FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Ferratum Australia Pty Limited (in liq) [2023] FCA 1043

File number:	NSD 1137 of 2021
Judgment of:	**KENNETT J**
Date of judgment:	7 September 2023
Catchwords:	**CONSUMER LAW –** alleged contraventions of the *National Consumer Credit Protection Act 2009* (Cth) and *National Credit Code* – where respondent held an Australian Credit Licence under the Act and carried on a business providing small amount credit contracts (SACCs) – whether respondents entered into SACCs that imposed impermissible fees and charges – whether activities in relation to SACCs engaged in efficiently, honestly and fairly as required by s 47(1)(a) – contraventions made out – hearing as to liability only – declarations made **PRACTICE AND PROCEDURE** – Application for non-publication orders pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) – financial and other personal information of consumers – whether order necessary to prevent prejudice to the proper administration of justice – consideration of duration for which order should operate
Legislation:	*Constitution* ss 51(xxxvii), 122 *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth) *Corporations Act 2001* (Cth) ss 500(2), 912A *Federal Court of Australia Act 1976* (Cth) ss 37AI, 37AF, 37AG, 37AJ, 50 *National Consumer Credit Protection Act 2009* (Cth) ss 3, 5, 29, 47, 49, 55, 166, 267, Sch 1 (*National Credit Code*) ss 17, 23A, 24, 31A, 82
Cases cited:	*Ali v Insurance Australia Limited* [2022] NSWCA 174 A*ustralian Competition and Consumer Commission v Air New Zealand Limited (No 3)* [2012] FCA 1430 *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55

	Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq) [2012] FCA 414; 88 ACSR 206 *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1422 *Australian Securities and Investments Commission v Membo Finance Pty Ltd (No 2)* [2023] FCA 126 *Australian Securities and Investments Commission v National Australia Bank Ltd* [2022] FCA 1324 *Australian Securities and Investments Commission v Westpac Banking Corp* (No 2) [2018] FCA 751; 266 FCR 147 *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515 *Bayles by his litigation representative Bayles v Nationwide News Pty Limited (No 3)* [2020] FCA 1397 *Cline Capital v UGL Pty Limited (No 2)* [2020] FCA 257 *Giddings v Australian Information Commissioner* [2017] FCAFC 225 *Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296; 104 NSWLR 634 *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 *Legal Services Board v Gillespie-Jones* [2013] HCA 35; 249 CLR 493 *Nationwide News Pty Ltd v JS and SD* [2022] NSWSC 774 *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 *Oreb v Australian Securities and Investments Commission* [2016] FCA 321; 154 ALD 124 *Porter v Dyer* [2022] FCAFC 116; 402 ALR 659 *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 *Re Hres and Australian Securities and Investments Commission* (2008) 105 ALD 124 *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661
	Leeming M, *Common Law, Equity and Statute: a Complex Entangled System* (Federation Press, 2023)
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations

Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	71
Date of hearing:	5 June 2023
Counsel for the Applicant:	Ms R Francois with Ms A Elizabeth
Solicitor for the Applicant:	Australian Securities and Investments Commission
Counsel for the Respondent:	The Respondent did not appear

ORDERS

NSD 1137 of 2021

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Applicant
AND:	**FERRATUM AUSTRALIA PTY LIMITED ACN 151 137 049 (IN LIQUIDATION)** Respondent
ORDER MADE BY:	**KENNETT J**
DATE OF ORDER:	**7 SEPTEMBER 2023**

THE COURT ORDERS THAT:

1. The applicant file, and serve on the liquidators of the respondent, short minutes of the final orders that it says should be made in the light of these reasons by 21 September 2023.
2. The matter be listed for a case management hearing on 5 October 2023, in order to set a timetable for a hearing on the question of the appropriate final orders.
3. The name of the respondent be changed to Ferratum Australia Pty Limited (in liquidation).
4. Pursuant to section 37AF(1)(a) of the *Federal Court of Australia Act 1976* (Cth), on the ground set out in section 37AG(1)(a), publication of the following details of the evidence relating to each consumer referred to in the proceeding be prohibited until the death of that consumer:
   (a) postal or residential addresses;
   (b) email addresses;
   (c) telephone numbers, including mobile numbers;
   (d) dates of birth; and
   (e) any bank account details associated with them (including credit card and debit card details).

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

REASONS FOR JUDGMENT

KENNETT J

INTRODUCTION

1 Following a resolution by the respondent Ferratum Australia Pty Limited (**Ferratum**) to be wound up voluntarily, liquidators were appointed on 4 April 2023. These proceedings were already on foot, having been commenced on 1 November 2021. The parties had filed Concise Statements and the bulk of their evidence.

2 On 1 May 2023 leave was granted to the applicant, the Australian Securities and Investments Commission (**ASIC**), under s 500(2) of the *Corporations Act 2001* (Cth) (**the Corporations Act**) to continue the proceeding against Ferratum. The liquidators appeared at the hearing of the leave application but took a neutral position, both as to the grant of leave to continue the proceeding and the grant of substantive relief. They played no role in the substantive hearing. The liquidators did not disclaim the Concise Statement in Response that had been filed for Ferratum. Aspects of ASIC's case were therefore formally in issue; however, the evidence adduced by ASIC was not challenged.

3 Prior to its liquidation Ferratum carried on business as a payday lender. It provided "small amount credit contracts" (**SACCs**) as defined in s 5 of the *National Consumer Credit Protection Act 2009* (Cth) (**the NCCP Act**) and had done so since at least 1 March 2013. Since 8 November 2011 it has held an Australian Credit Licence under Part 2-2 of the NCCP Act.

4 Ferratum offered SACCs to consumers through an online application process on its website. Loans were made in amounts ranging from $500 to $1,900, for periods of up to 12 months, with a "fast" online application and approval process. For a loan of $1,000 for a term of 12 months, the minimum fees and charges amounted to $680.

5 ASIC alleges multiple contraventions by Ferratum of obligations under the NCCP Act and the *National Credit Code* (**the Code**). These are as follows.

(a) Between 13 March 2019 and 14 July 2020 (**the first relevant period**) Ferratum is alleged to have breached s 24(1A)(b) of the Code by requiring consumers who paid out their SACCs early to pay an amount that exceeded that permitted under s 82(2) of the Code.

(b) Between 13 March 2019 and 30 September 2019 (**the second relevant period**) and between 1 October 2019 and 11 August 2021 (**the third relevant period**), Ferratum is alleged to have:

(i) breached ss 23A(1)(b) and 24(1A)(a) of the Code by entering into SACCs that imposed fees or charges contrary to s 31A(1) of the Code; and

(ii) breached s 24(1A)(b) of the Code by charging those fees.

(c) Ferratum is alleged to have breached s 47(1)(a) of the NCCP Act by failing to have a reliable system to calculate, record and monitor the amounts required to be paid by consumers who elected to pay out their loans prior to the expiry of the loan terms.

(d) Ferratum is alleged to have breached s 47(1)(d) of the NCCP Act by reason of the breaches of the Code referred to above.

6 The NCCP Act applies throughout Australia in reliance on referrals of power under s 51(xxxvii) of the Constitution (for its operation in each State) and s 122 of the Constitution (for its operation in the Australian Capital Territory and Northern Territory). Section 29 of the NCCP Act contains a prohibition on engaging in a "credit activity" without being the holder of a licence authorising that activity. Credit activity is broadly defined in s 6 and relevantly includes being "a credit provider under a credit contract" and carrying on "a business of providing credit" being credit to whose provision the Code applies. Ferratum, as noted above, held a licence issued under the NCCP Act at relevant times.

7 Section 3 of the NCCP Act gives the Code (which is Schedule 1 to the Act, and therefore part of the Act) effect as a law of the Commonwealth. Section 23A(2) of the Code renders void provisions in a SACC that violate s 23A(1) and provides that the debtor under the contract may recover any amount paid under those provisions. Section 24(1A) of the Code provides for a "civil penalty" of 5,000 penalty units for its breach and is thus a "civil penalty provision" within the meaning of the NCCP Act (see s 5), with the result that declarations and civil penalty orders are available for its breach under Part 4-1 of the NCCP Act as well as the remedies provided for in Part 4-2. Contraventions of s 24(1A) can also attract criminal penalties (s 24(2)).

8 The Code has a further effect in that an obligation of a licensee, under s 47(1)(d) of the NCCP Act, is to comply with the "credit legislation", which is defined in s 5 to include the NCCP Act and thus the Code. However, the NCCP Act does not provide any specific remedy for a contravention of s 47(1)(d) (in contrast to some other provisions in s 47(1): see s 47(4)). Rather, any non-compliance with s 47(1), including of para (d), is a ground on which ASIC is

empowered by s 55(1) of the NCCP Act to suspend or cancel a licensee's licence. (That power is qualified by an obligation to afford the licensee a hearing: s 55(4).)

9 In the present proceeding, ASIC seeks to build on the alleged breaches of the Code and establish that Ferratum contravened s 47(1)(a) (ASIC's Concise Statement also alleged a contravention of s 47(1)(f), but this was not pressed in submissions). By force of s 47(1)(a), a licensee must:

> do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly.

10 Contravention of s 47(1)(a) attracts a civil penalty: s 47(4).

11 As a result of an order that I made on 1 May 2023, the hearing on 1 June was limited to issues of liability. For reasons set out below, ASIC has established the contraventions that it alleges. That entitles ASIC to declaratory relief in relation to the civil penalty provisions, as a result of s 166 of the NCCP Act. I will hear argument at a later date on the terms of those declarations and the other orders that are sought.

EARLY PAYOUT – S 24(1A)(B) OF THE CODE

12 Section 82 of the Code provides what is described in the heading to the section as a "debtor's or guarantor's right to pay out contract". Whether it actually confers a "right" in a legal sense need not be explored here. The section was, at the relevant times, as follows:

> (1) A debtor or guarantor is entitled to pay out the credit contract at any time.
>
> (2) The amount required to pay out a credit contract (other than a continuing credit contract) is the total of the following amounts:
>
> (a) the amount of credit;
>
> (b) the interest charges and all other fees and charges payable by the debtor to the credit provider up to the date of termination;
>
> (c) reasonable enforcement expenses;
>
> (d) early termination charges, if provided for in the contract;
>
> less any payments made under the contract and any rebate of premium undersection 148.

13 Section 24(1A) of the Code provides:

> (1A) A credit provider must not:
>
> (a) enter into a small amount credit contract on terms imposing a monetary liability prohibited by subsection 23A(1); or

(b) require or accept payment of an amount in respect of a monetary liability that cannot be imposed consistently with this Code.

Civil penalty: 5,000 penalty units.

14 ASIC's case is that Ferratum required debtors to pay fees in respect of early payouts that exceeded what was permitted by s 82(2), and thereby contravened s 24(1A)(b).

15 ASIC issued several notices to Ferratum under ss 49 and 267 of the NCCP Act requiring it to provide information and produce documents. This material has been digested by officers of ASIC and aggregated in a series of spreadsheets, which were in evidence as exhibits to the affidavits of Yon Astar and Phi Ngo, officers of ASIC. This evidence was not challenged. Also in evidence were primary documents, obtained from Ferratum, relating to particular consumers whose loans were referred to in an annexure to ASIC's Concise Statement as examples of overcharging. ASIC's submissions set out the detail of the calculations in respect of two of these examples, confirming that in these instances consumers who paid out their loans early were charged more than the total of the amounts permitted under s 82(2) of the Code.

16 From a spreadsheet obtained from Ferratum listing 2,681 SACCs in existence in the first relevant period, ASIC selected a sample of 147 accounts in which the consumer elected to pay out their SACC early. Its analysis of these accounts found that 40 of the consumers had been overcharged. Ferratum admitted having charged amounts inconsistent with s 24(1A)(b) in 39 of these cases.

17 This was not a truly random sample—the selection was based on a series of triggers such as the consumer having been charged certain fees or a complaint having been made—so that it cannot be inferred that overcharging occurred in any particular percentage of cases. However, the cause of overcharging appears to be a simple inability to calculate things correctly, rather than some policy or systematic behaviour of Ferratum linked to the aspects of these cases that led to them being selected as part of the sample. Ferratum's "system" required manual calculations by its customer service officers and manual entry of data into a "calculator" contained in an Excel spreadsheet. The information provided by Ferratum did not indicate that there was any process for checking the accuracy of the resulting figures.

18 Accordingly, although ASIC's sample was not random, the result of its analysis provides at least an indication of the frequency with which errors occurred resulting in consumers being overcharged for early payouts. Even if ASIC's sample had some bias towards problematic accounts, it indicates that something like a quarter of consumers who paid out their loans early

were charged amounts that contravened s 24(1A) of the Code. At the very least there were 40 such cases in the period, which is not insignificant.

CONTRACTS CONTAINING PROVISION FOR UNLAWFUL FEES

19 Section 31A(1) of the Code provides that a SACC must not impose fees and charges other than of the four kinds which it sets out:

> (a) a permitted establishment fee;
>
> (b) a fee or charge (a permitted monthly fee) that is payable on a monthly basis starting on the day the contract is entered into;
>
> (c) a fee or charge that is payable in the event of a default in payment under the contract;
>
> (d) a government fee, charge or duty payable in relation to the contract.

20 Section 23A(1) provides:

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

21 Section 24(1A) of the Code has been set out above. It prohibits a credit provider (on pain of a civil penalty) entering into a SACC on "terms imposing a monetary liability prohibited by subsection 23A(1)".

22 Ferratum's standard form contracts for the second and third relevant periods were in evidence. These documents were produced in response to a notice seeking production of Ferratum's standard form contracts and information about the number of SACCs "entered into using" each version. The response identified four standard form contracts with a total of 44,675 SACCs having been entered into on the terms contained in them. Of these, 10,860 were entered into in the second relevant period (using the earliest form produced) and 33,815 in the third relevant period (using one or other of the remaining three forms). There is no reason to doubt, therefore, that the standard form contracts in evidence reflect the terms of SACCs actually entered into with consumers.

23 The standard form in use during the *second relevant period* provided for six charges which, ASIC contends, fell outside the categories in s 31A(1):

(a) "DDR Alteration Fee", payable "on a change being made to the DDR arrangement with you, at your request, at any time under the agreement" ("DDR" referred to a request for direct debit from a consumer's bank account);

(b) "Direct Deposit Fee", payable "on making manual payment of account balance directly into Ferratum owned bank accounts";

(c) "Returned Mail Fee", payable when "postal mail is undeliverable to the address provided on your application";

(d) "Additional Contract request service levy", payable "upon request by you to be provided with your loan contract where this has already been provided to you by us within the last 12 months";

(e) "Visa or MasterCard payment fee", payable "on request by you to make payment of your account by a card service provider, either Visa or MasterCard"; and

(f) "Returned Payment Fee", payable upon "funded loans being returned and repaid to client due to provision of incorrect bank information".

24 The forms in use in the *third relevant period* contained the "DDR Alteration Fee", and "Returned Mail Fee", but these were now expressed to be payable:

(a) "when, after you are in default in payment under the agreement, you request a change to the DDR arrangement with you"; and

(b) "when, after you are in default in payment under the agreement, postal mail is undeliverable to the address provided on your application or subsequently given to us".

25 These versions of the contract document also included a "Debt Collection Agency Transfer Fee", framed in a similar way, which is not the subject of complaint by ASIC. They did not include counterparts of the other fees referred to at [23] above.

Second relevant period

26 In each standard form contract, the fees complained of by ASIC and the circumstances in which they were payable were set out in a section of the contract document headed "Details of the loan offer". They were under a subheading "unascertainable fees and charges as at disclosure date", appearing below spaces for the insertion of the date, intended drawdown date, length of the loan period and "ascertainable fees and charges". This method of drafting was evidently intended to comply with s 17(8) of the Code, which required the contract document to contain

a statement of the fees and charges which were or might be payable "and when each such fee or charge is payable, if ascertainable".

27 Clause 5 of the document relevantly provided:

> 5. Your obligations
>
> You agree that you will:-
>
> > 5.1. Pay to us the repayments together with *any fees and charges* (including interest, if any) *specified in this agreement* to in the method provided in this agreement on the days provided in this agreement.
> >
> > …
>
> (Emphasis added.)

28 That clause is to be read with cl 4.3, which provided:

> 4.3. Any fee or charge able to be collected from you in accordance with this agreement shall, at our option
>
> > 4.3.1. be debited to your account held by us immediately they [sic] become due (in which case they will be added to the amount owing), or
> >
> > 4.3.2. will be paid by you to us on demand being made by us to you.

29 The fees or charges "able to be collected", for the purposes of cl 4.3 (and therefore either debited to the consumer's account or payable on demand) were those which the consumer undertook, by cl 5.1, to pay; that is, the fees and charges "specified in this agreement". By that means, contractual obligations arose to pay the fees listed as part of the "details of the loan offer" in the various circumstances described in that part of the contract document.

30 In its Concise Statement, Ferratum contended that the fees listed above were payable only when the consumer was in default and therefore came within s 31A(1)(c) of the Code. This argument relied on cls 6.1 and 6.2 of the contract document, read with cl 4.3. Clause 6.1 provided for the issue of a default notice and cl 6.2 provided that, if a default was not remedied, "the total amount remaining outstanding, together with all fees and charges, becomes immediately payable to us". This argument is not persuasive. First, it ignores the effect of cl 5.1, set out above. Secondly, the provision in cl 6.2 making all fees and charges "*immediately* due and payable" does not cohere with the specification of particular events that triggered the fees referred to above.

31 Section 23A(1) is directed at liabilities imposed on the debtor and thus concerns itself with the terms of the relevant contract. Evidence as to whether or not Ferratum enforced its contractual rights is therefore not relevant.

32 For these reasons, the fees complained of by ASIC in relation to the second relevant period contravened s 23A of the Code. The provisions imposing them were void by operation of s 23A(2).

Third relevant period

33 In relation to the *third relevant period*, the fees that are the subject of complaint were defined so as to become payable on the occurrence of a particular event after the consumer had defaulted on their payment obligations. That is, they were not triggered by the event of default *per se*, but by the happening of a subsequent event "after you are in default in payment".

34 Ambiguity in the terms of a standard form contract is to be resolved against the party that formulated those terms: *Ali v Insurance Australia Limited* [2022] NSWCA 174 [41]–[43] (Mitchelmore JA, Ward P and Leeming JA agreeing) (***Ali***). If applicable in the present case, that rule (the *contra preferentem* rule) would work in favour of the consumer and confine the relevant fees to circumstances where the consumer *remained* in default in payment (ie had not remedied their default). (The *contra preferentem* rule is one that applies in contractual disputes. I do not accept ASIC's submission that the rule works in its favour—ie to *enhance* Ferratum's rights under the contract—in the present case.)

35 However, the *contra preferentem* rule has often been described as a doctrine of last resort (eg *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296; 104 NSWLR 634 at [31] (Meagher JA and Ball J), cited in *Ali* at [41]) and should in my view be limited to cases of genuine ambiguity. The contract documents in use by Ferratum in the third relevant period can be given meaning without resort to such a rule. According to their terms, the fees complained of became payable if a specified event occurred "after" the consumer was in default in payment; that is to say, whether or not a state of default remained on foot at the time the event occurred.

36 The next question is whether a fee that is applicable in that way is properly described as one "payable in the event of a default in payment under the contract" for the purposes of s 31A(1)(c) of the Code. "In the event of" usually means "if something specified should happen". However, the examples supplied by the *Oxford English Dictionary* (online) include "in the event of one Siamese twin predeceasing the other" (which connotes the consequences of a specific event) and "in the event of an emergency, operate the radio" (which connotes a duty or function while particular circumstances exist), which indicates—unsurprisingly (see Mark Leeming, *Common Law, Equity and Statute: a Complex Entangled System* (Federation Press, 2023) at 90)—that the exact meaning of the phrase can depend on context. Thus, "in the event of a default in

payment" may mean "where a default has occurred" (eg a missed payment) or it may mean "where the consumer is in default of their payment obligations" (eg a missed payment has not yet been rectified or an obligation triggered by that missed payment has not been performed).

37 Section 31A of the Code was inserted by the *Consumer Credit Legislation Amendment (Enhancements) Act 2012* (Cth), which also inserted s 23A. The Explanatory Memorandum and Second Reading Speech for the Bill for that Act do not shed any light on the present issue.

38 Consumer protection legislation is a species of "remedial or beneficial" legislation, to be given "as generous a construction" to the interests sought to be protected "as the actual language of those provisions permits": *Legal Services Board v Gillespie-Jones* [2013] HCA 35; 249 CLR 493 at [50] (French CJ, Hayne, Crennan and Kiefel JJ). That principle calls for a broad view of the restriction placed on credit providers by s 24(1A)(a) of the Code (read with ss 23A(1) and 31A(1)), and a correspondingly narrow view of the exception in s 31A(1)(c). (The countervailing principle that penal provisions (such as s 24(1A)) are to be construed narrowly is to be regarded as a rule of last resort where the relevant obligation is imposed on a class of businesses in aid of remedial measures passed for the protection of those dealing with such businesses: *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 102–103 (Toohey, Gaudron and Gummow JJ), 109 (McHugh J).)

39 For this reason, the preferable understanding of s 31A(1)(c) is that it permits the imposition of a fee on a consumer that responds to a "default in payment" by the consumer and is triggered either by the event of default itself or an event that occurs while the consumer remains in default. It does not permit the credit provider to use default by the consumer as a basis to charge additional fees in respect of unrelated events that occur after the default has been remedied.

40 On this understanding, the fees complained of by ASIC in relation to the standard form contracts used by Ferratum in the third relevant period also contravened s 23A(1) of the Code. The provisions imposing these fees were void, by operation of s 23A(2).

CHARGING UNLAWFUL FEES

41 Ferratum has admitted that it:

(a) charged the DDR Alteration Fee on 105 occasions in the second relevant period and 204 occasions in the third relevant period;

(b) charged the Returned Mail Fee on 461 occasions in the second relevant period; and

(c) charged the Visa or MasterCard payment fee on 30 occasions in the second relevant period.

42 My conclusion that the provisions imposing these fees contravened s 23A of the Code means that, by requiring payment of these amounts, Ferratum contravened s 24(1A)(b).

SECTION 47(1) BREACHES

43 Section 47(1) of the Act required Ferratum, as a licensee, to:

> (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; and
>
> …
>
> (d) comply with the credit legislation …

44 As noted earlier, the "credit legislation" includes the Code.

45 The conclusions set out above mean that Ferratum has also contravened s 47(1)(d) of the Act. That does not have any additional remedial consequences other than the potential for a declaration recording the contravention.

46 Contravention of s 47(1)(a), on the other hand, may attract a civil penalty (see s47(4)).

47 In *Australian Securities and Investments Commission v Membo Finance Pty Ltd (No 2)* [2023] FCA 126 at [37], Yates J accepted that the meaning of the phrase "efficiently, honestly and fairly" in s 47(1)(a) was informed by cases on s 912A(1)(a) of the Corporations Act, which uses the same expression. His Honour then set out the summary of principles set out by Foster J in In *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* [2012] FCA 414; 88 ACSR 206 at [69] (***Camelot***), which is as follows:

> (a) The words "*efficiently, honestly and fairly*" must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672.
>
> (b) The words "*efficiently, honestly and fairly*" connote a requirement of competence in providing advice and in complying with relevant statutory obligations: *Re Hres and Australian Securities and Investments Commission* (2008) 105 ALD 124 at [237]. They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client's affairs: *Re Hres and Australian Securities and Investments Commission* (2008) 105 ALD 124 at [237].

(c) The word "*efficient*" refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672. Inefficiency may be established by demonstrating that the performance of a licensee's functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 679.

(d) It is not necessary to establish dishonesty in the criminal sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 at 110. The word "*honestly*" may comprehend conduct which is not criminal but which is morally wrong in the commercial sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* (1989) 1 ACSR 93 at 110.

(e) The word "*honestly*" when used in conjunction with the word "*fairly*" tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound: *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661 at 672.

(Foster J included references to ASIC's submissions which are omitted in the above.)

48 Yates J also referred to the statement by Beach J in *Australian Securities and Investments Commission v Westpac Banking Corp* (No 2) [2018] FCA 751; 266 FCR 147 at [2350] that contravention of the "efficiently, honestly and fairly" standard does not require contravention of any separately existing obligation. While that is no doubt correct, it is also the case that breach of another provision will sometimes be enough by itself to constitute a breach of the "efficiently, honestly and fairly" standard: eg *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* [2022] FCA 515 at [73] (Beach J).

49 Two further points, drawn from the cases on s 912A, should be noted.

(a) Use of the word "ensure" imports a forward-looking element into the obligation. It is necessary not only to act efficiently, honestly and fairly from day to day, but to take steps to guard against lapses from that standard by employees or representatives: *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2022] FCA 1422 at [146] (Downes J), citing *Australian Securities & Investments Commission v AMP Financial Planning Pty Ltd (No 2)* [2020] FCA 69; 377 ALR 55 at [105] (Lee J).

(b) Although the subjective intentions of the alleged infringer may clearly be relevant, the standard may be unintentionally breached. Contravention is generally a matter for objective analysis: *Australian Securities and Investments Commission v National Australia Bank Ltd* [2022] FCA 1324 at [352] (Derrington J).

50 ASIC's concerns in relation to the performance of Ferratum date back to at least November 2016. Correspondence at that time led to the appointment of an external compliance consultant to review Ferratum's operations. The consultant made two reports to ASIC and Ferratum, covering the periods 1 August – 31 October 2016 and 1 April – 30 June 2017. The consultant's first report concluded that Ferratum was in breach of several provisions of the NCP Act, had "some serious compliance issues", and did not have "appropriate accounting and record keeping systems to meet its obligations". Steps to improve its performance were recommended. Ferratum undertook to make changes to its operations in response. By the end of the period covered by the second report, not all of these things had been done. The second report concluded that Ferratum needed to do "more to be compliant" and that it "still appears to have significant issues with its loan management and the application of fees and charges and their disclosure in accordance with the requirements of the National Credit Code". In correspondence with ASIC, Ferratum acknowledged that it had overcharged some consumers and proposed that it undertake a remediation program. The proposal was not considered satisfactory by ASIC, which, around March 2020, commenced its investigation into suspected contraventions by Ferratum (leading ultimately to the present proceeding).

51 Documents and information provided by Ferratum in the course of that investigation have led to the findings set out above in relation to breaches of specific provisions of the Code. Those findings point to a large number of individual contraventions, most if not all of which involved small dollar amounts (in keeping with the relatively small amounts advanced pursuant to the individual SACCs). These contraventions had, in substance, two sources. One was a failure by Ferratum to bring its standard form contracts into line with the requirements of the Code. The other was adhering to a practice of calculating early payout fees using manual calculations and manual data entry into a standalone calculator, with no system for verifying the accuracy of what was produced.

52 Ferratum provided an explanation in February 2021 of how it calculated payout amounts for consumers seeking to pay out their loans early. This confirmed that, contrary to what it had said it would do in 2017 (in response to the consultant's first report), it was still calculating payout figures by a manual process.

53 There were a significant number of omissions, inaccuracies and contradictions in the responses that Ferratum made to notices issued to it by ASIC. The reason for these deficiencies seems to have been that Ferratum did not have systems that recorded transactions accurately or allowed

data to be extracted when required. This was in addition to the errors identified by ASIC in the calculation of early payout figures. ASIC's analysis of a sample of these calculations found 40 out of 147 consumers who had been overcharged (as mentioned above), but also 59 who had been undercharged. Thus, the payout figure was incorrect in two thirds of the individual cases that were analysed. This occurred during the first relevant period, in 2019, more than two years after Ferratum had received the reports of the expert consultant and undertaken to improve aspects of its operations.

54 Even if these deficiencies were limited to specific aspects of Ferratum's credit activities, they indicate a failure to carry out those activities efficiently. Seen in the context of significant problems having been highlighted in 2017, and Ferratum having accepted a need for improvement, these deficiencies amply demonstrate a failure to "do all things necessary to ensure" that its activities were undertaken efficiently.

55 As indicated by the extract from *Camelot* set out above, the requirements for efficiency, honesty and fairness interact. The inefficiency in Ferratum's business made it unfair in that, in its lending to a vulnerable class of consumers, there was a significant level of randomness as to whether each customer would be correctly or over- or undercharged. It also lacked honesty in that Ferratum was (or at least should have been) well aware of the deficiencies in its system and their potential to affect customers, yet persisted with that system. It was dealing with a vulnerable group of customers, many of whom would not have been well placed to check for themselves whether the amounts they were paying were correct, and in transactions of a size that would usually not justify significant effort on the part of individual consumers to identify and pursue instances of overcharging. While there is no evidence of a subjective intention on the part of Ferratum's controlling minds to take unfair advantage of its customers, failing to implement a system that would charge those customers correctly fell short of what was "ethically sound".

56 I am therefore satisfied that Ferratum breached the duty that s 47(1)(a) of the NCCP Act imposed on it, in the manner alleged by ASIC.

NON-PUBLICATION ORDERS

57 The evidence before the Court in this proceeding includes personal information about consumers. Much of this information is consumers' postal and residential addresses, email addresses, phone numbers and dates of birth, which is included in contract documents, credit assessments and statements. At the hearing ASIC sought non-publication orders in respect of

these details and also the details of any bank accounts associated with consumers. I made orders to that effect on an interim basis under s 37AI of the *Federal Court of Australia Act 1976* (Cth) (**the FCA Act**) and indicated I would consider what if any orders should be made on an ongoing basis as part of these reasons.

58 I am satisfied for the purposes of s 37AG(1)(a) that an order preventing publication of the classes of personal details outlined above is necessary to prevent prejudice to the proper administration of justice. It would bring the administration of justice into disrepute to permit this proceeding to become a vehicle for publication of sensitive financial information, or details which would leave consumers vulnerable to identity theft: see, eg, *Bayles by his litigation representative Bayles v Nationwide News Pty Limited (No 3)* [2020] FCA 1397 at [2], [8] (Katzmann J).

59 A secondary issue is the duration for which that order should operate. Section 37AJ of the FCA Act provides as follows.

> **37AJ Duration of orders**
>
> (1) A suppression order or non-publication order operates for the period decided by the Court and specified in the order.
>
> (2) In deciding the period for which an order is to operate, the Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.
>
> (3) The period for which an order operates may be specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

60 There is conflicting authority about whether a suppression or non-publication order expressed to operate "until further order" satisfies the requirements of s 37AJ(3). Counsel for ASIC referred me to *Giddings v Australian Information Commissioner* [2017] FCAFC 225 (***Giddings***) where at [25] the Full Court quoted the observation in *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 that, in relation to the predecessor of the current provisions (at [29]):

> It has been assumed, no doubt correctly, that an order made under s 50 of the Federal Court Act may be made until further order and, in any event, may be vacated if the continuation of the order no longer appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. As a general proposition, a court remains in control of its interlocutory orders and a further order will be appropriate, for example, where new facts and circumstances appear or are discovered, which render unjust the enforcement of the existing order.

61 However, this statement does not take things far because s 50 differs significantly from the current regime for non-publication and suppression orders. There was, importantly, no counterpart of s 37AJ requiring orders to operate for "no longer than is reasonably necessary" and for a period "specified by reference to a fixed or ascertainable period or by reference to the occurrence of a specified future event" in the Act the High Court was considering.

62 In *Porter v Dyer* [2022] FCAFC 116; 402 ALR 659 (***Porter***) Besanko and Abraham JJ tentatively concluded (at [28]):

> Such authority as we have been able to find suggests that a concluding date or event for a suppression order must be identified (A*ustralian Competition and Consumer Commission v Air New Zealand Limited (No 3)* [2012] FCA 1430 at [24] per Perram J [(***Air New Zealand***)]; *Oreb v Australian Securities and Investments Commission* [2016] FCA 321; (2016) 154 ALD 124 at [94] per Markovic J [(***Oreb***)]).

63 Their Honours were provisionally of the view that a duration of 10 years was appropriate, but the Court made orders allowing the parties to be heard "as to the need for a specified period for [a suppression] order and/or the proposed duration of 10 years" (at [30]). Ultimately, an order was made for a duration of 30 years, but no further reasons were published.

64 The passage of *Air New Zealand* cited in *Porter* records Perram J's finding that s 37AJ "[f]ormalises what was probably good practice beforehand, namely the placing on all suppression orders some form of sunset clause". In *Oreb,* the other case referred to, Markovic J cites *Air New Zealand* in reaching her conclusion that an order until further order would not satisfy s 37AJ.

65 The opposite conclusion is often reached. In *Cline Capital v UGL Pty Limited (No 2)* [2020] FCA 257 Anastassiou J referred to 19 cases in which orders have been made "until further order". His Honour followed that practice, finding (at [30]):

> … this practice in the class action context strikes the right balance between the protection of the legitimate interests that may be adversely affected by disclosure of the information, while not precluding any person who may be able to demonstrate a countervailing interest from applying to the Court for a variation of the orders.

66 Also relevant is *Nationwide News Pty Ltd v JS and SD* [2022] NSWSC 774. In that case Basten AJ observed, in the context of relevantly identical New South Wales provisions (at [45]):

> … Proposed order 6 identifies two events upon which the orders cease to operate, namely, (i) upon the coroner delivering her findings in respect of the inquest into the disappearance of William Tyrrell, and (ii) "or until further order". The last four words are otiose and inappropriate. On the one hand, the court which made the orders may

> vary them at any time, as may a court hearing a review or appeal application. On the other hand, there is a real risk that a person who is required to obey the order will not be sure whether there has been any further order or not. Those words should be omitted.

67 In the present case, the non-publication order will no longer be necessary only when the information being protected is no longer current or no longer sufficiently complete to present a risk of identity fraud. That may be not the case until each of the persons concerned dies. The possibility of identity fraud being practised on a deceased person is vanishingly small if not zero. Section 37AJ requires me to ensure a non-publication order "operates for no longer than is reasonably necessary to achieve the purpose for which it is made". I will therefore define the duration of the order in relation to each consumer by reference to their death. That gives the order a defined end point, and allows me to leave for another day the question whether s 37AJ permits an order having effect "until further order".

DISPOSITION

68 ASIC has established breaches by Ferratum of two "civil penalty provisions" (as defined in s 5 of the NCCP Act): s 47(1)(a) of the Act and s 24(1A) of the Code. Under s 166(2) of the NCCP Act, the Court is required to make declarations that Ferratum contravened these provisions. Although the things that must be specified in the declarations are specified in s 166, in my view it is useful to have the assistance of the parties in framing these declarations in the light of the findings I have made.

69 Questions as to what civil penalty, if any, should be imposed on Ferratum also arise from the findings in relation to contravention of these provisions. A question also arises as to whether a declaration should be made, and if so in what terms, regarding the contravention of s 47(1)(d) of the Act.

70 The hearing on 5 June 2023 was, as noted earlier, limited to issues of liability. I will therefore need to hear from the parties, and possibly receive further evidence, as to the appropriate relief.

71 The only orders that I will make at present are to:

(a) direct ASIC to file, and serve on the liquidators, short minutes of the final orders that it says should be made in the light of these reasons;

(b) list the matter for a case management hearing, in order to set a timetable for a hearing on the question of the appropriate final orders;

(c) formally change the name of the respondent to Ferratum Australia Pty Limited (in liquidation); and

(d) prohibit the publication of the following details of each of the consumers referred to in the proceeding until that consumer dies:

(i) their postal or residential addresses;

(ii) email addresses;

(iii) telephone numbers, including mobile numbers;

(iv) their dates of birth; and

(v) any bank account details associated with them (including credit card and debit card details).

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kennett.

Associate: 

Dated: 7 September 2023