

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
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



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

Dated: 15/03/2021 5:23:39 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 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.



## Concise Statement

No. of

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

### A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. The First Respondent (**Membo**) is the holder of Australian Credit Licence 428415 (**credit licence**), which authorises Membo, *inter alia*, to engage in credit activities in relation to credit contracts as set out in s 6 of the *National Consumer Credit Protection Act 2009* (Cth) (**Act**).
2. Since September 2017, the Second Respondent, Richmond Group Financial Services Pty Ltd (**RGFS**), has been authorised as Membo's credit representative pursuant to s 64 of the Act. RGFS is the sole shareholder of Membo.
3. At all relevant times, Membo and RGFS have carried on a credit business trading as "ClearLoans" (**CL**). The day to day running of the business is and was conducted wholly or principally by RGFS as Membo's credit representative and agent. References below to CL or Membo are references to Membo acting on its own account or acting through RGFS as its representative and agent.
4. CL describes its business as a "guarantor lending" model. Key features of CL's business include:
  - a. CL provides small loans to consumers (\$3,000–\$15,000) for terms of 12 to 60 months with a fixed interest rate of 43% per annum and fixed monthly repayments.
  - b. CL requires that all loans are secured by a personal guarantee, usually given by a friend or relative of the debtor. Debtors enter into a credit contract with Membo as credit provider. Guarantors enter into a contract of guarantee with Membo with respect to the debtor's credit contract.
  - c. CL requires debtors to make repayments by direct debit or by card payment authority. When a debtor fails to make a monthly repayment, CL immediately attempts collection from the guarantor by way of direct debit or card payment authority.

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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
Email conrad.gray@asic.gov.au / meredith.dodds@asic.gov.au	
<b>Address for service</b> (include state and postcode)	Level 5, 100 Market Street, Sydney NSW 2000

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5. At all relevant times CL operated exclusively from an online platform, with no offices or branches in Australia. Consumers interact with CL by telephone, email or text message with customer service representatives. CL operates call centres in the United Kingdom, New Zealand and the Philippines.
6. In the periods relevant to these claims, CL had written policies including “Debt Collection Policy & Procedures” and a “Financial Hardship Policy”. CL also had training manuals for customer service representatives, including a “Hardship Training Guide”.

**Conduct in relation to financial hardship during the COVID-19 pandemic (“Hardship Claims”)**

7. Pursuant to s 72(1) of the National Consumer Credit Code (Schedule 1 to the Act) (**Code**), a debtor who considers that he or she is or will be unable to meet his or her obligations under a credit contract may give notice to the credit provider of the debtor’s inability to meet the obligations (**Hardship Notice**). Such notice may be given orally or in writing. Under s 72(2) of the Code, the credit provider may request information from the debtor in respect of the Hardship Notice. After considering a Hardship Notice, the credit provider must give a notice to the debtor advising of the outcome of the Hardship Notice, which notice must comply with the requirements as to form, content and timing set out in ss 72(4) and 72(5) of the Code (**Decision Notice**).
8. During the period 3 March 2020 to 16 December 2020, when the COVID-19 pandemic was present in Australia, CL on at least 39 occasions failed to give a Decision Notice to debtors who had given a Hardship Notice. In particular:
  - a. 7 consumers (CN, UK, CP, SV, MS, JI and BA) (**Consumers**) gave a total of 9 Hardship Notices to CL, further details of which are set out in part 1 of Annexure A, advising CL that they were experiencing financial hardship as a result of the economic impacts of the COVID-19 pandemic. The Consumers gave the Hardship Notices either orally (during telephone calls with CL customer service representatives) or by email. On each of the 9 occasions, Membo failed to give a Decision Notice to the Consumer;
  - b. separately from the cases in (a) above, CL flagged a number of loan accounts as “Financial Hardship” after the debtor gave CL a Hardship Notice, and on 30 occasions, as set out in part 2 of Annexure A, Membo failed to give a Decision Notice to the debtor.
9. Pursuant to s 47(1)(a) of the Act, the holder of an Australian credit licence must do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly.
10. During the period 13 March 2019 to 16 December 2020, Membo failed 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 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 Decision Notice on each of the occasions referred to in paragraph 8;

- d. on at least 10 occasions, as set out in part 3 of Annexure A, 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, CL advised the debtor that if the required supporting documentation was not provided within the time requested, CL 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, as set out in part 4 of Annexure A, failed to consider Hardship Notices given by debtors of Membo, or to give those debtors Decision 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 from a debtor, SV:
  - (1) 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;
  - (2) 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.

**Conduct in relation to training and competence** ("Training Claim")

- 11. Pursuant to s 47(1)(g) of the Act, the holder of an Australian credit licence must ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence.
- 12. During the period 13 March 2019 to 28 August 2020, Membo:
  - a. allowed representatives of Membo who had failed and/or not completed financial hardship and other training to act in customer facing roles; and
  - b. provided to representatives of Membo the Hardship Training Guide that misstated the threshold requirements for a debtor to give a Hardship Notice.

**Failure to issue direct debit default notices** ("DD Default Claims")

- 13. Section 87(1) of the Code applies if a debtor authorises payment of an amount for a credit contract by direct debit; default occurs; and it is the first occasion the default occurs. In such a case, the credit provider must give the debtor, and any guarantor, a notice, complying with s 87(2), within 14 days of the default occurring (**DD Default Notice**).
- 14. During the period 15 December 2017 to 8 August 2020, on 112 occasions on which s 87(1) applied, Membo failed to give DD Default Notices to the relevant debtor and/or any guarantor. In particular:
  - a. 76 DD Default Notices were not issued during the period 15 December 2017 to 12 March 2019; and

- b. 36 DD Default Notices were not issued during the period 13 March 2019 to 8 August 2020.
15. Membo failed to have in place systems and processes to ensure that the conduct set out in paragraph 14 above did not occur.

**Premature commencement of proceedings (“Enforcement Claims”)**

16. Pursuant to s 88(1) of the Code, a credit provider must not begin enforcement proceedings against a debtor in relation to a credit contract unless (relevantly) the debtor is in default; the credit provider has given the debtor, and any guarantor, a default notice allowing the debtor a period of at least 30 days from the date of the notice to remedy the default (**Default Notice**); and the default has not been remedied within that period.
17. In the period from 18 May 2018 to 20 December 2019, on 60 occasions Membo (by its agent and representative RGFS) began enforcement proceedings against debtors less than 30 days after a Default Notice had been issued. In particular:
- a. 37 such proceedings were commenced in the period from 18 May 2018 to 12 March 2019 and;
  - b. 23 such proceedings were commenced in the period from 13 March 2019 to 20 December 2019.
18. Membo failed to have in place systems and processes to ensure that the conduct set out in paragraph 17 did not occur.

**Commencement of proceedings in wrong jurisdiction (“Jurisdiction Claims”)**

19. Pursuant to s 47(1)(e) of the Act, the holder of an Australian credit licence must take reasonable steps to ensure that its representatives comply with the credit legislation.
20. Pursuant to regulation 36 of the *National Consumer Credit Protection Regulations 2010* (Cth) (**Regulations**), proceedings in relation to a credit contract or a guarantee regulated under the Act, and involving a debtor or guarantor, must be brought in the State or Territory where the debtor or guarantor ordinarily resides.
21. During the period 11 May 2018 to 12 March 2020, Membo by its agent and representative RGFS, or alternatively RGFS, brought 278 court proceedings in the Parramatta Local Court of New South Wales to enforce a credit contract and/or guarantee regulated under the Act against 519 debtors and guarantors in circumstances where those debtors and guarantors did not ordinarily reside in New South Wales at the time the proceedings were commenced. In particular, such proceedings were commenced against:
- a. a total of 263 debtors and guarantors from 11 May 2018 to 12 March 2019; and
  - b. a total of 256 debtors and guarantors from 13 March 2019 to 12 March 2020.
22. Membo failed to maintain systems and processes to ensure that the conduct set out in paragraph 21 did not occur.

**B. RELIEF SOUGHT**

23. ASIC seeks the relief claimed in the Originating Application.

**C. LEGAL BASIS FOR RELIEF**

24. **Hardship Claims:** By failing to give Decision Notices on the 39 occasions set out in paragraph 8 above, Membo contravened s 72(4) of the Code (which at all relevant times was a civil penalty provision).
25. By reason of the conduct and failures set out in paragraph 10 above, Membo contravened s 47(1)(a) of the Act (which at all times relevant to the Hardship Claims was a civil penalty provision).
26. RGFS, as Membo's agent and credit representative, was, directly or indirectly, knowingly concerned in or party to the contraventions referred to in paragraphs 24 and 25, and thus involved in the contraventions within the meaning of s 169 of the Act.
27. **Training Claim:** By engaging in the conduct set out in paragraph 12 above, Membo contravened s 47(1)(g) of the Act (which at all times relevant to the Training Claim was a civil penalty provision).
28. RGFS, as Membo's agent and credit representative, was, directly or indirectly, knowingly concerned in or party to the contravention referred to in paragraph 27 above, and thus involved in the contravention within the meaning of s 169 of the Act.
29. **DD Default Claims:** By failing to give DD Default Notices on the 112 occasions set out in paragraph 14 above, Memo contravened s 87(2) of the Code (which is not a civil penalty provision).
30. By reason of the conduct and failure set out in paragraphs 14 and 15 above, Membo contravened s 47(1)(a) of the Act (which commenced as a civil penalty provision on 13 March 2019).
31. **Enforcement Claims:** By commencing enforcement proceedings against debtors less than 30 days after a Default Notice had been issued on the 60 occasions set out in paragraph 17 above, Memo contravened s 88 of the Code (which is not a civil penalty provision).
32. By reason of the conduct and failure set out in paragraphs 17 and 18 above, Membo contravened s 47(1)(a) of the Act (which commenced as a civil penalty provision on 13 March 2019).
33. **Jurisdiction Claims:** By reason of the conduct and failure set out in paragraphs 21 and 22 above, Membo contravened s 47(1)(a), and further or in the alternative contravened s 47(1)(e) of the Act (each of which commenced as civil penalty provisions on 13 March 2019).
34. **Bifurcation of claims:** With respect to the contraventions of s 47(1)(a) of the Act set out in paragraph 30, 32 and 33, ASIC seeks in each case:
  - a. declaratory relief pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) for the conduct constituting the contravention that occurred prior to 13 March 2019; and
  - b. declarations under s 166(2) of the Act and pecuniary penalties under s 167(2) of the Act for the conduct constituting the contraventions that occurred from 13 March 2019.

#### **D. HARM TO CONSUMERS AND PUBLIC**

35. Harm to consumers, while not a necessary element of contravention, did occur to consumers by reason of the conduct set out above.

36. Certain consumers were denied the opportunity to have their Hardship Notices considered and (if appropriate) to have their credit contracts amended to accommodate their circumstances of hardship. They were also deprived of a notice from CL advising of the outcome of their hardship application and, if it were refused, the reasons for that refusal and/or information about how to challenge Membo's decision through AFCA. Guarantors of these credit contracts lost the opportunity to have their obligations under the guarantee reduced, as may have happened if the debtor's hardship application had been successful and the credit contract varied as a result.
37. Certain consumers were required to provide requested documents to CL within 48 hours or less (on pain of not having their Hardship Notices further considered), being a far shorter period than the 21 days allowed by the legislation. Consumers were also denied the opportunity to know about and utilise relevant provisions of the Code and CL policies respecting hardship that, if implemented, had potential to lessen the stress and anxiety being experienced by consumers and, potentially, result in different, more favourable, outcomes for consumers who made hardship applications (as well as their guarantors).
38. Consumers who were entitled to but did not receive default notices lost the opportunity to regularise their account and remedy their default, as did customers who had proceedings commenced against them before the expiry of 30 days after issue of a default notice. Customers that had proceedings commenced against them in a jurisdiction outside of that in which they ordinarily resided were deprived of their rights under the legislation and were exposed to potential costs and inconvenience beyond those that would have been incurred if proceedings had been commenced in their home State or Territory.
39. All of these harms were magnified by the stress, disruption and financial difficulty that many CL customers (particularly those that gave Hardship Notices) were experiencing during the period of the COVID-19 pandemic.
40. Finally, public harm was occasioned by CL's failure to ensure that its business was carried on efficiently, honestly and fairly, and in accordance with the law.

## ANNEXURE A

### Part 1

**CN** (loan agreement number A-AUS-ODuQBWmt3F) gave a Hardship Notice to Membo on or about 24 March 2020 and a further Hardship Notice on or about 21 May 2020. No Decision Notice complying with the requirements of s 72(4) and s 72(5) was given to CN by Membo in response to either Hardship Notice.

**UK** (loan agreement number A-AUS-0plgPmzbk8) gave a Hardship Notice to Membo on or about 24 March 2020. No Decision Notice complying with the requirements of s 72(4) and s 72(5) was given to UK by Membo in response to his Hardship Notice.

**CP** (loan agreement number A-AUS-EMy4Q56MWe) gave a Hardship Notice to Membo on or about 24 March 2020. No Decision Notice complying with the requirements of s 72(4) and s 72(5) was given to CP by Membo in response to her Hardship Notice.

**SV** (loan agreement number A-AUS-u9dQXo03CL) gave a Hardship Notice to Membo on or about 31 March 2020. SV was told that in normal circumstances it was not possible to hold loans for more than 30 days. In that context, SV agreed to make an interim payment while his Hardship Notice was being assessed. Membo in fact collected payments that were greater than interim arrangements that had been agreed between Membo and SV. No Decision Notice complying with the requirements of s 72(4) and s 72(5) was given to SV by Membo in response to his Hardship Notice.

**MS** (loan agreement number A-AUS-WsAWiCc64B) gave a Hardship Notice to Membo on or about 4 April 2020 and a further Hardship Notice on 8 August 2020. No Decision Notice complying with the requirements of s 72(4) and s 72(5) was given to MS by Membo in response to either Hardship Notice.

**JI** (loan agreement number A-AUS-xxWFf4KNCY) gave a Hardship Notice to Membo on or about 15 April 2020. No Decision Notice complying with the requirements of s 72(4) and s 72(5) was given to JI by Membo in response to his Hardship Notice.

**BA** (loan agreement no. A-AUS-d5jkam5Oq2) gave a Hardship Notice to Membo on or about 11 May 2020. No Decision Notice complying with the requirements of s 72(4) and s 72(5) was given to BA by Membo in response to his Hardship Notice.



**Part 2**

<b>No.</b>	<b>Loan Agreement Number</b>	<b>Debtor Initials</b>	<b>Date of Hardship Notice</b>
1.	A-AUS-6njznK9s3s	TF	11/02/2020
2.	A-AUS-Ms2KqW5CxJ	RF	2/03/2020
3.	A-AUS-ZvT5wMSHq2	NC	3/03/2020
4.	A-AUS-nOUX49FU4t	SB	16/03/2020
5.	A-AUS-84P0PiXzme	PB	22/03/2020
6.	A-AUS-bTSuEwMuLJ	SO	23/03/2020
7.	A-AUS-ERWDS0BM47	GB	23/03/2020
8.	A-AUS-eYNZuI9KKf	KW	30/03/2020
9.	A-AUS-Kspw6q9tKi	NS	31/03/2020
10.	A-AUS-bSG4x61SnU	KR	31/03/2020
11.	A-AUS-vUumbLXikG	KP	31/03/2020
12.	A-AUS-6njznK9s3s	TF	4/04/2020
13.	A-AUS-aWZ66CkFFT	KM	6/04/2020
14.	A-AUS-Hd28oj3J9J	LB	9/04/2020
15.	A-AUS-465ImUiERZ	PS	14/04/2020
16.	A-AUS-5S1Hkvo0PB	EG	14/04/2020
17.	A-AUS-MZmYW80wIW	TF	20/04/2020
18.	A-AUS-khBhV8DVzk	BO	1/05/2020
19.	A-AUS-yB3bs7DRlh	KT	11/05/2020
20.	A-AUS-Wv0cKs53Jb	AH	18/05/2020
21.	A-AUS-tu1HegSiRk	ND	17/06/2020
22.	A-AUS-ZvT5wMSHq2	NC	3/07/2020

23.	A-AUS-z1xNiT4oIn	LH	15/07/2020
24.	A-AUS-ZvT5wMSHq2	NC	3/08/2020
25.	A-AUS-tA2ShrZiyp	LR	14/08/2020
26.	A-AUS-krPTNayL0M	BL	3/09/2020
27.	A-AUS-Ms2KqW5CxJ	RF	11/09/2020
28.	A-AUS-nOUX49FU4t	SB	4/10/2020
29.	A-AUS-zNw6x43GW2	LG	24/10/2020
30.	A-AUS-zNw6x43GW2	LG	18/11/2020

**Part 3**

<b>No.</b>	<b>Loan Agreement Number</b>	<b>Debtor Initials</b>	<b>Date of Hardship Notice</b>	<b>Date CL Requested Information</b>
1.	A-AUS-EMy4Q56MWe	CP	24/03/2020	07/04/2020
2.	A-AUS-465ImUiERZ	PS	14/04/2020	14/04/2020
3.	A-AUS-d5jkam5Oq2	BA	12/05/2020	12/05/2020
4.	A-AUS-qDQQt1gFSw	JR	13/05/2020	13/05/2020
5.	A-AUS-Wv0cKs53Jb	AH	18/05/2020	18/05/2020
6.	A-AUS-tu1HegSiRk	ND	17/06/2020	17/06/2020 23/06/2020
7.	A-AUS-ZvT5wMSHq2	NC	03/08/2020	03/08/2020
8.	A-AUS-WsAWiCc64B	MS	08/08/2020	10/08/2020
9.	A-AUS-tA2ShrZiyp	LR	14/08/2020	14/08/2020 28/08/2020 01/09/2020
10.	A-AUS-zNw6x43GW2	LG	18/11/2020	01/12/2020

**Part 4**

<b>No.</b>	<b>Loan Agreement Number</b>	<b>Debtor Initials</b>
1.	A-AUS-YjloWShDOc	GH
2.	A-AUS-d5jkam5Oq2	BA
3.	A-AUS-NlgFh84Xqq	MT
4.	A-AUS-47z2uaNpoL	AB
5.	A-AUS-oEMXJ11AjO	UM
6.	A-AUS-pVLdvgDawp	EL
7.	A-AUS-tu1HegSiRk	ND
8.	A-AUS-Kspw6q9tKi	NS
9.	A-AUS-84P0PiXzme	PB
10.	A-AUS-Hd28oj3J9J	LB
11.	A-AUS-03nTlznRbz	SS

### Certificate of lawyer

I Conrad Gray certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 15 March 2021



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Signed by Conrad Gray

Lawyer for the Applicant