

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 15/03/2021 4:39:43 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application - Form 15 - Rule 8.01(1)
File Number:	NSD209/2021
File Title:	AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v MEMBO FINANCE PTY LIMITED & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



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

Dated: 15/03/2021 5:05:44 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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



Originating Application

No. of 20

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations

Australian Securities & Investments Commission

Applicant

Membo Finance Pty Limited [ACN 159 693 464] and another
Respondents

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: 184 Phillip Street, Sydney

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Australian Securities and Investments Commission

Prepared by (name of person/lawyer) Conrad Gray / Meredith Dodds

Law firm (if applicable) _____

Tel (02) 9911 2313 / (02) 9911 2056 Fax 1300 729 000

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Address for service Level 5, 100 Market Street, Sydney NSW 2000
(include state and postcode)



Details of claim

On the grounds stated in the accompanying concise statement, the Applicant seeks:

Declarations

Contraventions in relation to financial hardship

1. Declarations pursuant to s 166(2) of the *National Consumer Credit Protection Act 2009 (Cth)* (**Act**) that during the period 3 March 2020 to 16 December 2020, the First Respondent (**Membo**) contravened s 72(4) of the *National Credit Code* (being Schedule 1 to the Act) (**Code**) on 39 occasions by failing in each case to give a notice in accordance with s 72(4) and s 72(5) of the Code in response to a hardship notice within the meaning of s 72(1) of the Code (**Hardship Notice**) given to Membo as credit provider by a debtor.
2. Declarations pursuant to s 166(2) and s 169 of the Act that the Second Respondent (**RGFS**) contravened s 72(4) of the Code by being involved in each of the contraventions the subject of the declaration in paragraph 1 above.
3. Declarations (or alternatively a declaration) pursuant to s 166(2) of the Act that during the period 13 March 2019 to 16 December 2020 Membo, in each of the respects identified in subparagraphs (a) to (g) below (or alternatively by reason of the identified conduct and failures as a whole), contravened s 47(1)(a) of the Act by failing to do all things necessary to ensure that the credit activities authorised by Membo's Australian Credit Licence (Number 428415) (**Membo's credit licence**) were engaged in efficiently, honestly and fairly, in that during the said period Membo:
 - a. had a practice of failing to inform debtors with whom Membo had a credit contract, and guarantors of such contracts, of Membo's policies and processes in respect of financial hardship or of the hardship processes under the Code;
 - b. had a practice of failing to advise debtors who gave Hardship Notices to Membo of Membo's policies and processes in respect of financial hardship or of the hardship processes under the Code;
 - c. failed to give to debtors, in response to a Hardship Notice, a notice in accordance with ss 72(4) and 72(5) of the Code on each of the occasions the subject of the declarations in paragraph 1 above;
 - d. on at least 10 occasions required debtors who gave a Hardship Notice to Membo to provide supporting documentation to Membo within 48 hours or less, in



circumstances where s 72(2) of the Code allows a debtor who gives a Hardship Notice and who is required by the credit provider to provide relevant information a period of 21 days in which to provide the information. On 7 of those 10 occasions, Membo advised the debtor that if the required supporting documentation was not provided within the time requested, Membo would assume that the debtor had the ability to pay (and, by implication, that the Hardship Notice was not pressed) and would resume collection activity;

- e. on at least 11 occasions failed to consider Hardship Notices given by debtors of Membo, or to give those debtors notices in accordance with ss 72(4) and 72(5) of the Code, prior to making inquiries of the guarantor under the relevant credit contract and ascertaining that the guarantor was unable to meet the obligations under their guarantee contract;
 - f. following receipt of a Hardship Notice on or about 31 March 2020 from a debtor, SV:
 - (i) advised SV that in normal circumstances it was not possible to hold loans for more than 30 days when there was a hardship process under both Membo's hardship policy and the Code which, properly implemented, would allow that outcome in an appropriate case;
 - (ii) collected payments from SV during assessment of the Hardship Notice that were greater than interim arrangements that had been agreed between Membo and SV;
 - g. failed to have in place systems and processes to ensure that the conduct in subparagraphs (a)-(f) did not occur.
4. Declarations (or alternatively a declaration) pursuant to s 166(2) and s 169 of the Act that the RGFS contravened s 47(1)(a) of the Act by being involved in each of the contraventions the subject of the declaration(s) in paragraph 3 above.

Contraventions in relation to training and competence

5. A declaration pursuant to s 166(2) of the Act that during the period 13 March 2019 to 28 August 2020, Membo contravened s 47(1)(g) of the Act by failing to ensure that its representatives were adequately trained, and were competent, to engage in the credit



activities authorised by Membo's credit licence, in that during the said period, systems and practices were in operation whereby:

- a. representatives of Membo who had failed and/or not completed financial hardship and other training were allowed to act in customer facing roles; and
 - b. representatives of Membo were provided with a training document being a 'Hardship Training Guide' that misstated the threshold requirements for a debtor to give a Hardship Notice pursuant to s 72(1) of the Code.
6. A declaration pursuant to s 166(2) and s 169 of the Act that the RGFS contravened s 47(1)(g) of the Act by being involved in the contravention the subject of the declaration in paragraph 5 above.

Contraventions in relation to direct debit default notices

7. A declaration pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) that during the period 15 December 2017 to 8 August 2020, Membo contravened s 87(2) of the Code on 112 occasions on which s 87(1) of the Code applied, by failing in each case to give to the debtor, and any guarantor, a notice, complying with s 87(2) of the Code, within 14 days of a first direct debit default occurring.
8. A declaration pursuant to s 21 of the FCA Act that during the period 15 December 2017 to 12 March 2019, Membo contravened s 47(1)(a) of the Act by failing to do all things necessary to ensure that the credit activities authorised by Membo's credit licence were engaged in efficiently, honestly and fairly, in that during the said period Membo:
- a. on 76 occasions on which s 87(1) of the Code applied, failed to give to the debtor, and any guarantor, a notice, complying with s 87(2) of the Code, within 14 days of a first direct debit default occurring; and
 - b. failed to have in place systems and processes to ensure that the conduct in subparagraph (a) did not occur.
9. A declaration pursuant to s 166(2) of the Act that during the period 13 March 2019 to 8 August 2020, Membo contravened s 47(1)(a) of the Act by failing to do all things necessary to ensure that the credit activities authorised by Membo's credit licence were engaged in efficiently, honestly and fairly, in that during the said period Membo:



- a. on 36 occasions on which s 87(1) of the Code applied, failed to give to the debtor^{*} and any guarantor, a notice, complying with s 87(2) of the Code, within 14 days of a first direct debit default occurring; and
- b. failed to have in place systems and processes to ensure that the conduct in subparagraph (a) did not occur.

Contraventions in relation to premature commencement of proceedings

10. A declaration pursuant to s 21 of the FCA Act that during the period 18 May 2018 to 20 December 2019, Membo contravened s 88(1) of the Code on 60 occasions by commencing (by its agent and representative RGFS) enforcement proceedings against a debtor before the expiry of 30 days after Membo gave the debtor, and any guarantor, a default notice, complying with s 88 of the Code, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default.
11. A declaration pursuant to s 21 of the FCA Act that during the period 18 May 2018 to 12 March 2019, Membo contravened s 47(1)(a) of the Act by failing to do all things necessary to ensure that the credit activities authorised by Membo's credit licence were engaged in efficiently, honestly and fairly, in that during the said period Membo:
 - a. on 37 occasions, by its agent and representative RGFS began enforcement proceedings against a debtor before the expiry of 30 days after Membo gave the debtor, and any guarantor, a default notice, complying with s 88 of the Code, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and
 - b. failed to have in place systems and processes to ensure that the conduct in subparagraph (a) did not occur.
12. A declaration pursuant to s 166(2) of the Act that during the period 13 March 2019 to 20 December 2019, Membo contravened s 47(1)(a) of the Act by failing to do all things necessary to ensure that the credit activities authorised by Membo's credit licence were engaged in efficiently, honestly and fairly, in that during the said period Membo:
 - a. on 23 occasions, by its agent and representative RGFS began enforcement proceedings against a debtor before the expiry of 30 days after Membo gave the debtor, and any guarantor, a default notice, complying with s 88 of the Code, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and



- b. failed to have in place systems and processes to ensure that the conduct in subparagraph (a) did not occur.

Contraventions in relation to commencement of proceedings in wrong jurisdiction

13. A declaration pursuant to s 21 of the FCA Act that during the period 11 May 2018 to 12 March 2019, Membo contravened s 47(1)(a) of the Act by failing to do all things necessary to ensure that the credit activities authorised by Membo's credit licence were engaged in efficiently, honestly and fairly, in that during the said period Membo:
 - a. by its agent and representative RGFS, brought court proceedings against a total of 263 debtors and guarantors in a jurisdiction other than that prescribed by regulation 36 of the *National Consumer Credit Protection Regulations 2010* (Cth) (**Regulations**); and
 - b. failed to have in place systems and processes to ensure that the conduct in subparagraph (a) did not occur.
14. A declaration pursuant to s 166(2) of the Act that during the period 13 March 2019 to 12 March 2020, Membo contravened s 47(1)(a) of the Act by failing to do all things necessary to ensure that the credit activities authorised by Membo's credit licence were engaged in efficiently, honestly and fairly, in that during the said period Membo:
 - a. by its agent and representative RGFS, brought court proceedings against a total of 256 occasions against a debtors and guarantors in a jurisdiction other than that prescribed by regulation 36 of the Regulations; and
 - b. failed to have in place systems and processes to ensure that the conduct in subparagraph (a) did not occur.
15. Further and in the alternative to paragraph 13, a declaration pursuant to s 21 of the FCA Act that during the period 11 May 2018 to 12 March 2019, Membo contravened s 47(1)(e) of the Act by failing to take reasonable steps to ensure that its credit representative, RGFS, complied with the credit legislation, in that during the said period:
 - a. RGFS began brought court proceedings against a total of 263 debtors and guarantors in a jurisdiction other than that prescribed by regulation 36 of the Regulations; and
 - b. Membo failed to have in place systems and processes to ensure that the conduct in subparagraph (a) did not occur.



16. Further and in the alternative to paragraph 14, a declaration pursuant to s 166(2) of the Act that during the period 13 March 2019 to 12 March 2020, Membo contravened s 47(1)(e) of the Act by failing to take reasonable steps to ensure that its credit representative, RGFS, complied with the credit legislation, in that during the said period:
- a. RGFS brought court proceedings against a total of 256 debtors and guarantors in a jurisdiction other than that prescribed by regulation 36 of the Regulations; and
 - b. Membo failed to have in place systems and processes to ensure that the conduct in subparagraph (a) did not occur.

Pecuniary penalties

Contraventions in relation to financial hardship

17. An order pursuant to s 167(2) of the Act that Membo pay to the Commonwealth of Australia such pecuniary penalties as the Court determines to be appropriate in respect of Membo's contraventions of s 72(4) of the Code the subject of the declarations in paragraph 1 above.
18. An order pursuant to s 167(2) of the Act that RGFS pay to the Commonwealth of Australia such pecuniary penalties as the Court determines to be appropriate in respect of RGFS's contraventions of s 72(4) of the Code the subject of the declarations in paragraph 2 above.
19. An order pursuant to s 167(2) of the Act that Membo pay to the Commonwealth of Australia such pecuniary penalties (or alternatively penalty) as the Court determines to be appropriate in respect of Membo's contraventions of s 47(1)(a) of the Act the subject of the declaration(s) in paragraph 3 above.
20. An order pursuant to s 167(2) of the Act that RGFS pay to the Commonwealth of Australia such pecuniary penalties (or alternatively penalty) as the Court determines to be appropriate in respect of RGFS's contraventions of s 47(1)(a) of the Act the subject of the declaration(s) in paragraph 4 above.

Contraventions in relation to training and competence

21. An order pursuant to s 167(2) of the Act that Membo pay to the Commonwealth of Australia such pecuniary penalty as the Court determines to be appropriate in respect of Membo's contravention of s 47(1)(g) of the Act the subject of the declaration in paragraph 5 above.



22. An order pursuant to s 167(2) of the Act that RGFS pay to the Commonwealth of Australia such pecuniary penalty as the Court determines to be appropriate in respect of RGFS's contravention of s 47(1)(g) of the Act the subject of the declaration in paragraph 6 above.

Contraventions in relation to direct debit default notices

23. An order pursuant to s 167(2) of the Act that Membo pay to the Commonwealth of Australia such pecuniary penalty as the Court determines to be appropriate in respect of Membo's contravention of s 47(1)(a) of the Act the subject of the declaration in paragraph 9 above.

Contraventions in relation to premature commencement of proceedings

24. An order pursuant to s 167(2) of the Act that Membo pay to the Commonwealth of Australia such pecuniary penalty as the Court determines to be appropriate in respect of Membo's contravention of s 47(1)(a) of the Act the subject of the declaration in paragraph 12 above.

Contraventions in relation to commencement of proceedings in wrong jurisdiction

25. An order pursuant to s 167(2) of the Act that Membo pay to the Commonwealth of Australia such pecuniary penalty as the Court determines to be appropriate in respect of Membo's contravention of s 47(1)(a) of the Act the subject of the declaration in paragraph 14 above.
26. Further and in the alternative to paragraph 25, an order pursuant to s 167(2) of the Act that Membo pay to the Commonwealth of Australia such pecuniary penalty as the Court determines to be appropriate in respect of Membo's contravention of s 47(1)(e) of the Act the subject of the declaration in paragraph 16 above.

Other relief

27. An order pursuant to s 182 of the Act that Membo and RGFS cause to be published on the home page of the ClearLoans website a notice:
- a. stating that borrowers with existing loans that are experiencing financial hardship may give ClearLoans a hardship notice;
 - b. stating that a hardship notice may be given to ClearLoans by phone, email or text message, and providing the contact details for each of those channels;



- c. stating that ClearLoans will advise the borrower in writing of the outcome of the hardship application (**Outcome Notice**) within the time limits set out in s 72(5) of the Code, and setting out those time limits;
 - d. stating that if ClearLoans does not agree to change the credit contract, the Outcome Notice will explain to the borrower the reasons why ClearLoans did not agree; and
 - e. stating that if ClearLoans does not agree to change the credit contract, the borrower is entitled to seek assistance from the Australian Financial Complaints Authority (**AFCA**), and setting out the name and contact details of AFCA.
28. An order pursuant to s 182 of the Act that Membo and RGFS cause to be maintained on the home page of the ClearLoans website the notice the subject of the order in paragraph 27 for a period of 12 months from the date of its first publication.
29. An order pursuant to s 182 of the Act that Membo and RGFS cause to be sent an email or text message to each debtor that, at the time of the order, has an existing loan with ClearLoans, to the effect that a notice has been published on the ClearLoans website with information about what to do if they experience financial hardship, and providing a link to the website.
30. An injunction pursuant to s 177 of the Act requiring Membo and RGFS to discontinue any enforcement proceedings against debtors or guarantors which:
- a. were commenced in a jurisdiction other than the State or Territory in which the debtor or guarantor ordinarily resided at the time the proceedings were commenced (or, if at the time the proceedings were commenced, it was not known where the debtor or guarantor ordinarily resided, the State or Territory in which the debtor or guarantor ordinarily resided at the time the credit contract or guarantee was made), contrary to regulation 36 of the Regulations; and
 - b. are, at the time of the injunction, on foot.
31. An injunction pursuant to s 177 of the Act requiring Membo and RGFS to discontinue any enforcement proceedings against debtors which:
- a. were commenced before the expiry of 30 days after Membo gave the debtor, and any guarantor, a default notice, complying with s 88 of the Code, allowing the debtor a period of at least 30 days from the date of the notice to remedy the default; and
 - b. are, at the time of the injunction, on foot.



32. An order pursuant to s 23 of the FCA Act or s 177 of the Act requiring Membo, within 90 days of the order, to establish and implement in or from Australia a compliance program that includes:
- a. the amendment of all written policies and procedures used by Membo, or in the business conducted under Membo's Australian Credit Licence No. 428415 (**ClearLoans Business**), to comply with sections 72, 87 and 88 of the Code and regulation 36 of the Regulations;
 - b. training delivered to each Membo employee and any other person involved in the ClearLoans Business (including contractors, and whether engaged or employed by Membo or any other person or entity) to familiarise them with the updated policies and procedures the subject of paragraph (a) and to minimise the risk of future contraventions of sections 72, 87 and 88 of the Code and regulation 36 of the Regulations;
 - c. the appointment of an appropriately qualified independent external reviewer approved by ASIC to audit and prepare a report to Membo and ASIC on the efficacy of the steps in subparagraphs (a) and (b) above;
 - d. the provision of the independent external reviewer's report to ASIC no later than 150 days after the date of the order.
33. Costs.
34. Such further or other order as the Court considers fit.

**Applicant's address**

The Applicant's address for service is:

Place: Level 5, 100 Market Street, Sydney NSW 2000

Email: conrad.gray@asic.gov.au

The Applicant's address is Level 5, 100 Market Street, Sydney NSW 2000.

Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 15 March 2021

A handwritten signature in blue ink, appearing to read 'Conrad Gray'.

Signed by Conrad Gray
Lawyer for the Applicant

Date: 15 March 2021



Schedule

No. of 20

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations

Respondents

Second Respondent: Richmond Group Financial Services Pty Limited
ACN 618 935 612

Date: