nature for personal investment including trust as purchaser
Investing or purchasing shares in stock market	Company is the stock market investor	Personal investment
Purchasing inventory or equipment	• To stock up inventory for business • Equipment needed for business operation	Purchasing groceries, home content, equipment or furniture for family
Pay bills / debt consolidation	For bills that is: • Business in nature e.g. business premises / supplier / payable etc For debts that is: • Borrower is company • Business contract • BAS / company income tax	Paying any personal bills or debt e.g. medical, utility, debt etc

419 It also set out documentation requirements. Again, it is useful to set out these requirements:

Business Structure

Under the Australian law, a business must have a valid ABN to trade; regardless of the involvement of GST. However, it is not compulsory to own an ABN for loan application purposes if the clients business has not yet started trading; they will simply need one before operation. Some clients may have more than 1 ABN:

	Sole Trader	Partnership	Company	Trust
Australia Business Number (ABN)?	Yes	Yes	Depends	Yes
Australia Company Number (ACN)?	No	No	Yes	No
Person in control	Proprietor	All partners	Director(s)	Trustee
Benefiters	Proprietor	All partners	Shareholder(s)	Beneficiaries
Who needs to be the borrower?	Proprietor	1 or more partner	2 directors (unless only 1) or 1 director and 1 secretary	Trustee

Documentation

All documents provided by clients must be verified:

1. Ensure the estimated approval given to the client is appropriate with verified data
2. Ensure the application meets legal compliance e.g. loan purpose, industry, ownership structure etc
3. Ensure the application submitted to the lender reflects the correct situation of the client based on the due diligence completed; especially when there's a variant to the submitted data

	Document	Check	Alternative	Minimum acceptance
Business	ABN / ACN	• Validity • Business type • Business status • Company search • Directorship	• Business Plan • Business Explanation Table	*Must be provided before loan assessment*

420 Max Funding also had a policy entitled "Correspondence Framework". It contained a section dealing with loan purpose, as follows:

> **Step 2 – Qualify loan purpose**
>
> What is the purpose of the loan?
>
> Can you tell me more about your business?
>
> How long have your business been operating?
>
> What kind of products or services do your business provide?

421 ASIC was critical of all of these policies. I will return to that criticism further below.

6.3.5 Evidence as to training and supervision

422 There was a dispute between the parties as to whether the applicable policies of Green County and Max Funding (such as they were) were provided to the Account Managers, whether they received any training in relation to them, and whether they received any supervision from Ms Ng.

423 Ms Ng submitted that the Account Managers were provided with Max Funding's policies (as described below) upon commencement of their employment as part of their initial training: relying upon the ASIC Assumptions at [42]. However, ASIC correctly pointed out that the ASIC Assumptions at [42] recorded no more than this is what was "claimed" by Max Funding.

424 Ms Ng submitted that new Account Managers were required during their training period to go through "scenario / role play exercises" and any direct communication with loan applicants was supervised by a senior Account Manager: relying upon the ASIC Assumptions at [61]. However, again, ASIC correctly pointed out that the ASIC Assumptions at [61] recorded this as a claim made by Max Funding.

425 The ASIC Assumptions at [62]-[67] record claims made by two Account Managers that Ms Ng held weekly team meetings where team members were given "constant training" and provided other training and supervision. However, these were all claims that ASIC instructed Mr Hartman to assume to be true for the purpose of preparing his expert report, but it does not follow that ASIC necessarily accepted these matters to be true.

426 On the state of the evidence, I am unable to be satisfied as to what, if any, training or supervision was provided to the employees of Green County and Max Funding.

6.3.6 Evidence as to Ms Ng's role and responsibilities

427 ASIC submitted that Ms Ng was responsible for:

(a) the day to day management of both Green County and Max Funding;

(b) the marketing material and content used on Max Funding's website to promote the loans available;

(c) the content of the loan application process used on Max Funding's website, through which Green County in turn received loan applications referred to it by Max Funding;

(d) the content and development of "policies" purportedly used and adopted by Max Funding and Green County, including the "Risk Assessment Policy"; and

(e) implementing, authorising, updating and reviewing Max Funding's policies.

428 Ms Ng did not dispute these matters. I accept them.

6.4 ASIC's Submissions in Support of the Case Against Ms Ng

429 ASIC submitted that, having regard to her position as director of Green County and an officer of Max Funding, the systems and policies which Ms Ng caused or allowed to be adopted fell well short of those which a competent director or officer of Green County and Max Funding would have caused to be implemented, especially in the circumstances of the Business Model they adopted.

430 ASIC submitted that, in light of the particular Business Model that was adopted, none of the policies that Green County and Max Funding relied upon contained a requirement or provided guidance as to the consideration of a proposed borrower's financial situation to determine the true loan purpose of that borrower in circumstances where that borrower was purportedly seeking credit to "start" or "plan" a business. ASIC contended that these policies were "abstract, identifying the issue but not grappling with that issue". In particular, it was submitted that the policies did not require consideration of, or direct any attention to the risk of, the potential for:

(a) a borrower to be facing severe personal financial difficulties;

(b) a borrower to divert loan proceeds to address those difficulties, rather than to the declared loan purpose; or

(c) a borrower to misrepresent the declared loan purpose in in their "business purpose declarations", especially in circumstances where s 13(3)(b) of the Code was predicated on a lender having to go further than simply accepting a declaration as to purpose and needing to make reasonable inquiries.

431 Particular emphasis was placed by ASIC on the fact that the relevant cohort of borrowers were those who were applying for a loan for business purposes but who were not operating a business. That is, the loan was for the purpose of a non-existent business. In this regard, ASIC pointed out that Green County made a significant number of loans to persons who were said to be "planning" or "starting" a business (at least 22.7% of Green County's loans), but there was inadequate guidance as to assessing whether prospective borrowers falling into this cohort had a genuine business purpose in mind. ASIC accepted that a person may borrow for a business yet to be operated, but submitted that this particular scenario provided an immediate warning

that the purpose may not be for a business. It was said that this circumstance called for critical inquiry, particularly where Green County did not intend to comply with the Code.

432 ASIC relied upon Mr Hartman's evidence to draw attention to the fact that there was no written guidance provided in any of Green County and Max Funding's policies which was directed to the matters to be considered, criteria to be satisfied and verification to be undertaken of information provided by a prospective borrower, such as:

(a) the types of information which either ought to result in the loan application being refused or being subject to obtaining further information and material demonstrating the loan purpose, for example, information indicating extensive gambling, overdue payments, negative account balances, extensive reliance on social security benefits or extensive other debt, including high-cost short-term loans;

(b) the relevant steps to be taken where those criteria were not satisfactorily addressed or where inconsistencies are identified such as:

(i) requiring provision of further information;

(ii) meeting with the prospective borrower with the object of critically ascertaining the purpose of the loan; and

(iii) speaking with the prospective borrower's accountant or business adviser to critically assess whether the prospective business was the real purpose of the proposed loan.

433 It was contended that Green County and Max Funding relied on a self-generated document styled as a "Business Plan", but which did not include or result in consideration of the individual's financial situation or the consistency of the provided information with the stated loan purpose, nor did it require information as to financial projections, the viability of the business, or evidence of progress toward setting up of a business (such as requiring the simple step of obtaining an ABN).

434 Again, relying upon Mr Hartman's evidence, it was submitted that:

(a) neither Green County nor Max Funding had in place written delegations and accountability statements identifying the persons responsible for actions to be taken and outcomes to be measured in relation to the assessment of loan applications, including in respect of the determination of the loan purpose;

(b) there was also an absence of policies, procedures, guidelines, training and other systemic controls which conformed with the "minimum requirements" that were called for in businesses of the type conducted by Green County and Max Funding.

435 As to the specific policies that Green County and Max Funding had in place, ASIC submitted that only the "Risk Assessment Policy" was a policy of Green County in its capacity as the credit provider and it was not a policy of Max Funding. Each of the other policies were those of Max Funding. It was further submitted that the policies contained no substantive content, and did not provide adequate guidance to assist in achieving the object of ensuring loans were only made for non-Code purposes. Again, relying upon Mr Hartman's evidence, ASIC submitted that there was:

(a) no system or protocol in place (such as controls built into the loan application process computer system), the object of which was to ensure that additional investigation occurred where inconsistencies or information gaps were identified in relation to the assessment of credit applications. For example, there was an absence of a requirement for rights, permissions or assets likely necessary to commence a business, such as an ABN, a registered business name, reserved domain name, or website, an actual business plan or budget, a lease of premises, ownership of tools of trade, reference to a professional advisor, or identification of the ability to meet the costs of setting up the business or meeting the borrower's financial obligations until the business was expected to do so;

(b) no system in place (such as a regular audit or hindsight review of loan application files/approvals by a second person) to ensure that the policies and processes that Green County and Max Funding had in place were in fact being followed, and to verify that loans were not being made for a Code purpose or where there was reason to believe that the loan was for a Code purpose;

(c) no training materials or documentary records to confirm that the training was undertaken, or that training assessments were undertaken. It was further said that the operational records further revealed numerous examples of incomplete data entry, and incorrect and inconsistent recording of information, evidencing ineffective procedures, controls, and training.

436 It was submitted that the policies of Green County and Max Funding offered no practical guidance to their staff as to the inquiries to be made of prospective borrowers and no

meaningful assistance as to indicia of the circumstances in which credit would be provided for a Code purpose as against a non-Code purpose. It was contended that there were also numerous crucial omissions from those policies as they contained no reference to a requirement to consider the individual's financial position or to the possibility that the loan proceeds would be used to meet any serious personal financial difficulties rather than being used for a declared business purpose. By way of example, the "considerations" identified in the Risk Assessment Policy for a "New business that has not yet started trading" were:

> o Does the applicant has an ABN yet? If not, do they intend to apply for one?
>
> o Is the applicant able to outline a reasonable business plan?
>
> o What industry is the business in?
>
> o How is the loan purpose related to the business?
>
> o Is the loan purpose directly related to the business?

437 It was said that the examples of Consumers 1 and 2 illustrated the deficiency in this and the other policies given that each of them did not have an ABN, they provided no meaningful business plan, there was an absence of a clearly articulated or objectively demonstrated connection between the claimed loan purpose and the amount of funds they sought, and the claimed prospective business presented no obstacle to those consumers being advanced funds. ASIC submitted that had Green County and Max Funding had policies that conformed with Mr Hartman's opinions, Consumers 1 and 2 would have required those consumers to provide further details that would have resulted in them not being advanced any loan amounts at all.

438 In light of her role as the sole director of the lending company (Green County), ASIC submitted that Ms Ng must have been aware, or at least certainly ought to have been aware, of the corporate respondents' legal obligations to avoid operating in a manner that was subject to the NCCP Act and Code, in circumstances where those companies did not hold an ACL.

439 Drawing these threads together, ASIC submitted that a reasonably careful and diligent person in her position would have taken steps to have in place policies, procedures, guidelines and frameworks aimed at ensuring Green County and Max Funding did not engage in credit activities that they were not licenced for. That is because it was reasonably foreseeable that Ms Ng's action or inaction might harm the interests of Green County and Max Funding in that, if they contravened the NCCP Act or Code, their interests may be jeopardised by, for example, their exposure to civil penalties, other liability under the NCCP Act or Code, or harm to their

reputation. It was said that, at a minimum, Ms Ng caused or permitted Green County and Max Funding to be exposed to those risks.

6.5 Mr Hartman's Evidence

440 Mr Hartman has worked in the "credit industry" since 1990, initially in the United States and then in Australia since July 1996. He has held numerous positions with private organisations in which he has been responsible for developing and overseeing the operation of credit practices relating to credit risk and compliance including in relation to the NCCP Act and the Code. Specifically, Mr Hartman's experience includes being:

(a) employed by:

(i) National Australia Bank (NAB), initially in the position of Head of Credit Risk Management (Credit Card) and then as Head of Credit Policy & Decision Infrastructure (Credit Card) in the period from 1996 to 2002;

(ii) ME Bank, in the position of National Credit Risk Manager from 2002 to 2005;

(iii) BMW Financial Services, in the position of Remediation Program Leader from October 2016 to August 2018;

(iv) Toyota Financial Services, in the position of Compliance Operations Consultant from September 2018 to September 2019; and

(v) Insync, in the position of Principal Consultant Risk & Compliance;

(b) self-employed by his own consultancy firm from 2005 to 2016, during which time he performed work for clients including GE Money, ANZ Bank, ARCA, Goodyear and ME Bank; and

(c) employed by Kadre (which appeared to be his private consultancy firm), in the role of Principal Consultant & Risk Compliance since September 2022.

441 Mr Hartman's experience includes the design, implementation and "operationalisation" of "execution frameworks" in relation to credit assessment tools and systems. This has included working on projects responsible for implementing policies and procedures for credit providers regulated by the NCCP Act and in remediation programs where there have been alleged breaches of the NCCP Act. For example, Mr Hartman worked for BMW Financial Services in respect of a remediation program which involved a review of over 100,000 loans to ascertain non-compliance with the NCCP Act including analysing loan applications and account data for

the purpose of ascertaining whether loan purpose had been determined correctly in respect of over 60,000 claimed business loans.

442 Mr Hartman now works as a consultant. His clients include a "start-up" company that provides only "non-regulated credit" (ie, not regulated by the Code) and he has advised that client in relation to both credit risk and compliance matters, including specifically the determination of loan purpose.

443 Other than his experience in relation to the "start-up" company, the vast majority of Mr Hartman's experience has involved working for large financial institutions, including banks and organisations who hold ACLs or whose relevant credit activities are regulated by the NCCP Act and the Code. I accept that some of the businesses that Mr Hartman had worked for and consulted with provided credit for non-Code purposes as part of their services. For example, it may be accepted that NAB and ANZ provide credit to consumers for both Code-covered and non-Code-covered purposes, and that a business such as BMW Financial Services is likely to have done the same. However, as far as I can ascertain on the evidence, the only business in respect of which Mr Hartman had worked that exclusively provided credit for non-Code purposes was the un-identified "start-up" company referred to by Mr Hartman.

444 ASIC briefed Mr Hartman to express his opinions on the "minimum arrangements that should be implemented" by entities such as Green County and Max Funding in relation to prospective borrowers who are purportedly seeking credit for the purpose of establishing a business in order to ensure that credit is not provided to those borrowers under a credit contract to which the Code applies. Mr Hartman was then asked to express his opinion as to whether the "arrangements" put in place by Green County and Max Funding were "adequate". It was clarified by ASIC that he should read the reference to "arrangements" broadly as including without limitation any policies, procedures, processes, systems, structures, tools, checks, training, guidelines, reference manuals and/or safeguards. Mr Hartman was briefed with various policies and associated documents that had been made available by Green County and Max Funding and asked to express various opinions about them based on a series of assumptions. For this purpose, Mr Hartman was also briefed with documents relating to Consumer 1.

445 Ultimately, the central questions that Mr Hartman was instructed to address were (a) what were the minimum arrangements that should be implemented, and (b) whether Green County and Max Funding's arrangements were in accord with those minimum arrangements.

446 Mr Hartman set about answering the questions asked of him by identifying what he described to be an "Execution Framework", which is what he considered to be the arrangements a "Reasonable and Prudent" lender would have in place to determine the loan purpose of a prospective borrower to ensure that, relevantly in circumstances as applicable to Green County and Max Funding, credit was not provided in a way that was regulated by the NCCP Act and the Code. The Execution Framework was said to consist of eight "integrated elements" which "together provide a holistic means of consistently delivering an outcome – in this case determining loan purpose and avoiding the provision or offering of consumer credit subject to the NCCPA obligations including requiring an ACL". From this Execution Framework, Mr Hartman derived a set of "Minimum Expectations" that reflected the policies and practices of "Reasonable and Prudent" lenders and compared these to the policies and practices of Green County and Max Funding. Mr Hartman then expressed the opinion that Green County and Max Funding's systems, policies and practices were in various respects defective by reference to the Minimum Expectations.

447 The eight "integrated" elements of the Execution Framework that Mr Hartman identified were:

(a) "**Accountability**", which Mr Hartman described as "requiring a clear articulation of who is responsible for performing what functions and who owns (is accountable for) the outcome...This includes control/assurance functions to ensure that what is expected to be done is, ultimately, done";

(b) "**Policy**", which Mr Hartman described as the "set of rules that must be followed, definitive statements as to 'what' must be done (or not done). Mr Harman further stated that, "[i]deally, a policy does not describe 'how' these things are done, as that is addressed in Process (in terms of the means) and Procedures (in terms of operating instructions). However, to be effective, a policy must include guidance, where needed, to explain what to consider in assessing a policy requirement and include what action to take based on the outcome of that assessment";

(c) "**Process**", which Mr Hartman described as "The 'how' or means, most often a system, by which the policy requirements are to be actioned. It includes controls to ensure that what is intended will likely be what happens. These can be manual or systemic/computerised";

(d) "**Procedures**", which Mr Hartman described as "The instructions as to how to operate the process";

(e) "**Training**", which Mr Hartman described as being "required initially before someone undertakes activities and on an ongoing basis, based on performance against set standards and as practices change". Mr Hartman further stated that training involves four elements: content, logistics, assessment and integration into operational practices;

(f) "**Monitoring**", which Mr Hartman described as "Capturing a record of actual performance – both of activities and outcomes";

(g) "**Reporting & Analysis**", which Mr Hartman described as involving periodic measurement of performance, analysis of performance and development of recommendations; and

(h) "**Governance**", which Mr Hartman described as "Evaluating recommendations, making decisions, and following up to ensure action is taken based on performance".

448 Mr Hartman's concept of "Minimum Expectations" was his description of the "baseline practices of Reasonable and Prudent lenders in the position of Green County and Max Funding" relative to each of the eight elements of the Execution Framework.

449 Mr Hartman's report (which consisted of 625 paragraphs) then proceeded in a largely formulaic way, in that Mr Hartman made an assessment of each of the eight elements of the Execution Framework (which expanded on his views as to the requirements of each such element) before turning to examine whether Green County and Max Funding had addressed those requirements and, in doing so, identifying the areas in respect of which Mr Hartman considered that Green County and Max Funding had failed to attend to the Minimum Requirements of each element of the Execution Framework. In every relevant respect, Mr Hartman expressed the opinion that Green County and Max Funding had failed to meet the Minimum Requirements.

450 The Respondents took objection to the entirety of Mr Hartman's expert report. Whilst I did not uphold that objection, I did make particular rulings in relation to the admissibility of specific aspects of Mr Hartman's expert report and I otherwise made specific rulings that limited the use of other parts of his report.

451 Ultimately, I regard Mr Hartman's opinions as being of little weight.

452 As a starting point, the central premise of Mr Hartman's opinions was of limited used to the issues before me. Mr Hartman's opinions as to the "Execution Framework" were based on his experience in working, mostly, for large financial institutions and banks. His further opinions as to the "Minimum Requirements" were drawn from that same experience, but from what he

considered to be the practices of "Reasonable and Prudent" lenders. These opinions were based on what Mr Hartman said he had observed "Reasonable and Prudent" lenders to do: T318.26-30. Mr Hartman's opinions in this regard were entirely circular in that Mr Hartman relied upon his observations to determine the content of the Execution Framework but then relied upon that Framework to identify the Minimum Requirements. Whilst Mr Hartman's specialised knowledge, and the opinions he expressed based on that knowledge, are useful, they are only useful in so far as they go. As I will shortly return to below in Part 6.6, they did not ultimately assist me in (a) determining what might have been reasonable and prudent for companies in the position of Green County and Max Funding's position or (b) making an assessment as to whether, in those circumstances, Ms Ng had contravened her duty under s 180(1) as pleaded by ASIC.

453 ASIC sought to counter these criticisms of Mr Hartman's evidence by submitting that the NCCP Act and the Code "do not provide different rules for large and small lenders, or those who choose to operate online". Whilst ASIC's submission may be accepted, it does not attend to the central questions before me. The "rules" applicable to lenders, large or small, may be no different, but the method by which one or other lender elects to comply with those rules will undoubtedly depend on the particular circumstances and exigencies of the particular lender's enterprise. The content of the duty imposed upon directors is not at large but is to be measured by the standard of a reasonable person in the same position (as director or officer) in the "corporation's circumstances". That is not to say that evidence of an expert with specialised knowledge as to the practices of other lenders is not relevant or admissible, but it is to conclude (as I have here) that such evidence may be of limited or no weight in a case alleging breaches of director's duties where the evidence does not ultimately assist in informing what would have been reasonable in the particular corporation's circumstances.

454 The above point is reinforced by the fact that Mr Hartman's opinions did not seek to differentiate between lenders depending on the relative cost and burden (including administrative burden) of implementing the Execution Framework, including with the Minimum Requirements. Again, as I will return to below, it is essential to establishing a breach of duty that there be a balancing of the magnitude of the foreseeable risk of harm and the degree of probability of its occurrence against the difficulty and cost of taking alleviating action. When challenged about this matter in cross-examination, I was not impressed with Mr Hartman's evidence and, in my view, it was unsatisfactory. The relevant passage of the cross-examination was as follows:

> now, another matter that your report makes no assessment of or consideration is the administrative cost or burden of putting in place the policies that you say all reasonable and prudent lenders are required to adopt; do you agree? --- **I do take into consideration the commercial aspect of this**, because that is part of what I do in terms of trying to interpret the practical application of the legal requirements, what it is that you have to do to meet what I understand the – the law to require. Now, I'm not a lawyer, but my job is to try and help businesses develop the practices, either as what I'm responsible for inside a business or as a consultant to a business, **and those elements need to be included, even in small institutions, because the law doesn't differentiate – my understanding of the law, anyway, is that it doesn't differentiate by the size of the institution**.
>
> Would you like to direct yourself to my question, please, Mr Hartman?---Sure. Could you repeat the question then, please.
>
> Your report nowhere takes into account the administrative cost or burden of the policies you say all reasonable and prudent lenders are required to adopt; do you agree? **There's no consideration of that matter?---No, I disagree with that**.
>
> Okay. **Where in the report have you addressed the administrative burden or cost of implementing any of these elements as a relevant consideration?---I don't directly comment on those elements**, but it is in the nature of **the things that I've listed as minimum requirements, taking consideration of the types of things I would expect from an institution that has the level of size and sophistication in terms of what they're doing, their product offerings, for example, of the types of Green County and Max Funding**.
>
> Is that the answer you would like to give to my question? Is there anything else you would like to say in answer to the question, or that's it?---No. I'm happy with that.
>
> (Emphasis added.)

455 The fact is that in his expert report, Mr Hartman did not expressly address the administrative cost or burden of implementing the Execution Framework or the Minimum Requirements. His explanation was to the effect that he had, in substance, taken those matters into account in formulating the Minimum Requirements having regard to the level of size and sophistication of, and the products offered by, Green County and Max Funding. However, Mr Hartman's expert report did not disclose how he had taken these matters into account. More specifically, Mr Hartman did not disclose in his report whether he had in fact consulted with or worked for organisations similar to Green County and Max Funding, other than in respect of a single "start-up" lender. His evidence in this regard was of limited weight.

456 Following the challenge to Mr Hartman's evidence, I was left with the very real impression that Mr Hartman had essentially constructed in his own mind, based on his experience, an ideal sense of the Execution Framework and Minimum Requirements he considered were "necessary" for every lender to have in place, irrespective of its particular circumstances. As I will return to, this distracts attention from the legal standard in issue before me. Further, there was a strident robustness to his approach which did not impress me and, as a result of which, I

did not come to regard his opinions as being of anything other than limited weight. An example of this was his position in relation to the "Minimum Requirement" to insist upon prospective business borrowers providing "business plans".

457 In his expert report, Mr Hartman expressed the following opinion about the "Minimum Requirement" of insisting upon a business plan:

> **9.2.2.2.1 Minimum Expectations**
>
> 242. A reasonably detailed business plan is necessary to determine whether the lending sought is needed for and likely to support the business's development.
>
> 243. Such details regarding the planned business should include, as a minimum:
>
> a) Proposed business structure (Ownership, Management);
>
> b) Product/Service Description;
>
> c) Explanation of how it will be marketed, including the target market and pricing, potentially a registered business name, a website or reserved domain name;
>
> d) A market analysis;
>
> e) A description of proposed operations;
>
> f) Staffing;
>
> g) A budget;
>
> i. Expected revenue and costs;
>
> ii. Timeframes of those revenues and costs;
>
> iii. How those costs will be covered, including how the loan proceeds will be used.
>
> h) Provision for premises (if required, which might include a lease agreement)
>
> i) Evidence that the equipment needed to undertake the business activity is obtained
>
> 244. Where such information is not provided, follow-up is required. It is common for this to be an iterative activity and may involve meeting with the applicant (in person or via video conference), or engaging the applicant's accountant or adviser, who may be assisting with the setting up of the business.
>
> 245. Such information is essential to answering questions central to whether the venture is likely viable and whether lending money in support of that venture (i.e. the loan's stated purpose) is reasonably justified in amount and from a loan purpose perspective.
>
> 246. In addition to collecting the relevant information, consideration needs to be given to the reasonableness of the information. Matters such as the quantum, timing and sequence of events must be considered

458 To put this evidence into context, Mr Hartman was telling the Court that based on his observation, it was his opinion that a "Minimum Requirement" of all "Reasonable and Prudent Lenders" was to insist upon the provision of a "detailed business plan" which should include "as a minimum" each of the elements he specified. This included, apparently, at "a minimum", that the prospective borrower was required to provide a business plan that contained a "market analysis", timeframes for revenues and costs, and provision for premises including leases where applicable. These matters were quite properly challenged by Senior Counsel for the Respondents as follows (T334.23-44):

> Are you seriously saying, Mr Hartman, that a lender needs to require the provision of a business plan containing each of these elements for every loan for a start-up, regardless of its size?---It will take me just a minute to read through the list, sorry. I would say yes.
>
> Even for a $2000 loan?---It would depend on what else is involved in the loan. I don't have enough evidence to give you a definitive answer – or enough information, sorry, to give you a definitive answer. It would depend on what else is involved.
>
> Well, Mr Hartman, in these paragraphs, you've told his Honour that a detailed business plan containing, at a minimum, these matters is required for any start-up loan. Was that not your opinion?---These expectations would be consistent with that, in the context of determining loan purpose, yes.
>
> So are you seriously telling his Honour a lender cannot properly assess loan purpose, regardless of the loan size, for a start-up loan, unless the borrower provides a business plan with these elements?---It – it – it is appropriate to determine from these elements what the individual needs the money for in the business. A – a – a modest amount for a modest – you know, a modest amount of a loan is not the sole determinant. There are a variety of different things that you need to take into account in considering what it is that you – you have to have, and so I don't know that a $2,000 loan is – is what will tip things in or out here.

459 As this passage demonstrates, Mr Hartman's opinion demonstrated a willingness to express definitive conclusions which did not withstand scrutiny when tested by reference to the particular circumstances of Green County's and Max Funding's businesses. Additionally, this evidence reveals that Mr Hartman was prepared to express inflexible and single-minded opinions in his report from which he was only willing to resile in limited respects (and even then, only reluctantly) when met with logical propositions countering the extremities of his opinions. This in my view generally undermined the weight to be given to his opinions.

460 Mr Hartman's opinions went into further extremes. Mr Hartman also expressed the opinion that it was a Minimum Requirement that *every* lender was required to compare the forecast financials as reported in a prospective borrower's business plan against "benchmark metrics" for equivalent businesses in the same industry: see Hartman Report at [256]-[257], [305]-[306].

The idea that this was required in respect of a small business seeking a loan of, say, $2,000 is as counter-intuitive as it is entirely unrealistic.

461 In other respects, Mr Hartman expressed opinions that took a particular example to an extreme conclusion. For instance, having reviewed a sample of three loan applications submitted to Green County, Mr Hartman asserted that there were "insufficient system controls" and, "[g]iven the educational background" of the relevant staff, the examples were "so extreme that they should have been called out" and "the fact they were not suggests that such neglect of compliance is likely a cultural norm, i.e., expected, perhaps even encouraged, but certainly accepted": see Hartman Report at [476]-[482]. The view expressed by Mr Hartman as to a "cultural norm" based on three examples was an extreme position to take, especially when the materials briefed to him included the fact that there were many thousands of loans offered by Green County which were entirely lawful.

462 In my view, there was considerable force in the respondents' submission that:

> Some of Mr Hartman's opinions, with respect, bordered on the absurd – that every reasonable and prudent lender would require an applicant for a $2,000 loan to prepare a detailed business plan containing, at a minimum, the matters in [243] of his report (including an explanation of how the business will be marketed, including target market and pricing; a market analysis; staffing; a budget containing forecast revenues and costs; provision for premises including a lease agreement; and evidence of the equipment needed to undertake the business) and where such information was not provided, meeting with the loan applicant face to face or by video conference or engaging the applicant's accountant or business adviser: Hartman, [244].

463 It will be plain from the foregoing that, overall, I did not regard Mr Hartman to be an impressive expert witness.

464 Further, and for completeness, Mr Hartman's opinions provided little assistance to me of what were, or would be, actual market practice in respect of companies in a similar position to Green County and Max Funding that operated in the Australian small business lending market. During his cross-examination, Mr Hartman was taken through a number of similar companies such as Business Fuel, Capify, GetCapital/Shift, Lumi, Moula, OnDeck, Prosp and Sail, but was not aware of them. Mr Hartman was also unaware of the policies or procedures of any of the Australian non-bank business lenders listed on the website "finder.com.au", being a website he himself referred to in his report: see the Hartman Report at p 15, fn 2. It follows that, as the respondents submitted, I have no evidence before me that a single non-bank small business lender in Australia has any of the policies and procedures that Mr Hartman opined were ones that a reasonable and prudent lender would adopt.

465 ASIC submitted that Mr Hartman made fair concessions and gave clarification to the matters set out in his expert report. It further submitted that his evidence was not as "un-nuanced or un-conditioned as some of the cross examination suggested". It was submitted that he repeatedly affirmed that the systems had to meet the particular circumstances, but with clear guidance: eg, T316.4-7, T316.38-317.14, T318.11-30, T322.17-24, T324.39-42, T328.31-329.15, T330.32-331.31, T333.32-47, T348.9-20. Whilst I accept that Mr Hartman made some concessions and exposed some subtlety in the opinions expressed in his report, I regard his evidence to be of limited weight.

6.6 Did Ms Ng Contravene Her Duties?

6.6.1 The framing of the calculus in light of ASIC's pleaded case

466 The focal point of the case against Ms Ng was on the implementation of policies and systems. However, the mere failure to implement policies and systems, or to implement inadequate policies and systems, is insufficient to establish a breach of the duty contained in s 180(1) of the Corporations Act. Nor is it sufficient that Green County and Max Funding are found to have contravened the NCCP Act and the Code.

467 As the authorities make plain, whether a director breaches their duties in respect of an exposure to a risk, the Court is required to make an assessment of the foreseeable risk of harm, the nature and magnitude of the foreseeable risk of harm and degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action: *Mariner* at [451]. The Court must balance the foreseeable risk of harm against the potential benefits that could reasonably be expected to accrue from the conduct in question. As I explain below, ASIC did not attend to essential elements of this "risk calculus".

6.6.2 Regulatory foundation of Required Framework and Minimum Requirements

468 Before turning to the relevant aspects of the "risk calculus", it is necessary to start with the statutory context, especially in light of ASIC's reliance upon Mr Hartman's opinions as to the "Execution Framework" (pleaded as the "Required Framework") and the "Minimum Requirements". It will be recalled that ASIC asked Mr Hartman to express an opinion about the "minimum arrangements" that "should be implemented by entities in the positions of Green County…and Max Funding…with respect to prospective borrowers that are purportedly seeking credit for the purposes of setting up a business or planning to start a business, to reasonably ensure that the credit to be provided or intended to be provided is not regulated" by

the NCCP Act and the Code. Mr Hartman then set out his opinions as to the "Minimum Requirements" based on his observations of "Reasonable and Prudent Lenders".

469 It is necessary to observe that neither the NCCP Act nor the Code impose any obligation as to "minimum arrangements" in respect of non-Code regulated credit. Parliament has enacted regulations in respect of Code-covered credit, but has not done so for non-Code-covered credit. Thus, the question posed by ASIC to Mr Hartman as to "minimum arrangements", and Mr Hartman's opinions as to "Minimum Requirements", do not have as their normative source a legal standard contained in the NCCP Act or the Code. Rather, at best, they are an appeal to a standard erected on an observational foundation of what might be best described as a "best practice" approach of non-Code lenders in the marketplace so as to ensure that they are not caught by the regulations imposed on Code-covered lenders. The nomenclature adopted by ASIC as to "minimum arrangements" and that adopted by Mr Hartman as to "Minimum Requirements" is apt to confuse to the extent that it contains the premise that there is a minimum legal standard in respect of non-Code lenders.

470 It may be accepted that in a negligence suit, such as one against a solicitor, expert evidence may be relevant and admissible as to "industry-wide good practice" and, "subject to relevance, evidence as to what is common practice amongst solicitors of good repute": see eg *Permanent Trustee Australia Ltd v Boulton* (1994) 33 NSWLR 735 at 738 (Young J) as cited in *Australian Securities and Investments Commission v Money3 Loans Pty Ltd (Expert Evidence Admissibility)* [2025] FCA 75 at [20] (McElwaine J); cf *MB v Protective Commissioner* [2000] NSWSC 717; 217 ALR 631 (Hodgson CJ in Eq). However, it is important to bear in mind, as Middleton J observed in *Healey* at [182], that evidence of "acceptable practice is relevant in determining the standard of care, but not decisive". Further, caution needs to be exercised where, as here, the evidence as to the "minimum" acceptable practice is directed to the corporation, and not to the acceptable practices of a director or officer of such a corporation.

471 Even accepting that expert evidence as to "industry-wide" practice may be relevant and admissible, in the present case it must be directed at establishing the relevant standard of care in view of the regulatory context. Here, the starting point for the assessment of the normative standard has to be the NCCP Act and the Code. As I have stated above, they do not impose any obligation, let alone any positive obligation, upon lenders that do not provide Code-covered credit. It is not unlawful for a lender to provide credit that it is not Code-covered. Nor is it unlawful for a lender to establish a business or a business model that exclusively seeks to

provide credit that is not Code-covered. However, in establishing such a business, the lender would have to pay close attention to the provision of the credit to each consumer and to guard against the risk that it is wholly or predominantly intended to be applied for a Code-purpose. The foundation for this is the operation of the statutory presumptions contained in the Code.

472 Section 13(1) of the Code creates a presumption for the purpose of proceedings that the Code applies. It follows that any lender that provides credit starts on the footing that, if there are proceedings, it will be presumed that the Code applies to the provision of the credit, unless the contrary is established. However, s 13(2) of the Code operates to displace the presumption in s 13(1) where a business purpose declaration is obtained. Where a lender seeks to provide credit that is not Code-covered, it runs the risk that the credit will be Code-covered if it does not obtain a business purpose declaration. As McGill DCJ said in *Dale* at [28] (in respect of a predecessor to the Code):

> Subsection (2) provides a mechanism by which a credit provider can protect itself from a debtor who might not be frank about the true purpose of the loan, which will be effective unless, pursuant to subsection (3), the credit provider has actual knowledge that the declaration given by the borrower is false. If the credit provider does not follow that precaution, the credit provider runs the risk that a court will find that the true intention of the borrower was that the money borrowed be used for personal, domestic or household purposes, regardless of what was apparent to the credit provider.

473 As adverted to in this passage, a business purpose declaration provides protection to the credit provider as against an untruthful debtor. However, as further adverted to, that protection will not apply where the business purpose declaration is ineffective. Relevantly, ss 13(3)(a) and (b) specify the circumstances where the declaration is ineffective and the credit is deemed to be Code-covered by reason of the operation of s 13(4). As earlier outlined, this applies where the credit provider actually knew or had reason to believe that credit would be applied for a Code purpose. This is a provision which essentially operates where, even though the debtor has been untruthful, the credit provider actually knows or has reason to believe that the debtor is being untruthful. A declaration will also be ineffective where the credit provider would have known or had reason to believe that the credit would be applied for a Code-purpose if reasonable inquiries had been made.

474 Although the Code does not impose a positive obligation on a credit provider to make reasonable inquiries as to "loan purpose", the failure to make reasonable inquiries informs whether a business purpose declaration will subsequently be found to be ineffective.

475 All of this statutory context reveals that a lender engaged in the exclusive provision of non-Code-covered credit will need to focus attention on the prospective borrower's purpose as a step along the way to ensuring that credit is not wholly or predominantly provided for a Code-covered purpose. That will necessarily be a fact dependent exercise in respect of each prospective borrower's application. However, the fact that a business purpose declaration is subsequently found to be ineffective under s 13(3)(b) may prove no more than that the credit provider's systems were not adequate in that particular instance. Of itself, such an inadequacy does not establish that the director of the lender failed to discharge the level of care and diligence required by s 180(1) of the Corporations Act.

6.6.3 The particular "risk calculus"

476 Returning to the "risk calculus", given the regulatory context, ASIC submitted that the foreseeable risk of harm was the potential for Green County and Max Funding to act in contravention of the NCCP Act and the Code. If that occurred, these two entities would be exposed to the imposition of civil penalties.

477 I accept (and it was not in dispute) that a risk existed that Green County and Max Funding may be exposed to a risk of harm from exposure to the imposition of civil penalties. There were different penalties applicable at different times during the Relevant Period. This was partly due to the penalty unit values changing during that period and partly due to the increase in penalties as a result of amendments made by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). As a result, during the Relevant Period, the applicable penalty unit values (prescribed by s 4AA of the Crimes Act 1914 (Cth)) were as follows:

(a) **Period 1** – 19 June 2017 to 30 June 2017 = $180.

(b) **Period 2** – 1 July 2017 to 30 June 2020 = $210.

(c) **Period 3** – 1 July 2020 to 4 May 2021 = $222.

478 Accordingly, if Green County and Max Funding were found to have engaged in unlicenced "credit activity" during the Relevant Period, a maximum civil penalty could have been imposed upon them as summarised in the following table:

Civil Penalty for Unlicenced "Credit Activity" under the NCCP Act			
Period	**Date Range**	**Penalty**	**Legislative Source**

Period 1	19 June 2017 - 30 June 2017	$360,000 (2,000 penalty units)	s 29(1)
Period 2	1 July 2017 - 12 March 2019	$420,000 (5,000 penalty units)	
	13 March 2019 - 30 June 2020	$4,200,000 (50,000 penalty units)	ss 29(1), 167B(2)(a)
Period 3	1 July 2020 - 4 May 2021	$11,100,000 (50,000 penalty units)	

479 Moreover, if Green County and Max Funding were found to have contravened one or more of the "key requirements" identified in the Code during the Relevant Period, a civil penalty could have been imposed on them as summarised in the following table:

Civil Penalty for Contravention of "Key Requirement" of the Code			
Period	**Date Range**	**Penalty**	**Legislative Source**
Period 1	19 June 2017 - 30 June 2017	$500,000	s 116 (Code)
Period 2	1 July 2017 - 12 March 2019	$500,000	
	13 March 2019 - 30 June 2020	$4,200,000 (50,000 penalty units)	s 167B(2)(a) (Act) s 116 (Code)
Period 3	1 July 2020 - 4 May 2021	$11,100,000 (50,000 penalty units)	

480 It may be accepted that the prospect of a maximum financial penalty in these ranges informs an assessment of the magnitude of the risk of harm, but it is not the only factor that so informs that assessment. The risk of harm also extends to reputational risks that may flow from the materialisation of the risk of imposition of civil penalties and the related financial risk of a loss of business by reason of the negative standing that may be associated with acting in contravention of a Commonwealth law.

481 I accept that the risk of harm was foreseeable. That this risk was foreseeable may be inferred from the fact that Green County and Max Funding had in place policies that were directed to ascertaining loan purpose and, where necessary, examining loan purpose. This indicates that Green County and Max Funding were aware of the risks that would arise if credit was provided for a Code-covered purpose.

482 However, given the paucity and quality of the evidence that was adduced, I am not satisfied that ASIC established the probability of the risk of harm arising when measured against the countervailing benefits and the relative burden of the alleviating action that ASIC pleaded: *Mariner* at [451]; *Cassimatis FFC* at [458]. Such an assessment is forward looking and to be

made without the benefit of hindsight: *Australian Securities and Investments Commission v* ***Cassimatis*** *(No 8)* [2016] FCA 1023*;* 336 ALR 209 at [487] (Edelman J). Nor am I satisfied that ASIC has established that the pleaded elements of the "alleviating action" would in fact have eradicated or minimised the risk of harm. However, before turning to these matters of proof, it is necessary to examine ASIC's case as to the "Business Model".

6.6.4 The Business Model

483 As set out above, ASIC submitted that it was relevant to the assessment that Ms Ng was aware of the Business Model.

484 The features of that Business Model pleaded by ASIC included in substance:

(a) advertising and promoting loan services for "purported" business purposes: ASOC [7(a)];

(b) offering loans in the "low thousands" and less than $100,000 generally to natural persons: ASOC [7(b)(i)-(ii)];

(c) making loans available within a short period of time (within 24 hours or two to three days) of receiving supporting documents deemed to be sufficient: ASOC [7(b)(iii)];

(d) making loans available based on limited documents and information provided by the borrower as to the "purported" business purpose: ASOC [7(b)(iv)];

(e) providing an online loan application process, and placing reliance upon Max Funding and Mutual Mortgage for various aspects of the loan application and assessment process: ASOC [7(c)-(d)]; and

(f) interacting with the prospective borrowers on a limited basis: ASOC [7(f)].

485 In essence, ASIC submitted that the Business Model was one which involved an online application process, a "low doc" approach to the loan assessment process, the creation of self-generated business plans that were not provided by the consumer, the promise of quick turn arounds on application approvals, indications that a bad credit history would not stand in the way of loan approval, limited enquiries as to business purpose, the provision of modest loan amounts that could be susceptible to personal use, the provision of credit to those seeking to establish a new business that was not yet trading, and so on.

486 The supressed, if not explicit, premise of ASIC's case was that the "Business Model" was an inherently risky system where there was not only a reasonable foreseeability of a loan being

granted for Code-covered purpose, but that the probability of it occurring was high. A further supressed premise in ASIC's contentions was that the marketing and promotion used by the corporate respondents, including by way of an online application process with the promise of relatively quick approvals irrespective of bad credit history, low loan amounts, a "low doc" approach to assessment and lending of money to persons with no established businesses created an inherent risk of inviting applications from prospective borrowers seeking quick access to credit for personal purposes. It was submitted that this was particularly risky when the prospective borrowers did not need to have an actual business in place with any trading history and were seeking funds to establish or plan a business.

487 However, these premises as to the inherently risk nature of the Business Model were not established on the evidence. As set out above in the background facts, during the period from 21 February 2018 to 4 May 2021 (which was a subset of the Relevant Period), Green County made a total of 4,150 loans. In these proceedings, ASIC has only alleged that five loans in total (three to Consumer 1 and two to Consumer 2) of the loans made by Green County, and arranged by Max Funding, were made for a Code purpose. Further, of the 4,150 loans, 22.7% of them were loans provided to borrowers who had indicated that they were "planning to start a business" or to "buy a business". I can only infer from the converse that 77.3% of the loans were made to borrowers who had established businesses. These figures do not demonstrate (albeit post-fact) an inherently risky system or a system that was prone to failure from its inception.

488 Each of ASIC's contentions has to be weighed against the fact that the particular circumstances of the business in which Ms Ng was a director was one which was marketed as a streamlined lender to the small business segment of the lending market. The evidence is that it was not the only such business lender. The small business lending market is characterised by most if not all providers operating through online digital platforms (T212.24-.25 (Steinfort)), often urgent requests for funding (exhibit 12; T340.17 (Hartman)), very fast advertised approval times (T212.29-.32 (Steinfort)) and "low doc" lending products (exhibit 11; T345.19-.33 (Hartman)). I accept the respondents' submission that there was no consideration given by ASIC as to the mutual benefit for consumers in the availability of such a market. It can only be inferred that such a lending market exists because there are occasions when some small businesses, and micro businesses, need access to funds without the perceived paperwork, processes, delays, approvals and other requirements that might be imposed by more established and traditional providers of credit. Or, it might be perceived that non-traditional lenders will be prepared to

take the risk in lending to small businesses with poor credit histories, with the attendant reward of higher interest rates. And, equally, small businesses might be prepared to pay the price of higher interest rates in order to access much needed funds. ASIC did not explore the existence of the small business lending market. Nor did Mr Hartman. Yet ASIC's case and Mr Hartman's opinions were pointedly critical of Green County's and Max Funding's marketing and promotion, use of online application forms and "low doc" requirements and promoted the view that these businesses had to conform in their operations to certain "minimum arrangements" that took no account of their circumstances.

489 Further, in propounding its case as to the Business Model, ASIC did not bring to account other aspects of the Business Model or the unfortunate circumstance that from time to time (and, one hopes, rarely) prospective borrowers might be untruthful and continue to be so even when pressed for further information.

490 ***First***, the Business Model was one which did require borrowers to identify their business or prospective business. It also required them to identify the specific purpose for which the loan was being sought. True it is that aspects of the questions made provision for pre-populated responses, but they were nevertheless targeted answers designed to elicit truthful response as to loan purpose.

491 ***Second***, the Business Model was also one which required a loan applicant, when submitting the online application, to agree to Max Funding's application terms and conditions, including that the person acknowledged and agreed that:

(a) they had provided truthful, correct and accurate information on the application form; and

(b) the loan was to be predominantly used for a business purpose.

492 ***Third***, prior to the entry of the loan contracts, each prospective borrower was required to complete the business purpose declaration. Thus, by the time of entry into the loan contract, the prospective borrower had twice confirmed that the credit was to be predominantly used for business purposes.

493 ***Fourth***, the Business Model also included written policies and procedures which directed Green County and Max Funding's staff (whoever they were) to consider whether the prospective borrower had a genuine loan purpose. As set out above, this included Green County's Risk Assessment Policy, which expressly stated that an applicant "must have a

genuine business loan purpose" and that it "should be in line with the proposed stated business". The Risk Assessment Policy also delineated between the types of considerations that may arise in respect of a business that was trading and a business that had not yet started trading. It gave an express instruction that the "presented scenario must be consistent, reasonable and logical based on the given context" and that applications should be declined and that further information should be requested "if in doubt". It was stated that no further assessment was required if the applicant was unable to provide satisfactory information. The Risk Assessment Policy also required assessments to be made as to bad credit histories, negative balances in bank statements, receipt of Centrelink payments and gambling transactions. Max Funding had similar policies in place, though not identical.

494 It may be accepted that the policies proved to be inadequate in seeking to ascertain Consumer 1's and Consumer 2's untruthful purpose. However, in the case of Consumer 1 that needs to be weighed against the fact that he had forged his wife's signature and, at the time, was prepared to actively lie. The examples of Consumer 1 and Consumer 2 also have to be weighed against the fact that of the 4,100 loans, there were only two consumers' respective loans that were found to be non-compliant. As I will return to below, the evidence in this regard raised a more fundamental question about whether ASIC's case was in truth one that compelled Ms Ng to have had in place a system that *eradicated* all risk as opposed to *minimising* the relevant risk.

495 ***Fifth***, I do not accept that ASIC established that the policies and procedures that were in place were proved to be deficient, other than in the two examples relating to Consumers 1 and 2. As I have emphasised, they were two examples from the many thousands of consumers who had entered into some 4,100 loans. In addition to this, Ms Ng tendered example loan application files which demonstrated that the policies and procedures worked in that they led to applications being declined because the loan purpose was not a business purpose, either on the basis that the loan application itself disclosed a personal purpose or on the basis of further information obtained from the prospective borrower: Exhibit 16, tabs 1–54. Ms Ng submitted that an examination of this sample provided evidence as to the practical working of Max Funding's and Green County's policies and procedures. ASIC submitted that the documents tendered by Ms Ng related to 27 prospective borrowers, but one of them fell outside the "Relevant Period". It submitted that of the remaining 26 consumers, their applications were made in the following periods:

FY2017	**FY2018**	**FY2019**	**FY2020**	**FY2021**

1	24	1	0	0

496 ASIC submitted that, included within this cohort were two consumers who identified their "stage of business" as "Trading over 6 months" and that these examples fell "outside the pleaded categories of borrowers to whom the proceeding is directed (cf ASOC [17], [26]-[27])". ASIC submitted that:

> 3. In comparison to the 24 relevant consumer examples in the relevant period, there were at least 956 loan applications in that same period from persons "planning" or "buying" a business i.e. the selected examples comprise only 2.5% of the loan applications.
>
> 4. Of the 25 consumer examples who were "planning" a business:
>
> (a) only 1 had an ABN;
>
> (b) 13 expressly identified a Code purpose in the loan application: "Home renovation"; "Relocation of employment"; "I have a baby so I need a new fridge"; "Study course"; "Educational tools"; "Bond rental"; "Bond loan"; "Solicitors and new Tyers"; "New types and rego and service", "New car tyres electric bill"; "Buy a car"; "electricity bill"; "gas bills";
>
> (c) a further 4 expressly identified a Code purpose in correspondence: "little bit behind on bills, rents and other bills"; "to get more places to find gold"; "short of cash, money for baby"; "not biz";
>
> (d) a further 4 expressly identified an inconsistency in stated purpose; and
>
> (e) 4 otherwise appear to have been rejected due to lack of sufficient security.
>
> 5. In other words, it is apparent that around 68% are applications where the Corporate Respondents in fact "knew" that the intended purpose was a Code purpose, and another 16% are applications where they had "reason to believe" it was for a Code purpose.

497 All of ASIC's points may be accepted, but they miss the point. The point is that, whatever policies that Green County and Max Funding had in place, they were able to detect and isolate loans that were clearly for Code-purposes. There was not an absence of systems altogether.

498 ***Sixth***, I am not satisfied that the modest amount of the quantum of the loans offered by Green County points one way or another to the probability of the risk of harm materialising. The average loan amount was $5,400. Approximately 43% of the loans were for less than $3,000, approximately 59% of the loans were for less than $4,000 and approximately 67% of the loans were for less than $5,000. However, that is not inconsistent with borrowers having a genuine business purpose, especially in a small business context.

499 ***Seventh***, I am also not satisfied that the fact that debtors defaulted under their loans pointed one way or another to the risk of harm materialising. In this respect, ASIC drew attention to the fact that 71.6% of borrowers had defaulted on at least one occasion. However, without more, the fact of default did not by itself establish a purpose inconsistent with a declared purpose. The fact that the majority of debtors defaulted on their loans may also give rise to an inference as to the failures associated with start-up business ventures.

500 Stepping back from each of the above points, I am not satisfied that ASIC has established that the Business Model was one which was *a fortiori* an inherently risky one. That is not say that there was no risk of harm involved in the business. ASIC did not submit that a director or officer of a corporation that exercises reasonable care and diligence must eradicate or eliminate all risk of harm, but aspects of ASIC's pleaded case and submissions had that flavour. Even systems that appear perfect may fail, but that does not establish an absence of care and diligence. The question as to the relevant standard of care here is not to examined within hindsight but is forward looking. When viewed in that context, the Business Model here was one which relied upon the truthfulness and candour of prospective borrowers but it did not rely upon that alone. As I have set out above, there were clearly not only policies in place but they were applied in a way that identified applications which were for Code-purposes and these were declined. It is true that there were two examples where loans were provided to consumers in respect of whom inadequate inquiries were made, but as I have said this does not necessarily establish a failure to meet the standard of care and diligence that was required of Ms Ng.

6.6.5 ASIC's failure to establish essential aspects of the pleaded case

501 I am not satisfied that ASIC has established essential aspects of the pleaded case.

502 As set out above, the authorities establish that there is to be a balancing of the risk of foreseeable harm as against other matters. As Edelman J observed in *Cassimatis* at [485], the balance is not weighed "as though by a common metric". In weighing the factors of likelihood of injury, seriousness of potential injury, and interest to be sacrificed to avoid the risk, the considerations are "practically not susceptible of any quantitative estimate" and "a solution always involves some preference, or choice between incommensurables": *Conway v O'Brien* 111 F 2d 611 at 612 (2nd Cir, 1940) (Learned Hand J) cited by Edelman J in *Cassimatis* at [485]. And, as Beach J explained in *Mitchell* at [1431], the balancing exercise is not to be taken literally. Although the balancing exercise does not involve a mathematical equation, it does

require an evaluative assessment of the type of calculus referred to by Mason J in *Wyong Shire Council v Shirt* [1980] HCA 12; 146 CLR 40 at 47–8.

503 Relevantly for the purpose of the calculus, in the present case, ASIC failed to establish the "expense, difficulty and inconvenience of taking alleviating action" that was alleged. There was no evidence as to what would be involved in implementing the "Execution Framework", containing each of the "Minimum Requirements". The question is not just one of cost, but the administrative burden and economic reality of aspects of the measures that Mr Hartman opined were "Minimum Requirements", which had to be weighed relevantly in the context of the "corporation's circumstances".

504 ASIC's case paid insufficient regard to the nature of the particular business. Green County and Max Funding are closely-held, family owned companies. They are owned by Ms Ng's immediate family: Green County is owned by an intermediate holding company, of which Ms Ng is the sole director and the ultimate parent company is the trustee of the family's discretionary trust. Max Funding's sole shareholder is Ms Chen, Ms Ng's sister-in-law. One may accept that there were entrepreneurial risks taken in the conduct of such businesses, but that is not to say that such calculated risks are to be countenanced by an indifference to lawful obligations. However, it is to underscore that attention must be given to the fact that the standard in s 180(1) is applicable to the particular circumstances of the corporation.

505 Much of ASIC's case and Mr Hartman's opinions were entirely indifferent to the particular circumstances of Green County and Max Funding on the basis that (as set out above) the law did not discriminate as between large or small businesses. This is to miss the point. The standard by which Ms Ng's conduct was to be assessed had to have regard to both the regulatory context, but also the immediate business context of the particular enterprise. The statutory standard contained in s 180(1) promotes a norm, but it is a norm that is directed to the particular circumstances of the corporation.

506 ASIC's case did not consider what burden would be imposed on businesses such as Green County and Max Funding by the elements of the Required Framework or the Minimum Requirements. The evidence (such as it was) demonstrated that Green County was making modest profits and Max Funding was making marginal levels of profit. There was no countervailing evidence as to the costs of the Required Framework. For example (and using only this example), ASIC's case did not examine what would be involved in the requirement that prospective borrowers provide detailed business plans and then for elements of that

business plan to be assessed as against industry benchmark metrics for the purpose of ascertaining loan purpose. Nothing was addressed by ASIC as to the burden that this would involve, both by way of cost and resources, let alone the economic unreality of placing burdens on prospective borrowers which included (other than in the two instances of Consumers 1 and 2) persons genuinely conducting small businesses. Nor did it consider the market reality as to whether, if Green County and Max Funding imposed such detailed requirements on small business borrowers, these companies would lose market share to their competitors. Where would that place Ms Ng *viz* her duties to the company.

507 Another example was ASIC's reliance upon Mr Hartman's opinions about the "Minimum Requirements" for training and instruction. Putting to one side whether in fact Green County and Max Funding had in place appropriate training regimes, Mr Hartman did not consider that "on the job" training and other day to day means of supervision or informal means of training and instruction would be adequate, as such approaches carried the risk of inconsistent instructions and lack of a ready port of call. Again, there was no consideration given to what was reasonable having regard to the facts and circumstances of the particular businesses and the relative cost and administrative burden of doing so.

508 None of the above is to say that ASIC could not have brought a case that established all of the above matters, but it is to make the more pertinent point that in this case ASIC did not satisfy me as to these matters.

509 Although cast in terms of "Minimum Requirements", there was something in the nature of a 'gold standard' approach taken by ASIC and Mr Hartman to what should have been in place. It was 'gold standard' in the sense that it paid no attention to the particular circumstances of the businesses of Green County and Max Funding and the relative burden. As noted above, ASIC submitted that the application of the NCCP Act and the Code does not discriminate as between businesses of different scales. That may be accepted, but the approaches that one business or another takes may differ depending on their size and scale.

510 Further, ASIC's case assumed the premise that the "Required Framework" would have the effect of alleviating the relevant risk but it was unclear (for the reasons I have stated above) whether, in effect, ASIC's case was that the relevant measures would eliminate the relevant risk. It appeared to me that the tenor of ASIC's case was that all risk of Green County and Max Funding providing or arranging Code-covered credit had to be eliminated, not merely minimised. Further, ASIC did not produce a particular policy or system that would achieve the

purpose of risk elimination or risk minimisation. Rather, its case was cast at a level of generality that pleaded, in a conceptual way, the types of policies and procedures that adhered to the elements of the "Required Framework" (drawn from Mr Hartman's "Execution Framework" and "Minimum Requirements") and which it impliedly contended would have alleviated the relevant risk of harm. However, none of this was established.

511 The first matter that ASIC alleged that a reasonable director in Ms Ng's position would have done was to take steps to have in place "**written** delegations and accountability statements identifying the persons responsible for actions to be taken and outcomes to be measured in relation to the assessment of credit applications, including in respect of the determination of the loan purpose". Whilst Mr Hartman expressed the opinion that these were Minimum Requirements, it was not established that having "written" delegations would either eliminate or minimise the relevant risk of harm and, if so, to what extent. Nor was there any evidence as to the relative cost and burden as to the implementation of such measures.

512 The second matter that ASIC alleged was "**written** policies and guidelines directed to the risk that a loan may be for a Code regulated purpose" including that the prospective borrower may misrepresent their stated loan purpose. Again, ASIC's pleaded case here assumed that "written policies and guidelines" to this effect would in fact eliminate or minimise the relevant risk of harm. The pleaded allegation lacked meaningful content. How would a written policy do this? And, how would such a policy do this any better than the policies that were in place? And, how would a written policy do this in circumstances where prospective borrowers of Green County and Max Funding had not just misrepresented the true position but had made a false declaration to that effect.

513 The third matter that ASIC alleged was "written" guidance to the relevant person considering the loan purpose (and his or her supervisor) as to the matters to be considered, criteria to be satisfied, and verification to be undertaken, etc, of the prospective borrower's stated loan purpose, including the types of information that should lead to rejection of an application and the steps to be taken when the criteria are not satisfied. As I have mentioned above, this aspect of the pleaded case relied upon Mr Hartman's opinion that written guidance was to be preferred to oral instruction and on the job training and guidance. However, none of this accounted for the particular circumstances of the businesses which were operated on a single floor of a suburban office block and where Ms Ng was in close physical proximity to the relevant staff. Further, ASIC's evidentiary case did not establish that such written guidance would in fact

eliminate or minimise the risk in the particular circumstances and, if so, the extent to which it would minimise the risk.

514 The fourth matter alleged by ASIC was that a reasonable person in Ms Ng's position would have taken steps to have in place "a system", the "object of which was to ensure that additional investigation" took place if inconsistencies or information gaps were identified in an application. This allegation also lacked meaningful content. ASIC did not establish what this system would look like and what it would involve, having regard to the particular operational facts relating to the business of Green County and Max Funding. Nor was it established that such a system would eliminate altogether the relevant risk of harm and, if it was directed to risk minimisation, the extent to which the harm would be minimised.

515 The fifth matter alleged by ASIC was that a reasonable person in Ms Ng's position would have taken steps to have in place "processes", the object of which was to "ensure" that the internal processes, policies, guidelines and systems were followed and that "no loan was made for a Code purpose". ASIC's pleaded case here was one that required Ms Ng to have established a system that entirely eliminated the risk of harm. I was taken to no authority in support of the proposition that a director in Ms Ng's circumstances had a positive obligation to achieve a standard of care and diligence that led to the elimination altogether of a risk of harm. The pleading betrayed the applicable authorities which call for a balancing exercise. In any event, the pleading was one that entirely lacked meaningful content. What would such a system look like and how would it be implemented to ensure that no loan was ever implemented for such a purpose? These matters were not addressed.

516 The final matter alleged by ASIC was that a reasonable person in Ms Ng's position would have taken steps to have in place a "system" to record information "obtained consistent with the lending being for a Code purpose", the object of which was to prevent loans made which required a credit licence. The allegation was not touched upon in written or oral submissions. I have difficulty in accepting that companies who are not regulated by the Code ought to have processes in place that are consistent with the application of the Code, let alone that a director in the position of such a company would take steps to have such processes in place.

517 I am left in the position where I can accept that Green County and Max Funding should have done more by way of reasonable inquiries in respect of Consumers 1 and 2 to ascertain loan purpose and that more generally their systems and training could have been better, but I am not

satisfied that ASIC has establish the specific pleaded case that it brought, having regard to the evidence it adduced.

6.6.6 Conclusions

518 In light of the conclusions I have reached, it is unnecessary to consider the operation of s 180(2). It is also unnecessary to consider the steps that Green County took during the trial to ratify Ms Ng's conduct.

7. DISPOSITION

519 For the foregoing reasons, I will invite the parties to provide me with competing or consent short minutes of order to deal with the case management matters relating to the next steps arising in the proceedings as a result of my reasons including as to the imposition of penalties, if any, and the applications made by the corporate respondents under s 183 of the NCCP Act as to whether any relief should be granted or penalties imposed. I will thereafter list the matter for case management.

I certify that the preceding five hundred and nineteen (519) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Shariff.

Associate: 

Dated: 15 April 2025