

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Concise Statement  
File Number: NSD1088/2021  
File Title: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION v  
ULTIMATE CREDIT MANAGEMENT PTY LTD ACN 600 325 451  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 18/10/2021 1:18:49 PM AEDT

Registrar

### Important Information

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

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## Concise Statement

No. of

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

### Australian Securities and Investments Commission

Applicant

### Ultimate Credit Management Pty Ltd (ACN 600 325 451)

Respondent

## A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

### Introduction

1. The Respondent holds Australian credit licence number 467301 and undertakes credit activities as a credit provider governed by the national credit legislation (created by the *National Consumer Credit Protection Act 2009* (**National Credit Act**) and *National Consumer Credit Protection Regulations 2010* (**Regs** or **r**) and inclusive of the National Credit Code at Schedule 1 of the National Credit Act (**Code**)).
2. At all relevant times the Respondent conducted a business of purchasing consumer credit debt from other companies and seeking to enforce that debt against debtors including, at times, by the commencement of legal proceedings.
3. The Applicant's claim relates to the Respondent's non-compliance with r 36 (**Jurisdiction Conduct**). This non-compliance occurred in respect of 24 proceedings commenced by the Respondent described at Annexure A (**Debt Recovery Proceedings**). The Debt Recovery Proceedings were commenced in circumstances where:
  - a. section 330 of the National Credit Act and r 36 of the Regs require that proceedings brought to enforce a regulated credit contract must be brought in a court of the State or Territory where the debtor ordinarily resides or if that address is unknown – the State or Territory where the debtor ordinarily resided at the time the credit contract was made;
  - b. the Respondent had been notified of its obligation to initiate proceedings in compliance with r 36 on multiple occasions by the Financial Ombudsman Service (**FOS**) and subsequently the Australian Financial Complaints Authority (**AFCA**) in response to consumer complaints received by them; and

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- c. the Respondent had made representations to FOS and AFCA that the Respondent would comply with r 36.
4. As described at paragraphs 5 to 24 below, each of the Debt Recovery Proceedings was initiated in non-compliance with r 36.

### **The Respondent's Conduct**

5. At all relevant times, the Respondent's registered address and principal place of business was in Sydney, New South Wales and Mr Abraham Dower was a director of the Respondent.
6. By May 2018, FOS had received complaints about Jurisdiction Conduct and had identified it as a possible systemic issue of the Respondent.
7. On 17 May 2018, FOS provided the Respondent with a written summary of the possible systemic issue which included an explanation of the meaning and effect of r 36(3) and (4).
8. On 15 June 2018, the Respondent provided FOS with its Legal Enforcement Proceedings Policy which was not compliant with r 36.
9. On 20 June 2018, FOS confirmed its view to the Respondent that the matter represented a systemic error and again provided to the Respondent a summary of r 36(3) and (4). FOS requested that the Respondent's policies be updated to be compliant and requested verification.
10. On 21 June 2018, Mr Dower, on behalf of the Respondent, represented to FOS during a telephone conversation that the Respondent agreed that it would bring proceedings in a court of the State that the debtor resided in and confirmed that the Respondent had updated its policies.
11. On 23 July 2018, the Respondent represented to FOS that it would initiate proceedings out of the State that the debtor had been confirmed to reside in by providing to FOS a copy of its updated Legal Referral Checklist for Interstate Proceedings.
12. Throughout July and August 2018, FOS made further inquiries in respect of Jurisdiction Conduct which culminated in the closure of the systemic issue on or around 17 August 2018.
13. FOS' closure of the issue was based upon, inter alia, the Respondent's representation that it had *"updated its policies and procedures to comply with its obligations to bring legal proceedings of consumer debts in a court of the State or Territory where the debtor ordinarily resides"*, as recorded in a letter from FOS to the Respondent dated 17 August 2018.
14. In May 2019, the Respondent brought eight of the Debt Recovery Proceedings in the Local Court of New South Wales in non-compliance with r 36 and inconsistent with the Respondent's representations to FOS (see rows 1-8 of Annexure A).
15. A further complaint was made to AFCA (which had taken over the role as the approved external dispute resolution scheme from FOS) against the Respondent. The complaint included a complaint of Jurisdiction Conduct and on 3 June 2019, AFCA inquired of the Respondent, inter alia, of the reason why proceedings had been issued against the complainant in the Local Court of New South Wales when he resided in Victoria.
16. On 13 June 2019, the Respondent brought a further two of the Debt Recovery Proceedings in the Local Court of New South Wales in non-compliance with r 36 and inconsistent with the Respondent's representations to FOS (see rows 9-10 of Annexure A).

17. On 2 July 2019 the Respondent wrote to AFCA and represented that it was currently in the “*transition of moving towards interstate [system] applicable to the individual state jurisdictions*”.
18. From 31 July 2019 to 11 December 2019, the Respondent brought a further 14 of the Debt Recovery Proceedings in the Local Court of New South Wales in non-compliance with r 36, inconsistent with the Respondent’s representations to FOS and inconsistent with the company moving towards an interstate system as represented to AFCA (see rows 11-24 of Annexure A).
19. Two additional complaints were made to AFCA against the Respondent in December 2019.
20. On 10 March 2020, AFCA notified the Respondent of its investigation into Jurisdiction Conduct as a possible systemic issue and, in this context, referred to the Respondent’s previous assurances to FOS.
21. On 25 May 2020, AFCA notified ASIC of the Jurisdiction Conduct as an unresolved systemic issue.
22. On 5 June 2020, the Respondent admitted to AFCA that it had not complied with r 36 in respect of the complaints that AFCA was investigating.
23. On 19 November 2020, an updated Legal Referral Checklist was provided to AFCA which specified that legal proceedings would be initiated in the same State as the address for service. On 24 November 2020, AFCA informed the Respondent that on the basis of this and other information provided to AFCA, it considered the issue resolved.

#### **Outcome of the Debt Recovery Proceedings**

24. The Debt Recovery Proceedings resulted in:
  - a. UCM obtaining 21 default judgments in the amount of \$176,379.84 (including interest and costs); and
  - b. UCM obtaining 14 garnishee orders in the amount of \$111,531.10 (including costs).

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

25. The Applicant seeks the relief set out in the Originating Application.

#### **C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT**

26. Each of the credit contracts the subject of the Debt Recovery Proceedings was a credit contract regulated by the Code (ss5 and/or 13 of the Code).
27. The Respondent engaged in a “credit activity” as a “credit provider” in respect of each of the credit contracts the subject of the Debt Recovery Proceedings (ss6(1) item 1(a) and 10; and/or s6(1) item 1(c) National Credit Act).
28. The Respondent is authorised by its Australian credit licence to engage in this credit activity.
29. By virtue of paragraphs 26 to 28, the National Credit Act, the Regs and the Code imposed obligations on the Respondent as a credit licensee in respect of these credit activities including the conduct obligations contained in s47(1)(a) of the National Credit Act.

30. Section 47(1)(a) of the National Credit Act requires that a licensee must do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly.
31. Section 330 of the National Credit Act and r 36, by virtue of subsections (3) and (4), provides that proceedings brought to enforce a regulated credit contract must be brought in a court of the State or Territory where the debtor ordinarily resides; or if that address is unknown – the State or Territory where the debtor ordinarily resided at the time the credit contract was made.
32. By reason of the matters set out in paragraphs 1 to 24, UCM failed to do all things necessary to ensure that the credit activities authorised by its licence were engaged in efficiently, honestly and fairly by:
- a. failing to comply with r 36, which was a failure of UCM to perform its statutory obligations (including those that are incidental or related to the provision of credit services) and therefore to meet the requirement of competence that is connoted by the words “efficiently, honestly and fairly”;
  - b. additionally, or alternatively, the failure as described in paragraph 32.a, in the context of UCM being informed of the meaning and effect of r 36 and representing to FOS and/or AFCA that UCM:
    - i. understood the meaning and effect of r 36;
    - ii. accepted that it was bound to comply with r 36;
    - iii. had corrected its internal process and procedure to comply with r 36; and
    - iv. would comply with r 36; and
  - c. additionally, or alternatively, failing as described in paragraph 32.a and/or 32.b, to meet industry and community standards including the standard that UCM should be familiar with the requirements of the national credit legislation and seek to comply with the requirements of that legislation given the nature of UCM’s business of providing credit services and given UCM’s position as a credit licensee.
33. By reason of paragraphs 26 to 31, the Respondent contravened s47(1)(a) of the National Credit Act.

#### **D. ALLEGED HARM SUFFERED**

34. Harm to debtors, while not a necessary element of the contravention, did occur by reason of UCM’s conduct.
35. The purpose of r 36 is to promote a consumer credit debtor’s access to justice and right to be heard in proceedings regulated by the national credit legislation. In the case of a credit contract, it seeks to do this by removing any difficulty that would arise if debt recovery proceedings were initiated in a State or Territory other than where the debtor resides. To do otherwise causes particular vulnerabilities for debtors who could not afford or have the capacity to challenge a proceeding in another jurisdiction.
36. On all 24 occasions when UCM acted in non-compliance with r 36, UCM caused harm by creating the very difficulties for each debtor that r 36 sought to avoid.

37. Further, UCM's conduct in representing that it had compliant processes and would adopt those processes, in circumstances where it did not, undermined the function and powers of FOS and subsequently AFCA. It is essential to the integrity of the Australian consumer credit system that a credit provider, as part of the AFCA scheme, provides honest and accurate information to AFCA. By acting as it did, UCM undermined the protection that FOS and AFCA provide to consumers, as well as their role in promoting a fair consumer credit industry in identifying systemic issues, seeking to resolve those issues, and reporting those issues to ASIC.

**Certificate of lawyer**

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

Date: 18 October 2021

A handwritten signature in cursive script, appearing to read 'Conrad Gray', positioned above a horizontal dotted line.

Signed by Conrad Gray

Lawyer for the Applicant

**ANNEXURE A**

**DEBT RECOVERY PROCEEDINGS INITIATED BY UCM IN THE LOCAL COURT OF NSW**

	<b>Debtor's initials</b>	<b>Date of instructions to initiate proceedings in NSW</b>	<b>Date proceedings initiated in NSW</b>	<b>Debtor's State / Territory per address for service in court documents</b>	<b>Default judgment (Yes; amount/No)</b>	<b>Garnishee order (Yes; amount/No)</b>
1.	SG	10-May-2019	20-May-2019	Queensland	Yes \$8,778.30	Yes \$8,845.30
2.	NC	10-May-2019	20-May-2019	South Australia	Yes \$9,788.46	Yes \$9,855.46
3.	WS	10-May-2019	20-May-2019	Western Australia	Yes \$7,800.24	Yes \$7,867.24
4.	KCam	10-May-2019	20-May-2019	Victoria	Yes \$6,184.98	Yes \$6,251.98
5.	DH	10-May-2019	20-May-2019	Victoria	Yes \$8,769.95	Yes \$8,857.95
6.	KCar	27-May-2019	28-May-2019	Victoria	Yes \$7,054.60	Yes \$7,142.60
7.	JMel	10-May-2019	28-May-2019	Western Australia	Yes \$4,358.24	Yes \$4,446.24
8.	BF	27-May-2019	28-May-2019	Victoria	Yes \$4,072.30	Yes \$4,160.30
9.	MK	07-Jun-2019	13-Jun-2019	Victoria	Yes \$5,248.86	No
10.	BD	07-Jun-2019	13-Jun-2019	South Australia	Yes \$13,299.64	Yes \$13,299.64
11.	TN	25-Jul-2019	31-Jul-2019	Victoria	Yes \$9,850.94	No
12.	JSma	25-Jul-2019	31-Jul-2019	Victoria	Yes \$9,657.81	No



	<b>Debtor's initials</b>	<b>Date of instructions to initiate proceedings in NSW</b>	<b>Date proceedings initiated in NSW</b>	<b>Debtor's State / Territory per address for service in court documents</b>	<b>Default judgment (Yes; amount/No)</b>	<b>Garnishee order (Yes; amount/No)</b>
13.	ARen	25-Jul-2019	31-Jul-2019	Victoria	Yes \$10,543.92	Yes \$10,631.92
14.	ARog	25-Jul-2019	31-Jul-2019	Victoria	Yes \$7,405.00	No
15.	PT	04-Nov-2019	13-Nov-2019	Victoria	Yes \$5,292.77	Yes \$5,380.77
16.	JMor	25-Nov-2019	11-Dec-2019	Western Australia	No	No
17.	SJ	25-Nov-2019	11-Dec-2019	Victoria	No	No
18.	JT	25-Nov-2019	11-Dec-2019	Tasmania	No	No
19.	SM	25-Nov-2019	11-Dec-2019	Australian Capital Territory	Yes \$15,112.09	Yes \$15,181.09
20.	JW	25-Nov-2019	11-Dec-2019	Queensland	Yes \$9,648.85	No
21.	JSea	25-Nov-2019	11-Dec-2019	Queensland	Yes \$8,581.01	No
22.	MN	25-Nov-2019	11-Dec-2019	Queensland	Yes \$4,735.12	Yes \$4,823.12
23.	DC	25-Nov-2019	11-Dec-2019	Queensland	Yes \$4,699.49	Yes \$4,787.49
24.	LT	25-Nov-2019	11-Dec-2019	Tasmania	Yes \$15,497.27	No