

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
File Number: VID181/2022  
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v  
DARRANDA PTY LTD (ACN 005 663 561) & ANOR  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 11/04/2022 11:36:20 AM AEST

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

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.

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Form NCF1

## Concise Statement

No.                      of 2022

Federal Court of Australia

District Registry: Victoria

Division: General

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Applicant

**DARRANDA PTY LTD (ACN 005 663 561)**

First Respondent

**RENT4KEEPS (AUST) PTY LTD (ACN 006 507 811)**

Second Respondent

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

1. Rent4Keeps (Aust) Pty Ltd (**Rent4Keeps**) is the master franchisor of businesses operating across Australia that enter into contracts with middle to low income earners to hire essential goods including electrical goods, home appliances and furniture.
2. Rent4Keeps provides a business model, systems and branding to its franchisees. Rent4Keeps authorises and directs its franchisees to enter into contracts with consumers using their standard form contracts and to use its "Quick Rental Calculator" to determine the amount payable, subject to a limited discretion conferred on the franchisees.
3. Darranda Pty Ltd (**Darranda**) is one of Rent4Keeps' franchisees. It holds Australian Credit Licence number 422144 which, among other things, authorises it to be a lessor under a consumer lease and a credit provider under a credit contract.
4. Kevin Payne is the Chief Executive Officer of both Rent4Keeps and Darranda and Mr Payne's wife, Vikki Payne, is named as the sole director of both entities. The sole shareholder of both entities is Waltrin Pty Ltd, of which Mr and Mrs Payne are the directors and Mrs Payne is the sole shareholder.
5. Between 1 April and 30 June 2019 (**the Relevant Period**), Darranda entered into 533 contracts with consumers that had a term of more than 1 year (**the Hire Contracts**).

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Filed on behalf of (name & role of party)

Australian Securities and Investments Commission, Applicant  
Georgina Thomas

Prepared by (name of person/lawyer)

Lawyer, Australian Securities and Investments Commission

Tel        +61 3 9280 4107

Fax        NA

Email     [georgina.thomas@asic.gov.au](mailto:georgina.thomas@asic.gov.au)

**Address for service**  
(include state and  
postcode)

Attention: Georgina Thomas  
Level 7, 120 Collins Street, Melbourne Vic 3000

6. The Hire Contracts were styled "Rental Agreements" and purported to be "consumer leases" within the meaning of Part 11 of the *National Credit Code (the Code)* at Schedule 1 of the *National Consumer Credit Protection Act 2009 (Cth) (the Credit Act)*.
7. The Credit Act distinguishes between "consumer leases" and "credit contracts", and there are a number of obligations and limitations that apply to credit contracts that do not apply to consumer leases. They include:
  - (a) the annual cost rate of a credit contract must not exceed 48% pursuant to ss 32A(1), 23(1) and 24(1) of the Code (**the Rate Cap**); and
  - (b) credit contracts must disclose the cash price of the goods, the annual percentage rate, the method of calculation of the interest charges and the total amount of interest charges payable under the contracts pursuant to ss 17(3), (4), (5) and (6) of the Code (**the Disclosure Requirements**).
8. Consumer leases are recognised as a category of product where the provider can access Centrepay to have payments made to it from a consumer's Centrelink benefits in priority to other debts; whereas this is not the case with credit contracts, where applications to use Centrepay need to be individually reviewed.
9. The key distinction between a credit contract and a consumer lease in the context of contracts for the hire of goods is that a credit contract confers on the consumer "a right or obligation to purchase the goods" whereas a consumer lease does not (see s 169 of the Credit Act and s 9 of the Code).
10. The Hire Contracts, which are based on the standard form contracts, contain the following terms relevant to that distinction:

### 3. Renter Declaration

(d) At the end of the Rental Term, Rent4Keeps may, at its discretion, gift the products to a person nominated by me. That person cannot be myself. Rent4Keeps is not bound by my nomination. The person nominated is: .....

### Terms and Conditions

#### 5. Ownership and Interest

5.1 You have a right to use the Product during the Term, but the Product remain [sic] Our property unless ownership is transferred to You at the end of the Term in accordance with this Agreement. During the term, You must not:

- (a) part with possession of the Product; or
- (b) give another person an interest in the Product.

5.2 Subject to the terms of this Agreement, at the end of the Term, provided you have complied with all of Your obligations under this Agreement, ownership of the Product automatically transfers to the nominated giftee.

11. In December 2017, Mr Payne and others received a compliance report from law firm Holley Nethercote which identified that the standard form contracts were inconsistent and confusing in that it was not clear whether the goods transferred to the renter or a nominated giftee; or whether the transfer occurred automatically or was subject to a discretion. The report identifies that these inconsistencies pertain to the question whether the contracts are consumer leases or credit contracts.

12. Since that time, including during the Relevant Period, Rent4Keeps has continued to authorise and direct its franchisees to use standard form contracts containing the inconsistencies and Darranda has continued to enter into contracts on those terms.
13. Despite the standard form contracts containing clauses which provide that the goods will transfer to a nominated giftee (see Renter Declaration 3(d) and clause 5.2) (**the gifting clauses**), during the Relevant Period, Darranda did not inform consumers of the requirement to nominate a giftee until after the consumer's application had been approved; did not take any steps to verify the identity of, or seek the address, telephone number or any contact details of, the nominated giftee; allowed the consumer to nominate as the giftee any person including a family member and/or a person with whom they reside; did not notify the nominated giftee that they had been nominated; and assured consumers that they could keep the goods. Darranda in fact never intended to, and never did, transfer the goods to a nominated giftee and never intended to, and never did, enforce the gifting clauses. Darranda and the consumers intended that consumers would keep the goods, which they invariably did.
14. With respect to each of the Hire Contracts, Darranda charged more than the Rate Cap and did not satisfy the Disclosure Requirements.

## **B THE RELIEF SOUGHT FROM THE COURT**

15. ASIC seeks the relief set out in the accompanying originating application.

## **C THE PRIMARY LEGAL GROUNDS UPON WHICH RELIEF IS SOUGHT**

16. The Hire Contracts did, in fact, provide the consumer with a right or obligation to purchase the goods and, accordingly, they were "credit contracts" (and not consumer leases) within the meaning of s 9 of the Code because:
  - (a) The gifting clauses should be disregarded as they were a device to avoid characterising the contracts as credit contracts and thereby to avoid the Rate Cap and the Disclosure Requirements and to simplify access to Centrepay. Darranda never intended to, and never did, transfer the goods to a nominated giftee and never intended to, and never did, enforce the gifting clauses; rather Darranda and the consumers intended that the consumer would keep the goods, which they invariably they did. The gifting clauses were accordingly a sham.
  - (b) Alternatively, on the proper construction of the Hire Contracts including the gifting clauses, they confer on the consumer a "right or obligation to purchase the goods" because the goods transfer automatically; the consumer, rather than the giftee, holds the rights under the contract; and the nomination clause constitutes no more than a power in the consumer to require Darranda to complete the contract by transferring the goods to a nominated giftee.
17. Having regard to the characterisation of the contracts as credit contracts, with respect to each of the Hire Contracts, Darranda failed to comply with the Rate Cap and the Disclosure Requirements in contravention of ss 32A(1), 23(1), 24(1), 17(3), 17(4), 17(5) and 17(6) of the Code.
18. Regardless of the characterisation of the Hire Contracts, during the Relevant Period, Darranda failed to do all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly (**the General Obligations**) in contravention of s 47(1)(a) of the Credit Act by:

- (a) using standard form contracts that contained the gifting clauses that provided that the goods would be transferred to a nominated giftee in circumstances where:
  - (i) Darranda never intended to, and never did, transfer the goods to a nominated giftee and never intended to, and never did, enforce the gifting clauses;
  - (ii) Darranda and the consumer intended that the consumer would in fact keep the goods; and
  - (iii) the gifting clauses were a device to avoid the obligations that apply to credit contracts (regardless of whether the gifting clauses are disregarded as a sham);
- (b) inducing consumers to acquiesce in entering into the Hire Contracts that contained the gifting clauses by:
  - (i) engendering in consumers a reasonable expectation that, despite the gifting clauses, they could keep the goods by:
    - (A) using the name and slogan "Rent4Keeps";
    - (B) not taking steps to verify the identity of the nominated giftee;
    - (C) not seeking the address, telephone number or any other contact details of the nominated giftee;
    - (D) allowing the consumer to nominate as the giftee any person including a family member and/or a person with whom they reside;
    - (E) not notifying the nominated giftee that they had been nominated;
    - (F) having practices that allowed consumers to keep the goods, including not taking any steps at the end of the contract term to gift the goods or to otherwise confirm that the consumer had gifted the goods, which practices were known to most customers; and
    - (G) assuring consumers that they could keep the goods;
  - (ii) offering contracts to consumers who were financially vulnerable and unlikely to be able to obtain goods from elsewhere; and
  - (iii) establishing momentum by already approving the application by the time the requirement to nominate a giftee was disclosed;
- (c) using standard form contracts that were confusing as to whether ownership passed at the end of the contract term and, if so, to whom;
- (d) after being put on notice in December 2017 that the standard form contracts contained inconsistencies that were relevant to their characterisation as consumer leases or credit contracts, failing to resolve the inconsistencies in their contracts;
- (e) assuming the Hire Contracts are credit contracts, failing to comply with the Rate Cap or the Disclosure Requirements and accessing Centrepay in circumstances where it had been approved to use Centrepay on the basis that the Hire Contracts were consumer leases;

- (f) adopting and implementing a business model and processes with some or all of the above features and in the above circumstances where it was required to ensure that it did not do so, to generate financial reward for itself at the expense of its clients;
  - (g) failing to have an officer of Darranda or a person performing duties on behalf of Darranda acting as the “key person” for the purposes of its Australian Credit Licence and failing to notify ASIC within five business days or at all that Harry Fares had ceased to be an officer of Darranda or to perform duties on behalf of Darranda with respect to its credit business and to lodge with ASIC an application for variation of that condition as required by s 47(1)(c) of the Credit Act. The “key person” condition is intended to ensure that a licensee ensures it has a person with appropriate qualifications and experience so that it has the competence to engage in all credit activities efficiently, honestly and fairly; and
  - (h) failing to have in place necessary compliance measures to ensure that the matters identified in the preceding subparagraphs did not occur.
19. Rent4Keeps was knowingly involved in Darranda’s conduct described above because it provided its franchisees including Darranda with the business model and processes described above and, among other things, in December 2017 it was put on notice through the compliance report issued by Holley Nethercote that its standard form contracts contained inconsistencies that were relevant to their characterisation as consumer leases or credit contracts.
20. In the circumstances, Rent4Keeps was involved in each contravention by Darranda. By reason of s 169 of the Credit Act, Rent4Keeps is also taken to have contravened s 24(1) of the Code concerning the Rate Cap and the General Obligations at s 47(1)(a) of the Credit Act.
21. The Applicant seeks against Darranda and Rent4Keeps:
- (a) declarations of contravention pursuant to ss 113 of the Code, 166 of the Credit Act and 21 of the *Federal Court of Australia Act 1976* (Cth);
  - (b) pecuniary penalties pursuant to s 167 of the Credit Act and/or 113 of the Code; and
  - (c) injunctions pursuant to s 177 of the Credit Act.

## **D ALLEGED DETRIMENT TO CONSUMERS**

22. In the Relevant Period, Darranda charged \$1,904,735.82 for the Hire Contracts, being over three times, or \$1,282,729.63, more than it would have been entitled to charge under the Rate Cap, equating to an average of \$2,406.62 overcharged on each contract.

Date: 11 April 2022

**Certificate of lawyer**

I, Georgina Thomas, certify to the Court that, in relation to the concise statement 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 concise statement.

Date: 11 April 2022



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Signed by Georgina Thomas  
Australian Securities and Investments Commission  
Lawyer for the Applicant