

FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Membo Finance Pty Limited (No 2) [2023] FCA 126

File number: NSD 209 of 2021

Judgment of: **YATES J**

Date of judgment: 23 February 2023

Catchwords: **CONSUMER LAW** – relief – admitted contraventions of *National Consumer Credit Protection Act 2009* (Cth) and National Credit Code – where applicant seeks declarations, pecuniary penalties and injunctions in relation to each respondent – where each respondent consents to all relief sought – whether appropriate to impose a single pecuniary penalty for multiple contraventions – relief sought granted

Legislation: *Corporations Act 2001* (Cth) s 912A
Federal Court of Australia Act 1976 (Cth) s 21
National Consumer Credit Protection Act 2009 (Cth) ss 47, 166, 167, 167A, 167B, 169, 177, 330, Sch 1 (*National Credit Code*) ss 72, 87, 88
Federal Court Rules 2011 (Cth) r 30.01
National Consumer Credit Protection Regulations 2010 (Cth) reg 36

Cases cited: *Australian Securities and Investments Commission v Rent 2 Own Cars Australia Pty Ltd* [2020] FCA 1312; 147 ACSR 598
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2017] FCAFC 113; 254 FCR 68
Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq) [2012] FCA 414; 88 ACSR 206
Australian Securities and Investments Commission v Westpac Banking Corp (No 2) [2018] FCA 751; 266 FCR 147
Commonwealth v Director, Fair Work Building Industry Inspectorate [2015] HCA 46; 258 CLR 482
RHG Mortgage Corp Ltd v Saunders [2016] NSWSC 929

Division: General Division

Registry: New South Wales

National Practice Area: Commercial and Corporations

Sub-area: Regulator and Consumer Protection

Number of paragraphs: 141

Date of hearing: 18 – 19 July 2022, 2 February 2023

Counsel for the Applicant: Mr A Harding SC, Ms A Garsia and Ms A Poukchanski

Solicitor for the Applicant: Australian Securities and Investments Commission

Counsel for the Respondents: The Respondents did not appear

ORDERS

NSD 209 of 2021

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION**
Applicant

AND: **MEMBO FINANCE PTY LIMITED (ACN 159 693 464)**
First Respondent

**RICHMOND GROUP FINANCIAL SERVICES PTY
LIMITED ACN 618 935 612**
Second Respondent

ORDER MADE BY: YATES J

DATE OF ORDER: 23 FEBRUARY 2023

THE COURT DECLARES THAT:

1. During the period 3 March 2020 to 16 December 2020, Membo Finance Pty Ltd (**Membo**) contravened s 72(4) of the National Credit Code (being Sch 1 to the *National Consumer Credit Protection Act 2009* (Cth) (**Act**)) (**Code**) on 38 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 (**Declaration 1**).
2. Richmond Group Financial Service Pty Ltd (**RGFS**) contravened s 72(4) of the Code on 38 occasions by being involved in the contraventions the subject of Declaration 1 (**Declaration 2**).
3. During the period 13 March 2019 to 16 December 2020, Membo by its conduct and its failures set out in subparagraphs (a) to (g) below 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 declaration in Order 1;
- (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 (**Declaration 3**).

4. RGFS contravened s 47(1)(a) of the Act by being involved in the contravention the subject of Declaration 3 (**Declaration 4**).
5. 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 (**Declaration 5**).
6. RGFS contravened s 47(1)(g) of the Act by being involved in the contravention the subject of Declaration 5 (**Declaration 6**).
7. During the period 15 December 2017 to 8 August 2020, Membo contravened s 87(2) of the Code on 75 occasions on which s 87 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 (**Declaration 7**).
8. 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 52 occasions on which s 87 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 (**Declaration 8**).
9. 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 23 occasions on which s 87 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 (**Declaration 9**).
- 10. During the period 18 May 2018 to 20 December 2019, Membo contravened s 88(1) of the Code on 59 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 (**Declaration 10**).
- 11. 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 (**Declaration 11**).
- 12. 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 22 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 (**Declaration 12**).
13. 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 reg 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 (**Declaration 13**).
14. 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 debtors and guarantors in a jurisdiction other than that prescribed by reg 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 (**Declaration 14**).
15. 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 reg 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 (**Declaration 15**).
16. 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 reg 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 (**Declaration 16**).

THE COURT ORDERS THAT:

- 17. Pursuant to s 167(2) of the Act, Membo pay to the Commonwealth of Australia a pecuniary penalty of \$1,500,000 in respect of Membo's contraventions of s 72(4) of the Code the subject of Declaration 1.
- 18. Pursuant to s 167(2) of the Act, RGFS pay to the Commonwealth of Australia a pecuniary penalty of \$1,500,000 in respect of RGFS's contraventions of s 72(4) of the Code the subject of Declaration 2.
- 19. Pursuant to s 167(2) of the Act, Membo pay to the Commonwealth of Australia a pecuniary penalty of \$1,200,000 in respect of Membo's contravention of s 47(1)(a) of the Act the subject of Declaration 3.
- 20. Pursuant to s 167(2) of the Act, RGFS pay to the Commonwealth of Australia a pecuniary penalty of \$1,200,000 in respect of RGFS's contravention of s 47(1)(a) of the Act the subject of Declaration 4.
- 21. Pursuant to s 167(2) of the Act, Membo pay to the Commonwealth of Australia a pecuniary penalty of \$100,000 in respect of Membo's contravention of s 47(1)(g) of the Act the subject of Declaration 5.
- 22. Pursuant to s 167(2) of the Act, RGFS pay to the Commonwealth of Australia a pecuniary penalty of \$100,000 in respect of RGFS's contravention of s 47(1)(g) of the Act the subject of Declaration 6.
- 23. Pursuant to s 167(2) of the Act, Membo pay to the Commonwealth of Australia a pecuniary penalty of \$30,000 in respect of Membo's contravention of s 47(1)(a) of the Act the subject of Declaration 9.
- 24. Pursuant to s 167(2) of the Act, Membo pay to the Commonwealth of Australia a pecuniary penalty of \$75,000 in respect of Membo's contravention of s 47(1)(a) of the Act the subject of Declaration 12.

25. Pursuant to s 167(2) of the Act, Membo pay to the Commonwealth of Australia a pecuniary penalty of \$300,000 in respect of Membo's contravention of s 47(1)(a) of the Act the subject of Declaration 14.
26. Pursuant to s 177 of the Act, Membo and RGFS discontinue such of the enforcement proceedings against debtors that:
 - (a) are listed in Schedule K to the Amended Further Concise Statement filed on 8 June 2022, being enforcement proceedings that 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) at the date of these orders, remain on foot.
27. Pursuant to s 177 of the Act, Membo and RGFS discontinue such of the enforcement proceedings against debtors or guarantors that:
 - (a) are listed in Schedule L to the Amended Further Concise Statement filed on 8 June 2022, being enforcement proceedings that were commenced in a jurisdiction other than the jurisdiction required by reg 36 of the Regulations; and
 - (b) at the date of these orders, remain on foot.
28. The respondents pay the costs of the applicant.

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

REASONS FOR JUDGMENT

YATES J:

INTRODUCTION

1 The applicant, the Australian Securities and Investments Commission (**ASIC**), has commenced this proceeding against the first respondent, Membo Finance Pty Ltd (**Membo**), and the second respondent, Richmond Group Financial Services Pty Ltd (**RGFS**), for contraventions of the *National Consumer Credit Protection Act 2009* (Cth) (the **NCCP Act**) and the National Credit Code (Sch 1 to the NCCP Act) (the **Code**) in relation to the conduct of a credit business trading as “ClearLoans”.

2 At all relevant times, Membo was the holder of an Australian credit licence under which the credit activities of the ClearLoans business were conducted. RGFS was Membo’s sole shareholder and, pursuant to a deed dated 18 September 2017, Membo’s sole credit representative under the Act. RGFS conducted the day-to-day functions of the ClearLoans business as Membo’s agent.

3 The ClearLoans business operated under an unsecured guarantor lending model. Under this model, loans of between \$3,000 and \$15,000 were advanced to borrowers (**debtors**) under a credit contract for terms of 12 to 60 months with a fixed interest rate of 43% per annum. The loans were secured by personal guarantees. The debtors usually made fixed monthly repayments by direct debit or by card payment authority. When a debtor failed to make a monthly repayment, RGFS, as Membo’s agent, attempted to obtain payment from the guarantor, once again by way of direct debit or card payment. No other security was taken in respect of the loans.

4 ASIC has identified five categories of contravening conduct, which it has described as: “**Hardship Claims**”; “**Training Claims**”; “**DD Default Claims**”; “**Enforcement Claims**”; and “**Jurisdiction Claims**”.

5 As to the Hardship Claims, ASIC alleges that Membo contravened s 72(4) of the Code on 38 occasions by failing to adequately respond to financial hardship notices given by debtors. It also alleges that Membo contravened s 47(1)(a) of the NCCP Act by failing to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly in

relation to the handling of financial hardship notices. It alleges that RGFS was involved in these contraventions.

6 As to the Training Claims, ASIC alleges that Membo contravened s 47(1)(g) of the NCCP Act by failing to ensure that its representatives were adequately trained and competent to engage in the credit activities authorised by its licence. ASIC alleges that RGFS was involved in that contravention.

7 As to the DD Default Claims, ASIC alleges that Membo contravened s 87(2) of the Code by failing on 75 occasions to issue notices to debtors and guarantors advising when a payment by direct debit had failed. ASIC also alleges that the circumstances of these failures, and the fact Membo failed to have systems and processes in place to ensure that the conduct did not occur, constituted a contravention of s 47(1)(a) of the NCCP Act.

8 As to the Enforcement Claims, ASIC alleges that Membo contravened s 88(1) of the Code on 59 occasions by commencing enforcement proceedings prematurely. ASIC also alleges that the circumstances of these contraventions, and the fact that Membo failed to have systems and processes in place to ensure that the conduct did not occur, constituted a contravention of s 47(1)(a) of the NCCP Act.

9 As to the Jurisdiction Claims, ASIC alleges that Membo, by its agent and representative RGFS, or alternatively RGFS itself, commenced court proceedings on 278 occasions against 519 debtors and guarantors to enforce credit contracts contrary to the requirement of reg 36 of the *National Consumer Credit Protection Regulations 2010* (Cth) (the **NCCP Regulations**) as to the jurisdiction in which such proceedings must be commenced. ASIC alleges that the circumstances of these contraventions and the fact that Membo failed to have in place systems and processes to ensure that the conduct did not occur, constituted a contravention of s 47(1)(a) of the NCCP Act. ASIC also alleges that Membo failed to take reasonable steps to ensure that its representatives complied with credit legislation in contravention of s 47(1)(e).

10 On 5 October 2021, I made an order pursuant to r 30.01 of the *Federal Court Rules 2011* (Cth) that all questions of liability under the NCCP Act and the Code be heard and determined separately from, and in advance of, all questions of relief (including declaratory relief and penalty). I also fixed the dates for the liability hearing.

11 The respondents were represented by solicitors and counsel for all case management hearings
and interlocutory hearings until 27 April 2022, when a notice of ceasing to act was filed by the
respondents' (then) solicitors.

12 On 3 June 2022, the Court received an email from Mourad Malki, who has been the only
director of Membo, and the only director of RGFS, since 15 November 2021. In that email,
Mr Malki informed the Court that, due to a lack of funding, new lawyers for the respondents
had not been appointed and that he would not be attending an upcoming case management
hearing on 6 June 2022. Mr Malki also stated that the respondents did not object to leave being
granted to ASIC to file an amended further concise statement (which had been discussed
between the parties).

13 At the case management hearing on 6 June 2022, I granted leave to ASIC to file the amended
further concise statement and noted that the hearing on liability was then estimated to take two
hearing days rather than the five days originally fixed on 5 October 2021.

14 The respondents did not appear at the hearing on liability on 18 and 19 July 2022. However,
at the commencement of the hearing, Senior Counsel for ASIC informed the Court that there
had been discussions between the parties culminating in correspondence in which Mr Malki
confirmed that the following statements represented Membo's and RGFS's respective
positions:

1. Membo Finance Pty Limited (**Membo**):

- a. admits all of the facts and contentions alleged in the Amended Further Concise Statement filed on 8 June 2022 (copy attached);
- b. no longer relies on the matters set out in its Response filed on 25 October 2021 (copy attached);
- c. consents to all of the relief sought in the Amended Originating Application sent to you by email on 11 July 2022 (copy attached) and will join with ASIC in a submission that pecuniary penalties totalling \$3,205,000 and set out in Annexure A are appropriate; and

2. Richmond Group Financial Services Pty Ltd (**RGFS**):

- a. admits all of the facts and contentions alleged in the Amended Further Concise Statement filed on 8 June 2022;
- b. no longer relies on the matters set out in its Response filed on on [sic] 25 October 2021 (copy attached); and
- c. consents to all of the relief sought in the Amended Originating Application sent to you by email on 11 July 2022 and will join with ASIC in a submission that pecuniary penalties totalling \$2,800,000 and

set out in Annexure B are appropriate.

15 Annexures A and B to that correspondence were as follows:

Annexure A - Pecuniary penalties for Membo

	Membo's contraventions	Pecuniary penalty
(a)	38 contraventions of s72 of the Code	\$1,500,000
(b)	s47(1)(a) of the Act relating to financial hardship	\$1,200,000
(c)	s47(1)(g) of the Act relating to training	\$100,000
(d)	s47(1)(a) of the Act relating to direct debit default notices sent in contravention of s87 of the Code	\$30,000
(e)	s47(1)(a) of the Act relating to premature commencement of proceedings in contravention of s88 of the Code	\$75,000
(f)	s47(1)(a) and/or s47(1)(e) of the Act relating to proceedings commenced in the wrong jurisdiction contrary to Regulation 36	\$300,000

Annexure B - Pecuniary penalties for RGFS

	RGFS contraventions	Pecuniary penalty
(a)	38 contraventions of s72 of the Code	\$1,500,000
(b)	s47(1)(a) of the Act relating to financial hardship	\$1,200,000
(c)	s47(1)(g) of the Act relating to training	\$100,000

16 At the hearing on liability, I was carefully taken through the comprehensive and detailed written submissions that ASIC had filed on the question of liability (**ALS**), as well as the supporting evidence. After taking time to consider the submissions and the evidence, I was satisfied that the alleged contraventions had been established. I was assisted in reaching this view by the admissions and concessions which Membo and RGFS had made.

17 On 20 September 2022, I made an order that the proceeding be listed for a hearing on relief on 2 February 2023. As anticipated, the respondents did not appear at that hearing. However, as recorded above, they had signified their consent to all the relief claimed by ASIC in its amended originating application and had agreed to the imposition of pecuniary penalties in the stated amounts.

18 ASIC has filed an amended originating application with the Court's leave. The amendments reflected in that document are only matters of detail that bring the amended originating

application into line with the amendments already made in the amended further concise statement, to which the respondents had consented.

19 ASIC has also filed comprehensive and detailed written submissions on the question of relief and penalty (**ARS**). At the hearing on relief, I was taken to aspects of those submissions as well as to some additional evidence, particularly in relation to Membo’s purported assignment of the ClearLoans loan book (a matter to which I will return).

20 Given their extensive and detailed nature, I do not propose to summarise all the submissions advanced by ASIC on liability and relief/penalty. Rather, I will focus on those matters that are of cardinal importance to these reasons.

21 Further, I do not propose to survey the principles to be applied in granting the relief that ASIC seeks. Those principles are not controversial and their application to the facts of the present case does not raise any novel question.

22 I will, however, record that it is appropriate to recognise the parties’ agreement—and in particular the respondents’ consent—to the relief that is now claimed. Even though the relief claimed includes pecuniary penalties for stated amounts, it is desirable to give effect to the parties’ agreement on appropriate civil remedies where the court is sufficiently persuaded of the accuracy of the parties’ agreement as to the relevant facts and their consequences, and that what is proposed, by way of relief, is appropriate: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [57] – [59].

DECLARATORY RELIEF

Introduction

23 ASIC seeks declarations pursuant to s 21 of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**) and pursuant to s 166 of the NCCP Act. The reason for calling in aid both provisions is that some contraventions are of civil penalty provisions (in which case, ASIC relies on s 166 of the NCCP Act) while other contraventions are not of civil penalty provisions or are of provisions that were not civil penalty provisions at the time the contraventions occurred (in which case, ASIC relies on s 21 of the FCA Act).

24 Section 21 of the FCA Act provides:

21 Declarations of right

(1) The Court may, in civil proceedings in relation to a matter in which it has

original jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed.

- (2) A suit is not open to objection on the ground that a declaratory order only is sought.

25 Section 166 of the NCCP Act provides:

166 Declaration of contravention of civil penalty provision

Application for declaration of contravention

- (1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for a declaration that the person contravened the provision.

Declaration of contravention

- (2) The court must make the declaration if it is satisfied that the person has contravened the provision.

- (3) The declaration must specify the following:

- (a) the court that made the declaration;
- (b) the civil penalty provision that was contravened;
- (c) the person who contravened the provision;
- (d) the conduct that constituted the contravention.

Declaration of contravention conclusive evidence

- (4) The declaration is conclusive evidence of the matters referred to in subsection (3).

26 The mandatory requirement of s 166(2) should be noted. It should also be noted that the making of a declaration under s 166 is a prerequisite to granting injunctive relief under s 167 of the NCCP Act, which I address below.

27 As a general observation, I am satisfied that the granting of declaratory relief in the present case is justified and appropriate, for the reasons set out in ARS paras 32 – 41.

The Hardship Claims

28 ASIC seeks four declarations in relation to the Hardship Claims (**Declaration 1, Declaration 2, Declaration 3, and Declaration 4**). These declarations reflect the substance of the declarations claimed in prayers 1 to 4, respectively, of the amended originating application. The declarations are sought under s 166 of the NCCP Act.

29 The Hardship Claims concern the response of the ClearLoans business to notices of financial hardship given by debtors during the first year of the COVID-19 pandemic. Section 72 of the Code provides a procedural scheme, in respect of credit contracts to which the Code applies,

by which debtors can notify credit providers of financial hardship and seek to make changes to their credit contracts. As ASIC submitted in ALS para 84, s 72 of the Code provides an important formal mechanism to protect consumers who may be vulnerable in times of financial hardship.

30 Section 72 of the Code provides:

72 Changes on grounds of hardship

Hardship notice

- (1) If a debtor considers that he or she is or will be unable to meet his or her obligations under a credit contract, the debtor may give the credit provider notice (a **hardship notice**), orally or in writing, of the debtor's inability to meet the obligations.

Note: If the debtor gives the credit provider a hardship notice, there may be requirements (beyond those in section 88) that the credit provider must comply with before beginning enforcement proceedings—see section 89A.

Further information

- (2) Within 21 days after the day of receiving the debtor's hardship notice, the credit provider may give the debtor notice, orally or in writing, requiring the debtor to give the credit provider specified information within 21 days of the date of the notice stated in the notice. The information specified must be relevant to deciding:
- (a) whether the debtor is or will be unable to meet the debtor's obligations under the contract; or
 - (b) how to change the contract if the debtor is or will be unable to meet those obligations.
- (3) The debtor must comply with the requirement.

Note: The credit provider need not agree to change the credit contract, especially if the credit provider:

- (a) does not believe there is a reasonable cause (such as illness or unemployment) for the debtor's inability to meet his or her obligations; or
- (b) reasonably believes the debtor would not be able to meet his or her obligations under the contract even if it were changed.

Notice of decision on changing credit contract

- (4) The credit provider must, before the end of the period identified under subsection (5), give the debtor a notice:
- (a) that is in the form (if any) prescribed by the regulations and records the fact that the credit provider and the debtor have agreed to change the credit contract; or
 - (b) that is in the form (if any) prescribed by the regulations and states:
 - (i) the credit provider and the debtor have not agreed to change the

credit contract; and

- (ii) the reasons why they have not agreed; and
- (iii) the name and contact details of the AFCA scheme; and
- (iv) the debtor's rights under that scheme.

Civil penalty: 5,000 penalty units.

- (5) The credit provider must give the notice before the end of the period identified using the table.

Period for giving notice		
	If:	The period is:
1	The credit provider does not require information under subsection (2)	21 days after the day of receiving the hardship notice
2	The credit provider requires information under subsection (2) but does not receive any information in compliance with the requirement	28 days after the stated date of the notice under subsection (2)
3	The credit provider requires information under subsection (2) and receives information in compliance with the requirement	21 days after the day of receiving the information

Regulations may prescribe shorter periods for credit contracts

- (6) The regulations may provide for subsections (2), (3), (4) and (5) to have effect in relation to credit contracts prescribed by the regulations as if a particular reference in subsection (2) or (5) to a number of days were a reference to a lesser number of days prescribed by the regulations.

31 ASIC's case on the Hardship Claims concerns 38 occasions in which (a) hardship notices were given; (b) there was no agreement between Membo and a debtor to change the credit contract; and (c) Membo failed to provide a notice in accordance with s 72(4)(b) of the Code.

32 Although the form of the notice that was required to be given was not prescribed by regulation as envisaged by s 72(4), I accept ASIC's submission (at ALS paras 105 – 107) that the notice must be given in written (not oral) form: cf *RHG Mortgage Corp Ltd v Saunders* [2016] NSWSC 929 at [36].

33 The circumstances giving rise to Membo's contraventions of s 72(4) of the Code, and ASIC's case against it, are set out, principally, in ALS paras 82 – 126, 131 – 133, 145 and 151. On the evidence before me, and having regard to Membo's admissions and concessions, I am satisfied that those contraventions have been established. Declaration 1 is directed to these contraventions and should (must) be made.

34 I am also satisfied that the acts and omissions of Membo were carried out by RGFS as Membo's sole credit representative and agent. The circumstances giving rise to RGFS's corresponding liability, and ASIC's case against it, are set out at ALS paras 203 – 231. On the evidence before me, and having regard to RGFS's admissions and concessions, I am satisfied that RGFS was knowingly concerned in or party to the contraventions and, thus, involved in the contraventions within the meaning of s 169(b) of the NCCP Act: see s 5 thereof, and *Australian Securities and Investments Commission v Rent 2 Own Cars Australia Pty Ltd* [2020] FCA 1312; 147 ACSR 598 at [121]. Declaration 2 is directed to this contravention and should (must) be made.

35 ASIC's case on the Hardship Claims also involves Membo's conduct as a licensee, as assessed under s 47(1)(a) of the NCCP Act, which provides:

- (1) A licensee must:
 - (a) do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly; ...

36 Section 47(1)(a) became a penalty provision on 13 March 2019.

37 ASIC submits, and I accept, that the cases under s 912A(1)(a) of the *Corporations Act 2001* (Cth), which imposes the same obligation on holders of Australian financial services licences, inform the meaning of the expression "efficiently, honestly and fairly" as used in s 47(1)(a).

38 In *Australian Securities and Investments Commission v Camelot Derivatives Pty Ltd (in liq)* [2012] FCA 414; 88 ACSR 206 at [69] – [70], Foster J said:

69 In support of the relief which it seeks based upon s 912A(1)(a) of the Corporations Act, ASIC made the following submissions:

- (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. ([126])
- (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]. ([127])
- (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. ([128])

- (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. ([129])
- (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. ([130])

70 The submissions which I have extracted at [69] above are correct and I accept them.

39 In *Australian Securities and Investments Commission v Westpac Banking Corp (No 2)* [2018] FCA 751; 266 FCR 147, Beach J observed at [2350]:

2350 Further, it is also not in doubt that a contravention of the “efficiently, honestly and fairly” standard does not require a contravention or breach of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise. The statutory standard itself is the source of the obligation.

40 Declaration 3 is directed to Membo's contravention of s 47(1)(a). At the liability hearing, ASIC advanced this contravention solely on the basis of the cumulative effect of seven categories of particularised conduct. One category is Membo's failure to give the notices referred to in Declaration 1.

41 The circumstances giving rise to this contravention, and ASIC's case against Membo, are set out in detail in ALS paras 163 – 202. On the evidence before me, and having regard to Membo's admissions and concessions, I am satisfied that this contravention has been established and that Declaration 3 should (must) be made.

42 The circumstances giving rise to RGFS's corresponding contravention, and ASIC's case against it, are set out in ALS paras 232 – 240. On the evidence before me, and having regard to RGFS's admissions and concessions, I am satisfied that RGFS was involved in Membo's contravention, such that it also contravened s 47(1)(a) by dint of s 169(b) of the NCCP Act. Declaration 4 is directed to that contravention and should (must) be made.

The Training Claims

43 ASIC seeks two declarations in relation to the Training Claims (**Declaration 5** and **Declaration 6**). These declarations reflect the substance of the declarations claimed in prayers 5 and 6,

respectively, of the amended originating application. The declarations are sought under s 166 of the NCCP Act.

44 The Training Claims concern Membo’s obligation under s 47(1)(g) of the NCCP Act, which provides:

(1) A licensee must:

...

(g) ensure that its representatives are adequately trained, and are competent, to engage in the credit activities authorised by the licence; ...

45 As ASIC stressed in its written submissions on liability (ALS para 244), the statutory obligation is to ensure that representatives are adequately trained *and* competent. Further, I accept that the definition of “representative” (see s 5 of the NCCP Act) is broad, particularly having regard to para (iv) of the definition which refers to “any other person acting on behalf of the licensee”.

46 ASIC relies on two types of conduct as constituting Membo’s failure to ensure that its representatives were adequately trained, and competent, to engage in the credit activities authorised by Membo’s licence. First, customer service representatives had failed, and not completed, training modules but were allowed to work in customer facing roles in the ClearLoans business. Secondly, from 13 March 2019 to 28 August 2020, Membo provided ClearLoans staff with a Hardship Training Guide. This guide misstated the threshold requirements for a debtor to give a hardship notice. ASIC’s case is that, either individually or together, these two types of conduct amounted to a breach of Membo’s training obligations.

47 The circumstances giving rise to Membo’s contravention of s 47(1)(g), and ASIC’s case against it, are set out in ALS paras 248 – 259. On the evidence before me, and having regard to its admissions and concessions, I am satisfied that Membo’s contravention of s 47(1)(g) of the NCCP Act has been established. Declaration 5, which is directed to that conduct, should (must) be made.

48 The circumstances giving rise to RGFS’s liability, and ASIC’s case against it, are set out in ALS para 260. On the evidence before me, and having regard to RGFS’s admissions and concessions, I am satisfied that RGFS was involved in Membo’s contravention such that it also contravened s 47(1)(g) by dint of s 169(b) of the NCCP Act. Declaration 6 is directed to that contravention and should (must) be made.

DD Default Claims

49 ASIC seeks three declarations in relation to the DD Default Claims (**Declaration 7, Declaration 8, and Declaration 9**). These declarations reflect the substance of the declarations claimed in prayers 7, 8 and 9, respectively, of the amended originating application.

50 Declaration 7 and Declaration 8 are sought under s 21 of the FCA Act. Declaration 9 is sought under s 166 of the NCCP Act.

51 The conduct in question concerns 75 occasions of failure to issue notices when a debtor's loan repayments by direct debit failed for the first time. In this regard, s 87 of the Code provides:

- (1) This section applies if:
 - (a) a debtor authorises payment of an amount for a credit contract by direct debit; and
 - (b) default occurs; and
 - (c) it is the first occasion the default occurs.
- (2) The credit provider must give the debtor, and any guarantor, a notice, complying with this section, within 14 days of the default occurring.

Criminal penalty: 50 penalty units.

- (3) The notice must contain the information prescribed under the regulations.
- (4) Subsection (2) is an offence of strict liability.

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

- (5) This section does not affect any other requirement under this Code to give a notice.

52 Despite the fact that contravention of s 87(2) is a criminal offence, s 87(2) is not a civil penalty provision—hence ASIC's reason for seeking Declaration 7 under s 21 of the FCA Act.

53 The circumstances giving rise to Membo's contravention of s 87(2) of the Code, and ASIC's case against it under that provision, are set out in ALS paras 272 – 285. I note that the failure to issue s 87 notices appears to have resulted from a "system error" which Membo self-reported to ASIC.

54 On the evidence before me, having regard to Membo's admissions and concessions, I am satisfied that Membo's contravention of s 87(2) of the Code is established. Declaration 7 should be made.

55 The conduct in question not only constituted a contravention of s 87(2) of the Code. Membo failed to have in place systems and processes to prevent the conduct occurring in the first place.

It thereby contravened s 47(1)(a) of the NCCP Act which, as I have noted, required Membo to engage in credit activities “efficiently, honestly and fairly”.

56 The circumstances giving rise to Membo’s contravention of s 47(1)(a) in this regard, and ASIC’s case against it, are set out in ALS paras 295 – 300. On the evidence before me, and having regard to Membo’s admissions and concessions (including its contention that the failure to give the relevant notices was a system error), I am satisfied that Membo’s contravention of s 47(1)(a) is established.

57 Membo’s contravention of s 47(1)(a) falls into two time periods.

58 The first period 15 December 2017 to 12 March 2019, when s 47(1)(a) was not a civil penalty provision. In that period, Membo failed to give the required notice on 52 occasions, contrary to s 87(2) of the Code. Declaration 8 is directed to the contravention of s 47(1)(a) in this period and is sought under s 21 of the FCA Act. This declaration should be made.

59 The second period is 13 March 2019 to 8 August 2020, when s 47(1)(a) was a civil penalty provision. In this period, Membo failed to give the required notice on 23 occasions, contrary to s 87(2) of the Code. Declaration 9 is directed to the contravention of s 47(1)(a) in this period and is sought under s 166 of the NCCP Act. This declaration should (must) be made.

Enforcement Claims

60 ASIC seeks three declarations in relation to the Enforcement Claims (**Declaration 10, Declaration 11, and Declaration 12**). These declarations reflect the substance of the declarations claimed in prayers 10, 11, and 12, respectively, of the amended originating application.

61 Declaration 10 and Declaration 11 are sought under s 21 of the FCA Act. Declaration 12 is sought under s 166 of the NCCP Act.

62 The conduct in question concerns 59 occasions when Membo commenced enforcement proceedings against a debtor prematurely, contrary to s 88(1) of the Code, which provides:

Enforcement of credit contract

- (1) A credit provider must not begin enforcement proceedings against a debtor in relation to a credit contract unless:
 - (a) the debtor is in default under the credit contract; and
 - (b) the credit provider has given the debtor, and any guarantor, a default notice, complying with this section, allowing the debtor a period of at

least 30 days from the date of the notice to remedy the default; and

- (c) the default has not been remedied within that period; and
- (d) if the credit contract is for a reverse mortgage, the credit provider has spoken to one of the following persons by telephone or in person in that period and has thus both confirmed that the debtor received the default notice and informed the person of the consequences of failure to remedy the default, or has made reasonable efforts to do so:
 - (i) the debtor;
 - (ii) a practising lawyer representing the debtor;
 - (iii) a person with a power of attorney relating to the debtor's financial affairs.

Criminal penalty: 50 penalty units.

Note: If a debtor or guarantor has given a credit provider a hardship notice or a postponement request there may be extra requirements that the credit provider must comply with before beginning enforcement proceedings: see sections 89A and 94.

63 Despite the fact that contravention of s 88(1) of the Code is a criminal offence, s 88(1) is not a civil penalty provision—hence ASIC's reason for seeking Declaration 10 under s 21 of the FCA Act.

64 The circumstances giving rise to Membo's contravention of s 88(1) of the Code, and ASIC's case against it under that provision, are set out in ALS paras 301 – 309. On the evidence before me, and having regard to Membo's admissions and concessions, I am satisfied that Membo's contraventions of s 88(1) of the Code are established. Declaration 10 should be made.

65 The conduct in question not only constituted contravention of s 88(1) of the Code. Once again, Membo failed to have in place systems and processes to prevent the conduct occurring in the first place. It thereby also contravened s 47(1)(a) of the NCCP Act.

66 The circumstances giving rise to Membo's contravention of s 47(1)(a) in this regard, and ASIC's case against it, are set out in ALS paras 310 – 311. On the evidence before me, and having regard to Membo's admissions and concessions, I am satisfied that Membo's contravention of s 47(1)(a) is also established.

67 Membo's contravention of s 47(1)(a) falls into two time periods.

68 The first period is 18 May 2018 to 12 March 2019, when s 47(1)(a) was not a civil penalty provision. In that period, Membo, through RGFS, began enforcement proceedings on 37 occasions when s 88(1) of the Code was not complied with. Declaration 11 is directed to the

contravention of s 47(1)(a) in this period and is sought under s 21 of the FCA Act. This declaration should be made.

69 The second period is 13 March 2019 to 20 December 2019, when s 47(1)(a) was a civil penalty provision. In that period, Membo, through RGFS, began enforcement proceedings on 22 occasions when s 88(1) of the Code was not complied with. Declaration 12 is directed to the contravention of s 47(1)(a) in this period and is sought under s 166 of the NCCP Act. This declaration should (must) be made.

The Jurisdiction Claims

70 ASIC seeks four declarations in relation to the Jurisdiction Claims (**Declaration 13, Declaration 14, Declaration 15, and Declaration 16**). These declarations reflect the substance of the declarations claimed in prayers 13, 14, 15, and 16, respectively, of the amended originating application.

71 In the period 11 May 2018 to 12 March 2020, Membo, through RGFS, commenced 278 proceedings in the Parramatta Local Court in New South Wales to enforce credit contracts and/or guarantees regulated under the NCCP Act against 519 debtors and guarantors who did not ordinarily reside in New South Wales. The commencement of those proceedings in New South Wales was contrary to reg 36 of the *National Consumer Credit Protection Regulations 2010* (Cth) (the **NCCP Regulations**).

72 Section 330 of the NCCP Act provides that the location where court proceedings in relation to (amongst other things) credit contracts and guarantees *must* be brought, can be prescribed by regulations. Regulation 36 of the NCCP Regulations relevantly provides:

- (1) For section 330 of the Act, this regulation sets out where court proceedings may be brought.
- (2) ...
- (3) Subject to subregulation (4), a court proceeding must be brought in a court of the State or Territory where the debtor, mortgagor or guarantor ordinarily resides, if the court proceeding:
 - (a) is in relation to:
 - (i) a credit contract; or
 - (ii) ...
 - (iii) ...
 - (iv) a guarantee;

regulated under the Act; and

(b) involves a debtor, mortgagor or guarantor.

(4) For subregulation (3), if it is not known where the debtor, mortgagor or guarantor ordinarily resides, the court proceeding must be brought in a court of the State or Territory where the debtor, mortgagor or guarantor ordinarily resided at the time the credit contract, consumer lease, mortgage or guarantee was made.

...

73 ASIC's case is that Membo did not have in place systems and processes to prevent this conduct from occurring and that Membo thereby contravened s 47(1)(a). ASIC also says that Membo contravened s 47(1)(e) of the NCCP Act by failing to take reasonable steps to ensure that RGFS complied with credit legislation, including reg 36.

74 The evidence reveals that, despite debtors and guarantors residing all over Australia, the practice within the ClearLoans business, when enforcing contracts against defaulting debtors and guarantors, was to commence proceedings in the Parramatta Local Court.

75 I have already quoted s 47(1)(a). Section 47(1)(e) provides:

(1) A licensee must:

...

(e) take reasonable steps to ensure that its representatives comply with the credit legislation; ...

76 The facts and circumstances giving rise to Membo's contraventions, and ASIC's case against it in this regard, are set out, principally, in ALS paras 316 – 344. On the evidence before me, and having regard to Membo's admissions and concessions, I am satisfied that Membo's contraventions of s 47(1)(a) and s 47(1)(e) are established.

77 Once again, these contraventions fall into two time periods.

78 The first period is 11 May 2018 to 12 March 2019, when s 47(1)(a) and s 47(1)(e) were not civil penalty provisions. In that period, proceedings were commenced against 263 debtors and guarantors, contrary to the requirement of reg 36. Declaration 13 and Declaration 15 are directed to the contraventions in this period and are sought under s 21 of the FCA Act. These declarations should be made.

79 The second period is 13 March 2019 to 12 March 2020, when s 47(1)(a) and s 47(1)(e) were civil penalty provisions. In that period, proceedings were brought against 256 debtors and guarantors, contrary to the requirement of reg 36. Declaration 14 and Declaration 16 are

directed to the contraventions in this period and are sought under s 166 of the NCCP Act. These declarations should (must) be made.

PENALTY

Introduction

80 Section 167 of the NCCP Act provides:

167 Court may order person to pay pecuniary penalty for contravening civil penalty provision

Application for order

- (1) Within 6 years of a person contravening a civil penalty provision, ASIC may apply to the court for an order that the person pay the Commonwealth a pecuniary penalty.

Court may order person to pay pecuniary penalty

- (2) If a declaration has been made under section 166 that the person has contravened the provision, the court may order the person to pay to the Commonwealth a pecuniary penalty that the court considers is appropriate (but not more than the amount specified in section 167A).

Determining pecuniary penalty

- (3) In determining the pecuniary penalty, the court must take into account all relevant matters, including:
 - (a) the nature and extent of the contravention; and
 - (b) the nature and extent of any loss or damage suffered because of the contravention; and
 - (c) the circumstances in which the contravention took place; and
 - (d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in similar conduct.

Civil enforcement of penalty

- (4) A pecuniary penalty is a debt payable to the Commonwealth.
- (5) The Commonwealth may enforce a pecuniary penalty order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgement debt.

81 In light of my satisfaction that declarations under s 166 of the NCCP Act should be made in respect of the Hardship Claims, the Training Claims, the DD Default Claims, the Enforcement Claims, and the Jurisdiction Claims, the requirement of s 167(2) is satisfied for the imposition of pecuniary penalties in respect of those declared contraventions.

82 In respect of each contravention, the pecuniary penalty must not be more than the “pecuniary penalty applicable” to the contravention, as defined (for a body corporate) in s 167B(2) of the NCCP Act: s 167A.

83 Section 167B(2) provides:

Pecuniary penalty applicable to the contravention of a civil penalty provision—by a body corporate

- (2) The **pecuniary penalty applicable** to the contravention of a civil penalty provision by a body corporate is the greatest of:
- (a) the penalty specified for the civil penalty provision, multiplied by 10; and
 - (b) if the court can determine the benefit derived and detriment avoided because of the contravention—that amount multiplied by 3; and
 - (c) either:
 - (i) 10% of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision; or
 - (ii) if the amount worked out under subparagraph (i) is greater than an amount equal to 2.5 million penalty units—2.5 million penalty units.

84 ASIC submits that, in applying s 167B(2) in the present case, the appropriate penalties are to be gauged by reference to para (a). This is because, in relation to para (b), it is not possible to quantify the benefit of the contravening conduct to Membo and RGFS. ASIC certainly does not contend that Membo or RGFS derived any substantial monetary benefit from the contraventions.

85 In relation to para (c), ASIC submits that the financial information that is available is incomplete or lacking in the detail necessary to calculate a penalty based on turnover. It submits that, in any event, 10% of the annual turnover for each of Membo and RGFS at any given time would be less than the amount provided for under para (a), based on the available financial statements for Membo and RGFS (as to which, see below).

86 I am prepared to accept those submissions.

87 Turning to para (a), the specified penalty for contravention of each relevant subsection of s 47(1) of the NCCP Act, and of s 72(4) of the Code, is 5,000 penalty units. For contraventions that occurred in the period 1 July 2017 to 30 June 2020, the penalty unit amount is \$210. For contraventions that occurred in the period on and after 1 July 2020, the penalty unit amount is

\$222. Therefore, the maximum penalty for each contravention is an amount between \$10.5 million and \$11.1 million, depending on the date of the contravention in question.

88 ASIC submits, and I accept, that the maximum penalties available (having regard to ss 167A and 167B(2) of the NCCP Act) should be considered in the context of the financial size of the respondents. The maximum penalty per contravention represents a significant proportion of, or more than, their annual turnover. The Court has been informed that the parties have taken those parameters into account in agreeing upon the amount of the appropriate penalties in this case.

89 ASIC has drawn the Court's attention to a number of general principles with respect to the imposition of pecuniary penalties: see ARS paras 42 – 59. I will not repeat those principles in these reasons, save to note ASIC's reliance on the principle that, where there are multiple contraventions of a provision, it may be permissible and appropriate for the court to impose a single pecuniary penalty for those contraventions, even when a course of conduct analysis is not adopted.

90 In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; 254 FCR 68 (*ABCC v CFMEU*), the Full Court said (at [145]):

145 The decisions in both *Coles Supermarkets* and *Matcham* tend to suggest that ... it may be permissible and appropriate for the Court to impose a single pecuniary penalty for multiple contraventions of a civil penalty provision or provisions having regard to the approach jointly taken by the parties in the pleadings, statement of agreed facts, and submissions. In particular, where the parties jointly propose to the Court that, having regard to the particular facts and nature of the contraventions, it would be appropriate to impose a single penalty, or to group the contraventions in terms of separate courses of conduct and impose single penalties in respect of those groups, the Court may accept that proposal and order a single penalty, or single penalties in respect of groups of contraventions.

91 At [149], the Full Court also said:

149 In an appropriate case ... the Court may impose a single penalty for multiple contraventions where that course is agreed or accepted as being appropriate by the parties. It may be appropriate for the Court to impose a single penalty in such circumstances, for example, where the pleadings and facts reveal that the contraventions arose from a course of conduct and the precise number of contraventions cannot be ascertained, or the number of contraventions is so large that the fixing of separate penalties is not feasible, or there are a large number of relatively minor related contraventions that are most sensibly considered compendiously. As revealed generally by the reasoning in *Commonwealth v Director, FWBII*, there is considerably greater scope for

agreement on facts and orders in civil proceedings than there is in criminal sentence proceedings. As with agreed penalties generally, however, the Court is not compelled to accept such a proposal and should only do so if it is considered appropriate in all the circumstances. It is also at the very least doubtful that such an approach can be taken if it is opposed or the proceedings are defended.

92 In ARS paras 85 – 104, ASIC has drawn attention to a number of factors that are relevant, generally, to the Court’s consideration of the appropriate penalties in this case.

93 First, as to deterrence, ASIC points to the fact that a company called Greenwich Pty Ltd (**Greenwich**) now claims to have the legal and equitable title to the ClearLoans’ loan book and appears to be carrying on the ClearLoans business to the exclusion of Membo and RGFS. This is consistent with advice given by Membo to ASIC in 2020 that it intended to exit the Australian market. While these circumstances are relevant to whether the necessity for specific deterrence remains, Membo still holds an Australian credit licence. As ASIC submits, the possibility exists that Membo might resume trading in Australia, potentially with RGFS’s involvement.

94 General deterrence remains an important consideration, particularly having regard to the protective nature of the provisions that have been contravened and the vulnerabilities of debtors who are the subject of those protections.

95 Secondly, as to the respondents’ size, the evidence is incomplete. Documents produced by Membo show that it had a gross income of \$9.5 million and \$16.4 million for the 2019 and 2020 financial years respectively, with substantial net profits of \$6 million and \$10.5 million for the same years. Documents produced by RGFS for the same period show no gross income and significant net losses.

96 The ultimate parent company of the respondents, Richmond Group Limited (**Richmond**), is located in the United Kingdom and is of a substantial financial size. Its financial statements for the financial years ended 31 March 2019 and 31 March 2020 show significant revenue (£308.3 million and £343.2 million, respectively) as well as a substantial profit after tax of £70.8 million for the 2019 financial year. Richmond recorded a loss after tax of £12.5 million for the 2020 financial year.

97 ASIC submits, and I accept, that the available evidence shows that Membo had a substantial business operation during the relevant period and that the size of Membo and RGFS is not inconsistent with the imposition of the agreed penalties.

98 Thirdly, as to whether Membo and RGFS have a culture of compliance, ASIC points to the fact that the ClearLoans business operated in Australia for a short time, from 2017, before the earliest contraventions commenced. There is no baseline against which a culture of compliance can be meaningfully assessed. I accept that submission.

99 Fourthly, as to prior conduct, so far as ASIC is aware neither respondent has been found by a court to have engaged in similar conduct, whether in Australia or overseas.

100 Fifthly, as to cooperation and contrition, it is relevant to bear in mind that each respondent agreed to make admissions and consent to the relief sought by ASIC. However, this was done immediately prior to the liability hearing and did not relieve ASIC from the burden of preparing extensive evidence in support of its case and in response to the denials and assertions previously made by each respondent in their Responses filed on 25 October 2021. ASIC submits, and I accept, that limited weight should be given to the degree of cooperation offered in this case. The respondents have not participated in the liability hearing or the penalty hearing and have proffered no evidence of contrition.

101 Sixthly, the evidence suggests that the day-to-day management and administration of the ClearLoans business was carried out by senior management. ASIC points to the involvement of Mr Garcia in the conduct of the ClearLoans business. Mr Garcia was, variously, the Responsible Manager, the Risk Manager, and the Breach Manager of RGFS. He also undertook other roles, including as Training Manager. Mr Garcia reported to, and was in frequent contact with, the Chief Executive Officer, Mr Waylett, and the Chief Operating Officer, Mr Malki in relation to day-to-day management and operational matters concerning the ClearLoans business. ASIC submits, and I accept, that it should be inferred that senior management had a level of day-to-day involvement with, and an understanding of, the ClearLoans business and had, at least, a general awareness of the circumstances relating to the contraventions.

102 I now turn to ASIC's submissions in respect of the particular contraventions, recognising, once again, that the quantum of the proposed penalties represents an agreed position between the parties.

The Hardship Claims

103 ASIC seeks a pecuniary penalty of \$1.5 million in relation to Membo’s 38 contraventions of s 72(4) of the Code referred to in Declaration 1. It also seeks a pecuniary penalty of \$1.5 million in relation to RGFS’s corresponding contraventions referred to in Declaration 2.

104 Each failure to give a notice in accordance with s 72(4) of the Code was a separate contravention. ASIC submits that these contraventions should not be considered as a single course of conduct. ASIC submits that each contravention arose from a “personalised and individualised interaction” between the ClearLoans business and an individual debtor who gave a hardship notice, and the “failure to give each notice occurred in the individual circumstances of each debtor’s case”. ASIC also submits that the number of contraventions is not so large as to be incapable of separate analysis. That said, ASIC submits that it is appropriate that the Court impose a single penalty, having regard to the parties’ agreement and the observations of the Full Court in *ABCC v CFMEU*, discussed above.

105 ASIC submits that the contravening conduct, in each case, falls in “the middle range of seriousness”. As ASIC puts it, the contravening conduct:

... represents a total failure to comply with the obligation provided for by the provision, in circumstances where the obligation was imposed for the protection of consumers that had already expressed their vulnerable circumstances by applying for hardship arrangements. The large number of debtors to whom hardship notices were not provided supports the inference that the failure was not a limited oversight but illustrative of a general practice. The conduct was such that, as a result, certain debtors may have been denied the opportunity of potentially having their credit contracts amended to accommodate the circumstances of hardship. Moreover, the conduct meant that debtors were deprived of the reasons for the refusal of their hardship request, as well as information about the Australian Financial Complaints Authority (AFCA) which may have been of assistance to them had they wished to seek redress by way of a complaint to AFCA or by some other means.

106 As regards Membo, ASIC submits that it was the credit provider that held the ultimate responsibility under the licence, and its failure, as a licensee, to comply with the Code is serious. As to RGFS, ASIC submits that it was knowingly involved in the contraventions and had carriage of the day-to-day operation of the ClearLoans business, including as to hardship matters.

107 It is not necessary for me to form a view as to whether, preferably, the course of conduct principle should be applied given that the parties propose that a single pecuniary penalty be imposed against each respondent in any event. I am satisfied that a single pecuniary penalty is appropriate in each case and that the amount sought, and agreed to, is an appropriate penalty.

108 ASIC seeks a pecuniary penalty of \$1.2 million in relation to Membo’s contravention of s 47(1)(a) of the NCCP Act referred to in Declaration 3. It also seeks a pecuniary penalty of \$1.2 million in relation to RGFS’s corresponding contravention referred to in Declaration 4.

109 These penalties are for contravening conduct which occurred wholly on or after 13 March 2019, when s 47(1)(a) became a civil penalty provision (as is made clear by the prefatory words of Declaration 3).

110 ASIC submits that, as against the range of conduct that may be captured by s 47(1)(a), the conduct in this case should be considered at “the lower end of the mid-range of seriousness”. ASIC submits that, except for some aspects of the contravening conduct (namely, the conduct identified in subparas (a) and (g) of Declaration 3—although I would add subpara (b)), the contravention involved conduct that did not involve general practices but rather conduct that impacted individual debtors. ASIC submits:

Whilst the number of affected debtors is relatively low, the nature of the conduct, including failure to advise of financial hardship policies and processes ... wrongly insisting on a 48 hour period for provision of documentation ... and failing to consider hardship notices prior to ascertaining that the guarantor was unable to meet the obligations under their guarantee contract ... is such that it may have had a serious effect on those debtors and caused them substantial stress, anxiety and potential financial difficulty.

111 ASIC acknowledges that there is no evidence that the contravening conduct involved a deliberate or wilful contravention of the NCCP Act. It does, however, refer to the evidence of several debtors, whose affidavits were read at the liability hearing, of the harm suffered by reason of the contravention.

112 I note that there is some overlap between the conduct that contravened s 72(4) of the Code and s 47(1)(a) of the NCCP Act: see subpara (c) of Declaration 3. The application of the rule against double punishment (codified in s 175 of the NCCP Act) means that penalties will not be imposed twice for that conduct.

113 I am satisfied that the amounts sought against Membo and RGFS as pecuniary penalties for these contraventions of s 47(1)(a) of the NCCP Act are appropriate.

The Training Claims

114 ASIC seeks a pecuniary penalty of \$100,000 against Membo in relation to its contravention of s 47(1)(g) of the NCCP Act referred to in Declaration 5. It seeks a pecuniary penalty of \$100,000 in relation to RGFS’s corresponding contravention referred to in Declaration 6.

115 ASIC submits that the contravening conduct falls in “the middle range of seriousness”. As ASIC explained:

... It is not in the low range because it involves the absence of any training whatsoever to particular members of staff, who continued to work in customer facing roles for substantial periods of time. It also involves the misstatement of the threshold requirements for the giving of a hardship notice such as to raise them and in a way that was capable of confusing or discouraging debtors that wished to enquire about hardship arrangements.

116 ASIC submits that the nature of the conduct was such that it was capable of directly affecting customers experiencing financial hardship by making it harder for them to give hardship notices. However, there is no evidence to suggest that the conduct was deliberate.

117 I am satisfied that the amounts sought against Membo and RGFS as pecuniary penalties for these respective contraventions of s 47(1)(g) of the NCCP Act are appropriate.

DD Default Claims

118 ASIC seeks a pecuniary penalty of \$30,000 against Membo in relation to its contravention of s 47(1)(a) of the NCCP Act referred to in Declaration 9. ASIC submits that s 87(2) of the Code performs an important regulatory purpose for debtors. Repeated failure by a licensee, such as Membo, to ensure that its systems and processes are in place, so that compliance with s 87 occurs, is not a contravention that should be viewed as “merely technical”.

119 Even so, ASIC submits that the contravening conduct in question is on the “low end of seriousness”. ASIC submits that the number of occasions on which Membo failed to give direct debit default notices complying with s 87(2) of the Code is small compared to the likely number of direct debit default notices that were issued in the relevant period. ASIC submits that the failure was, nevertheless, sufficiently substantial as not to be viewed as an isolated incident.

120 ASIC acknowledges that the borrower contact records demonstrate that it was the practice of the ClearLoans business to text and often called debtors as soon as any payment failed. Therefore, while failure to comply with the form of notice stipulated by the Code meant that the underlying conduct was a contravention of the Code, the substantive effect of the failure was mitigated by the text messages and telephone calls.

121 ASIC also acknowledges that Membo’s failure to give the required notice was first brought to ASIC’s attention by Membo itself. Consistent with Membo’s explanation that the failures were the result of a system error, ASIC accepts, and submits, that there is no indication that Membo’s contravening conduct was deliberate.

122 However, balanced against this, Membo continued to deny its contravention of s 47(1)(a) until immediately before the liability hearing. This meant that ASIC was required to put on evidence and submissions proving the contravention and addressing the position that Membo had adopted in its Response.

123 Further, although Membo informed ASIC that, as of 24 September 2020, the system error had been rectified, Membo failed have in place systems and processes capable of picking up the system error for the period of the contravention, some 17 months.

124 I am satisfied that \$30,000 is an appropriate penalty for this contravention of s 47(1)(a) of the NCCP Act.

Enforcement Claims

125 ASIC seeks a pecuniary penalty of \$75,000 against Membo for its contravention of s 47(1)(a) of the NCCP Act referred to in Declaration 12.

126 ASIC submits that the contravening conduct is “on the low to moderate end of the range of seriousness”. ASIC also submits that s 88 of the Code performs an important regulatory purpose for debtors. The failure to have in place systems and processes to ensure that there are no repeated contraventions of s 88(1) is a matter that should be viewed as serious.

127 ASIC submits that the potential for harm from the contravening conduct is readily apparent: the early commencement of proceedings deprives a debtor of time to rectify the default and curtails a consumer right granted by the legislation. In the present case, proceedings were commenced between 13 and 28 days after the issue of a default notice. ASIC accepts that that length of time falls into “the less serious category” contrasted with, for example, a practice of commencing proceedings the day after the issue of a default notice.

128 ASIC submits that, although there is no evidence that Membo was acting in wilful defiance of s 88(1) of the Code, the contraventions did involve the taking of deliberate steps to commence proceedings against debtors in circumstances where Membo and its agents should have been aware of the relevant obligations under the Code.

129 I am satisfied that \$75,000 is an appropriate penalty for this contravention of s 47(1)(a) of the NCCP Act.

Jurisdiction Claims

130 These claims involve contraventions of both s 47(1)(a) and s 47(1)(e) of the NCCP Act. However, as the same conduct is involved in each contravention, Membo is protected against civil double jeopardy by s 175(1) of the NCCP Act. It is liable for only one civil penalty. In the course of oral submissions, ASIC accepted that, in this case, it would be appropriate for the pecuniary penalty to be imposed for the contravention of s 47(1)(a).

131 ASIC seeks a pecuniary penalty of \$300,000 for the contravention referred to in Declaration 14, which concerns the wrongful commencement of proceedings against 256 debtors and guarantors and Membo's failure to have in place systems and processes to ensure that the conduct did not occur.

132 ASIC submits that the contravening conduct is of "moderate seriousness".

133 ASIC submits:

... Regulation 36 provides an important protection to debtors. It protects their access to justice and right to be heard in proceedings by removing any difficulty that would arise if debt recovery proceedings were initiated in a State or Territory other than where the debtor or guarantor resides. The potential for and nature of the harm is readily apparent. Commencement of proceedings in a jurisdiction away from where the debtor and/or guarantor resides makes it less likely that the debtor and/or guarantor will be able (or easily able) to defend the proceedings and more costly for them to attend in person. That consequence is significant because judgment against the debtor and/or guarantor will have potentially serious implications for their finances and credit record.

134 ASIC submits that the cohort of proceedings that were improperly commenced is "quite large" and that the underlying conduct had a "systemic aspect". Nevertheless, ASIC submits that there is no evidence that Membo was acting in wilful defiance of the regulation.

135 I am satisfied that a penalty of \$300,000 is an appropriate penalty for this contravention of s 47(1)(a) of the NCCP Act.

INJUNCTIVE RELIEF

136 Section 177 of the NCCP Act provides:

177 Injunctions

(1) If, on the application of ASIC or any other person, the court is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute:

- (a) a contravention of this Act; or
- (b) attempting to contravene this Act; or

- (c) aiding, abetting, counselling or procuring a person to contravene this Act; or
- (d) inducing or attempting to induce, whether by threats, promises or otherwise, a person to contravene this Act; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
- (f) conspiring with others to contravene this Act;

the court may grant an injunction on such terms as the court considers appropriate.

- (2) If an application for an injunction under subsection (1) has been made, the court may, if the court considers it appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the court is satisfied that the person has engaged, or is proposing to engage, in conduct of a kind referred to in subsection (1).
- (3) The court may, if the court considers it appropriate, grant an interim injunction pending determination of an application under subsection (1).
- (4) The court may revoke or vary an injunction granted under subsection (1) or (3).
- (5) The power of the court to grant an injunction restraining a person from engaging in conduct may be exercised:
 - (a) whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to another person if the person engages in conduct of that kind.
- (6) The power of the court to grant an injunction requiring a person to do an act or thing may be exercised:
 - (a) whether or not it appears to the court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
 - (b) whether or not the person has previously refused or failed to do that act or thing; and
 - (c) whether or not there is an imminent danger of substantial damage to another person if the person refuses or fails to do that act or thing.
- (7) If ASIC applies to the court for the grant of an injunction under this section, the court must not require ASIC or another person, as a condition of granting an interim injunction, to give an undertaking as to damages.
- (8) If the court has power under this section to grant an injunction against a person, the court may, either in addition to or in substitution for the grant of the injunction, order the person to pay damages to another person.

137 In ARS paras 64 – 67, ASIC sets out a number of principles relevant to the grant of injunctive relief in cases such as the present. Here, ASIC seeks injunctions against both Membo and RGFS in relation to the wrongful commencement of court proceedings against debtors and guarantors. Once again, this is relief which Membo and RGFS have, in substance, agreed should be granted (ASIC has proposed certain amendments to the injunctions claimed in prayers 30 and 31 of the amended originating application in order to provide greater precision).

138 ASIC is concerned that there is a real risk that some or all of the proceedings referred to in the evidence remain extant (i.e., not formally discontinued or otherwise determined). In this connection, and prior to the commencement of this proceeding, Membo informed ASIC that, except in a few cases, the enforcement proceedings were “on hold”. Further, in response to notices to produce issued to Membo and RGFS prior to the penalty hearing, the respondents produced no documents indicating which of the wrongfully commenced proceedings remained on foot. Correspondence between ASIC and the respondents has not clarified the position.

139 In the circumstances, I am satisfied that it is appropriate that the respondents be required, by way of an injunction granted under s 177 of the NCCP Act, to formally discontinue any proceedings that remain on foot. I accept ASIC’s submission that the debtors and guarantors should not be required to take steps to have the proceedings dismissed in circumstances where the respondents can, and should, take the necessary steps.

OTHER MATTERS

140 ASIC does not press the relief claimed in prayers 27 to 29 of the amended originating application (relating to adverse publicity orders) or prayer 32 (relating to a compliance program). As I have noted, there has been a change in the operation of the ClearLoans business which calls into question the utility of such relief. At the hearing on relief, I was taken to evidence concerning the purported assignment of the ClearLoans loan book by Membo to, ultimately, Greenwich. ASIC is not satisfied that the assignment has been effective, but it nevertheless recognises that Greenwich appears to be carrying on the ClearLoans business to the exclusion of the respondents. Whilst I was taken to the evidence in some detail, and received submissions from ASIC on this topic, the resolution of this proceeding does not require the Court to make any findings as to the effectiveness of the assignment of the ClearLoans loan book.

DISPOSITION

141 The relief now sought by ASIC to which the respondents have, in substance, agreed, will be granted.

I certify that the preceding one hundred and forty-one (141) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates.

Associate: 

Dated: 23 February 2023