FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Smart Corporation Pty Ltd (No 3) [2021] FCA 347

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| File number: | WAD 215 of 2019 |
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| Judgment of: | **JACKSON J** |
|  |  |
| Date of judgment: | 15 April 2021 |
|  |  |
| Catchwords: | **CONSUMER LAW** - application for remedies under the *Australian Consumer Law* - respondent company in business of hiring out four wheel drive vehicles - knowing involvement of second and third respondents  **CONSUMER LAW** - misleading or deceptive conduct - false or misleading representations - website and certain emails represented that vehicles were fully insured - vehicles not fully insured - contract term giving discretion to first respondent not to make claim against insurer even if vehicle insured and instead claim damage from hirer - finding that respondents had engaged in misleading or deceptive conduct  **CONSUMER LAW** - unfair contract terms - contract term permitted first respondent to track hire vehicles by global positioning system (**GPS**) - GPS data used to create reports alleging that hirers had engaged in driving behaviour which caused 'excessive wear and tear' - contract term allowing first respondent to deduct $500 from hirers' bonds per incident - contract term giving discretion to first respondent not to make claim against insurer even if vehicle insured and instead claim damage from hirer - contract term providing that hirers must not denigrate first respondent in any way after hire period had expired - terms found to be unfair  **CONSUMER LAW** - unconscionable conduct - bonds retained after hire - aggressive emails advising customers of bond retention - emails threatened customers with litigation, referral to authorities on basis of GPS data - emails intended to intimidate customers into not challenging the retention of the bonds - conduct found to be unconscionable  **CONSUMER LAW** - remedies - declarations including that contract terms are unfair - penalties - unknowable number of contraventions - course of conduct - non-party consumer redress orders |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AB  *Australian Securities and Investments Commission Act 2001* (Cth) Part 2, Division 2  *Bankruptcy Act 1966* (Cth) ss 58, 82  *Competition and Consumer Act 2010* (Cth) ss 83, 155, 137H Schedule 2 (*Australian Consumer Law*) ss 2, 15, 16, 18, 21, 22, 23, 24, 29, 84, 87, 224, 232, 237, 238, 239, 243, 248, 250  *Federal Court of Australia Act 1976* (Cth) s 21 |
|  |  |
| Cases cited: | *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390  *Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 5)* [2012] FCA 908  *Attorney‑General of New South Wales v World Best Holdings Ltd* [2005] NSWCA 261; (2005) 63 NSWLR 557  *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68  *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368  *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd* [2019] FCA 1436  *Australian Competition and Consumer Commission v Black on White Pty Ltd* [2004] FCA 363; (2004) 138 FCR 314  *Australian Competition and Consumer Commission v Chrisco Hampers Australia Limited* [2015] FCA 1204; (2015) 239 FCR 33  *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* [2016] FCA 377  *Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2)* [2016] FCA 62  *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; (2014) 317 ALR 73  *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 5)* [2019] FCA 1544  *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146; (2007) 161 FCR 513  *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682  *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd (No 2)* [2013] FCA 1267  *Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 4)* [2020] FCA 23; (2020) 376 ALR 701  *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA 1018  *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698  *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90  *Australian Competition and Consumer Commission v Morild Pty Ltd* [2017] FCA 1308  *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40  *Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25  *Australian Competition and Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135  *Australian Competition and Consumer Commission v Service Seeking Pty Ltd* [2020] FCA 1040  *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd* [2019] FCA 1603  *Australian Competition and Consumer Commission v Sony Interactive Entertainment Network Europe Limited* [2020] FCA 787; (2020) 381 ALR 531  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; (2020) 381 ALR 507  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640  *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80  *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303  *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18; (2019) 267 CLR 1  *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132  *Commonwealth Bank of Australia v Finance Sector Union of Australia* [2002] FCAFC 193; (2002) 125 FCR 9  *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1  *Director General of Fair Trading v First National Bank plc* [2002] UKHL 52; [2002] 1 AC 481  *Elan, Re Guild Enterprises Australia Pty Ltd v Cohen* [2020] FCA 79; (2020) 142 ACSR 554  *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 260 FCR 68  *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52  *Gaffney v Federal Commissioner of Taxation* (1998) 81 FCR 574  *IMF (Australia) Ltd v Sons Of Gwalia Ltd (Administrator Appointed) ACN 008 994 287* [2004] FCA 1390; (2004) 211 ALR 231  *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15; (2018) 356 ALR 440  *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113  *Keller v LED Technologies Pty Ltd* [2010] FCAFC 55; (2010) 185 FCR 449  *Kerkhoffs v Registrar of Aboriginal and Torres Strait Islander Corporations* [2014] FCAFC 66  *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357  *Mathers v Commonwealth of Australia* [2004] FCA 217; (2004) 134 FCR 135  *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1  *Mill v The Queen* (1988) 166 CLR 59  *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285  *P (a minor) v National Association of School Masters/Union of Women Teachers* [2003] UKHL 8; [2003] 2 AC 663  *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199  *Re Altim Pty Ltd* [1968] 2 NSWR 762  *Re Sharpe; Ex parte Tietyens Investments Pty Ltd (in liq) v Official Trustee* (Unreported, Federal Court of Australia, 26 October 1998)  *Royer v State of Western Australia* [2009] WASCA 139; (2009) 197 A Crim R 319  *Swishette Pty Ltd v Australian Competition and Consumer Commission* [2017] FCAFC 45; (2017) 249 FCR 483  *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076  *Trivago N.V. v Australian Competition and Consumer Commission* [2020] FCAFC 185; (2020) 384 ALR 496  *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; (2018) 266 FCR 631  *Violet Home Loans Pty Ltd v Schmidt* [2013] VSCA 56; (2013) 44 VR 202  *Yorke v Lucas* (1985) 158 CLR 661 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Number of paragraphs: | 316 |
|  |  |
| Date of hearing: | 29 September 2020 |
|  |  |
| Date of Last Submissions: | 22 February 2021 (Applicant) |
|  |  |
| Counsel for the Applicant: | Mr MD Howard SC with Ms JA Thornton |
|  |  |
| Solicitor for the Applicant: | Norton Rose Fulbright |
|  |  |
| Counsel for the Respondents: | The respondents did not appear |

ORDERS

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|  | | WAD 215 of 2019 |
|  | | |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | SMART CORPORATION PTY LTD (ACN 134 192 297)  First Respondent  VITALI ROESCH  Second Respondent  MARYNA KOSUKHINA  Third Respondent | |

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| --- | --- |
| order made by: | JACKSON J |
| DATE OF ORDER: | 15 April 2021 |

**PENAL NOTICE**

**IF YOU (BEING THE PERSON BOUND BY THIS ORDER):**

**(A) REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THIS ORDER FOR THE DOING OF THE ACT; OR**

**(B) DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,**

**YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT. ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED.**

THE COURT DECLARES THAT:

1. The first respondent:

(a) during the period January 2014 to August 2019, made a representation to consumers, via the publication of statements made on its website, australian4wdhire.com.au that:

(i) all A4WD's rental vehicles had the benefit of being insured for off‑road use; and

(ii) if any damage occurred to the vehicle while being hired, including while being used on unsealed roads, it would be insured under A4WD's insurance policies,

(together, the **Insurance Coverage Representation**),

when in fact in not all instances would consumers have the benefit of the rental vehicle being insured for damage to it, and in cases of a single vehicle incident where the vehicle was insured, the consumer would at the first respondent's sole discretion be liable under the first respondent's standard form contract for either the costs of rectifying the damage to the vehicle, the vehicle's replacement value or the payout figure under the first respondent's finance contract for the vehicle; and

the first respondent, thereby, in trade or commerce, in connection with the supply or possible supply of rental vehicles:

(b) engaged in conduct that was misleading or deceptive or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law*, contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**); and

(c) made a false or misleading representation that the rental vehicles had characteristics or benefits which they did not have, in contravention of s 29(1)(g) of the ACL.

2. The terms in the various standard form contracts between the first respondent and consumers, as set out in Annexure A, are declared pursuant to s 250 of the ACL to be unfair terms within the meaning of s 24 of the ACL, and are also declared to be void pursuant to s 23 of the ACL, because they included terms to the following effect:

(a) **GPS Provisions** under which, taken together:

(i) the first respondent was permitted to use global positioning system (**GPS**) tracking data on the hired vehicle to monitor where the vehicle was driven, the times when the vehicle was being driven and how fast it was being driven;

(ii) the first respondent could use this GPS data to conclude that a consumer had operated the vehicle in a manner which was a **Prohibited Operation** (defined in the contract to include, among other things, driving in contravention of any traffic laws, driving outside of built-up areas between sunset and dawn and driving during periods of low visibility including but not limited to fog and heavy rain);

(iii) the consumer acknowledged that engaging in a Prohibited Operation will or may cause excessive wear and tear and would likely cause other damage to the vehicle (defined as **Driver Behaviour Damage**); and

(iv) in the event that the GPS data evidenced that a Prohibited Operation had occurred, the consumer would be liable to compensate the first respondent for the deemed Driver Behaviour Damage in amounts which could authorise the first respondent to deduct part or all of the consumer's security bond;

(b) an **Insurance Discretion Clause** which provided that in the event of a single vehicle accident, the first respondent had the sole discretion to elect not to submit an insurance claim to its insurers for damage caused to the vehicle, the consequence of which was that the consumer was then liable to pay for the costs of rectifying the damage, the vehicle's replacement value or the payout figure under the first respondent's finance contract, even in circumstances where the vehicle was in fact insured for the damage; and

(c) a **Non-Disparagement Clause** which required consumers to act at all times in the first respondent's best interests,

in circumstances where each of the GPS Clause, the Insurance Discretion Clause and the Non-Disparagement Clause:

(d) caused a significant imbalance between the rights and obligations of consumers and the first respondent;

(e) were not reasonably necessary to protect the legitimate interests of the first respondent as the party advantaged by the terms; and

(f) caused financial and non-financial detriment to consumers.

3. Between April 2017 and August 2019, the first respondent engaged in conduct in trade or commerce that was, in all the circumstances unconscionable in breach of s 21 of the ACL, by:

(a) in respect of each of the 31 identified consumers (listed at Annexure B), sending each consumer an email that contained language that was intimidating and threatening:

(i) claiming misleadingly and in bad faith that information contained in a document produced by its GPS data provider (**Driver Behaviour Report**), was evidence that the consumer had incurred large numbers of 'speeding violations' or had otherwise engaged in a Prohibited Operation when using the vehicle, which was a serious breach of contract; and

(ii) saying that the first respondent would be retaining part or all of the security bond because the consumer engaged in a Prohibited Operation;

(b) in respect of 25 of the 31 identified consumers (listed at Annexure C), also relying on a consumer's alleged Prohibited Operation of the vehicle, as purportedly evidenced by the Driver Behaviour Report, to deduct an amount of the consumer's security bond for what it described as 'excessive wear and tear' or 'night driving' irrespective of whether there had been any damage done to the vehicle;

(c) in respect of 18 of the 31 identified consumers (listed at Annexure D), also sending other intimidatory correspondence containing intemperate language that was intimidating and threatening, and which was sent in order to deter and discourage the consumer from:

(i) raising legitimate concerns about the accuracy of the Driver Behaviour Report; and

(ii) disputing the first respondent's allegations that they had engaged in a Prohibited Operation when using the hire vehicle; and

(d) in respect of three of the 31 identified consumers (listed at Annexure E), falsely alleging that the police had issued speeding fines in respect of the consumer's driving of the hired vehicle.

4. The second and third respondents, each of whom caused the first respondent to engage in the conduct described at paragraphs 1 and 3 above, were each knowingly concerned in and a party to, the contraventions of the first respondent declared in those paragraphs within the meaning of s 224(1)(e) of the ACL.

THE COURT ORDERS THAT:

Non-party consumer redress

5. Pursuant to s 239 of the ACL, and within 21 days of the date that this order is served by email on the second and third respondents (at the addresses set out in Annexure F), the second and third respondents must jointly and severally pay to the applicant, on behalf of each of the consumers named in Annexure G, the amount identified in Annexure G for that consumer.

Disqualification orders

6. Pursuant to s 248 of the ACL, the second respondent is disqualified from managing a corporation for a period of three years from the date that this order is served on the second respondent by email (at the address set out in Annexure F).

7. Pursuant to s 248 of the ACL, the third respondent is disqualified from managing a corporation for a period of three years from the date that this order is served on the third respondent by email (at the address set out in Annexure F).

Pecuniary penalties

8. Pursuant to s 224 of the ACL, the first respondent must pay to the Commonwealth of Australia, within 21 days of the date that this order is served by email on the first respondent (at the address set out in Annexure F), $870,000 by way of pecuniary penalty, in respect of the contraventions of s 21 and 29(1)(g) of the ACL referred to in paragraphs 1 and 3 above.

9. Pursuant to s 224 of the ACL, the second respondent must pay to the Commonwealth of Australia, within 21 days of the date that this order is served by email on the second respondent (at the address set out in Annexure F), $179,000 by way of pecuniary penalty in respect of the second respondent's involvement in the first respondent's contraventions of s 21 and 29(1)(g) of the ACL as declared in paragraph 4 above.

10. Pursuant to s 224 of the ACL, the third respondent must pay to the Commonwealth of Australia, within 21 days of the date that this order is served by email on the third respondent (at the address set out in Annexure F), $174,000 by way of pecuniary penalty in respect of the third respondent's involvement in the first respondent's contraventions of s 21 and 29(1)(g) of the ACL as declared in paragraph 4 above, such penalty to become payable only after payment of the non-party consumer redress set out in paragraph 5 above and only on the last day of the month following the month in which the third respondent is discharged from bankruptcy.

Other orders

11. The reasons for judgment with a seal of the court affixed thereon be retained on the court file for the purposes of s 137H(3) of the *Competition and Consumer Act 2010* (Cth).

12. The second and third respondents must pay the applicant's costs of the proceeding to be taxed, if not agreed.

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

**Annexure A**

The terms in the various standard form contracts between the first respondent and consumers that are unfair terms, and are therefore void:

| Dates standard contract terms in force | Void terms |
| --- | --- |
| From January 2014 to some time before 31 March 2016 | Clause 4(d)  Clause 19(d) |
| From at least 31 March 2016 to at least 24 May 2017 | Clause 4(d)  Clause 20(d) |
| From at least 24 May 2017 to some time before 3 April 2018 | Clause 4(d)  Clause 17 (second and third paragraphs only)  Clause 20(d) |
| From at least 3 April 2018 to some time before July 2018 | Clause 4(d)  Clause 13(f)  Clause 17 (second and third paragraphs only)  Clause 20(d) |
| At some time between April 2018 and July 2018 until at least September 2018 | Clause 5(c), (j)  Clause 8 (d)-(i)  Clause 17(g), (h) |
| From at least 24 September 2018 until May 2019 | Clause 5(c), (j)  Clause 8(d)-(j)  Clause 17(g), (h) |
| From at least May 2019 | Clause 5(c), (j)  Clause 8(h), (j)  Clause 17(g), (h) |

**Annexure B**

The 31 identified consumers who received emails from the first respondent as described in paragraph 3(a) of these orders:

| **No.** | **Customer name(s)** |
| --- | --- |
| 1. | Benjimen Bomford |
| 2. | Kenneth Hitchcock |
| 3. | John Moriarty |
| 4. | Matthew Roach |
| 5. | Ian Davison and Jane-Marie Forrest |
| 6. | AK |
| 7. | BP |
| 8. | CL |
| 9. | DB |
| 10. | GS |
| 11. | HY |
| 12. | JL |
| 13. | JH |
| 14. | JK |
| 15. | LM |
| 16. | MV |
| 17. | MM |
| 18. | NC |
| 19. | PF |
| 20. | PH |
| 21. | RW |
| 22. | SL |
| 23. | SM |
| 24. | VV |
| 25. | WR |
| 26. | CM |
| 27. | DM |
| 28. | MK |
| 29. | NJ |
| 30. | TM |
| 31. | TMcC |

**Annexure C**

List of 25 consumers who were charged for 'excessive wear and tear' and/or 'night driving' as described in paragraph 3(b) of these orders:

| **No.** | **Customer name(s)** | **Amounts deducted for 'excessive wear and tear' and/or 'night driving'** |
| --- | --- | --- |
| 1. | Benjimen Bomford | $4,710 |
| 2. | Kenneth Hitchcock | $3,002.15 |
| 3. | John Moriarty | $500 |
| 4. | Matthew Roach | $500 and $500 for 'night driving' |
| 5. | Ian Davison and Jane-Marie Forrest | $1,000 |
| 6. | AK | $1,000 |
| 7. | BP | $500 |
| 8. | CL | $500 |
| 9. | DB | $1,000 for 'night driving' |
| 10. | GS | $500 |
| 11. | HY | $1,164.66 |
| 12. | JL | $500 |
| 13. | JH | $500 |
| 14. | JK | $500 |
| 15. | LM | $500 |
| 16. | MV | $500 |
| 17. | MM | $193.81 |
| 18. | NC | $500 |
| 19. | PF | $500 |
| 20. | PH | $500 |
| 21. | RW | $500 |
| 22. | SL | $500 |
| 23. | SM | $70 |
| 24. | VV | $4,390 |
| 25. | WR | $500 |

**Annexure D**

List of 18 consumers who received other intimidatory correspondence from A4WD as described in paragraph 3(c) of these orders:

| **No.** | **Customer name(s)** |
| --- | --- |
| 1. | Benjimen Bomford |
| 2. | Kenneth Hitchcock |
| 3. | John Moriarty |
| 4. | Matthew Roach |
| 5. | Ian Davison and Jane-Marie Forrest |
| 6. | CL |
| 7. | DB |
| 8. | GS |
| 9. | HY |
| 10. | JH |
| 11. | LM |
| 12. | MV |
| 13. | MK |
| 14. | PF |
| 15. | PH |
| 16. | SM |
| 17. | WR |
| 18. | CM |

**Annexure E**

List of three customers who were falsely told that the police had issued speeding fines in respect of the consumer's driving of the hired vehicle as described in paragraph 3(d) of these orders.

|  |  |
| --- | --- |
| 1. | Benjimen Bomford |
| 2. | Kenneth Hitchcock |
| 3. | Matthew Roach |

**Annexure F**

A copy of these orders must be served on the first, second and third respondents at the following email addresses:

|  |  |  |
| --- | --- | --- |
| **Respondent** | **Contact Name** | **Email Address** |
| First respondent | Matthew Bookless (SV Partners) | Matthew.Bookless@svp.com.au |
| Second respondent | Vitali Roesch | vitaliroesch@gmail.com |
| Third respondent | Maryna Kosukhina | marynakosukhina@gmail.com |

**Annexure G**

The second and third respondents pay to the ACCC the following amounts for the benefit of the following consumers:

|  |  |
| --- | --- |
| **Hirer name(s)** | **Amount (deducted by the respondents for 'excessive wear and tear' and processing/administration fees)** |
| Ian Davison and Jane-Marie Forrest | $1,200 |
| John Moriarty | $550 |
| Benjimen Bomford | $4,760 |
| Kenneth Hitchcock | $3,052.15 |

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REASONS FOR JUDGMENT

JACKSON J:

## Introduction

1 In this proceeding, the applicant (**ACCC**) seeks declarations as to breaches of Schedule 2 of the *Competition and Consumer Act 2010* (Cth), known as the *Australian Consumer Law* (**ACL**), by the first respondent, Smart Corporation Pty Ltd, which formerly traded as Australian 4WD Hire (**A4WD**). The ACCC also seeks a pecuniary penalty against A4WD. The second respondent, Vitali Roesch, and the third respondent, Maryna Kosukhina, are former directors and employees of the company. The ACCC seeks declarations, non‑party redress orders, injunctions, disqualification from managing corporations and pecuniary penalties against Mr Roesch and Ms Kosukhina based on what is said to be their knowing involvement in A4WD's breaches of the ACL. The ACCC also seeks declarations that certain terms in what were A4WD's standard conditions for the hire of vehicles are unfair contract terms for the purposes of s 23 of the ACL.

2 This proceeding was commenced in April 2019. The respondents were initially represented by a solicitor, filed a concise statement in response to the ACCC's concise statement, and opposed the remedies sought. Then A4WD went into liquidation on 23 December 2019. Ms Kosukhina became bankrupt on 26 February 2020. The court gave the ACCC leave to proceed against the company, subject to an undertaking by the ACCC that it will not enforce any pecuniary penalties or costs orders against the company without the leave of the court. The liquidators indicated that they did not want A4WD to take any further part in the proceeding. The lawyer who had been on the record for all three respondents ceased to act after the company went into liquidation, and no notice of acting or notice of address for service has since been filed for any of the respondents. The ACCC has not communicated with Ms Kosukhina's trustee in bankruptcy.

3 In those circumstances, orders were made to ensure that the respondents had notice of the hearing of the matter and the possible consequences for them if they did not take part. But none of the respondents appeared at the hearing, which proceeded in their absence on 29 September 2020. The ACCC adduced evidence, largely by affidavit, and made submissions in favour of the relief sought.

4 The court received supplementary written submissions from the ACCC on 30 September 2020 and 22 February 2021. During the preparation of these reasons it became apparent that the decision of the Full Court in an appeal which the ACCC brought in relation to Quantum Housing Group Ltd was likely to be relevant to questions of unconscionable conduct in this proceeding. My Chambers raised with the ACCC whether I should await the Full Court's decision in that case before delivering these reasons, the ACCC submitted that I should, and so I have done so. That decision came down on 19 March 2021: *Australian Competition and Consumer Commission v* ***Quantum*** *Housing Group Pty Ltd* [2021] FCAFC 40.

5 For the reasons that follow, I have decided substantially to grant the relief the ACCC seeks.

## The alleged bases of the remedies sought under the ACL

6 A4WD was in the business of hiring out four wheel drive vehicles. It appears that its customers were typically tourists who wanted to drive the vehicles in remote places, including off sealed roads.

7 There are three sets of allegations made against A4WD. They concern misleading or deceptive conduct and false or misleading representations, unfair contract terms, and unconscionable conduct.

### Misleading or deceptive conduct and false or misleading representations

8 The ACCC makes allegations of breach of the ACL concerning statements about insurance coverage for hired vehicles which A4WD made on its website (australian4wdhire.com.au) and in emails to potential customers between January 2014 and August 2019. According to the ACCC, these were representations to consumers that all of A4WD's vehicles had the benefit of being insured for off‑road use, and that if any damage to the vehicle occurred when it was being hired, including when it was being used on unsealed roads, it would be covered by insurance policies taken out by A4WD.

9 The ACCC alleges that those representations were false, because not all of A4WD's vehicles were insured for damage caused by single vehicle accidents. A4WD's standard terms and conditions required the hirer to reimburse the company for the cost of repairs in that situation. Also, those terms also gave A4WD the sole discretion not to make a claim on its insurers for single vehicle accidents even if the vehicle was insured, but to instead recover repair costs from the hirer.

10 Accordingly, the ACCC says that the statements made by A4WD on its website and in its emails involved misleading or deceptive conduct in breach of s 18 of the ACL. The ACCC also claims that the statements were false or misleading representations that goods, namely the hired vehicles, had benefits which they did not have, in breach of s 29(1)(g) of the ACL.

### Unfair contract terms

11 The ACCC alleges that certain provisions which appeared in A4WD's standard terms and conditions are unfair contract terms within the meaning of Part 2‑3 of the ACL.

12 The standard terms varied from time to time, but the alleged effect of the relevant provisions can be summarised as follows:

(1) Through Global Positioning System (**GPS**) tracking data on the hired vehicle, A4WD could prepare a Driver Behaviour Report (**DBR**) which could show that the hirer had engaged in a '**Prohibited Operation**'as defined in the contract, for example by driving over the speed limit. That would make the hirer liable to compensate A4WD for deemed '**Driver Behaviour Damage**', and A4WD could deduct the compensation from the hirer's security bond. The ACCC submits that these provisions are unfair contract terms because they imposed financial penalties on the hirer without a causal connection between the hirer's behaviour and any loss to A4WD.

(2) If the hired vehicle was damaged in a single vehicle incident, A4WD had the sole discretion to elect not to submit an insurance claim to its insurers for damage, loss or replacement of the hire vehicle. The consumer would then be liable to pay for the costs of rectifying the damage, the vehicle's replacement value, or the pay‑out figure under A4WD's finance contract, even in circumstances where the vehicle was in fact insured for the damage. This is the same provision which is said to falsify the representations about insurance.

(3) Hirers were obligated to act at all times in the best interests of A4WD's business and interests and not defame or denigrate A4WD following the return of the vehicle, including by placing misleading, deceptive or defamatory negative reviews on any website or other form of online forum. The ACCC says that this created a significant imbalance because there were no corresponding obligations that A4WD owed to the customer. This clause prevented the customer from denigrating A4WD even when the customer's views were honestly and genuinely held, and it exposed the customer to liability to A4WD for allegedly failing to act in the company's best interests.

13 The ACCC alleges that the above terms are unfair contract terms within the meaning of s 23 of the ACL and so should be declared to be unfair under s 250.

### Unconscionable conduct

14 The allegations of unconscionable conduct arise out of A4WD's behaviour in relation to some 31 customers, after they had returned their hired vehicles. The conduct took place in a period from about April 2017 to about August 2019. It typically started with an email the customers would receive after the vehicle had been returned which alleged on the basis of the DBR that the customers had engaged in numerous speeding violations, in the order of hundreds. That was in circumstances where the hirers had paid substantial security bonds (of between $1,500 and $5,000) and the contracts they had signed purportedly entitled A4WD to deduct money from the bond for each violation. The language of the emails is said to have been intemperate, intimidating and threatening, and some customers who tried to dispute the matters received further emails which the ACCC characterises in the same way. After these emails, A4WD deducted money from the security bonds of 25 of the customers for 'excessive wear and tear' or as a 'night driving fee'. Six customers did not receive any part of their bonds back. This is all said to be in breach of the prohibition in s 21 of the ACL on engaging in conduct that is, in all the circumstances, unconscionable.

### Involvement of Mr Roesch and Ms Kosukhina

15 Mr Roesch was a director of A4WD from November 2008 until October 2015 and its sole director for nearly all of that time. He became bankrupt in 2016. Ms Kosukhina was a director of the company from September 2015 until January 2020, and sole registered director for nearly all of that time. The ACCC alleges that Mr Roesch continued as a shadow director from October 2015. It says that Mr Roesch and Ms Kosukhina were jointly and severally responsible for the actions of A4WD and so should be liable in respect of its alleged breaches of the ACL and subject to pecuniary penalties, injunctions and disqualification orders.

## Preliminary issue - proceeding against Ms Kosukhina

16 While the ACCC has obtained leave to proceed against A4WD as a company in liquidation, it has not sought any comparable leave to proceed against Ms Kosukhina, a bankrupt. It submits that it is not required to do so because it is not seeking to proceed against her in respect of a provable debt.

17 Section 58(3)(b) of the *Bankruptcy Act 1966* (Cth) relevantly provides that after a debtor has become bankrupt, it is not competent for a creditor to take any fresh step in a legal proceeding in respect of a provable debt, except with the leave of the court. As to what is a provable debt, s 82(1) provides that subject to Part VI Division 1 of the *Bankruptcy Act*:

all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy.

18 Section 82(3) provides that penalties or fines imposed by a court in respect of an 'offence against a law' are not provable in bankruptcy.

19 The monetary remedies the ACCC seeks against Ms Kosukhina are pecuniary penalties, non-party consumer redress orders and the costs of the proceedings. As to the penalties, there is a question about whether s 82(3) applies, because it is arguable that the reference to an 'offence' is only to a criminal offence, and here the ACCC seeks civil penalty orders. In *Mathers v Commonwealth of Australia* [2004] FCA 217; (2004) 134 FCR 135 at [29]‑[30], Heerey J held that civil penalties which the ACCC was pursuing under s 76 of the *Trade Practices Act 1974* (Cth) came within the meaning of 'penalties or fines imposed by a court in respect of an offence against a law' and so were not admissible to proof against an insolvent company under s 553B of the *Corporations Act 2001* (Cth). But a similar result does not necessarily follow in relation to s 82 of the *Bankruptcy Act*. That is because s 82(3AA) expressly provides that civil penalties under the *Corporations Act* are not provable debts, which might suggest that civil penalties under other legislation such as the ACL may be provable. There was no provision in the *Corporations Act* comparable to s 82(3AA) of the *Bankruptcy Act* which was drawn to Heerey J's attention; in fact, s 553B(1), in providing that pecuniary penalty orders under the *Proceeds of Crime Act 1987* (Cth) *were* admissible to proof, points in the opposite direction to s 82(3AA).

20 But it is not necessary to decide the issue on that basis, because I consider that the monetary remedies, if ordered, are neither debts or liabilities to which Ms Kosukhina was subject at the time of her bankruptcy, nor debts or liabilities to which she may become subject before her discharge by reason of an obligation incurred before the date of the bankruptcy. For Ms Kosukhina to become liable to pay a pecuniary penalty, it will be necessary for this court to determine that she has breached relevant civil penalty provisions and to exercise a discretion that she should be liable for a penalty. For her to be liable for non-party redress orders, the court will have to determine that she was involved in contraventions of relevant provisions of the ACL and to exercise a discretion to make the redress orders: see ACL s 239. A costs order will similarly require the exercise of the court's discretion. None of those matters constitute debts or liabilities to which Ms Kosukhina was subject at the time of the bankruptcy or liabilities to which she will become subject by reason of an obligation incurred before that time. At most, there was a vulnerability to a determination that A4WD had breached the ACL, that Ms Kosukhina had been involved in those breaches, and that the court's discretion should be exercised in a way giving rise to monetary obligations on her part: see *Gaffney v Federal Commissioner of Taxation* (1998) 81 FCR 574 at 581; *Australian Competition and Consumer Commission v Black on White Pty Ltd* [2004] FCA 363; (2004) 138 FCR 314 at [34]‑[35]; *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 52 at [35]‑[36].

21 Another possible reason why any liability would not be provable in the bankruptcy is that the ACCC, the party proceeding in this court, is not a 'creditor' so that s 58(3) of the *Bankruptcy Act* does not apply to it in respect of that liability. Pecuniary penalties are payable to the Commonwealth (or a State or Territory), not to the ACCC (ACL s 224(1)), and prima facie, if liability had been imposed by non‑party consumer redress orders at the commencement of the bankruptcy, it would have been liability to the consumers, not to the ACCC. But basing the result on that ground might be anomalous, as it may be inconsistent with the policy of s 58(3) to ensure that relevant monetary claims are realised and discharged through the bankruptcy process rather than through the courts: see *Re Sharpe; Ex parte Tietyens Investments Pty Ltd (in liq) v Official Trustee* (Unreported, Federal Court of Australia, 26 October 1998) at 6‑7 (Weinberg J). In the absence of full argument on the point it is preferable not to resolve it on that ground.

22 I conclude that the potential monetary liabilities which will be imposed on Ms Kosukhina if the ACCC is successful in this proceeding will not be debts provable in the bankruptcy, so that s 58(3) does not require the ACCC to obtain the leave of the court before continuing to prosecute its claims against her.

## Misleading or deceptive conduct or false or misleading representations

### Principles

23 In *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; (2020) 381 ALR 507 at [22] the Full Court summarised the principles to be applied to the prohibition on misleading or deceptive conduct and closely related prohibitions as follows (citations removed):

The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter). A number of subsidiary principles, directed to the central question, have been developed:

(a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so.

(b) Second, it is not necessary to prove an intention to mislead or deceive.

(c) Third, it is unnecessary to prove that the conduct in question actually deceived or misled anyone. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself.

(d) Fourth, it is not sufficient if the conduct merely causes confusion.

(e) Fifth, where the impugned conduct is directed to the public generally or a section of the public, the question whether the conduct is likely to mislead or deceive has to be approached at a level of abstraction where the Court must consider the likely characteristics of the persons who comprise the relevant class to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful.

24 The Full Court also indicated (at [23]) that a requirement that a significant number of persons to whom the conduct is directed would be led into error is no part of the test under s 18 of the ACL: see also *Trivago N.V. v Australian Competition and Consumer Commission* [2020] FCAFC 185; (2020) 384 ALR 496 at [192].

25 As far as the prohibition on false or misleading representations in s 29 of the ACL goes, a representation is a statement, which may be conveyed by words or conduct, explicitly or by implication: *Aqua-Marine Marketing Pty Ltd v Pacific Reef Fisheries (Australia) Pty Ltd (No 5)* [2012] FCA 908 at [78]. It is doubtful whether there is any material difference between the requirement in s 29 that the representation be 'false or misleading' and the phrase used in s 18, 'misleading or deceptive': see *Australian Competition and Consumer Commission v Dukemaster Pty Ltd* [2009] FCA 682 at [14]; *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; (2014) 317 ALR 73 at [40].

### The statements made

26 The ACCC has adduced evidence of captures of A4WD's website, australian4wdhire.com.au at various times.

27 As at 3 August 2017 the home page of the website made the following statement (all errors in original):

**Our 4WD's And Bush Campers**

For the recreational 4WD and Camper Hire we provide wide range of Small 4WD, Medium 4WD, Large 4WD, Extra Large 4WD, Dual Cabs with Canopy, Troop Carriers, Luxury 4WD as well as various types of Bush Campers. Our 4WD and Bush Camper range was designed predominantly for the self-drive 4WD Tourism & Travel where travelers can experience top quality 4WD and equipment to go for a cruise around the Country Side or to explore the Australian Outback and to have the access and flexibility for their destinations and enjoy their holidays at their own pace. Vehicles of this category are properly insured and equipped and are suitable for this type of travel.

**Area of Use, Insurance & Roadside Assistance**

Australian 4WD Hire has Off-Road Insurance for all vehicles and we allow you to travel on unsealed roads as long as they are on HEMA MAPS, (aka gazetted road) and are open and safe for passage and you have disclosed your remote Area of Use if applicable. All our vehicles are covered by Manufacturers Warranties and Roadside Assistance. In the unlikely event of vehicle failure, a replacement vehicle will be provided to you subject to availability.

HEMA Maps is a company that produces maps, atlases, guides and digital navigation products.

28 The above text was displayed prominently near the top of the home page. Further down under the heading 'We Offer' there were a number of bullet points, one of which said 'All Vehicles Off-Road Insured'. The statement 'Australian 4WD Hire has Off-Road Insurance and we allow you to travel on unsealed roads as long as they are on HEMA MAPS, (aka gazetted road) and are open and safe for passage' was repeated towards the bottom of the page. Similar statements appeared in web captures taken regularly up to September 2018.

29 From July 2018, the home page, after photographs of vehicles available for hire and a booking form, contained another section headed 'Why Australian 4WD Hire?'. One of the answers to that question under a graphic of a 4WD vehicle was 'All Vehicles Off-Road Insured'. Another, under a graphic indicating an online map was 'Off-Road OK as long as on HEMA MAPS'.

30 Further down the home page as it appeared from July 2018 under a heading '4 x 4 Rental For Any Purpose' or 'Off-Road 4 x 4 Rental For Any Purpose' and a sub-heading 'Freedom and Peace of Mind', the following statement was made: 'Choosing your own adventure while enjoying peace of mind is the ultimate in off-road travel. All Australian 4WD Hire Vehicles are insured for Off-Road use, allowing you to travel worry free on any unsealed roads found on Hema Maps (aka gazetted, open to the public and safe for passage)'.

31 The ACCC has provided page captures for subsequent dates from which it can be inferred that the home page made these representations throughout the period (at least) to 21 August 2019. At some time between then and the next web capture, which was taken on 9 September 2019, references to vehicles being insured for off-road use were removed.

32 While the respondents did not appear at trial, their position on these and other matters can be found in their responses to compulsory notices for the production of information which the ACCC served under s 155 of the *Competition and Consumer Act 2010* (Cth) (**CACA**). The ACCC's first s 155 notice was dated 8 November 2018 and contained requirements for information that were divided into a Schedule 1 and a Schedule 2. On 29 November 2018, A4WD gave separate responses to each schedule (**Sch 1 Response** and **Sch 2 Response**). On 21 December 2018, the ACCC sought clarification of some of the company's previous answers. A4WD responded to this on 1 February 2019 (**February Response**). In the Sch 1 Response, A4WD said (emphasis and errors in original):

A4WD WEBSITE

7. The Australian 4Wd Hire website, under the current Entity was published in January 2014.

8. a,b,c, - All of the statements you have highlighted have appeared on the website pretty much since the business' inception. It appears that you may be forgot or deliberately choose not to mention that all these statements are also subject to our T&Cs which are published on our website 24/7.

The only alteration in that regard has been made to any of these statements is the removal of 2 words, **'Fully Comprehensively'**, which appeared before '**Insured**' on the website and was removed from all text on the website and terms and conditions sometime between September and November 2017.

The decision to remove these 2 specific words came following meetings with the Office of Fair Trading, also correspondence with ACCC on and before 6th of October of 2017 and our Legal Representatives, who advised that, even though Legal Liability Cover as Fully Comprehensively Insured does extend to our customers, subject to our T&C's, the web advertising may give the customer a false sense of security or perception in believing that, no matter the cause, or nature of the incident that they would have no liability in event of damage, and of course this is not the case with any insurer in Australia.

We concluded that by using these 2 specific words, we were not only risking the genuine interests of our business, but also our customers. Given this advice we made the decision to remove these 2 specific words and simply advertise vehicles as 'Off-Road Insured', however the Legal Liability Cover as Fully Comprehensively Insured subject to our T&C's on all our vehicle has not changed.

33 In the February Response, A4WD clarified the timing of the representations to make it clear that they had appeared on its website since January 2014. From this, it is clear that statements to the effect of those set out above were made on the website from that time until August 2019. Until at least September 2017 they were made with particular emphasis by saying that the vehicles were 'Fully Comprehensively' insured.

34 In addition, emails which A4WD sent to potential customers who had requested quotes on the website said:

WE OFFER - ANY TIME - ANY WHERE

THE RIGHT VEHICLE FOR THE RIGHT PURPOSE WITH RIGHT EQUIPMENT

…

* All Vehicles Off-Road Insured
* Off-Road OK as long as on HEMA MAPS

…

There are examples of these emails in evidence that are dated 2 April 2017, 22 December 2017 and 7 February 2018. It can be inferred from the standardised wording and formatting of the emails that many more such emails were sent to potential customers between at least April 2017 and February 2018.

### The representations thereby made

35 There was no specific evidence about the characteristics of the class of people who were exposed to these statements by way of the website. But from the affidavit evidence provided by specific customers, and the nature and evident intended audience of the website itself, it may be inferred that the class was comprised of a potentially wide range of individuals who were considering or planning holidays in remote and regional areas of Australia. It is likely that they had some familiarity with using the internet to acquire and reserve goods and services but they may not have ever done so for the purpose of hiring a vehicle. There were members of the class who were not Australian citizens and lived overseas.

36 There is no reason to limit that class to people with any particular background, or level of education or experience, so it may be inferred that the class would be made up of people with varying levels of experience in hiring vehicles, varying familiarity with 4WD vehicles and varying levels of knowledge about the insurance arrangements common in the vehicle hire industry, ranging from detailed knowledge to no knowledge at all. Some members of the class may never have hired a vehicle at all before, and many would never have done so in Australia.

37 The ACCC alleges that the statements set out above represented that all of A4WD's vehicles had the benefit of being insured for off-road use. The respondents have admitted this in their concise statement filed on 21 May 2019. That allegation is made out for the period January 2014 to August 2019.

38 The ACCC also contends that the statements represented to consumers that should any damage occur to the vehicle while being hired, including while being used on unsealed roads, it would be insured under A4WD's insurance policies. The respondents' concise statement denies this.

39 Obviously the statements I have set out above did represent that all vehicles that could be hired from A4WD were insured for off-road use. The issue appears to be whether they represented that they were insured for *any* damage.

40 It seems that from January 2014 up until at least September 2017, they did make that representation. By the Sch 1 Response as quoted above, A4WD has admitted that the website said that the vehicles were 'fully comprehensively' insured. Mr Roesch and Ms Kosukhina have admitted that too, as they each were named on both Sch 1 and Sch 2 Responses as having signed it.

41 I am also satisfied that in the form the website appears to have taken from September 2017 to September 2018, a representation that any damage would be insured was made. The statement that the vehicles are 'properly insured' and are 'suitable for this type of travel' together with unqualified statements that A4WD has off-road insurance for all vehicles, and allows travel on unsealed roads, conveyed that the vehicles were insured for any damage. The statements were made on a website with the evident purpose of persuading potential customers to hire the vehicles. In the absence of any express qualification, they are likely to have led at least some ordinary, reasonable members of the class of users of the website to believe that any damage to the vehicle, including any damage sustained off-road, would be covered by insurance.

42 The representation that any damage was insured was also made on another part of the web site in the form it appears to have taken from July 2018 to at least August 2019. The heading 'Freedom and Peace of Mind', and the statement that, due to A4WD being insured, the customer could 'travel worry free on any unsealed roads found on Hema Maps' conveyed that any damage on those roads would be covered by the company's insurance. If there had been gaps in that insurance, the hirer would not necessarily be 'worry free'.

43 Finally, from April 2017 to February 2018, the emails received, in the context of the website (which it appears all recipients of the emails had used before receiving the emails), also conveyed that any damage which occurred to the vehicle while it was being hired would be insured under A4WD's policies.

44 I therefore find that both alleged representations were made, that is, that all of A4WD's vehicles had the benefit of being insured for off-road use, and that if any damage occurred to the vehicle while being hired it would be insured under A4WD's insurance policies (**Insurance Representations**). They were made on the website as it stood from least January 2014 to August 2019, and by emails from April 2017 to February 2018. Many ordinary and reasonable users of the website would understand the insurance mentioned in both of these representations to refer to insurance provided by an insurance company. And the insurance in question would not just mean the existence of an indemnity under an insurance policy which may or may not be called upon. In common experience and in ordinary parlance, to say that a vehicle is 'insured' implies that if damage to the vehicle occurs, or the vehicle is stolen or lost, an insurance company will pay for the cost of repairing or replacing the vehicle. That was reinforced by the context of the statements on the website, which were viewed by people considering whether to hire a vehicle from A4WD and so would be understood as advancing a reason why they should do so, namely because if any damage to the vehicle occurs, they will not be liable for it. That would be especially important to potential customers who may be considering taking the vehicle off sealed roads, where the risk of single vehicle accidents may be perceived to be greater.

45 In the respondents' concise statement they seem to try to minimise the extent to which it is likely that anyone was misled by noting, in effect, that the hirer always took the risk of such matters as excesses and exclusions, as well as mechanical damage. But while it can be accepted that most people are familiar with such common limitations to vehicle insurance, that does not detract from the main thrust of what the statements conveyed, as described above.

### Were the Insurance Representations misleading or deceptive and false or misleading?

46 The ACCC relies on four matters said to falsify the Insurance Representations. The first matter is that not all of A4WD's rental vehicles were insured for damage caused in single vehicle accidents. The respondents admitted in their concise statement an allegation that approximately 46% of the vehicles hired by A4WD were not insured for accidents causing damage to the rental vehicle (i.e. they were not comprehensively insured). But that admission followed a statement that, 'Originally, A4WD advertised that all vehicles were comprehensively insured. When they cease [sic] to be comprehensively insured, A4WD changed the wording of the representation to reflect that fact.' From this and from the Sch 1 Response as set out above, it appears that any admission made by the respondents only relates to the period after September to November 2017. It is implicit in the concise statement that at that time, or perhaps some time before it, all vehicles were insured for all damage.

47 The ACCC also relies on a schedule of insurances dated 26 November 2018 which shows that approximately half of A4WB's vehicles were insured for third party property damage only. This tends to confirm the admission but it does not contain any dates on which insurance ceased and so does not shed any light on whether the vehicles were comprehensively insured before November 2018. There are individual certificates of comprehensive insurance but these all date from the end of 2018.

48 The Sch 2 Response dated 29 November 2018 explains A4WD's policy on insuring vehicles as follows (errors in original):

Once a vehicle reaches a certain age (2-3 years) or travels over 100,000 km, it is no longer commercially viable to insure them comprehensively through a 3rd party insurer, at which time they are transferred to a The 3rd Party Property Damages cover and the Comprehensive Cover is then extended through us as I hire company, subject to, our customers adhering to our Terms and Conditions.

The response asserts that 'we do extend Full Comprehensive Cover on all our vehicles subject to, our customers adhering to our Terms and Conditions'. But it is clear that to the extent that the 'Comprehensive Cover' relates to damage to the hired vehicle, it refers to a 'self‑insurance policy'. In my view these passages in the Sch 2 Response also confirm the admission in the concise statement, but they do not indicate whether it relates to the period before September to November 2017.

49 Since over half of the vehicles had only third party damage insurance as at November 2018, and since the Sch 2 Response seems to indicate this was the result of a policy that depended on the age of the vehicle, and so was applied progressively over the fleet, it may be inferred that there were a number of vehicles that were uninsured before November 2018. But it is not clear from the admission when that policy began to be applied, it is not possible to say how many vehicles were insured at any given time, and, in particular, it is not possible to conclude on the balance of probabilities that any vehicles were uninsured before September to November 2017, that being the subject of the admission.

50 The second matter on which the ACCC relies to falsify the Insurance Representations is that if there was a single vehicle accident, there was a possibility that a vehicle hired from A4WD would not be insured for accidental damage. This also relies on the statements about self‑insurance in both of the Sch 1 and Sch 2 Responses that are described above and does not add to the first matter on which the ACCC relies.

51 The third matter relied on by the ACCC is that if an A4WD rental vehicle was damaged in a single vehicle accident while being used by the hirer, the costs of repairing the damage to the vehicle might not necessarily have been insured and in that circumstance the hirer would be required to reimburse A4WD for the cost of repairing the damage to the vehicle. The fourth matter relied on is that there was a possibility that even if A4WD's rental vehicle was insured for the damage to it, the hirer would still be required to pay for the cost of repairing the damage, because A4WD's hire contract gave it the sole discretion to elect not to submit an insurance claim to its insurers for damage caused in single vehicle accidents and, instead, A4WD could claim the costs of the repairs from the hirer.

52 Those two matters are each said to follow from A4WD 's standard hiring terms and conditions, as they varied from time to time. The periods in which each different version of the standard terms was in use is difficult to establish from the evidence. The only sure evidence of the relevant periods comes from examples of signed and dated contracts with customers. The earliest of these in evidence is dated 24 May 2017. Before then, it is necessary to rely on dates given for three versions of the standard terms in the s 155 responses. It is clear from comparing those versions to actual signed contracts that the version history given by A4WD in the s 155 responses is unreliable. Nevertheless, I accept the ACCC's submission that what it says is the first version was in use from January 2014. That is because A4WD admits as much in the Sch 1 Response and confirms the same in the February Response, no actual signed contract or other evidence contradicts that admission, and from observing the history of ongoing elaboration of the standard terms - a history of terms being added or being amended so as to become more detailed - it can be inferred that the version which the ACCC says is the first version was indeed the earliest one in use. For example, that version does not contain a provision about GPS tracking, which appears to have first appeared in the standard terms in around March 2016.

53 The significance of the above for present purposes is that this first version of the standard terms contained the clause concerning insurance and single vehicle incidents which, the ACCC says, falsifies the Insurance Representations. Hence I find that this clause appeared in all versions of A4WD's standard terms, dating from January 2014. Clause 4(d) of the terms as they stood as at January 2014 was:

In the event of a single vehicle incident the Company may at its sole discretion, depending on the extent of the damage to the Vehicle, elect not to submit a claim to its insurer for damage, loss or replacement of the Vehicle. Should the Company elect not to lodge a claim with in [sic] its insurer in a single vehicle incident, the Company may instead hold the Hirer/Joint-Hirer and/or Authorised Driver/s of the vehicle jointly and severally liable for:

i. the total amount necessary to rectify all Vehicle damage in order to repair the Vehicle to a standard to be determined by the Company; or

ii. the Vehicle's replacement value as assessed by the Company's insurer; or

iii. the sum required to fully satisfy any vehicle pay-out figure under a contract of finance between the Company and a financier whichever is the greater of these three figures and at the sole discretion of the Company. In the event the Company elects not to submit a claim to its insurer for any such rectification of Vehicle damage or Vehicle replacement, the Hirer / Joint Hirer and/or Authorised Driver/s hereby acknowledge and agree that the quantum associated with the repair or replacement of the Vehicle, or the Vehicle's payout figure with the Company's financier, will be payable to the Company as liquidated damages immediately upon written demand by the Company or its legal representatives.

That term was substantially unchanged in various iterations of the standard conditions running through to 2019. I will refer to the terms to that effect collectively as the **Insurance Discretion Clause**.

54 To summarise, then, my findings about the matters said to falsify the Insurance Representations: the evidence set out above satisfies me that from at least November 2017 until August 2019, some of the vehicles hired out by A4WD were not subject to policies of insurance taken out with third party insurers which provided coverage for any damage to the vehicle. From November 2018, the date of the schedule of insurance to which I have referred, the proportion of such vehicles was a little over half. For those vehicles, single vehicle accidents where there was no damage to third party property would not be insured by any third party insurer at all. In view of what was conveyed by the statements on the website and in the emails, as I have found above, those statements were misleading or deceptive and false or misleading from November 2017.

55 Given the lack of evidence regarding the true position as to the insurance of the vehicles before September to November 2017, the ACCC has not established that some of A4WD's vehicles were not comprehensively insured before that time. I do not find that the statements were misleading, deceptive or false for that reason before November 2017.

56 As for the Insurance Discretion Clause, under it the benefit of any insurance policy could be denied to the customer at A4WD's absolute discretion. That is a significant qualification to the unqualified statements that all vehicles were insured, including for off-road use. The respondents' concise statement asserts that all vehicles were the subject of insurance policies for at least third party damage, so that the statements to the effect that the vehicles were insured were correct. But whether or not those statements were literally true when understood in that light, I have found that they would be understood by reasonable users of the website and recipients of the emails to be saying that if damage to the vehicle occurred, or the vehicle was stolen or lost, an insurance company would pay for the cost of repairing or replacing the vehicle. In failing to refer to the fact that this would depend on whether A4WD exercised its contractual discretion against lodging a claim, and that if it did then the customer would be liable to indemnify the company for any loss, the statements were misleading. The presence of the Insurance Discretion Clause from January 2014 means that they were misleading from that date on.

57 The respondents' concise statement argues that since the contract contained a security bond clause, and the hirers had to pay the bond, it must have been apparent to them that the insurance did not cover all damage or other losses. There are three answers to this. First, it is likely that many users of the website viewed the statements on the website before deciding to hire a vehicle, before turning their minds to matters such as a security bond, before being informed of the requirement for the bond, and before paying it. It has long been recognised that a contravention of s 18 of the ACL may occur at the point where members of the target audience have been enticed into 'the marketing web' by an erroneous belief caused by the respondent, even if the consumer may come to appreciate the true position before a transaction is concluded: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 at [50]. The second answer is that not all consumers were likely to make the connection between the existence of a security bond and insurance coverage which supports the inference on which the respondents relied. Failing to make that connection and inference does not, in my view, take a user of the website outside the class of ordinary and reasonable users. The third answer is that even if an ordinary reasonable user did make that connection, they could nevertheless understand the security bond to cover matters which one would not ordinarily expect to be covered by comprehensive insurance, such as deliberate damage or an excess.

58 The Sch 1 Response also refers to the availability of the terms and conditions on the website. Whether or not qualifying material of that nature is effective to neutralise an otherwise misleading or deceptive statement is a matter for determination in the specific circumstances of any particular case, and the qualifying material must be sufficiently prominent to prevent the primary statement from being misleading and deceptive: *Medical Benefits Fund of Australia Ltd v Cassidy* [2003] FCAFC 289; (2003) 135 FCR 1 at [37] (Stone J, Moore and Mansfield JJ agreeing). In the present case, there was little to indicate to users of the website that the statements were qualified by terms and conditions. There was no statement to that effect made immediately after the misleading statements, or any other device designed to draw the user's attention to the fact that those statements were qualified by the company's standard terms and conditions. A link to the terms and conditions is found near the bottom of the home page, behind an asterisk referable to the hire fees, not to the misleading statements. The link is in the same size print as the rest of the normal block text, three paragraphs below the statement about driving 'worry free'. It just says 'Terms and conditions apply' - it is not specifically connected with the statements about insurance coverage. And the terms themselves are the usual finely and densely printed mass of detailed provisions, in which the Insurance Discretion Clause can be found as an unlabelled sub‑clause, or at least it can if one is looking for it. It is unlikely that an ordinary, reasonable user of the website, devoting a reasonable but not excessive amount of time to his or her review of it for the purposes of possibly hiring a vehicle, would find the Insurance Discretion Clause, read it, and understand it to qualify the prominent statements made on the website home page. Despite the fact that it was possible to find the standard terms and conditions, the website was still misleading.

### Conclusion on contraventions

59 There can be no issue that the publication of the website and the sending of the quotation emails to potential customers was conduct in trade or commerce.

60 For the reasons given, in making the statements on its website that I have described above between January 2014 and August 2019 (both inclusive), A4WD engaged in conduct that was misleading and deceptive. The company therefore contravened s 18 of the ACL during that period. The ACCC has established that from January 2014, the website and emails were misleading because of statements they made which obscured the existence and effect of the Insurance Discretion Clause. From November 2017, they were also misleading because not all of the company's hire vehicles were insured for damage to the vehicle.

61 As for s 29(1)(g) of the ACL, the respondents' concise statement admits that A4WD has represented to consumers, via the publication of statements made on its website, that all A4WD's rental vehicles have the benefit of being 'insured for off-road use'. In the circumstances, and as I have explained, that statement conveyed that all the vehicles also had the benefit that if damage occurred or the vehicle was stolen or lost, an insurance company would pay for the cost of repairing or replacing it. Given that this was not true for some of the vehicles from at least November 2017 (as at November 2018, over half of them), that statement was false. And given that it omitted to refer to the potentially significant qualification to the statement which arose from the Insurance Discretion Clause, it was also misleading from January 2014.

62 The Insurance Representations were false or misleading representations that the goods supplied had benefits. They were made in connection with the supply of goods and the promotion of the supply of goods; when used as a verb, 'supply' includes supply by way of hire and when used as a noun it has a corresponding meaning: ACL s 2(1). So from January 2014until August 2019, in making the Insurance Representations, A4WD contravened s 29(1)(g) of the ACL.

## Unfair contract terms

### Principles

63 Section 23(1) of the ACL relevantly provides that a term of a consumer contract is void if it is unfair, and the contract is a standard form contract. A consumer contract includes a contract for the supply of goods to an individual whose acquisition of the goods is wholly or predominantly for personal, domestic or household use or consumption: s 23(3).

64 Section 24 of the ACL provides:

(1) A term of a consumer contract or small business contract is unfair if:

(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and

(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and

(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:

(a) the extent to which the term is transparent;

(b) the contract as a whole.

(3) A term is transparent if the term is:

(a) expressed in reasonably plain language; and

(b) legible; and

(c) presented clearly; and

(d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

65 In *Australian Competition and Consumer Commission v* ***CLA Trading*** *Pty Ltd* [2016] FCA 377 at [54], Gilmour J set out the following principles (citations removed) about the application of Part 2, Division 2, Subdivision BA of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). For present purposes that Part is not materially different to Part 2‑3 of the ACL, which contains s 23 and s 24:

(a) the underlying policy of unfair contract terms legislation respects true freedom of contract and seeks to prevent the abuse of standard form consumer contracts which, by definition, will not have been individually negotiated;

(b) the requirement of a 'significant imbalance' directs attention to the substantive unfairness of the contract;

(c) it is useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it;

(d) the 'significant imbalance' requirement is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in its favour - this may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty;

(e) significant in this context means 'significant in magnitude', or 'sufficiently large to be important', 'being a meaning not too distant from substantial';

(f) the legislation proceeds on the assumption that some terms in consumer contracts, especially in standard form consumer contracts, may be inherently unfair, regardless of how comprehensively they might be drawn to the consumer's attention; and

(g) in considering 'the contract as a whole', not each and every term of the contract is equally relevant, or necessarily relevant at all. The main requirement is to consider terms that might reasonably be seen as tending to counterbalance the term in question.

66 It can be relevant in assessing whether a term would cause a significant imbalance to consider whether any burden that the contract imposes on the consumer is matched by a corresponding right or (as a correlative) a corresponding duty on the supplier: see *Australian Competition and Consumer Commission v* ***Chrisco*** *Hampers Australia Limited* [2015] FCA 1204; (2015) 239 FCR 33 at [53]‑[58] (Edelman J).

67 As for what is reasonably necessary to protect the legitimate interests of the supplier, it is not appropriate to attempt to define 'legitimate interest' as it will depend on the nature of the particular business of the relevant supplier, the particular circumstances of the business, and the context of the contract as a whole. A legitimate interest may not be purely monetary and may not be confined to reimbursement of expenses directly occasioned by the customer's default. It may be intangible and unquantifiable. The court may take into account options that might be available to the supplier in terms of protecting its business interests, other than the impugned contract terms: see *Australian Competition and Consumer Commission v* ***Ashley & Martin*** *Pty Ltd* [2019] FCA 1436 at [48]‑[49], [51], [53] (Banks-Smith J). Here, the ACCC relies on the presumption under s 24(4), which requires A4WD to prove that the impugned terms are reasonably necessary in order to protect its legitimate interests.

68 The third element in s 24(1) is detriment to the consumer. Lord Steyn said of a similar provision applicable in the United Kingdom that this element 'may not add much': *Director General of Fair Trading v First National Bank plc* [2002] UKHL 52; [2002] 1 AC 481 at [36]. In my view that element simply requires that the application of or reliance on the unfair contract term will be disadvantageous to the consumer in some way. Under s 23(1)(c), the detriment may be financial or otherwise. It can include the imposition of liability in circumstances where the consumer would otherwise not be liable, or allowing the company to charge the consumer for damage for breach of contract where that breach did not cause or contribute to the damage: *Ashley & Martin* at [63]. Both of those are instances where the contract causes detriment because it imposes a disadvantage which would not be imposed in its absence.

69 As to transparency, s 24(2)(a) only requires the Court to consider transparency in relation to the particular term that is said to be unfair and only in relation to the matters concerning that term in s 24(1)(a) to (c): *Chrisco* at [43]. The meaning of 'transparency' in this context is explicit in s 24(3) (see [64] above). But it is not immediately apparent how the transparency of a term, or lack of it, can affect the question of whether the term is unfair.

70 The difficulty arises because of the nature of the evaluation required by Part 2‑3. It does not involve the exercise of a discretion. Section 23 provides that a term of a relevant consumer contract is void if it is unfair. The term will be unfair if the three elements in s 24(1) are satisfied. Whether that is so is an objective question requiring the application of the specified criteria to the facts. Section 24(2) describes it as a determination. No order of the court is required for s 24(2) to have effect. The court may make a declaration under s 250 which can have further remedial consequences (see below), and that involves a discretion. But that is a different thing to the determination contemplated by s 24(2).

71 That being so, it is hard to see how the transparency of the provision can affect the objective question of whether the three criteria in s 24(1) are satisfied. With one qualification, whether a term would cause a significant imbalance, is reasonably necessary to protect legitimate interests of a party, or would cause detriment to another party depends on what the impugned term means, that is, on its proper construction. Those matters depend on the effect of the term, on other relevant characteristics of the contract as a whole, and on the factual question of whether the term is reasonably necessary to protect legitimate interests. They do not depend on how the impugned term is presented. If, for example, it is buried in fine print, that may affect its legibility, but it will make no difference to the effect it will have on the parties if it is relied on. So, as Edelman J pointed out in *Chrisco* at [43], the Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth)on the introduction of what is now Part 2‑3 of the ACL says that if a term is not transparent it does not mean that it is unfair and if a term is transparent it does not mean that it is not unfair: see also Gilmour J's observation in *CLA Trading* at [54(f)] (quoted above).

72 The one qualification emerges from the judgment of Banks‑Smith J in *Ashley & Martin*. At [157] her Honour referred to obscurity in the way a particular provision was drafted. The obscurity meant that it was hard to know how the clause would apply in a particular situation: see [113]‑[115]. Her Honour observed that this increased the degree of difficulty for consumers in identifying their contractual rights and thus added to the significant imbalance which the provision caused. This was still a question of the terms in which the provision was cast, not the way in which it was presented. I do not suggest that this is the only way that transparency (or lack thereof) can contribute to unfairness. It will depend on the circumstances of the case. But in the circumstances of this case, no other ways spring to mind.

73 As to having regard to the contract as a whole, an impugned term cannot be assessed in a vacuum which ignores the practical considerations that attach to the carrying out of contractual obligations: *Ashley & Martin* at [66].

### Standard form consumer contracts

74 The respondents have admitted in their concise statement that 'consumers' - by implication persons who wanted to hire vehicles from A4WD - were required to enter into a standard form contract as the ACCC alleges. There are numerous examples of contracts in the evidence which contain the terms that the applicant says are unfair contract terms. It is inherent in the likely purpose of each vehicle hire, namely use by people who are on holiday, that the goods were being acquired for personal use (there is a definition of 'acquire' in s 2(1) of the ACL which confirms that it encompasses the hire of goods). The contracts here meet the definition of 'consumer contracts' in s 23(3) and were 'standard form contracts' for the purposes of Part 2‑3 and s 250 of the ACL.

### GPS Provisions

75 The first set of terms which the ACCC says are unfair concern the GPS tracking of the hired vehicles, the DBR that could be prepared on the basis of the GPS data, and the consequences for the hirer if that DBR revealed breaches of the contract. These standard terms varied somewhat over time and it is necessary to trace the changes.

76 I have described above the combination of admissions in the s 155 responses and the ongoing development of A4WD's standard terms, which permits different versions of the standard terms to be dated. That process establishes that as at 31 March 2016, the standard terms contained a cl 17 (**First** **GPS Clause**), as follows:

**GPS Tracking of Vehicles**

Australian 4WD Hire reserve the right to use GPS tracking to record speed, area, and time of use, however use of GPS tracking is not limited to this. Should any data received show any breach of speed limits or area or time of use, it will be considered as Negligence and regardless of circumstances, will constitute a breach of these Terms and Conditions.

Notwithstanding the capitalisation, 'Negligence' is not a defined term.

77 Subsequent versions of the contracts made between May 2017 and April 2018 contained an expanded version of cl 17 (**Second** **GPS Clause**). The ACCC submitted that this version of the GPS Clause should be dated from 1 January 2017, but that relies on admissions in the s 155 responses which I have found to be unreliable because they do not correspond with other signed and dated customer contracts which are in evidence. Those contracts are the surest way of dating the various versions of the clauses from 2017 on. The Second GPS Clause is:

You hereby acknowledge that the Company uses GPS systems to track and monitor the vehicles including, but not limited to, speed, time, driver behaviour, location and routes of travel. At any time, the Company may at its sole discretion prepare a GPS Driver Behaviour Report ('DBR') in respect of the Vehicle indicating the aforementioned matters in addition to other matters the Company at its discretion considers necessary.

In the event the DBR evidences that you:

a. have driven the Vehicle in excess of legal speed limits and/or driven the Vehicle more than 60 kilometres per hour on unsealed roads or tracks;

b. at the reasonable assessment of the Company your driver behaviour has caused damage and/or excessive wear and tear to the Vehicle;

c. the Vehicle has been driven on a road or track which has not been either open or safe for passage or permitted by Company;

You acknowledge that such acts have caused damage and/or excessive wear and tear to the vehicle either seen or unseen and that the Company has suffered loss and damage ('Driver Behaviour Damage'). In respect of the Driver Behaviour Damage you hereby irrevocably authorise the Company, at its sole discretion, to deduct your security bond or part of it by way of liquidated damages ('the Liquidated Damages'). You hereby acknowledge that the Liquidated Damages are a genuine pre-estimate of the loss that the Company will suffer in relation to Driver Behaviour Damage. This clause (17) does not limit the rights and/or remedies available to the Company pursuant to these Terms and Conditions, at law or in equity.

78 From at least 3 April 2018 until sometime before July 2018, a further clause was inserted into the standard terms at cl 13(f), which provided (**Third** **GPS Clause**):

The Hirer/Joint Hirer and Authorised Driver being jointly and severally liable for any and all loss or damage whosoever caused to the vehicle or the Company as a result of any breach of the terms and conditions herein, acknowledge, consent and agree to the following:

…

f. That when travelling outside built up areas you are not permitted to drive between sunset and dawn or during any period of reduced visibility, including but not limited to fog, dust storms, heavy rain and hirer accepts that minimum penalty of $500.00 per incident will apply

79 Under these standard terms, the amount of the security bond varied between $1,500 and $5,000, depending on the age of the driver, whether the customer chose to pay a daily amount of between $25 and $50, and (at A4WD's discretion) whether the customer intended to drive the vehicle to any remote areas: see cl 12.

80 At some time between April 2018 and July 2018, the terms concerning GPS tracking were moved to cl 5(c) and cl 8 of the standard terms (**Fourth GPS Clause**). Under cl 8(a), the hirer acknowledged 'that the Company monitors the areas the Vehicle was driven, when the Vehicle was driven and how fast the Vehicle was driven using GPS'. Under cl 8(b), A4WD could, at its discretion, prepare a DBR for the Vehicle. It is clear from acknowledgments in cl 8(c) that GPS data supplied by a third party provider called CTRACK was to be used to compile the DBR.

81 In this version of the contract, cl 3(i) obligated the hirer to prevent the vehicle from being operated in a manner that was a 'Prohibited Operation'. Clause 1(w) contained a long and detailed definition of what was a Prohibited Operation. It included operating the vehicle outside any agreed or disclosed area of use. It also included (among many other things):

(1) operation in contravention of any traffic laws;

(2) operation outside built up areas between sunset and dawn;

(3) operation 'during any period of reduced visibility, including but not limited to fog, dust storms and heavy rain';

(4) 'driving the Vehicle at a speed higher than 60km per hour on an unsealed road or track, unless the conditions (including but not limited to the road conditions) and the Traffic Laws permit otherwise'; and

(5) 'driving the Vehicle above the indicated speed limit'.

82 By cl 8(d) the parties agreed that 'engaging in Prohibited Operation of the Vehicle will cause excessive wear and associated damage to the Vehicle (Driver Behaviour Damage)' (the word 'may' was substituted for 'will' in the contracts some time after 27 July 2018). Clause 5(c) of the standard terms was to a similar effect. By cl 8(e) they agreed that 'the Driver Behaviour Damage may not be identifiable at the time the Vehicle is returned to the possession of the company'.

83 Clause 8(f) to cl 8(i) provided:

(f) In the event the DBR evidences that the Hirer has engaged in Prohibited Operation of the Vehicle then the Hirer will be liable to the Company for the Driver Behaviour Damage.

(g) If the Hirer is liable to the Company for Driver Behaviour Damage, the Hirer must pay the Company the sum of Five Hundred Dollars ($500.00) for each instance of Prohibited Operation. The Parties agree that Five Hundred Dollars ($500.00) is a genuine pre-estimate of the cost to repair or otherwise mitigate the loss the Company will suffer as a result of the Prohibited Operation and the Hirer must make payment of that amount to the Company as liquidated damages for its breach of its obligations under this Agreement.

(h) The Hirer expressly and irrevocably authorises the Company to deduct any amounts owing by the Hirer pursuant to this clause from any monies held as a Bond.

(i) For the avoidance of doubt, the Parties expressly agree that the Company shall be entitled to provide for an amount for future loss resulting from the Prohibited Operation, including but not limited to amounts for replacing the parts of the vehicle which were subject to excessive wear during the Prohibited Operation.

84 It is also relevant to note that from at least April 2018, in the covering form which the hirer signed to enter into the contract to hire the vehicle there was an acknowledgment as follows (there were immaterial variations to this example from time to time):

Excessive Wear & Tear & Night Driving - I/We hereby acknowledge, and accept, that all vehicles are GPS monitored and that additional charges will be incurred in the event of prohibited operation as per point 1 section W subsections xii and xix also as per point 8 section e and f in our Terms and Conditions.

85 As at 24 September 2018, these terms had seen further material amendment (**Fifth** **GPS Clause**). At that time, cl 8(g) and cl 8(h) provided:

(g) If the Hirer is liable to the Company for Driver Behaviour Damage, the Hirer must pay the Company an amount determined by the Company up to Five Hundred Dollars ($500.00) for each instance of Prohibited Operation. The Parties agree that the Five Hundred Dollars ($500.00) limit for each instance is a genuine pre-estimate of the cost to repair or otherwise mitigate the loss the Company will suffer as a result of the Prohibited Operation and due to the acceleration of the Vehicle part replacement and repair.

(h) Notwithstanding any right that the Hirer has against CTRACK regarding the collection of the GPS data, the Hirer must make payment of that amount to the Company as liquidated damages for its breach of its obligations under this Agreement. If, within 6 months of liability being incurred under this clause, the Hirer is successful in challenging the collection of the GPS data which would have resulted in a Prohibited Operation not being deemed to have occurred, the Company will refund any amounts which have been collected where a Prohibited Operation would not have occurred under the amended GPS data.

The provision authorising deduction of the security bond became cl 8(i) and the provision about 'future loss', cl 8(j).

86 By September 2018, cl 8(d) had been amended to add after the definition of Driver Behaviour Damage, the following:

For the avoidance of doubt, the Hirer acknowledges that whilst engaging in a Prohibited Operation may not result in an immediate cost to the Company, each occurrence of a Prohibited Operation may shorten the life cycle of the Vehicle, which results in accelerated Vehicle part replacement and repairs.

87 By May 2019, cl 8(g) was also amended to remove the stipulation of $500 per incident and to provide instead (**Sixth GPS Clause**):

If the Hirer is liable to the Company for Driver Behaviour Damage, the Hirer will be charged for the actual damages caused to the vehicle and equipment quantified by a qualified mechanic nominated by the Company.

#### Whether the GPS Provisions are unfair contract terms

88 The ACCC submits that the provisions described in the preceding section (collectively, **GPS Provisions**) created a significant imbalance in the respective rights and obligations of the parties because they required the hirer to agree in advance that a Prohibited Operation would cause excessive wear and tear to the vehicle which would in turn cause financial loss to A4WD, even though Prohibited Operations included potentially trivial breaches which could not cause any wear and tear to the vehicle. Examples include operating the vehicle outside a built up area between sunset and dawn and driving during periods of reduced visibility.

89 The ACCC says that this went beyond what was reasonably necessary to protect A4WD's legitimate interests by imposing a financial penalty on the hirer without requiring a causal link between the amount payable and the cost of repairing the damage to the vehicle.

90 As for the element of detriment to the consumer, the ACCC says that is evident in the requirement to pay 'liquidated damages'.

91 I broadly accept these submissions. But the history of changes to the GPS Provisions outlined above means that they cannot be accepted in an unqualified way in relation to each one of those provisions as in force from time to time. It is necessary to be specific.

92 I do not consider that the First GPS Clause dated 31 March 2016, set out at [76] above, is an unfair contract term. It appears from the minute of orders the ACCC provided that it does not think so either, but since that was not clear from its submissions it is appropriate that I record my findings. The First GPS Clause authorised A4WD to record GPS data for the vehicle. The ACCC accepts that the provision and use of GPS in a hired vehicle was reasonable in order to protect A4WD's legitimate interests, for example to help in cases of theft or breakdown. The only other thing this clause did was to provide that if the GPS data showed a breach of speed limits or the agreed area in which the vehicle could be used, or the agreed times of use, 'it will be considered as Negligence and regardless of circumstances, will constitute a breach of these Terms and Conditions'. But 'Negligence' was not a defined term and characterising the conduct that way had no apparent consequences under the contract. And simply defining certain conduct as a breach of the 'Terms and Conditions' did not necessarily result in any significant imbalance. In this clause, there is no attempt to override the usual causal relationship between breach and loss.

93 The same cannot be said of subsequent GPS Provisions, although as will be seen it is still necessary to distinguish between particular terms that are unfair and others that are not. In the Second GPS Clause dated between May 2017 and April 2018 set out at [77] above, the hirer acknowledged that driving the vehicle in certain ways will cause damage and/or excessive wear and tear to the vehicle. On the proper construction of the clause, each of the three matters said to cause loss (set out as (a), (b) and (c)) are alternatives - by their nature it is unlikely that they were intended to be cumulative so that the breach would occur only if all three are satisfied. As a result, simply exceeding the speed limit by 1 km/h, even for a brief period of time, would have to have been acknowledged by the customer to have caused damage and/or excessive wear and tear. The GPS tracking meant that such minor infractions would be recorded. Another example is if the customer were to drive the vehicle at night on a highway which was sealed and well maintained, but happened to be outside a built up area. Such 'breaches' on their own could not have involved excessive wear and tear or unacceptable risk. Yet they would lead to the consequence that A4WD could at its discretion deduct the entire amount of the security bond, which could be as much as $5,000 (it would be less if the hirer chose to pay an additional daily fee know as a 'Collision Damage Loss Liability' charge).

94 That would cause a significant imbalance in the parties' rights and obligations arising under the contract. It gave A4WD the ability at its sole discretion to recover amounts of money from the hirer which exceeded by a substantial amount any loss the company may have suffered as a result of the hirer's behaviour, and thus went significantly further than the rights the company would have had for breach of contract at common law, in the absence of the clause. No corresponding obligation of A4WD or right granted to the customer counterbalanced this.

95 The Second GPS Clause was also not reasonably necessary to protect the legitimate interests of A4WD. In order to negative this element the onus was on A4WD to prove that the clause was reasonably necessary in order to protect its legitimate interests: ACL s 24(4). Since the respondents did not appear at the hearing or file evidence, they made no attempt to do so. Nevertheless, the ACCC has, properly, drawn the court's attention to matters raised by the respondents in their concise statement and in the Sch 1 and Sch 2 Responses, so it is appropriate to consider those matters in order to determine whether the respondents have nevertheless discharged their burden here.

96 The respondents contended that it was appropriate to have a GPS tracking system on the hired vehicles for various reasons, including the prospect that the driver might become lost, the vehicles might be stolen and the fact that the vehicles were often taken to remote, hard to access areas. The respondents stated in the Sch 2 Response that the GPS monitoring improved driver behaviour and that after introducing the GPS Provisions, hirers had maintained the vehicles in better condition than was previously the case. They contended that the information in the DBR was recorded in the interests of safety and that Prohibited Operations, such as driving above the speed limit and driving outside of built up areas and between the times of sunset and dawn increased the likelihood of damage to the suspension or undercarriage and increased the likelihood of injury to the hirer.

97 This all points to a possible justification for the Second GPS Clause which is evident on its face, including from the references to wear and tear which may not have been identifiable at the time the vehicle was returned. A4WD was in the business of hiring out vehicles for the purpose of driving in remote locations, often off-road, where the conditions were likely to increase the wear and tear on the vehicles and increase the risk of accidents and damage. It is readily apparent that A4WD would have a legitimate interest in deterring hirers from driving the vehicles in places, at times and in a way which increased wear and tear and risks to an unacceptable level.

98 But in the present case, the Second GPS Clause through to the Fifth GPS Clause went further than was reasonably necessary to protect that legitimate interest. These provisions authorised A4WD to deduct up to $5,000 from the security bond for trivial breaches which could on no view have caused any, let alone excessive, loss or damage. Nothing in the evidence suggests that it was necessary to expose hirers to a potential loss of up to $5,000 in order to deter them from driving behaviour with the potential to damage the vehicle. Section 24(1)(b) of the ACL is satisfied in relation to that clause. So is s 24(1)(c), as deducting such a large amount of money would obviously be detrimental to the hirers.

99 For those reasons, the Second GPS Clause at least *contains* an unfair contract term (whether the whole clause must be so characterised is discussed below). I reach that conclusion after having considered the contract as a whole. There is nothing in it which ameliorates the effect of the clause or otherwise redresses the imbalance I have identified.

100 I have assessed the extent to which the Second GPS Clause as well as each of the other GPS Provisions are transparent. I consider that they are expressed in reasonably clear language. The drafters have not taken pains to express them in simple English but the drafting is tolerably straightforward, with some 'legalese' but not much. They could be more legible than they are, as the print is reasonably fine and there are large blocks of text, although the later versions move away from that. In terms of being presented clearly, it appears from the hire contracts in evidence that the hirer was required to initial every page of the terms and conditions. I have also described the acknowledgment of certain aspects of the GPS Provisions which appeared above the hirer's signature on some of the cover pages. These matters enhance transparency. Also, I infer from the fact that the ACCC obtained copies of the contracts from some customers that it was A4WD's practice to give them a copy of the contract at the commencement of the hire, which indicates that the terms were readily available. There is no evidence that hirers were not permitted to read the terms before signing, although many would not have. The terms were also available on the website before any hiring, albeit they were not prominently displayed there.

101 All of this means that the GPS Provisions, including the Second GPS Clause, can be described as reasonably transparent. But there is nothing in that finding, nor in the nature of the case, which causes me to modify the views I have reached about the unfairness of the Second GPS Clause.

102 It does not follow from those views that all of the Second GPS Clause comprised a single unfair contract term. I doubt that it is open to the court to sever only part of a term, so as to take the 'blue pencil' to it to convert an unfair term to a fair one. While s 16(1) of the ACL provides for the severance of a provision which causes the making of a contract to contravene the ACL, s 15 relevantly provides that conduct is not taken, for the purposes of the ACL, to contravene a provision of the ACL merely because of the application of s 23(1), which effectively excludes the operation of s 16 for present purposes. In *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq) (formerly Advanced Medical Institute Pty Limited)* [2015] FCA 368 at [981], North J mentioned an alternative approach of viewing each of the 'unfair elements' in a provision as a term in itself, but his Honour did not adopt that approach.

103 In providing that the contract continues to bind the parties if it is capable of operating without the unfair term, s 23(2) suggests that term may be excised even if the result is to change the meaning of the contract, provided it remains capable of operating. But this all begs the question of what the word 'term' means in s 23. The effect of the section is relevantly that a 'term of a consumer contract' is void. It is the term which is the irreducible minimum unit which is either void, or not, in its entirety. 'Term' is not defined in the ACL, but its ordinary, natural meaning is the one given in Butterworths' *Encyclopaedic Australian Legal Dictionary* (online at 13 April 2021) of a 'clause, provision, or undertaking in a contract': see also *P (a minor) v National Association of School Masters/Union of Women Teachers* [2003] UKHL 8; [2003] 2 AC 663 at [24]‑[25] (Lord Hoffmann).

104 Identifying what is a separate term could be influenced by choices or accidents of layout or numbering such as, in the present case, whether the drafter of the Second GPS Clause chose to number the second and third sub-paragraphs separately as cl 18 and cl 19. Those matters may help with the ascertainment of the objective intention of the parties as to whether the clauses may operate independently. But the outcome could not entirely depend on layout and numbering, as that would be to elevate form over substance.

105 In my view this means that the first paragraph of the Second GPS Clause, which merely acknowledges that A4WD will use GPS monitoring and may prepare a DBR, can be treated as a separate term to the balance of the clause, which provides for various matters to be breaches and imposes onerous consequences if such breaches occur. The first paragraph is not unfair. The ACCC accepts that the use of a GPS tracking system in a hired vehicle is reasonable, and there is nothing prejudicial to the customer in the mere preparation of a report based on that data. This means that the unfair term (or terms) in the Second GPS Clause are only those that appear after that first paragraph. The whole of the clause is not void.

106 The Third GPS Clause, which is quoted above at [76], allowed A4WD to deduct a 'minimum penalty' of up to $500 each time a hirer drove a vehicle outside of a built up area at night or during any period of reduced visibility. Since there could be multiple occasions of this, that could authorise A4WD to deduct the entire bond. There was no requirement for the conduct to have caused any actual damage to the vehicle before A4WD could deduct the money. I find the Third GPS Clause to be unfair for the same reasons as the Second GPS Clause.

107 Clause 8(a) through to cl 8(c) of the Fourth GPS Clause that was introduced in about April 2018 merely provide for GPS tracking and the preparation of the DBR, and are not unfair. But cl 8(d) through to cl 8(i) are unfair, taken together and taking into account the contract as a whole. Their combined effect is that even in cases of trivial breaches which cannot possibly have caused excessive wear and tear or other damage, A4WD can deduct $500. Taken by itself, this is not as onerous as the Second GPS Clause was, as it does not authorise deducting the entire amount of the security bond at once. But cl 8(g) makes it clear that the $500 applies 'for each instance of Prohibited Operation'. There could easily be many such instances: for example, if the speed of a vehicle travelling in a 110 km/h zone constantly fluctuated between 105 km/h and 115 km/h, a large number of Prohibited Operations could occur in a short period of time, causing no damage to the vehicle. Once again, the GPS tracking would pick this up. So the amount of 'liquidated damages' A4WD was entitled to receive could soon equal or even exceed $5,000. The evidence described below about A4WD's alleged unconscionable conduct shows that this was not a merely theoretical possibility. For reasons similar to those I gave in relation to the Second GPS Clause, I find that cl 8(d) to cl 8(i) of the Fourth GPS Clause were unfair contract terms and void. I reach that conclusion after taking into account the contract as a whole and the transparency of the impugned terms, which was no different to the transparency of the Second GPS Clause.

108 As I have described, the Fifth GPS Clause effected an amendment to cl 8 by at least September 2018. The relevant change this brought about was that, from then, the hirer was not liable for a flat $500 per instance of Prohibited Operation, but for an amount determined by A4WD up to that amount. But even with that change, the provision was still an unfair contract term. The company still had the ability to charge $500 for each instance of Prohibited Operation, regardless of whether it caused damage. There was no requirement in the provisions that the company act reasonably. That means that there was still a significant imbalance. Clause 8(d) to cl 8(j) of that version of the standard terms and conditions were unfair contract terms and are void.

109 However in around May 2019 a significant further amendment was made as shown in the Sixth GPS Clause, to provide that if the hirer was liable to A4WD for Driver Behaviour Damage, the hirer would be charged for 'the actual damages caused to the vehicle and equipment', quantified by a qualified mechanic nominated by A4WD. There is no reference to 'liquidated damages' of $500 per instance and no right for A4WD to deduct the entire amount of the security bond, regardless of the quantum of actual damages.

110 The ACCC submitted that the Sixth GPS Clause nevertheless contained unfair contract terms because the provision for GPS tracking of vehicles, the definition of Prohibited Operation and the acknowledgment that engaging in a Prohibited Operation would result in Driver Behaviour Damage, were unfair. It was submitted that the hirers could not challenge the company's interpretation of the DBRs and the issue was likely to arise after the vehicles were returned, when the drivers had no ability to disprove the matters raised in the DBR. The DBRs could show, or purport to show, a high number of violations because they recorded speed every minute or less (see [155] below for more detail as to this).

111 But, as I have said, A4WD did have a legitimate interest in employing GPS tracking of vehicles, and the acknowledgment of deemed wear and tear could not overcome the requirement in the Sixth GPS Clause for there to be actual damage. The acknowledgment is only that a Prohibited Operation *may* cause excessive wear and tear or damage, which was no doubt correct. Subject to a qualification based on two provisions I am about to mention, the removal of the tariff or penalty per Prohibited Operation robbed the clause of its teeth and rendered it unobjectionable. It is true that certain instances of what I will find below to be unconscionable conduct connected with the GPS Provisions occurred under this contractual regime, but that conduct did not necessarily depend on the particular terms of the contract.

112 The first of the two provisions which qualify this conclusion, which remained in the Sixth GPS Clause, was cl 8(h). This required the customer to pay the amount of 'liquidated damages', no doubt as assessed by A4WD, to the company, and then recover it only if the hirer was successful in 'challenging the collection of the GPS data which would have resulted in a Prohibited Operation not being deemed to have occurred'. The wording is the same as cl 8(h) in the Fifth GPS Clause, quoted at [85] above. The second of the two provisions was cl 8(j), which was the clause about 'future loss' the same as that quoted as cl 8(i) in the Fourth GPS Clause at [83] above. The first of these provisions expressly placed the onus of disproving the Prohibited Operations on the customer. The second gave A4WD a practically unrestrained discretion to charge the customer for the total cost of replacement parts even when the customer's conduct did not cause all the damage to the parts or cause their destruction. Both of these created a significant imbalance and went further than was reasonably necessary to protect A4WD's legitimate interests, given that it already had the inherent protection of the security bond. I consider that each of these are 'terms' for the purposes of s 23 and s 24 which can be treated as void, after which the contract would have remained capable of operation and the balance of cl 8 would not have been unfair. After considering the Sixth GPS Clause in the context of the contract as a whole, I consider that only cl 8(h) and cl 8(j) in this final iteration are unfair contract terms.

### Insurance Discretion Clause

113 The second group of terms the ACCC seeks to impugn are the Insurance Discretion Clause provisions, which leave it at A4WD's discretion whether or not to claim under insurance policies if there is a single vehicle incident. I have set out a representative example already at [53] above and it is not necessary to set out more. There was no material change between the different iterations of the standard terms and conditions.

114 The ACCC submits that the Insurance Discretion Clause was an unfair contract term because it gave A4WD the sole discretion to decide whether to submit a claim to its insurer for a single vehicle accident, and this was not reasonably necessary to protect any legitimate interest of A4WD because if it had insurance, the hirers would reasonably expect it to claim. The detriment it could cause the hirer, in being liable for the cost of repairing or replacing the vehicle, is obvious.

115 I accept those submissions. The effect of the Insurance Discretion Clause was to put the entire financial risk of damage to or destruction of the hired vehicle on the hirer, at the sole discretion of A4WD, even if A4WD had insured against that risk. That is a significant imbalance in the rights and obligations of the parties to the contract.

116 There is nothing to suggest that the Insurance Discretion Clause was reasonably necessary to protect any legitimate interest of A4WD. The respondents advanced no reason why it might have been in their concise statement or any of their 155 Responses. One can imagine circumstances where the company may wish not to make a claim so as to avoid premium increases or loss of a no claim bonus (although there was no evidence that the latter would apply to a commercial insured such as A4WD). But even so, it should only have been open to A4WD, at most, to obtain recompense limited to any financial prejudice it suffered as a result. Even assuming (without deciding) that a provision of that kind would be fair, placing the entire risk of damage on the hirer goes further. There is nothing in the evidence capable of discharging the burden which falls on A4WD of proving that the Insurance Discretion Clause was reasonably necessary to protect its legitimate interests.

117 Taking into account the effect of the contract as a whole, there are no other provisions which materially ameliorate or redress the imbalance, reduce the detriment to the hirer, or suggest that the Insurance Discretion Clause was reasonably necessary to protect A4WD's legitimate interests.

118 The Insurance Discretion Clause was less transparent than the GPS Provisions because it was not drawn to the customer's attention on the signing page. Other than that, there is no difference between the extent to which the two sets of provisions were transparent. I have taken the transparency of the clause into account but it does not affect my conclusions.

119 The Insurance Discretion Clause as it appeared in the various iterations of the standard terms, in so far as it found its way into contracts between A4WD and its customers, is an unfair contract term and void.

### Non-Disparagement Clause

120 The third group of provisions which are said to be unfair contract terms is comprised of terms which required the hirers to act in A4WD's best interests and not to defame the company.

121 By way of example, by cl 20(d) of standard terms and conditions which appear to have applied from at least January 2014 to 3 April 2018 (towards the beginning of that period it had a different clause number):

The Hirer/Joint Hirer and Authorised Driver/s warrant that they will at all times act in the best interests of, well and faithfully serve and promote the Company's business and interests and will not defame or denigrate the Company or its employees, agents or servants following the return of the vehicle.

122 By an equivalent term in a contract made in July 2018 (cl 5(j)), the hirers 'warranted' that they:

will at all times act in the best interests of the Company's business and interests and will not defame or denigrate the Company or its employees, agents or servants following the return of the Vehicle, including but not limited to leaving misleading, deceptive or defamatory reviews on any website or other form of online forum.

123 Other examples of this kind of term were similar; the only potentially material difference is that from May 2019, the obligation to act in the company's best interests only applied during the term of the hire. The obligation not to defame or denigrate A4WD on an online forum following the term of the hire remained. I will refer to these terms collectively as the **Non‑Disparagement Clause**.

124 The ACCC submits that the Non-Disparagement Clause caused a significant imbalance because it imposed an obligation on the hirer to act in the best interests of A4WD's business without imposing a corresponding obligation on A4WD. The clause was not reasonably necessary to protect A4WD's legitimate interests because it went beyond preventing unjustified, false or misleading statements, and extended to preventing a hirer from denigrating A4WD even if the hirer was expressing views that were honestly or genuinely held. This is said to cause detriment to the hirer because if A4WD considered that the hirer was not acting in its best interests, or had denigrated A4WD including by publishing honestly held negative opinions, it could allege that the hirer was in breach of the agreement. It could also cause financial detriment because if the term was breached, the hirer could be liable to indemnify A4WD or pay damages.

125 I accept these submissions. I need only add the following comments:

(1) The Non-Disparagement Clause was entirely in A4WD's favour, and imposed on hirers obligations they would not have in its absence. Taking into account the contract as a whole, nothing in it counterbalanced or ameliorated this. Rather, there was a general indemnity for breach of contract as well as a right to deduct from the security bond, which exacerbated the imbalance.

(2) There is nothing to suggest that a clause of this kind was necessary to protect the legitimate interests of A4WD in what was, after all, likely to be a short term transaction rather than an ongoing relationship calling for duties to act in the interests of the other party. To require a hirer as a party to that kind of transaction to act in the best interests of the company is extraordinary.

(3) While a prohibition on misleading or deceptive reviews could be reasonable, the prohibition went further than that. It is possible to defame and denigrate someone by expressing views which are not only genuinely and honestly held, but are also true.

(4) The fact that from May 2019 the obligation to act in A4WD's best interests only applied during the term of the hire reduced the significant imbalance, but did not eliminate it. The term still exceeded what was reasonably necessary to protect the company's legitimate interests. The respondents' concise statement sought to justify it by saying that it encouraged the hirer to take reasonable care of the vehicle. A term to that effect would have been unobjectionable, but the Non-Disparagement Clause went further. In any event, it is difficult to see any logical connection between an obligation not to defame or disparage A4WD and any incentive to look after the vehicle.

(5) The Non-Disparagement Clause was transparent to the same extent as the Insurance Discretion Clause was. That makes no difference to my conclusions as to whether it was unfair.

126 The Non-Disparagement Clause, as found in all the versions of the standard terms and conditions which are in evidence, was unfair within the meaning of s 23 of the ACL and is void.

## Unconscionable conduct

### Principles

127 The ACCC alleges that A4WD has breached s 21 of the ACL, which relevantly provides:

(1) A person must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company); or

(b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

…

(4) It is the intention of the Parliament that:

(a) this section is not limited by the unwritten law relating to unconscionable conduct; and

(b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and

(c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

(i) the terms of the contract; and

(ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

128 Section 22 sets out a number of matters to which the court may have regard in the application of s 21. Section 22(1) deals with the current situation, where the person alleged to have engaged in unconscionable conduct is the supplier of goods or services, as follows:

Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the ***supplier***) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the ***customer***), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the customer; and

(b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

(c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and

(f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and

(g) the requirements of any applicable industry code; and

(h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and

(i) the extent to which the supplier unreasonably failed to disclose to the customer:

(i) any intended conduct of the supplier that might affect the interests of the customer; and

(ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and

(j) if there is a contract between the supplier and the customer for the supply of the goods or services:

(i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and

(ii) the terms and conditions of the contract; and

(iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and

(iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and

(k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and

(l) the extent to which the supplier and the customer acted in good faith.

129 The question of whether conduct is rightly characterised as unconscionable for the purposes of s 21 is an evaluative judgment: see *Australian Securities and Investments Commission v* ***Kobelt*** [2019] HCA 18; (2019) 267 CLR 1 at [13] (Kiefel CJ and Bell J). But that is not the same as a discretionary judgment; it is a conclusion that is either right or wrong: *Kobelt* at [47]. It is not to be made purely by reference to the judge's subjective views based on 'the formless void of individual moral opinion': ***Paciocco*** *v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199 at [306] (Allsop CJ).

130 The evaluation requires close attention to all the facts and circumstances of the case. As in equity, so under s 21 must the court look 'to every connected circumstance that ought to influence its determination upon the real justice of the case': ***Jenyns*** *v Public Curator (Qld)* (1953) 90 CLR 113 at 119; *Kobelt* at [150] (Nettle and Gordon JJ). This has been described as a 'multi-factorial judgment': *Kobelt* at [120] (Keane J). In *Violet Home Loans Pty Ltd v Schmidt* [2013] VSCA 56; (2013) 44 VR 202 at [59] the Victorian Court of Appeal (Warren CJ, Cavanough and Ferguson AJJA) described the process as requiring a 'synthesised approach' and said that little was to be gained by a close factual analysis of the myriad of decided cases, as, while there are sometimes factual similarities between the cases, inevitably there are differences.

131 The term 'unconscionable' is not defined in the legislation and bears its ordinary meaning: *Kobelt* at [14]. On its ordinary and natural interpretation it means doing what should not be done in good conscience: *Australian Securities and Investments Commission v National Exchange Pty Ltd* [2005] FCAFC 226; (2005) 148 FCR 132 at [33], *Quantum* at [87] (Allsop CJ, Besanko and McKerracher JJ). It is permeated with accepted and acceptable community values: *Paciocco* at [298]. Guidance as to how to determine and apply its ordinary meaning in the circumstances of a particular case can be found in *Australian Competition and Consumer Commission v* ***Lux Distributors*** *Pty Ltd* [2013] FCAFC 90 at [23], where the Full Court (Allsop CJ, Jacobson and Gordon JJ) said:

The task of the Court is the evaluation of the facts by reference to a normative standard of conscience. That normative standard is permeated with accepted and acceptable community values. In some contexts, such values are contestable. Here, however, they can be seen to be honesty and fairness in the dealing with consumers. The content of those values is not solely governed by the legislature, but the legislature may illuminate, elaborate and develop those norms and values by the act of legislating, and thus standard setting. The existence of State legislation directed to elements of fairness is a fact to be taken into account. It assists the Court in appreciating some aspects of the publicly recognised content of fairness, without in any way constricting it. Values, norms and community expectations can develop and change over time. Customary morality develops 'silently and unconsciously from one age to another', shaping law and legal values: Cardozo, *The Nature of the Judicial Process* (Newhaven, Yale University Press, 1921) pp 104-105. These laws of the States and the operative provisions of the ACL reinforce the recognised societal values and expectations that consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct.

132 At [41] their Honours said of particular conduct in the case before them, which at [42] they characterised as taking advantage of a deceptive ruse practised on an elderly woman living alone (citations removed):

The word 'unconscionability' means something not done in good conscience. No argument was put that required any consideration of the authorities. Notions of moral tainting have been said to be relevant, as often they no doubt are, as long as one recognises that it is conduct against conscience by reference to the norms of society that is in question. The statutory norm is one which must be understood and applied in the context in which the circumstances arise. The context here is consumer protection directed at the requirements of honest and fair conduct free of deception. Notions of justice and fairness are central, as are vulnerability, advantage and honesty.

133 In *Paciocco* at [296], Allsop CJ said:

The working through of what a modern Australian commercial, business or trade conscience contains and requires, in both consumer and business contexts, will take its inspiration and formative direction from the nation's legal heritage in Equity and the common law, and from modern social and commercial legal values identified by Australian Parliaments and courts. The evaluation of conduct will be made by the judicial technique referred to in *Jenyns*. It does not involve personal intuitive assertion. It is an evaluation which must be reasoned and enunciated by reference to the values and norms recognised by the text, structure and context of the legislation, and made against an assessment of all connected circumstances. The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.

134 Kiefel CJ and Bell J approved this passage in *Kobelt* at [14]. See also *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155; (2018) 266 FCR 631 at [155].

135 A court called on to determine whether conduct is unconscionable must identify the values and norms which Parliament is taken to have considered relevant from the text and structure of the Act and from the context of the provision, including the guidance afforded by s 22: *Paciocco* at [262], [279], [285]. In *Paciocco* at [285] Allsop CJ summarised the values and conceptions reflected in the ASIC Act equivalent of s 22 of the ACL as:

fairness and equality: see paras (a), (b), (d) to (k); a lack of understanding or ignorance of a party: para (c); the risk and worth of the bargain: paras (e) and (i); and good faith and fair dealing; para (l).

136 Dishonesty will also be a material consideration in determining whether, objectively, the supplier's conduct involves such a departure from accepted community standards in the supply of the goods or service as to warrant the characterisation that it is unconscionable: see *Kobelt* at [59]. The presence of deception, while not sufficient, can be decisive of unconscionability in certain circumstances: see *Lux Distributors* at [63]ff.

137 Exploitation of or predation upon some pre-existing vulnerability or disadvantage of people will also often be a feature of conduct which satisfies the characterisation of unconscionable conduct under s 21 ('pre-existing' in the sense that it is not vulnerability or disadvantage that is a feature of the circumstances of the conduct of which complaint is made). But it is not a necessary feature of the conception or a necessary essence in the embodied meaning of the statutory phrase: *Quantum* at [4], [36], [80]-[87]. In *Quantum* at [91] the Full Court said:

Surely to predate on vulnerable consumers or small business people is unconscionable. But why is it not also unconscionable to act in a way that is systematically dishonest, entirely in bad faith in undermining a bargain, involving misrepresentation, commercial bullying or pressure and sharp practice, using a superior bargaining position, behaving contrary to an industry code, using significant market power in a way to extract an undisclosed benefit that will harm others who are commercially related to the counterparty? The proposition that such conduct (not all of which might be seen to be present here) is not unconscionable by an Australian statutory business standard of conscience because the counterparty to the business transaction suffered from no relevant pre-existing disadvantage, disability or vulnerability (other than, perhaps, having a decent degree of trust and faith in its business counterparty's honesty and good faith) is difficult to accept, unless one posits a narrow defined meaning of 'unconscionable' that remains hinged in some way to the structural form of the equitable doctrine as expressed in cases such as *Kakavas* [*v Crown Melbourne Ltd* [2013] HCA 25; (2013)] 250 CLR [392] at 439-440 [161]. The history, text and structure of the Act is contrary to such a conclusion. It is not to be derived from the meaning of the word 'unconscionable'.

138 In *Attorney‑General of New South Wales v World Best Holdings Ltd* [2005] NSWCA 261; (2005) 63 NSWLR 557 at [121], Spigelman CJ said that unconscionability is a concept which requires a high level of 'moral obloquy'. While the use of the term 'moral obloquy' to describe the standard to be applied has since been deprecated (see *Kobelt* at [91] (Gageler J); *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* [2018] NSWCA 15; (2018) 356 ALR 440 at [194]‑[195], [275]-[278]), the point of its use was to differentiate the moral or normative standard of unconscionability as higher than unfairness or unjustness: *Paciocco* at [260]-[261] (Allsop CJ, Besanko and Middleton JJ agreeing). Similarly, Gageler J has observed that the choice by Parliament to use the word 'unconscionable' in expressing the prohibition 'serves to signify the gravity of the conduct necessary to be found by a court in order to be satisfied of a breach of that standard': *Kobelt* at [88]. In *Quantum* at [92] the Full Court said:

The expression of the matter by Gageler J in *Kobelt* 267 CLR at 40 [92] (see [59]–[60] above) may be seen to be similar to the expression of the matter by the Full Court in *Unique* 266 FCR at 667 [155] (see [88] above). We would respectfully venture to suggest that the strength of the qualifying or descriptive language ('so far outside', 'warrant condemnation', 'offensive to the conscience') should be seen as indicative of the quality of the departure from right commercial behaviour, explicated and articulated case by case over time, rather than be taken as definitional of some measurable departure from conscionable business conduct. Perhaps little is to be gained by quibbling over adjectives, adverbs and verbs to express the notion, as long as it is recognised that unconscionable conduct is not limited to the worst kind of unconscionable conduct. There may be more and less serious examples. That will reflect in penalty. The task is an evaluation of the impugned conduct to assess whether it is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience and so be characterised as unconscionable. In any particular case, it should be recognised that if the evaluative answer be 'no: it is not unconscionable', the court is concluding that by an Australian business conscience the conduct was conscionable and is not to be deterred by penalty.

139 It should also be borne in mind that conduct in breach of s 21 of the ACL is of sufficient seriousness to warrant the punishment involved in a pecuniary penalty, and this affects the construction of the section: *Paciocco* at [300]; *Quantum* at [88].

140 Section 21(4)(b) makes it clear that even if there are factors militating against a conclusion that there was unconscionable conduct in a dealing between a supplier and a particular customer, a system of conduct or pattern of behaviour can still exhibit unconscionable conduct: see *Paciocco* at [309]. In a case like the present, where the ACCC is not relying on a system of conduct, it is necessary to consider each alleged contravention separately. Nevertheless, it may still be relevant to consider any common features of the conduct which emerge from the circumstances of each alleged contravention: see *Lux Distributors* at [25].

### The conduct complained of - one customer's experience

141 The ACCC's allegations of unconscionable conduct concern the period April 2017 to August 2019. The evidence identifies 31 customers as having experienced the conduct said to be unconscionable. The conduct is mostly evidenced by emails between A4WD and the customers, although the ACCC has also obtained affidavits from five customers giving an account of their experiences.

142 In order to understand the allegations, it is convenient to set out an example of A4WD's interactions with one of those customers in some detail, before commenting on similarities and differences between his experience and those revealed by evidence about other customers. The customer I will focus on is Kenneth Hitchcock. The account which follows is largely drawn from his affidavit. Mr Hitchcock gave evidence at the trial orally by video and was questioned by senior counsel for the ACCC and by me. He struck me as a careful man who gave his evidence in a straightforward way with no attempt to exaggerate or embellish. I found him to be a truthful witness and I accept his account of what transpired during and after his hire of a vehicle from A4WD.

143 Mr Hitchcock is a resident of South Africa, although he only moved there in 2019. During the time covered by his hire of a vehicle from A4WD, he lived in Melbourne. He is in his mid‑50s. He is a qualified engineer. He is retired, but before his retirement held a senior logistics management position with a multinational corporation.

144 In early 2018 Mr Hitchcock was planning a holiday with his wife and two children in the Kimberley region of Western Australia. Some of the roads they wanted to drive on were unsealed and they needed camping equipment. In February 2018, Mr Hitchcock conducted a web search and found A4WD. Mr Hitchcock obtained a quote online and he received emails from A4WD containing details of the quote. He then made an online booking. He chose the option of a $5,000 security bond, with no daily 'Collision Damage Loss Liability' charge.

145 The total Mr Hitchcock was to be charged for the hire was $1,680 for seven days hire commencing on 3 April 2018. He paid a deposit on 8 February 2018. On 2 March 2018 he paid the balance of the rental. On 20 March 2018 he paid the security bond and, at A4WD's request, advised the company of the route he was intending to take. Mr Roesch was copied in on some of the emails setting up the hire.

146 On 2 April 2018, A4WD sent Mr Hitchcock an email telling him that the vehicle he had hired had been involved in an incident but another one had been dispatched to be available for Mr Hitchcock's hire. Previous emails had come from other staff but this one came from Ms Kosukhina. It included the statement '[t]he good news is that the business owner (at his own expense) has dispatched a vehicle from another location to be available for your hire'.

147 Mr Hitchcock and his family picked up the vehicle, a Toyota Hilux, from a business called Broome Hire Centre, in Broome, on 3 April 2018. He inspected it with a staff member of that business. He noticed a few scratches, including damage on the underside of the front protection plate, and took some photographs of the vehicle at the time. He also noticed that the engine was warm. A few small defects were noted on the paperwork which he signed. This included A4WD's terms and conditions at the time, and the 'Excessive Wear and Tear & Night Driving' acknowledgment on the front page, which is set out above. The terms contained a GPS Provision in the form of the Second GPS Clause (with the further cl 13(f) reflected in the Third GPS Clause) as discussed above. Mr Hitchcock initialled all the pages.

148 Mr Hitchcock and his family then had their holiday in the Kimberley, driving some 1,400 km in the hired vehicle. They experienced no issues with it during that time.

149 Mr Hitchcock returned the vehicle to Broome Hire Centre on 9 April 2018. There was an inspection with a staff member who raised no concerns. But it transpired that on 5 and 6 April 2018, Mr Hitchcock had received two emails from A4WD raising concerns about incidents and vehicle damage arising from GPS data the company had received. He had not checked his email until after he returned the vehicle because of poor reception in the remote areas in which he had been travelling.

150 The emails were from one Jake Kuykendall, whose position at A4WD was given in the email signatures as Fleet Manager. They claimed that the GPS in the hire vehicle had registered 'harsh bumps' that were cause for concern. They threatened seizure of the vehicle if A4WD failed to hear from Mr Hitchcock or the GPS system registered more incidents. However, after Mr Hitchcock queried the alleged incidents, Mr Kuykendall left it on the basis that the vehicle would be checked in the post hire inspection. The correspondence from A4WD up to this point was not untoward. While views may differ about whether it was necessary to threaten repossession of the vehicle, the emails from Mr Kuykendall display an ostensibly reasonable approach by A4WD to the issues apparently raised by the GPS reporting.

151 That approach changed on 11 April 2018, when Mr Hitchcock received another email from A4WD. Similar emails to other customers are a common part of all of the ACCC's allegations of unconscionable conduct. It is necessary to set it out in full in order to grasp the tenor of the conduct alleged (all errors and emphases are in the original):

Hello Ken,

With respect to your rental contract with us **RA#7410 Ken Hitchcock - Toyota Hilux Rego 500WGR** - unfortunately the vehicle was returned in a terrible condition, with multiple underbody and suspension damages and a shocking DBR.

As you are already aware, we sent you a number of email during your hire regarding warnings that had been sent by our GPS monitoring system, indicating the vehicle had been experiencing harsh bumps.

When you finally responded after your hire, you indicated that you had no idea why these warnings were coming up and that you had taken care of the vehicle throughout the hire.

Given the multiple underbody damages, including a dented bash plate, cracked engine mounts and damaged shocks, it is clear this was not the case, please refer to attached pictures and mechanical invoices and statements.

If you refer to the 1st section of the mechanics invoice, he clearly states that this vehicle has been absolutely thrashed during the previous hire, which is fully evident by your DBR.

The 2nd section of the mechanics invoice is a statement from the mechanic who did the pre-hire inspection, he clearly states that none of these issues were present when the vehicle was hired out to you.

Upon downloading your Driver Behaviour Report (DBR) through the GPS tracking system, we have also found you to be breaching your contract by **consistently disobeying posted speed limits**. In total you have managed to accumulate **299** speeding violations with 5km/h grace calculated in and a maximum of **171km/h, as well as consistently travelling more than 40km/h over the posted limit**, see attached your DBR.

These excessive speeding violations are clear negligence and serious breaches of our contract, showing continuous disregard for the property and the law.

If you refer to point 17. GPS Tracking of Vehicles in our Terms and Conditions, this is grounds for complete forfeiture of your bond.http://australian4wdhire.com.au/forms\_file/Australian\_4WD\_Hire\_Terms\_and\_Conditions.pdf

In our businesses entire history we have never seen anyone reach speeds this high in our vehicle, and cannot believe you could be so reckless.

If you refer to the bottom of **page 1** in your check-out, just above your signature, you have signed and acknowledged that your speed will be monitored and extra charges apply for consistently travelling above the speed limit.

Just 1 speeding violation is grounds for complete forfeiture of your bond, let alone **299!**

Please also note that as of today we have received 2 speeding fines issued during your hire, these have been sent back to the appropriate authorities (Traffic Police), along with your contract and they will be in touch soon.

Should it be requested of us we will supply the full driver behaviour record from your hire, given the speed recorded you should expect rather serious repercussions from your behaviour.

By all available reports, including the GPS warnings, the DBR (speeding report) and the statements provided by our mechanics, it is unmistakeably clear that you have grossly misused our vehicle, and proceeded to attempt to mislead us when we enquired into any potential issues.

You have made the choice to blatantly disregard the conditions of hire and the law, and we have every right to enforce the terms and conditions how we see fit.

The business owner is currently seeking advice form our legal representative and is considering pursuing you for your gross misuse, and extreme endangering of our property.

We reserve the right to sue you on a full indemnity basis for any subsequent damage found to be caused by your negligence and gross misuse of the vehicle.

Considering your Driver Behaviour, at this stage, we will be keeping your bond to cover the cost of damages and the severe wear & tear caused by your driver behaviour.

**Here is the breakdown of all costs;**

BR4WD Inv - **$1,947.85**

Severe wear & tear fee - **$3002.15**

Admin Fee - **$50.00**

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**TOTAL COST OF ADMIN CHARGES - $5,000.00**

As per our Terms and Conditions you are fully liable for all listed costshttp://australian4wdhire.com.au/forms\_file/Australian\_4WD\_Hire\_Terms\_and\_Conditions.pdf

As per Terms and Conditions of our Rental Contract we have processed your Security Bond in amount of **$5,000.00** via EFT to comply with our Terms and Conditions and Insurance Policy.

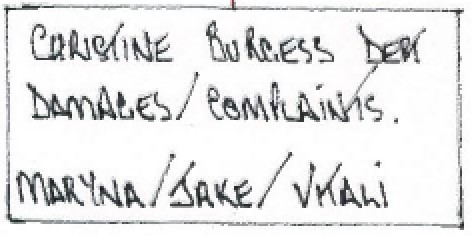
There will be no refunds.

See all relevant info attached

Kind Regards,

**Christine Burgess| Fleet Administration | Australian 4WD Hire**

152 Before going further, it is necessary to say that the putative author of this email, Christine Burgess, is not a real person. In the February Response, the respondents provided a handwritten organisational chart containing the following box:



153 A4WD 'explained' this to the ACCC as follows:

'Christine Burgess' is the name aptly applied to the department that is responsible for all Damages and Complaints. The process in this department follows very strict guidelines. Firstly, the complaint must be in writing, formalised and detailed by the customer, with supporting evidence if possible. Secondly, once the complaint is identified be it a sales issue or a damage claim the relevant people responsible for that task are then to initiate a response to the director for instruction, and Maryna then determines how the company will respond to that particular client. The staff that are responsible for responses to the customer dependant on the complaint, flow between Jake Kuykendall, Vitali Roesch and Marina Kosukhina.

It is fair to say that with the understanding that 'Christine Burgess' has been identified as a dept name only and not an individual, you will be able to realise that there are several individuals that are authorised by the Managing Director to respond to complaints from the 'Christine Burgess' dept.

154 Despite this, Mr Hitchcock's evidence, which I accept, is that on one occasion after receiving this email he telephoned A4WD and spoke to someone who identified herself as Christine Burgess. The call did not lead to any meaningful engagement with Mr Hitchcock, however, as he was told that the company would not talk to him over the telephone and he would have to correspond by email.

155 Returning to the email of 11 April 2018 from 'Christine Burgess', it attached photographs of various parts of a vehicle. Some seem to show minor scratching, some possibly more serious damage or wear to an unspecified vehicle part. It also attaches what appears to be a document containing GPS data generated by and obtained from CTRACK, which seems to comprise the DBR. It purports to show 299 speeding violations with a top speed of 171 km/h on one occasion on the Great Northern Highway where the speed limit was 110 km/h. But even if the report is accurate, the true number of violations was not nearly that high. The system appears to have taken samples of speed at intervals of one minute or less. For example, on 3 April 2018 the vehicle was reported to be travelling at 128 km/h at 4:07:00 pm, 128 km/h at 4:08:00 pm, 128 km/h at 4:09:00 pm, and so on. Sometimes the interval was a matter of seconds. So if the vehicle was speeding at that time, it was doing so continuously, meaning there was not a separate 'violation' for each reading, assuming there were any 'violations' at all.

156 Also attached to the email of 11 April 2018 was an invoice from what appeared to be a mechanical business known as 'Broome 4WD Recyclers/Broome Auto Spares' containing notes which referred to underbody, suspension and driveline damage said to have been the likely result of driving the vehicle at excessive speeds on unsealed or rough roads. This appears to be the 'BR4WD' invoice in the amount of $1,947.85 for which Mr Hitchcock was charged.

157 Mr Hitchcock immediately replied to the email of 11 April 2018 expressing shock and asking for details of where the violations that led to speeding fines occurred. He sent a further email on 11 April 2018 setting out the route he followed, saying that he never left mapped roads or camping area access roads, and asking whether with that information the speeding claims and fines could be mapped.

158 'Christine Burgess' replied on 12 April 2018, taking the trouble to change the subject heading of the email to: 'Subject: Legal Warning Notice - Ken Hitchcock - Toyota Hilux 500WGR'. The email was copied to a Queensland law firm. After a passage asserting the accuracy of the DBR on various grounds, the email said:

… we ran your Driver Behaviour Report, which provides data on your speed from check-out to check-in, as previously mentioned, we were shocked at your blatant disregard for the vehicle, your safety and the law.

You managed to consistently reach speeds no other customer has even come close to.

From all reports, there is undeniable evidence supporting that the vehicle was misused continuously.

…

The physical evidence is even clearer, the drive shaft and differential seals are completely destroyed, the shock absorber mounts are damaged and broken and so are the engine mounts.

None of this damage was present on the vehicle when it was hired to you.

This type of damage does not come from normal driving.

When looking at the big picture it is clear, the driver data shows consistent disregard for your duty of care by driving the vehicle recklessly, and the physical evidence clearly shows the consequences of operating the vehicle in such a way.

With all of this evidence, we are completely baffled that you are still trying to avoid your responsibility.

Of course, you have every right to dispute these charges in any way you see fit, however we must advise you of what the consequences of doing so will be.

We reserve the right to sue you on a full indemnity basis for any subsequent damage found to be caused by your negligence and gross misuse of the vehicle.

Please note, should any claims be filed against us, we have instructed our legal representative to immediately file a counter claim against you.

The business owner has become quite irritated with your refusal to accept your responsibility and is currently considering pursuing you on a full indemnity basis for all losses suffered from your breach of contract.

We strongly suggest you seek legal advice and get their professional opinion about your legal position and obligation with us before you do or say anything that you might regret and will be held accountable for later.

If you wish to take this matter further, we will happily provide all evidence of your breaches of contract as well as your blatant disregard of the law by consistently speeding, we can assure you that no court in Australia will look favourably on your reckless, dangerous driving.

At this stage we endeavour to finalise your obligations with us in a professional manner, however should any further work be required, or if you wish to dispute this matter further, we would prefer to only do so via professional legal channels and herewith we reserve our rights, without further notice to you, to charge you under this contract and sue you on a full indemnity basis for all losses suffered from multiple breaches of contract, as well as providing false and misleading information, and will pursue you for all and any future legal costs deriving from this matter including but not limited to defamation in any country.

Please note that all contact that has been made between the company and you has been recorded and that this email has been forwarded to our legal representative and we will take it from there.

159 Mr Hitchcock replied on 15 April 2018 raising a number of queries, including asking for the two domestic speeding fines to be sent to him. On 16 April 2018, 'Christine Burgess' replied saying, among other things, that the police would send the fines to Mr Hitchcock directly, issued in his name.

160 On 16 April 2018 Mr Hitchcock sent A4WD an email maintaining that he did not drive in the way indicated by the GPS data in the DBR. He said that the DBR 'has caused me untold stress and discomfort as it is pretty much an attack on my personal integrity'. His email of 16 April 2018 then set out a detailed analysis of the DBR report. It pointed out that certain entries showed that the vehicle was being driven at very high speeds in Broome before Mr Hitchcock picked it up. The DBR also showed something very similar having happened within 30 minutes after the vehicle was dropped off, and Mr Hitchcock queried whether it was possible to perform a complete vehicle inspection during that time. Mr Hitchcock suggested that the fact that the engine was still warm when he picked it up meant that there was not time for a thorough inspection. He pointed out that the engine and suspension were not inspected when he picked it up. He referred to the uneventful inspection on drop off. He noted that the front protection plate was damaged when he picked it up, as confirmed by one of the photographs he took. He then went through the itinerary of the vehicle in detail, making a number of points as to why the GPS data was not credible. For example, he noted harsh bumps while the vehicle was parked at a camp site. Mr Hitchcock expressed scepticism about how the GPS report showed harsh bumps when the vehicle was travelling on sealed roads or stationary at campsites, but showed no harsh bumps when it was travelling on unsealed roads (during a journey of some 1,400 km).

161 The last email Mr Hitchcock received from A4WD was a response to these queries on 17 April 2018 from 'Christine Burgess' which asserted the correctness of the information on which the company relied and confirmed, in effect, that the security bond would not be returned. Mr Hitchcock made a complaint to the Office of Fair Trading in Queensland, but that has not been taken any further. He also made a complaint to the ACCC.

162 Mr Hitchcock has described his journey in the hired vehicle in his affidavit in a way which supports the points made in his email of 16 April 2018.

163 There is a question about whether the DBR attached to the first email from 'Christine Burgess' accurately recorded Mr Hitchcock's driving of the hired vehicle or the 'harsh bumps' said to have occurred. I have found that Mr Hitchcock was a witness of truth. I accept the account of his driving given in his affidavit. I find that he did not speed anywhere near as frequently or as egregiously as the DBR indicated. The reasons he gives to doubt the reality of the 'harsh bumps' recorded in the DBR are persuasive. The possibility that Mr Hitchcock exceeded the speed limit from time to time cannot be excluded, and it is neither possible nor necessary to say exactly when he did (and did not) do so. It is enough to say that the manner in which the company relied on the DBR in his case was materially misleading, and that whatever wear and tear or damage may have been caused to the vehicle over the course of the 1,400 km trip during which Mr Hitchcock drove it, A4WD was not justified in deducting $3,002.15 from the security bond as 'compensation' for wear and tear and damage to a vehicle which had already done over 133,000 km of driving, much of it off sealed roads, before Mr Hitchcock set foot in it.

164 The ACCC stopped short, however, of submitting that I should make a finding that the specific damage to the vehicle claimed to have been repaired pursuant to the 'BR4WD' invoice for which Mr Hitchcock was charged $1,947.85 did not occur. I therefore make no finding on that subject.

165 The email dated 11 April 2018 also claims that the company had received two speeding fines. Mr Hitchcock's evidence was that he never received any speeding tickets in relation to the hired vehicle. A subpoena issued to the Western Australian police in relation to the vehicle for the period of hire returned no speeding tickets. As for the threat to provide the entire DBR to the police 'if necessary', although there was no real prospect that the police would rely on third party material of that kind to charge Mr Hitchcock with further traffic offences, it was clearly intended to work as a threat of repercussions of that kind for Mr Hitchcock.

166 These threats are to be understood in terms of the 'consequences' of disputing the charges referred to in the email of 12 April 2018, including a counterclaim and pursuit of Mr Hitchcock 'on a full indemnity basis', said to be because the 'business owner has become quite irritated with your refusal to accept your responsibility'. The initial email dated 11 April 2018 goes further and characterises Mr Hitchcock's assertions in his own defence that he did not damage the vehicle as an 'attempt to mislead us when we enquired into any potential issues'.

### Initial emails to other customers making allegations

167 The ACCC has put emails to 30 other customers from A4WD into evidence. I will refer to these customers by their initials only, except for those customers who gave affidavit evidence in this proceeding. Each of them received an email similar to the first one that Mr Hitchcock received from 'Christine Burgess'. The emails commenced by referring to a 'shocking DBR' or an 'unimpressive DBR' and went on to accuse the hirer of speeding and, in some cases, night driving and other breaches of the hire agreement. While there were variations in the language, and in the details of number of speeding offences and speeds reached, the following excerpt from one of the emails (to Customer JL) is representative (errors in original):

Upon downloading your Driver Behaviour Report (DBR) through the GPS tracking system, we were shocked to find how misused the vehicle was. In total you have managed to accumulate 208 speeding violations with 5km grace calculated in and a maximum of 139km/h, with speed consistantly more than 10km/h over 60km/h off road limit, see attached your DBR. These excessive speeding violations are clear negligence and serious breaches of our contract, showing continuous disregard for the property and the law.

168 As with the initial email to Mr Hitchcock, the DBRs routinely sampled speeds at intervals of one minute or less, the number of readings being enlisted to support allegations of very large numbers of speeding violations. In the case of at least one customer (John Moriarty, who gave affidavit evidence in this proceeding), the DBR had obviously inaccurate information, namely that the speed limit on the Mitchell Freeway in Perth was 50 km/h.

169 The following also appeared in the initial email to Customer JL, and (with minor variations) to seven of the other customers:

Should any further work be required, or if you wish to dispute this matter further, herewith we reserve our rights, without further notice to you, to take possession of the remainder of your security bond and to pursue you for all and any future legal costs deriving from this matter including but not limited to defamation in any country and forward your DBR to the authorities for their input into your disregard for the law.

170 In six of the initial emails, A4WD claimed that speeding fines had been received. In all but one of those cases, the number of speeding fines received was said to be two.

171 Nearly all of the emails were from 'Christine Burgess'. A4WD went so far as to write an email to the Queensland Office of Fair Trading, in response to a complaint from customer ID, using this fictitious persona.

172 Some of the emails contained individual touches. For example, in an email to Customer VV (errors in original):

Your despicable behaviour did not stop there as you have threatened our agent verbally swearing and screaming and insulting them, you were stupid enough to steal the paperwork from their desk.

…

We also have already received 2 speeding fines, which were redirected to you in Germany.

…

We have forwarded your driving report to the authorities and given the nature of the data you should thoroughly expect to hear from them about you dangerously driving. This is taken very seriously in Australia and they will ensure you are properly reprimanded.

…

We will also happily publish your driving data to all agencies in Australia and Overseas to ensure you never hire another vehicle again.

173 Benjimen Bomford (who gave affidavit evidence in this proceeding) sent an email to A4WD before receiving the initial email because of a dispute he had with an agent of A4WD's regarding the cleanliness of the vehicle when he returned it. Mr Bomford received an email in reply from A4WD which included the following:

We cannot believe you had the audacity to email us and complain about the cleaning charges when you have so clearly abused and mistreated our vehicle.

…

The business owner is currently considering pursuing you and your co-hirers for your gross misuse, and extreme endangering of our property.

We reserve the right to sue you on a full indemnity basis for any subsequent damage found to be caused by your negligence and gross misuse of the vehicle.

Considering your Driver Behaviour, at this stage, we will be keeping your bond to cover the cost of cleaning and the excessive wear & tear caused by your driver behaviour.

### Further emails to some customers

174 Twenty-two of the 31 customers who received emails of the kind above contacted A4WD about them. Of those, 18 received further correspondence from A4WD. The further emails which Mr Hitchcock received are examples. The email correspondence reveals that when a customer would try to telephone A4WD to speak to 'Christine Burgess', they would be told that she was not available. It appears that Mr Hitchcock is the only customer among the 31 who managed to speak to 'Christine Burgess'. A4WD would then send an email saying that it would only communicate in writing.

175 Most of the emails to customers who queried or challenged A4WD's allegations commenced with a suggestion that the customer 'stop embarrassing' themselves. An example is an email sent to Customer HY on 7 March 2018 (errors in original):

We strongly suggest you stop embarrassing yourself and issue written apology within 24 hours.

Your statements are highly defamatory and will not be tolerated, the only dishonest and unreasonable one in this situation is you, and your attempts at commercial extortion are pathetic.

Should you fail to issue an apology, we will not hesitate to sue you on a full indemnity basis for all costs, including defamation and commercial extorsion.

We do not care how long you have been coming to Australia or how many cars you have hired, it only makes your stupidity even more pathetic.

We welcome you to seek advice form the Tourism Board of any country, we also recommend you take this matter to the Australian Office of Fair Trading and the ACCC, and continue to make an absolute fool of yourself.

We will gladly provide them with all of your signed documentation and personal details as well as all correspondence between us, which will clearly show your absolute stupidity and incompetence.

…

The points you have made in your email are absolutely idiotic, and show you lack even a basic understanding of your obligations under the contract.

176 In some subsequent emails, there was an expanded threat of litigation, as follows:

At this stage we endeavour to finalise your obligations with us in a professional manner, however should any further work be required, or if you wish to dispute this matter further, we would prefer to only do so via professional legal channels and herewith we reserve our rights, without further notice to you, to charge you under this contract for the remainder of your security bond and sue you on a full indemnity basis for all losses suffered from multiple breaches of contract, as well as providing false and misleading information, commercial extortion, and will pursue you for all and any future legal costs deriving from this matter including but not limited to defamation in any country.

Please note that all contact that has been made between the company and you has been recorded and that this email has been forwarded to our legal representative and we will take it from there.

This appeared (with minor variations) in these subsequent emails with 15 of the customers.

177 An email sent to Customer PH on 11 August 2017 said:

You clearly have no idea what you are talking about as your verbal diarrhea is riddled with false accusations and misrepresentations that we strongly deny.

…

We have been in this industry for many years and in our entire history we have never had a customer so blatantly disregard their contract and still believe they had room for disputes.

This shows your extreme arrogance and stupidity.

…

Regardless of what you believe, you must be delusional if you think we would take your word over the certified professionals at our agency whom we have trusted for many years to provide us with true and accurate information.

178 Customer PH replied in detailed, forthright, but courteous terms challenging the contents of the email. To that he received the following reply (errors in original):

Get a lawyer so I can sue your ass of you moron

**Bussines Owner Australian 4WD Hire**

179 One email, sent to Customer PF, who is a magistrate in New South Wales, read, in its entirety:

Fuck Off

It was signed:

Kind Regards,

**Business Owner | Australian 4WD Hire**

180 Representative passages from other emails are set out in Appendix A to this judgment.

### Deduction of money from security bonds

181 A4WD retained money for 'excessive wear and tear' or night driving (as well as administration and processing fees) from the security bonds of 25 of the 31 customers who are encompassed by the ACCC's application. The amounts retained ranged from $120 to $4,760. Seven of those customers had their entire bond retained (although some of them had amounts deducted for matters other than 'excessive wear and tear' or night driving).

### Evaluation of the conduct

182 The ACCC did not pursue a 'system case' relying on s 21(4)(b) of the ACL (see [127] above). It is therefore necessary to make findings in relation to A4WD's conduct towards each of the 31 customers. However there are sufficient commonalities between the experiences of the customers to enable the findings to be expressed compendiously. Details specific to each customer are set out in Appendix B to this judgment.

183 First, each of the customers received an initial email of the kind that Mr Hitchcock received on 11 April 2018, with common features and variations that I have described at [167]‑[173**Error! Reference source not found.**] above (see *Lux Distributors* at [25]). I make the following observations about those initial emails:

(1) Before the start of the hire, and at the time of the correspondence with 'Christine Burgess', the customers had paid a large security deposit of between $1,500 and $5,000. A4WD had the practical ability to retain that amount of money at the customer's expense upon giving a reason to do so, whether or not the reason was sound. The burden would be on the customer to take action to recover that amount of money.

(2) Each of the initial emails made the claim that the customer had engaged in very large numbers of speeding violations, in the order of hundreds. This was misleading because, as I have explained, it was a function of the way the DBR recorded GPS readings at intervals of one minute or less. While some 14 of the DBRs said to be attached to the initial emails were not in evidence, that was a result of A4WD's failure to give proper discovery: see *Australian Competition and Consumer Commission v Smart Corporation Pty Ltd* [2019] FCA 1603 (***Smart Corporation (No 1)***). I infer that similar DBRs, with similar intervals of data, were attached to those when they were sent to the customers.

(3) Even if it is assumed that the customers had driven above the speed limit or outside areas or times permitted under the contract, the emails from 'Christine Burgess' display an extraordinary level of aggression and also show bad faith. The aggression is obvious from the terms of the emails I have set out. The tone is hyperbolic.

(4) For 10 of the customers, the initial email made the threat that if they disputed the matter further, A4WD would take possession of the remainder of the security bond, would pursue them for 'legal costs' and, gratuitously, pursuing the customers for 'defamation in any country'.

(5) For one of the customers, the initial email added a threat of suing the customer 'on a full indemnity basis for all losses suffered from multiple breaches of contract, as well as providing false and misleading information, commercial extortion'. I infer that these gratuitous threats of legal action were intended to deter the customer from pursuing any objections to the DBR and the claims arising out of it.

(6) In the case of 11 customers, there was a threat to send the GPS data to the police, which I infer was made to the same end as the threats of legal action. These were threats to report alleged breaches of the law to prosecuting authorities in order to extract financial advantage by way of deterring the customer from any resistance to retention of part or all of the security bond.

(7) In the case of six of the customers, there was an additional claim made that a speeding fine or fines had been received. For three of these, the ACCC has subpoenaed relevant police departments who have responded that no such fines were issued. Mr Hitchcock, whom I have already mentioned, was one of those customers who never received any speeding fine. I find that A4WD's claims in those three emails that they had received speeding fines were false. A4WD sent emails to three other customers which claimed that speeding fines had been received, but the evidence does not permit a finding that those claims were false.

(8) The bad faith I have mentioned emerges from the above and from A4WD's unwillingness to engage genuinely with customers by speaking to them on the telephone. That is exacerbated, and indicated to be a deliberate feature of the conduct, by the use of the fabricated persona of 'Christine Burgess'.

(9) For all 31 of the customers, some or all of their security bonds were retained by the company. This involved reliance on terms and conditions of the customer contracts that I have found to be unfair, including because they went further than was necessary to protect A4WD's legitimate interests. In a few cases the entire amounts of the bonds were later refunded, although this only relates to five of the customers and the evidence does not permit a firm conclusion that all of them received a full refund. However, in the case of Matthew Roach, the evidence does permit the finding that he received a full refund (albeit on behalf of another customer). Mr Roach pursued A4WD on behalf of his friend 'HL', who signed the hire contract with A4WD, by making a complaint to the Queensland Office of Fair Trading and commencing proceedings against A4WD in the Queensland Civil and Administrative Tribunal. In the course of those proceedings, Mr Roach wrote to A4WD saying that he would make an application for Mr Roesch, Ms Kosukhina and Christine Burgess to appear at the hearing. That Mr Roach, a qualified solicitor, had to go to those lengths demonstrates the likelihood that this conduct by A4WD would usually be effective to deter customers from recovering part or all of their bonds. This supports an inference that the conduct in which A4WD engaged was designed to achieve that end.

184 In my view, the conduct displayed by the sending of these initial emails to each of the 31 customers was, in all the circumstances, unconscionable. It lacked honesty and fairness. It involved bad faith, deception, unfair pressure and sharp practice. It included harsh and unjustified threats of legal action and other adverse consequences for the customers which were out of all proportion to any prejudice which A4WD had suffered or would suffer as a result of the customer's conduct.

185 I infer that the threats, the misleading reliance on the DBRs and the use of the fictitious persona of 'Christine Burgess' were intended to exploit the advantageous position A4WD was in by reason of holding the customers' large security bonds so as to make it difficult for customers to contest the allegations made against them, to intimidate them into not doing so, and thereby to secure the result that A4WD could retain part or all of those bonds, to its profit. It was, in substance, profit because the amounts deducted for 'excessive wear and tear' and night driving bore no relationship to any loss suffered by the company. This was exacerbated by the practical inability of the customers to dispute the DBRs in any meaningful way. Even Mr Hitchcock's careful rebuttal of his DBR proved fruitless, as he was hardly going to commence legal action to vindicate his position.

186 It is true that the security bonds were provided pursuant to contracts which the customers entered into freely in circumstances where they had no special disadvantage. It is also true that the retention of security bonds is a widespread practice in which car rental companies and other businesses engage in order to minimise the cost and time which would be required to pursue customers for breaches of contract which have caused loss to those businesses. But the conduct displayed by the initial emails went beyond legitimate use of the mechanism of the security bond, so as to exploit that mechanism for profit and was accompanied by misleading conduct, threats and intimidation. In my view that was well outside the bounds of ordinary commercial morality, so as to deserve the characterisation that it was offensive to conscience, judged against the standards of contemporary society.

187 That conclusion is reinforced by consideration of relevant matters to which, under s 22(1) of the ACL, the court may have regard. By the time of the initial emails, the hire having ended and the security bond being in the possession of A4WD meant that the company was in a stronger bargaining position than the customer: s 22(1)(a). I have already found that the GPS Provisions, which were a central aspect of the company's conduct, were conditions that were not reasonably necessary for the protection of the legitimate interests of A4WD: s 22(1)(b). The emails constituted, at least, undue pressure and unfair tactics against the customers: s 22(1)(d). Conduct that A4WD engaged in, in connection with its commercial relationship with the customers after they entered into the contract, was relevant: s 22(1)(j)(iv). There is no evidence that the customers acted in bad faith, but as I have said, A4WD did: s 22(1)(l).

188 A4WD's asserted justification for this conduct, which is found in the Sch 1 Response, is that driving its vehicles at speed and at night in off-road areas is liable to cause excessive wear and tear and increases the risk of damage to the vehicles to an unacceptable level. The retention of part or all of the security bond for such defaults is said to be necessary to deter customers from engaging in such driving behaviour and to compensate A4WD for excessive wear and tear which, while purportedly real, could not always be ascertained in an inspection of the vehicle after the hire. But even if all of those things are accepted to be true, they do not justify the dishonesty, bad faith and intimidation inherent in the way A4WD went about enforcing the relevant provisions of the hire contracts which, I have already found, went further than was reasonably necessary to protect A4WD's legitimate interests in relation to these matters.

189 For 18 of the customers, their engagement with A4WD after the vehicle hire went beyond the initial email and retention of all or part of the bond. The company's subsequent emails exacerbated the threats and intimidation in which it engaged towards those customers. The examples I have set out above are ample evidence of how the tone of its emails grew harsher and more intimidating. But this is not just a matter of tone. A business may write to its customers in a way that is intemperate, extraordinarily rude and even aggressive without engaging in unconscionable conduct because of those aspects of its behaviour alone. But when correspondence of that kind is joined with threats, deception, bad faith and exploitation of an advantageous contractual position, in the ways I have described, it is capable of rising to the level of unconscionable conduct. It has here. In the case of John Moriarty (see Appendix A at [5]), his retraction of the allegations he was making show that from A4WD's point of view, the threats and intimidation worked.

190 In *Quantum* at [96] the Full Court observed of the conduct found to be unconscionable in that case:

Conduct by a commercial entity which, as here, systematically misuses its superior bargaining position by dishonestly misleading its counterparties and pressuring them by unjustified and unnecessary commercial requirements in a way that reflects a dishonest lack of good faith in undermining bargains previously reached in order to extract surreptitious and undisclosed financial benefits is against and offends an Australian business conscience.

191 The different combination of facts in a different case is not to be treated as some sort of precedent governing the outcome here. But the expression of values in this passage exemplifies the values inherent to an Australian business conscience against which A4WD has offended here: honesty, good faith, and an absence of unfair and unjustified pressure. A4WD's conduct as described above departs from those values to such a degree that it merits characterisation as unconscionable.

192 I therefore find that in relation to each of the 31 customers, A4WD engaged in conduct that was in all the circumstances unconscionable, in breach of s 21(1) of the ACL.

## Involvement of Mr Roesch and Ms Kosukhina

### Principles

193 The ACCC seeks declarations against Mr Roesch and Ms Kosukhina on the basis that they were knowingly concerned in A4WD's breaches of s 18 (misleading or deceptive conduct), s 21 (unconscionable conduct) and s 29(1)(g) (false or misleading representations) of the ACL.

194 Under s 224(1)(a)(i) and s 224(1)(a)(ii) of the ACL respectively, the court may order civil penalties against A4WD for breaches of s 21 and s 29(1)(g). Under s 224(1)(e), the court may also order civil penalties against a person who 'has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision'.

195 Also, s 232(1)(e) combined with s 232(3) empowers the court to grant an injunction if it is satisfied that a person has engaged in conduct that constitutes being knowingly concerned in or party to, conduct constituted by applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under s 250 to be an unfair term. This applies as if the conduct were a contravention of a provision of Chapter 2 of the ACL. That is relevant here because the ACCC seeks injunctions on that basis against Mr Roesch and Ms Kosukhina in respect of the unfair contract terms.

196 The ACCC also seeks orders under s 248 of the ACL disqualifying Mr Roesch and Ms Kosukhina from managing corporations. Relevantly, those orders can be made against persons who have been 'involved' in contraventions of s 21 or s 29. Section 2(1) defines being involved in a contravention of a provision of the ACL, or in conduct that constitutes such a contravention, to include being knowingly concerned in or a party to such a contravention or conduct.

197 In order for a person to be 'knowingly concerned in or a party to' conduct for the purposes of these provisions, it must be shown that the person had actual knowledge of the essential facts constituting the contravention, or at least that he or she was wilfully blind to those facts: *Yorke v Lucas* (1985) 158 CLR 661 at 670; ***Keller*** *v LED Technologies Pty Ltd* [2010] FCAFC 55; (2010) 185 FCR 449 at [335]. But it need not be shown that the person drew the conclusion that the conduct was misleading or deceptive or unconscionable, or that the representations were false or misleading, let alone that he or she knew that there were breaches of the ACL: *Keller* at [336].

### Extent of Mr Roesch's and Ms Kosukhina's knowing involvement

198 The ACCC relies on a number of matters as establishing that Ms Kosukhina and Mr Roesch were 'jointly and severally responsible for the actions of A4WD'. Those matters, and my comments on them, are as follows.

(1) Mr Roesch was the sole director of A4WD until October 2015, shortly before he was declared bankrupt in 2016. Ms Kosukhina was a director from September 2015 and after Mr Roesch's resignation as a director, was the sole director of the company.

(2) The Sch 1 and Sch 2 Responses from A4WD to the ACCC's first s 155 notice were signed off by both Mr Roesch, as Fleet Manager, and Ms Kosukhina, as director.

(3) The organisational diagram provided by A4WD in the February Response shows that corporate responsibility at A4WD was primarily with Ms Kosukhina and secondly with Mr Roesch. It also shows that after ceasing to hold office as a director, Mr Roesch continued to occupy a senior management position as 'Fleet Manager'. The organisational diagram shows lines of reporting up to Mr Roesch from all staff members other than Ms Kosukhina (to whom he is shown as reporting). In particular, the 'Christine Burgess complaints department' reports to both Mr Roesch and Ms Kosukhina and both of them, along with Mr Kuykendall, are members of that 'department'. Mr Kuykendall reported directly to Mr Roesch.

(4) The Sch 1 Response states that Mr Roesch and Ms Kosukhina were the owners and operators of all website content, insurance policies and were responsible for setting, managing and enforcing all company policies. That alone is an admission made by each of them which shows that they knew of and were responsible for what the website was saying about the insurance of the vehicles, and they knew the true position as to the insurance. Responsibility for setting, managing and enforcing all company policies also implies knowledge of and responsibility for the policy about insurance claims, which is reflected in the Insurance Discretion Clause, on the part of both Mr Roesch and Ms Kosukhina. They both therefore knew of that as another matter which falsifies the representations made on the website.

(5) Mr Roesch is shown in the Sch 1 Response as being responsible for authorising and approving the terms and conditions 'under the supervision of' external lawyers. So he had direct knowledge of the Insurance Discretion Clause, the GPS Provisions and the Non-Disparagement Clause and it can be inferred he provided instructions to external lawyers as to the drafting of each of these.

(6) The February Response said that Mr Kuykendall and another staff member, Amber Trudgett, did not 'have the authority to make senior management decisions', attributing sole responsibility for those decisions to Ms Kosukhina as '[m]anaging director'. That response also said:

… all decisions regarding relevant matters such as damages claims and complaints are overseen, and directed by Maryna Kosukhina (Director), no other staff member has the authority to make final decisions in these matters … Our staff are simply performing their jobs as directed by Maryna Kosukhina …

…

… once the complaint is identified be it a sales issue or a damage claim the relevant people responsible for that task are then to initiate a response to the director for instruction, and Maryna then determines how the company will respond to that particular client. The staff that are responsible for responses to the customer dependant on the complaint, flow between Jake Kuykendall, Vitali Roesch and Marina [sic] Kosukhina …

It follows that Ms Kosukhina was knowingly concerned in the company's reliance on the GPS Provisions.

(7) In regard to the unconscionable conduct, there is no denial in either of the Sch 1 and Sch 2 Responses or the February Response that the emails were sent either by Mr Roesch or Ms Kosukhina or with their approval, nor is there any statement in those responses which seeks to distance Mr Roesch or Ms Kosukhina from the statements made in the various emails. In fact, they seek to justify the responses that were given to the clients who complained.

199 In addition to those matters, I make the following observations:

(1) The respondents' concise statement contains no denial of the allegations made in the ACCC's concise statement that Mr Roesch and Ms Kosukhina were each responsible for, and had knowledge of, all aspects of the operation of the management of A4WD's business and were 'knowingly concerned in, or a party to, the contraventions' on that basis (although the contraventions themselves were implicitly denied).

(2) The Sch 1 Response refers to A4WD as a 'family owned and operated business'. That is in circumstances where Ms Kosukhina and Mr Roesch are married. As at the date of the Sch 1 Response, she was shown in the records of the Australian Securities and Investments Commission (**ASIC**) as the sole shareholder. At all relevant times prior to that, until (it can be inferred) sometime between his bankruptcy in 2016 and notification to ASIC in February 2017, Mr Roesch was the sole shareholder. I have also mentioned Ms Kosukhina's reference in an email to Mr Hitchcock to a male 'business owner'. I infer from all of this that at the time of the contraventions, both of Mr Roesch and Ms Kosukhina acted as owners and operators of A4WD's business.

(3) The organisational chart shows that the company only had three other employees, all of whom reported to Mr Roesch and Ms Kosukhina. In such a small organisation, each of them was aware of the unconscionable conduct, and given their positions in the 'Christine Burgess' department, each of them is likely to have engaged in the conduct of that kind.

200 I agree with the ACCC's submission that these matters constitute ample evidence before the court that Mr Roesch and Ms Kosukhina were jointly and severally responsible for the contravening conduct of A4WD. Both of those respondents have admitted knowledge of and responsibility for the making of the representations that I have found to be misleading, deceptive, and false. They knew the true position regarding insurance coverage for the hired vehicles and they knew of the Insurance Discretion Clause. They were knowingly concerned in the company's breaches of s 18 and s 29 of the ACL. They knew of the contravening conduct and caused the company to engage in it.

201 As for the unconscionable conduct, Ms Kosukhina has effectively admitted in the February Response that she knew of and was responsible for the handling of customer complaints, which is when and how the unconscionable conduct occurred. On the basis of the small size of the company and Mr Roesch's role as Fleet Manager, as a de facto owner of the company, and as a member of the 'Christine Burgess' department, I am satisfied that he too knew of, and engaged in, the unconscionable conduct. Each of Mr Roesch and Ms Kosukhina was knowingly concerned in and a party to A4WD's contraventions of s 21 of the ACL. Once again, they each knew of the unconscionable conduct and caused the company to engage in it.

202 Finally, the ACCC seeks injunctions against Mr Roesch and Ms Kosukhina to restrain them from offering or entering into any standard form consumer contracts containing the GPS Provisions, the Insurance Discretion Clause and the Non‑Disparagement Clause. As explained above, the power to grant those injunctions will arise if Mr Roesch and Ms Kosukhina are found to have been knowingly concerned in conduct constituted by applying or relying on those terms if they have been declared under s 250 to be unfair terms. I have referred to direct evidence about Mr Roesch's knowing involvement with the adoption of those provisions. And there is direct evidence that Ms Kosukhina was knowingly concerned in the unconscionable conduct which included, in effect, reliance on the GPS Provisions. The evidence about her participation in matters concerning the Insurance Discretion Clause and the Non-Disparagement Clause is less direct. Nevertheless, I infer from her position as putative owner, director and managing director of A4WD, the small size of the company and what can be inferred to be her close co-operation with Mr Roesch in relation to the company's affairs, that she too was knowingly concerned in or a party to the company's application of and reliance on those terms.

## Remedies - declarations of contravention

203 I now turn to consider what remedies are appropriate in relation to the contraventions of the ACL and unfair contract terms which are identified above.

204 The ACCC seeks declarations of contravention of s 18, s 21 and s 29(1)(g). I am satisfied that declarations are appropriate. In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 113; (2017) 254 FCR 68 (***ABCC v CFMEU***) at [92]‑[93] the Full Court held (citations removed):

The Court has a wide discretionary power to make declarations under s 21 of the *Federal Court of Australia Act 1976* (Cth). Before making a declaration, the Court should be satisfied that the question is real, not hypothetical or theoretical, that the applicant has a real interest in raising the issue, and that there is a proper contradictor.

Declarations relating to contraventions of legislative provisions are likely to be appropriate where they serve to record the Court's disapproval of the contravening conduct, vindicate the regulator's claim that the respondent contravened the provisions, assist the regulator to carry out its duties, and deter other persons from contravening the provisions.

205 All of these conditions are satisfied here. While the respondents did not appear at the hearing, they were active contradictors up until around the time that A4WD went into liquidation and their subsequent withdrawal from an active role in the proceeding did not signify that they accepted that they contravened the ACL. Even if they had, in my view what is required for a proper contradictor is a person with a true interest in opposing the declarations: see *Australian Competition and Consumer Commission v* ***Service Seeking*** *Pty Ltd* [2020] FCA 1040 at [41] and the authorities cited there; and also *IMF (Australia) Ltd v Sons Of Gwalia Ltd (Administrator Appointed) ACN 008 994 287* [2004] FCA 1390; (2004) 211 ALR 231 at [47] (French J). The respondents each have that interest here.

206 As to the content of the declarations, I will apply the summary given in *Commonwealth Bank of Australia v Finance Sector Union of Australia* [2002] FCAFC 193; (2002) 125 FCR 9 at [6] as to what is required for 'declarations of right', that being the phrase used in s 21 of the *Federal Court of Australia Act 1976* (Cth). The declaration should identify the obligation of which the respondents are found to be in breach, the persons in respect of whom the breach occurred (that is, for want of a better word, the 'victims' of the conduct), the nature of the breach and the dates of the breaches. Ascertainable rights and liabilities will flow from the matters so declared. See *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 3)* [2017] FCA 1018 at [102]: 'Moreover, if a declaration is to be made then it must be framed to disclose the gist of the factual findings and disclose the basis upon which those findings are said to contravene the relevant statutory provisions'.

207 In my view, the declarations that the ACCC seeks as to contraventions of s 18 and s 29 of the ACL meet these requirements. The obligations breached and the statutory provisions under which they arise are specified. The persons to whom the conduct was directed - consumers using A4WD's website - are identified. The nature of the contravening conduct - the making of the representation about insurance coverage - is described. A date range of the breach is provided. For reasons I have given above, however, I am unable to conclude that before November 2017 the Insurance Representations were misleading or false by reason of lack of comprehensive insurance coverage on some vehicles before November 2017. Modifications to the declaration sought by the ACCC will be made to reflect this.

208 For reasons the same as given above, it is also appropriate to make declarations that Mr Roesch and Ms Kosukhina were knowingly concerned in and a party to A4WD's contraventions.

## Remedies - declarations of unfair contract terms

209 The ACCC also seeks declarations to the effect that the terms I have identified above are unfair contract terms. This would not be a declaration of breach of any law. It raises different considerations. The declarations are sought under s 250(1)(b) of the ACL, which provides that on an application by the regulator (or a party to the contract), the court may declare that a term of a consumer contract is unfair. Section 250(3) provides that s 250(1) (and s 250(2)) do not apply unless the contract is a standard form contract. Section 250(4) provides that s 250(1) (and s 250(2)) do not apply if Part 2‑3 does not apply to the contract. Part 2‑3 is the part in which the provisions about unfair contract terms appear. It is not clear why the drafters of s 250 chose such a circuitous way to say that the court may declare that contracts that are void by reason of s 23 are unfair. But that is what s 250 effectively provides.

210 What is the point of a declaration under s 250? After all, as I have said, s 23 requires a non-discretionary determination as to whether impugned terms are unfair and appear in a standard form contract. If both those conditions are satisfied, the terms are void by operation of s 23(1), without more. A declaration under the court's power conferred by s 21 of the *Federal Court of Australia Act* would serve to confirm this. What further utility is there in declaring a term that is already void for unfairness to be unfair?

211 One answer is that it provides an additional level of certainty about the status of the term. This could be important in cases involving unfair terms affecting large numbers of consumers. But more specific reasons emerge from other provisions of the ACL. Broadly speaking, those provisions give reliance on a contract term which is the subject of a declaration under s 250 a status similar to a contravention of the ACL. Section 232(3) of the ACL is especially relevant here. It provides that s 232(1), the power to order injunctions in relation to contraventions:

applies in relation to conduct constituted by applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term as if the conduct were a contravention of a provision of Chapter 2.

Similarly, under s 237(1)(a)(ii), s 238(1)(b) and s 239(2)(b) compensation and redress orders, including the wide range of orders contemplated by s 243, can be made in relation to terms that have been declared unfair under s 250.

212 I have determined that some of the GPS Provisions (in certain iterations of the standard form contracts), the Insurance Discretion Clause and the Non-Disparagement Clause were unfair contract terms for the purposes of s 23 of the ACL, so the discretion to make declarations under s 250 arises. The main concern I have about exercising the discretion in favour of the ACCC is that it may lack utility. A4WD is in liquidation so it will not be offering any more standard form contracts to consumers, nor would any rights that those consumers may have against it have any practical value.

213 The ACCC submitted that the declarations have utility because they will vindicate the ACCC's contentions that the impugned terms are void and will assist in the development of a body of law about the application of s 23 to specific kinds of contract terms which may assist other consumers in other cases. I accept all of that. There is still room for doubt about whether a declaration under s 250 is appropriate, or whether it ought to be made under s 21 of the *Federal Court of Australia Act* instead. But there is a more tangible reason why a declaration under s 250 has utility, namely the injunctions the ACCC seeks against Mr Roesch and Ms Kosukhina under s 232(1)(e) and s 232(3), to prevent them from offering or entering into any standard form consumer contracts containing the impugned terms. I will consider whether to order those injunctions below, but I do not consider it appropriate to deal with the issue of injunctions here. Regardless of the outcome on that issue, the making of a declaration under s 250 has *potential* utility because of the possibility of injunctions, and further utility for the other reasons I have given.

214 No other factors relevant to the exercise of the discretion arise here. I am satisfied that a declaration under s 250 ought to be made in relation to each of the GPS Provisions I have identified as being unfair above, the Insurance Discretion Clause and the Non-Disparagement Clause.

## Remedies - injunctions

215 The ACCC seeks an injunction for a period of five years restraining each of Mr Roesch and Ms Kosukhina from offering or entering into any standard form consumer contracts containing any of the GPS Provisions, the Insurance Discretion Clause, the Non-Disparagement Clause or any iteration thereof. It does not seek any injunction against A4WD because it is in liquidation.

216 Section 232(1) of the ACL empowers the court to grant an injunction, in such terms as the court considers appropriate, if the court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute (relevantly) a contravention of a provision of Chapter 2, or being knowingly concerned in, or party to, such a contravention. Under s 232(2), this may be done on the application of the ACCC. Section 232(3) provides:

Subsection (1) applies in relation to conduct constituted by applying or relying on, or purporting to apply or rely on, a term of a contract that has been declared under section 250 to be an unfair term as if the conduct were a contravention of a provision of Chapter 2.

217 I will assume without deciding that the power is enlivened in circumstances where the declarations under s 250 are made at the same time as the injunctions, even though the verb form here is present perfect tense ('has been'); see the Second Reading Speech of the Hon Penny Wong, the Minister for Climate Change and Water (Commonwealth, *Parliamentary Debates*, Senate, 26 October 2009 at 7080) (emphasis added):

… the Bill would permit both regulators [ACCC and ASIC] to seek a declaration from a court that a term of a standard-form contract is unfair, or is a prohibited term.

If a party *then* seeks to apply or rely on, or purports to apply or rely on, a term which is the subject of a declaration then the regulator may seek all of the remedies available in respect of a contravention of the Trade Practices Act and ASIC Act.

218 There is thus a question whether the court must express its conclusion on the unfairness of the term by way of a declaration under s 250 *before* a person should suffer consequences akin to those attending a contravention of the law. But I do not need to answer that question here because I do not consider that the injunctions proposed will serve a useful purpose in any event. It is unlikely that Mr Roesch and Ms Kosukhina will themselves ever offer standard form consumer contracts. While that can be at least partially addressed by drafting the orders so as to capture offering them indirectly through a company, it is even less likely when they are to be disqualified from managing corporations for three years. I also take into account that A4WD ultimately modified the GPS Provisions to ameliorate the unfairness, so that I have found the most recent iteration of those provisions were not unfair contract terms, albeit that it did so belatedly, after these proceedings had commenced.

219 The power to grant an injunction exists whether or not it appears to the court that the person intends to engage again, or to continue to engage, in conduct of a kind referred to in s 232(1). The ACCC, however, properly drew my attention to decisions canvassing discretionary considerations against granting injunctions when the risk of a repetition of the contravening conduct is low. It is not necessary to detail them here. There is no evidence suggesting that Mr Roesch or Ms Kosukhina will enter the car hire business within the next five years and if they do, this decision and the orders made will present direct and indirect impediments to their offering, agreeing to or relying on any clauses of the kind that have been found to be unfair contract terms. I will not make any orders for injunctions.

## Remedies - non-party consumer redress

220 The ACCC seeks redress orders in favour of five named consumers in respect of A4WD's breaches of s 21 of the ACL. It applies for orders compelling payment of the amounts deducted from the consumers' security bonds for 'excessive wear and tear' and any accompanying processing or administration fees incurred as part of the unconscionable conduct I have identified. The orders are sought against Mr Roesch and Ms Kosukhina, once again not against A4WD because it is in liquidation.

221 The orders are sought under s 239 of the ACL, which relevantly provides:

(1) If:

(a) a person:

(i) engaged in conduct (the contravening conduct) in contravention of a provision of Chapter 2, Part 3-1, Division 2, 3 or 4 of Part 3-2 or Chapter 4; or

(ii) is a party to a contract who is advantaged by a term (the declared term) of the contract in relation to which a court has made a declaration under section 250; and

(b) the contravening conduct or declared term caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons who are non-party consumers in relation to the contravening conduct or declared term;

a court may, on the application of the regulator, make such order or orders (other than an award of damages) as the court thinks appropriate against a person referred to in subsection (2) of this section.

Note 1: For applications for an order or orders under this subsection, see section 242.

Note 2: The orders that the court may make include all or any of the orders set out in section 243.

(2) An order under subsection (1) may be made against:

(a) if subsection (1)(a)(i) applies - the person who engaged in the contravening conduct, or a person involved in that conduct …

(3) The order must be an order that the court considers will:

(a) redress, in whole or in part, the loss or damage suffered by the non‑party consumers in relation to the contravening conduct or declared term; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct or declared term.

Also, s 239(4) effectively provides for a limitation period of six years, which has not expired here.

222 Section 240 of the ACL must also be taken into account when determining whether to make a non-party redress order. It relevantly provides:

(1) In determining whether to make an order under section 239(1) against a person referred to in section 239(2)(a), the court may have regard to the conduct of the person, and of the non-party consumers in relation to the contravening conduct, since the contravention occurred.

…

(3) In determining whether to make an order under section 239(1), the court need not make a finding about either of the following matters:

(a) which persons are non-party consumers in relation to the contravening conduct or declared term;

(b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

223 As I have said, being involved in conduct is defined to include being knowingly concerned in or a party to the conduct. Section 243 sets out a number of different kinds of orders that may be made under s 239(1) (and other provisions). Consistently with the exclusion of 'an award of damages' in s 239(1), the orders in s 243 expressly preclude an order directing the respondent to pay the injured person the amount of the loss or damage in cases of non-party redress orders sought under s 239: s 243(e).

224 The ACCC's written submissions refer to both s 21 and s 29(1)(g) in relation to the contraventions here which enliven the power under s 239. But it was clear from oral submissions that only the unconscionable conduct is relied on.

225 The ACCC seeks to characterise the orders for Mr Roesch and Ms Kosukhina to pay money to the ACCC for the benefit of the consumers as 'refunds' of moneys deducted from their security bonds. But Mr Roesch and Ms Kosukhina never received those moneys directly; the bonds were paid to and retained by A4WD. And there is no evidence capable of establishing that the amounts deducted can be traced to or otherwise attributed to any payments which A4WD made to Mr Roesch or Ms Kosukhina.

226 The *Shorter Oxford English Dictionary* defines 'refund' as 'repayment; a sum repaid', 'return or repay (a sum of money)' or 'make repayment' or 'reimburse or repay (a person)'. That confirms that the ordinary meaning of the term 'refund' is to pay *back*, *re*pay or *restore* a sum of money. It implies that the person who received the money is giving it back. That is consistent with the use of the term in other provisions of the ACL so as to speak of, for example, a refund by a supplier who is a party to an unsolicited consumer agreement of an amount paid by a consumer under the agreement or a related contract or instrument: see, e.g., s 84, s 87.

227 Nevertheless, the ACL is remedial legislation which should be given a liberal interpretation: *AB v Western Australia* [2011] HCA 42; (2011) 244 CLR 390 at [24]. While the term 'refund' is used in s 243(d), the list of possible orders in s 243 is not exhaustive. The use of the word 'refund' in the proposed order may be nothing more than inapt terminology. A more substantive question is whether making an order requiring payment to a consumer of an amount equal to the amount the consumer paid to a third party is, in effect, an award of damages, rather than a refund, and so has the impermissible effect of circumventing the express exclusion of damages from s 239(1) and, where that subsection applies, s 243.

228 The difference between an order that provides redress for or a reduction of loss and damage (see s 239(3)) and an order directing a respondent to pay the injured person the amount of the loss or damage is an elusive one. This gives rise to an ambiguity or obscurity which permits resort to Parliamentary materials: *Acts Interpretation Act 1901* (Cth) s 15AB(1)(b)(i).

229 The current provisions in the ACL concerning redress orders are, in substance, the successors to the former s 87AAA of the *Trade Practices Act 1974* (Cth): *Australian Competition and Consumer Commission v* ***Geowash*** *Pty Ltd (Subject to a Deed of Company Arrangement) (No 4)* [2020] FCA 23; (2020) 376 ALR 701 at [168]. Section 87AAA was introduced by the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* (Cth). In the Second Reading Speech to the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*, the Hon Dr Craig Emerson, the Minister for Competition and Consumer Affairs, said in the House of Representatives on 24 June 2009 (Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009 at 6988):

Redress for non-parties will allow the ACCC and ASIC to act more effectively where, for instance, thousands of consumers suffer small losses on which each of them might not take action individually because of cost and inconvenience. Businesses should not profit from consumer detriment, just because the amount is small or the harm is spread widely.

This is not a general power to award damages, but a power to order redress where that loss or damage is clearly identifiable and there is no need to decide the merits of each case. It could be used to order redress such as an apology, the exchange of goods or a refund.

…

230 See also the Second Reading Speech in the Senate, where similar comments were made (Commonwealth, *Parliamentary Debates*, Senate, 26 October 2009 at 7082).

231 Thus, the object of the exclusion of damages from s 239(1), but not from other provisions for orders of the kind listed in s 243, emerges as a concern about what would otherwise be a need to prove the amount of loss or damage suffered by each consumer, who is not a party to the proceeding. That is reflected in s 240(3) (see above). So, as Mortimer J concluded in *Australian Competition and Consumer Commission v* ***Clinica*** *Internationale Pty Ltd (No 2)* [2016] FCA 62at [255] (successfully appealed in *Swishette Pty Ltd v Australian Competition and Consumer Commission* [2017] FCAFC 45; (2017) 249 FCR 483, but not on this point):

Although the text of s 239 indicates non-party redress orders are not intended to operate as a substitute for damages, it is clear they are intended to provide a limited form of redress where loss or damage is clearly identifiable, such as in the case of a refund for goods purchased or services paid for, in circumstances of contravening conduct.

232 In my view, the purpose of s 239 will be served here if redress orders are made against Mr Roesch and Ms Kosukhina substantially as sought by the ACCC. Each of them was knowingly concerned in and a party to unconscionable conduct which involved deducting specific amounts of money from the security bonds of the identified customers, causing the customers to suffer loss and damage. There is a clear causal connection between the unconscionable conduct and the amounts deducted in this class of case which warrants redress, and does not require adjudication of the merits of each individual case. Payment of the amounts deducted for 'excessive wear and tear' and the accompanying processing and administration fees in the course of conduct that was unconscionable will redress in part the loss or damage that the customers have suffered. So, while I do not consider that the term 'refund' is correct, I will make redress orders substantially in the terms sought by the ACCC.

233 Section 227 of the ACL provides, in effect, that where the court considers that it is appropriate to order both a pecuniary penalty and 'compensation' against the respondent, and the court is satisfied that the respondent does not have sufficient financial resources to pay both, the court must give preference to making an order for compensation. Redress orders of the kind to be made here are 'compensation' for the purposes of that provision: *Clinica* at [255]. The ACCC submits and I accept that in the case of Ms Kosukhina, her bankruptcy dictates that the court should give preference to the redress orders over the pecuniary penalties here. While Mr Roesch was a bankrupt, it appears his bankruptcy is now discharged and there is no evidence of his financial position which permits the court to draw a similar conclusion in his case.

## Remedies - disqualification

234 The ACCC seeks orders disqualifying each of Mr Roesch and Ms Kosukhina from managing corporations for a period of five years each.

### Principles

235 Section 248(1) of the ACL gives the court a discretion, on the application of the regulator, to make an order disqualifying a person from managing corporations for a period that the court considers appropriate if the court is satisfied, relevantly, that the person has been involved in a contravention of a provision of Part 2‑2, and the court is satisfied that the disqualification is justified. Part 2‑2 is the Part concerning unconscionable conduct in which s 21 is found, so the first precondition enlivening the discretion is satisfied here in respect of both Mr Roesch and Ms Kosukhina. As for the second precondition, s 248(2) provides:

In determining under subsection (1) whether the disqualification is justified, the court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the court considers appropriate.

236 I respectfully adopt the following summary of the principles to be applied in exercising the discretion which Gordon J gave in *Australian Competition and Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 at [90]‑[95], a case under s 86E of the CACA, which is equivalent to s 248 of the ACL (citations removed):

Disqualification orders may be imposed by way of deterrence (both personal and general).

Disqualification orders may also be imposed by way of punishment. Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty. In assessing an appropriate length of prohibition, the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public may be relevant considerations. A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming.

Disqualification orders are also designed to protect the public from the harmful use of a corporate structure or from use that is contrary to proper commercial standards.

The banning order is designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office.

Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors.

It is therefore necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct.

237 I will also have regard to the well-known list of factors which must be taken into account under statutory provisions of this kind which was developed by Santow J in *Australian Securities and Investments Commission v* ***Adler*** [2002] NSWSC 483; (2002) 42 ACSR 80 at [56]. It is not necessary to set them out here; where relevant I will address them below.

238 I will follow the practice of the court to consider the issue of disqualification before considering whether a pecuniary penalty should be imposed: *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303 at [15] (Goldberg J). The court should consider the overall impact of any disqualification and any pecuniary penalties as a whole: see *Kerkhoffs v Registrar of Aboriginal and Torres Strait Islander Corporations* [2014] FCAFC 66 at [20]‑[21].

### Application of principles

239 The ACCC submits that a disqualification period of five years for each of Mr Roesch and Ms Kosukhina is appropriate to balance the personal hardship of the order against the public interest in the need to protect the public from a repetition of the contravening conduct.

240 The ACCC relies on statements in a report of the liquidator of A4WD dated 23 March 2020 to the effect that, while Ms Kosukhina held office as the sole director of the company during most of the relevant period, Mr Roesch was in fact a shadow director during that period. However, I do not consider I can rely on that hearsay statement of the liquidator as evidence of the truth of the opinion expressed in it. The other evidence as to Mr Roesch's role in the company raises a strong suspicion that he was in fact acting as a shadow director, but I do not consider it sufficient to support a finding to that effect on the balance of probabilities. Nor is it necessary to make a determination one way or another for the purposes of setting any disqualification period. It is enough to say that there is ample evidence, as I have detailed, that Mr Roesch held a senior position within A4WD which made him, along with Ms Kosukhina, responsible for the company's unconscionable conduct.

241 The ACCC further submits that any penalties (including disqualification) to be imposed on Mr Roesch and Ms Kosukhina should be the same, and I accept that submission. Apart from the fact that Ms Kosukhina is presently a bankrupt and Mr Roesch is not (a matter I will avert to shortly), and a minor difference in their respective involvement in relation to one customer (Matthew Roach), there is no basis in the evidence to distinguish between them from the point of view of either their conduct or personal histories and circumstances.

242 My assessment of the factors which are relevant to determining whether disqualification is justified and, if so, for what period, is as follows:

(1) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards: *Adler* at [56(i)]. Mr Roesch and Ms Kosukhina have used A4WD's structure in that way here, so that purpose is likely be served by disqualification. A particular aspect of their use of the corporate structure was the creation of the persona of 'Christine Burgess', which effectively anonymised and facilitated their conduct behind the shield of a fictitious company employee.

(2) It follows that disqualification will also protect individuals who deal with companies, particularly consumers: *Adler* at [56(iii)].

(3) Disqualification, along with pecuniary penalties, are also necessary to effect personal deterrence for Mr Roesch and Ms Kosukhina and general deterrence for others who may be tempted to engage in similar conduct in the future: *Adler* at [56(v)] and [56(vi)].

(4) While the unconscionable conduct involved dishonesty, and was exacerbated by it, I do not consider that it was a thoroughgoing or central aspect of the unconscionable conduct. The main vice in the conduct was intimidation for profit. That is of course serious and that seriousness needs to be reflected in the disqualification and penalties. But while the specific concern of s 248(1) to prevent dishonesty in the management of corporations is engaged here, it is not engaged strongly: cp. *Adler* at [56(vii)].

(5) As for the seriousness of the contraventions (*Adler* at [56(ix)]), they were serious and, for reasons I will develop in more detail when I come to discuss penalty, they caused financial and emotional harm to A4WD's customers. But there needs to be a sense of proportion. The customers had no inherent vulnerabilities which A4WD exploited in a predatory way. They were in weak bargaining positions as a result of contracts they had agreed to. The contracts concerned a transaction of only incidental importance to the customers' lives and the amounts of money concerned, while potentially significant to the individuals, were not large. In particular there is no evidence enabling the court to conclude that the conduct was significantly more widespread than the 31 customers who have been identified. Senior counsel for the ACCC submitted, and I accept, that the 31 customers were unlikely to have been the only customers of A4WD who were subjected to conduct of this kind. But how much further the conduct went, it is impossible to say. It is also important, in assessing the seriousness of the conduct, not to be distracted by the extreme nature of some of the language A4WD used in the emails to customers. While that language was an element of the unconscionable conduct, in particular the intimidation, by itself it would not have been unconscionable and this case represents no principle that the law will penalise rudeness or intemperate language *per se*.

(6) There is no evidence permitting the court to conclude that the orders will impose any special personal hardship on Mr Roesch or Ms Kosukhina: *Adler* at [56(x)]. They have chosen not to present evidence to the court and the extent to which disqualification will interfere with their future livelihoods is unknown. Since Ms Kosukhina is a bankrupt she is presently disqualified from managing corporations anyway, a matter to which I will return below.

(7) As for the risk that Mr Roesch or Ms Kosukhina will engage in similar conduct in the future (*Adler* at [56(ix)]), there is little to go on. There is no suggestion in the evidence of any contrition or remorse on the part of either of them, and no reason to think that they will reform their approach to business and to looking after the interests of customers. On the other hand, the unconscionable conduct in question involved a fairly specific set of circumstances and it is not clear whether they will have the opportunity to engage in it in future, even if they wanted to. Balancing all of this up, it appears to me that the risk of them engaging in unconscionable conduct in the future, if not prevented from doing so, is a significant risk but not a high one.

243 The ACCC relies on guidance which Santow J gave in *Adler* as to the range of different disqualification periods, including where the shortest periods of disqualification (up to three years) were handed down as a result of factors such as contrition, remorse and attempts to give redress: see *Adler* at [58(xv)]. Those factors are absent here. Nevertheless, it is necessary to set the disqualification on the basis of the specific circumstances of this case (the ACCC did not suggest otherwise). In my view, it is justified, and appropriately balances the competing factors I have detailed above, to impose a disqualification period of three years. In particular, I am influenced by the reasons why, I have said, there needs to be a sense of proportion about the seriousness of the conduct and the lack of any strong basis for concern that Mr Roesch and Ms Kosukhina will engage in similar conduct in the future. The conduct was serious enough to be characterised as unconscionable and to merit disqualification and penalties, but it is easy to envisage unconscionable conduct which is much more serious, both from the point of view of the extent to which it transgresses proper standards of corporate behaviour and the extent of the harm caused.

244 How does Ms Kosukhina's bankruptcy bear on this assessment? There is, as the ACCC says, no evidence of a causal relationship between it and her conduct (including the consequences of that conduct in the present litigation). The ACCC contends that general deterrence will not be achieved by Ms Kosukhina's bankruptcy alone, because although she will be disqualified from being a director or from operating a business during her bankruptcy, the bankruptcy period is likely to end in 2023. Accordingly the ACCC submits that it is appropriate for a disqualification order to be made against Ms Kosukhina which will operate for a period of time following the discharge of her bankruptcy.

245 I do not accept that submission. It may be that in an appropriate case it is necessary to extend disqualification beyond the period of a person's bankruptcy in order to ensure general and specific deterrence. But I do not consider that the period of disqualification here should be extended to take account of Ms Kosukhina’s bankruptcy. The fact that the respective roles of Mr Roesch and Ms Kosukhina in the unconscionable conduct and their personal circumstances are indistinguishable dictates that there must be equivalence between Ms Kosukhina and Mr Roesch in terms of disqualification and penalty. I do not consider that Ms Kosukhina's bankruptcy is a distinguishing factor in circumstances where there is no discernible link between it and the unconscionable conduct and the disqualification from managing corporations which follows from bankruptcy is not penal in character: see *Elan, Re Guild Enterprises Australia Pty Ltd v Cohen* [2020] FCA 79; (2020) 142 ACSR 554 at [13] (Reeves J) quoting *Re Altim Pty Ltd* [1968] 2 NSWR 762 at 764.

246 As far as general deterrence in Ms Kosukhina's case goes, the disqualification order shows the disapproval of the court and the consequence that may be expected if other persons are found to have engaged in similar conduct. That, along with the penalties which, it will be seen, the court will impose, will serve as an appropriate general deterrent. There will also be some utility to the disqualification order of three years in that it will extend beyond the three year automatic discharge period for the bankruptcy and may have practical effect for a longer time if, for some reason, the bankruptcy is terminated earlier.

## Remedies - pecuniary penalties

247 The ACCC seeks pecuniary penalties against each of the respondents in relation to A4WD's contraventions of s 21 and s 29(1)(g) of the ACL. As I have indicated, the court is empowered to make penalty orders against the contravenor and (relevantly) persons knowingly concerned in the contraventions.

### General approach

248 Under s 224(1), the court is empowered to order each relevant person to pay to the Commonwealth 'such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the court determines to be appropriate'. For the purposes of any penalties ordered against Mr Roesch or Ms Kosukhina, that is a reference to each act or omission which constitutes being knowingly concerned in or a party to A4WD's contraventions of s 21 and s 29.

249 I repeat the following summary of the overarching principles to be applied in setting pecuniary penalties which I gave in *Service Seeking* at [49]:

There is no scientific approach or arithmetic formula to be applied in determining the appropriate penalty; the circumstances of each contravention need to be looked at, taking into account all the circumstances pertaining to the contravention: *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238 at [251] (Middleton J), quoted with approval in *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [54]. The purpose of a civil penalty is primarily if not wholly protective in promoting the public interest in compliance: [*Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 258 CLR 482]at [55]. It does so by putting a price on contravention that is sufficiently high to deter repetition by the contravenor (specific deterrence) and by others who might be tempted to contravene the Act (general deterrence): *Trade Practices Commission v CSR Ltd* [1990] FCA 521; (1991) ATPR 41-076 at [40] (French J). It must be set with a view to ensuring that the penalty will not be seen by the contravenor or others as an acceptable cost of doing business: *Singtel Optus* at [62].

### Maximum penalties

250 Section 224(3) provides for maxima for pecuniary penalties payable under s 224(1). A maximum amount applies for each act or omission to which s 224 applies. These maxima were amended with effect from 1 September 2018. Before that date, for a natural person the maximum was $220,000 for each act or omission and for a body corporate it was $1.1 million. That was the case in relation to contraventions of both s 21 and s 29. From 1 September 2018, the maximum penalties were increased to $500,000 for a natural person and for a body corporate the greater of $10 million, or numbers worked out as multiples of either the benefits reasonably attributable to the relevant act or omission or the company's annual turnover.

251 The ACCC submits that only a small proportion of the acts and omissions which constituted contravening conduct or involvement in it post‑dated 1 September 2018, so it is appropriate to proceed on the basis of the pre‑September 2018 maxima here. I accept that submission. It is true that careful attention to maximum penalties is almost always required and that one must start by giving proper weight to the statutory maximum as referable to the most serious kind of contravention: *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [31]; ***Flight Centre*** *Ltd v Australian Competition and Consumer Commission (No 2)* [2018] FCAFC 53; (2018) 260 FCR 68 at [55]. But, 'the task is one that is evaluative, taking into account all the circumstances of the case, not to be reached mechanically or by some illusory process of exactitude, but rather by evaluation that is articulated to a point (but no further) that is useful and meaningful': *Flight Centre*, ibid; see also *Australian Competition and Consumer Commission v Sony Interactive Entertainment Network Europe Limited* [2020] FCA 787; (2020) 381 ALR 531 at [101]. Since the assumption that the maximum penalties are $220,000 and $1.1 million, rather than $500,000 and $10 million, respectively, is favourable to the respondents, I will make that assumption here.

252 As will be seen, in relation to the false or misleading Insurance Representations made on the website and in certain emails, the process of calculating maximum penalties per act or omission would soon become meaningless anyway, because the number of relevant acts or omissions would be very large. So in relation to the false or misleading representations, the assessment of the appropriate range for penalty is best assessed by reference to factors other than the maximum penalties: see *Australian Competition and Consumer Commission v* ***Reckitt Benckiser*** *(Australia) Pty Ltd* [2016] FCAFC 181; (2016) 340 ALR 25 at [157].

### Number of contraventions, course of conduct and totality

253 The course of conduct principle and the totality principle are two principles relevant to the process of setting penalties which bear similarities to each other and are sometimes confused and conflated with each other: *ABCC v CFMEU* at [117] (Dowsett, Greenwood and Wigney JJ).

254 In *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [39], Middleton and Gordon JJ explained the first of these principles as follows (emphasis in original):

… a 'course of conduct' or the 'one transaction principle' is not a concept peculiar to the industrial context. It is a concept which arises in the criminal context generally and one which may be relevant to the proper exercise of the sentencing discretion. The principle recognises that where there is an interrelationship between the *legal and factual elements of two or more offences* for which an offender has been charged, care must be taken to ensure that the offender is not punished twice for what is essentially the same criminality. That requires careful identification of what is 'the same criminality' and that is necessarily a factually specific enquiry. Bare identity of motive for commission of separate offences will seldom suffice to establish the same criminality in separate and distinct offending acts or omissions.

255 And at [41] (citations removed, emphasis in original):

… In other words, where two offences arise as a result of the same or related conduct that is not a disentitling factor to the application of the single course of conduct principle but a reason why a court *may* have regard to that principle, as one of the applicable sentencing principles, to guide it in the exercise of the sentencing discretion. It is a tool of analysis which a court is not compelled to utilise.

256 In *Royer v State of Western Australia* [2009] WASCA 139; (2009) 197 A Crim R 319 at [22], Owen JA observed that the interrelationship between the legal and factual elements of two or more offences:

may be legal, in the sense that it arises from the elements of the crimes. It may also be factual, because of a temporal or geographical link or the presence of other circumstances compelling the conclusion that the crimes arise out of substantially the same act, omission or occurrences.

257 If the court determines that it is appropriate to assess penalties for multiple contraventions as part of a single course of conduct, it should consider whether it should reduce the penalties for each contravention accordingly. In *ABCC v CFMEU* at [148], the court said:

If the contraventions arose out of a course of conduct, the penalties imposed in relation to the contraventions should generally reflect that fact, otherwise there is a risk that the respondent will be doubly punished in respect of the relevant acts or omissions that make up the multiple contraventions.

258 As for the totality principle, in the context of the criminal law its effect has been described as to:

require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'.

DA Thomas, *Principles of Sentencing: The sentencing policy of the Court of Appeal Criminal Division* (2nd ed, 1979) at 56-57 quoted with approval in *Mill v The Queen* (1988) 166 CLR 59 at 62‑63.

259 In cases involving fines or pecuniary penalties, the principle is to be applied, if necessary, by fixing a fine for each offence and then reviewing the aggregate to ensure that it is just and appropriate. If the total penalty is excessive, that may lead to the moderation of the penalty imposed in respect of each offence: *ABCC v CFMEU* at [118], [120].

260 In *ABCC v CFMEU* at [119], [148]‑[149] the court held that neither the course of conduct nor the totality principles authorise the fixing of a single penalty for multiple contraventions, at least where penalties are not agreed between the parties. However their Honours were speaking in the context of industrial law contraventions and did not appear to have in mind the situation which frequently arises in relation to misleading representations made on product packaging, in advertising or on websites, where the number of individual contraventions can be both very large and incalculable.

261 It is impossible to see how one can meaningfully fix a penalty for each contravention when the number of contraventions may be in the thousands or millions and the precise number is unknowable. In those circumstances, it is open to the court to group the contraventions according to the course of conduct principle, or on any other appropriate basis, in order to impose a single penalty for each relevant group of contraventions, rather than a penalty calculated for each contravention. In my view this follows from the course the Full Court (Jagot, Yates and Bromwich JJ) took in *Reckitt Benckiser*,a case where penalty was contested: see [39]. There were at least 5.9 million contraventions in the sale of products with misleading packaging, so the maximum penalty would have been in the trillions of dollars and hence was meaningless. The Full Court divided the contravening conduct into four courses, one each for the packaging of a particular product plus 'one or two serious courses of conduct' for website representations. Ultimately, however, the court held that the course of conduct approach was of limited utility in the circumstances, and it did not divide up the penalty of $6 million it ordered by reference to the courses of conduct it identified, let alone by reference to individual contraventions: see *Reckitt Benckiser* at [157], [165], [179].

262 How do these principles apply here? I have found that there were contraventions of two provisions authorising the court to apply pecuniary penalties: s 21(1) (unconscionable conduct) and s 29(1)(g) (false or misleading representations). First, it is to be observed that the conduct respectively constituting the two classes of contravention is factually distinct: one concerns misleading representations on the website, the other concerns conduct directed towards individual customers (which does not involve the misleading representations). So there is no call to apply s 224(4)(b), which provides that if conduct constitutes a contravention of two or more civil penalty provisions, a person is not liable to more than one pecuniary penalty under the section in respect of the same conduct.

263 Second, the number of contraventions of s 29(1)(g) is potentially very large and impossible to calculate precisely. Not only were the statements made on multiple versions of the website, it is open to say that a contravention occurred each time the misleading statement was viewed by a user of the website: see *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd trading as Bet365 (No 2)* [2016] FCA 698 at [12]. Also, it may be inferred that the Insurance Representations, when made in the quote emails, were made in a standard form email that was sent to a large proportion of A4WD's customers, perhaps all of them.

264 Third, the ACCC submitted that the Insurance Representations on the website should be treated as a single course of conduct in breach of s 29(1)(g). I accept that, although in my view it is also helpful to identify an additional course of conduct, being the making of the Insurance Representations in the quote emails.

265 Starting with the website, it will be recalled that in substance there were two Insurance Representations: first, that all of A4WD's vehicles had the benefit of being insured for off-road use and second, that if any damage occurred to the vehicle while being hired it would be insured under A4WD's insurance policies. But they were both conveyed by the same conduct, namely the things said on the website which I have described above. While those things were said in different places on the website, and on different versions of the website changing over time, there is a great deal of similarity in the statements made. It can be readily inferred that they were all part of a plan to promote the hire of A4WD's vehicles to potential customers by leading them to believe that all the vehicles were fully insured for off-road used and thus arose out of substantially the same act of making that plan a reality on the website. It was a kind of 'broadcast conduct': see *Geowash* at [132] (Colvin J). I consider it useful to analyse the Insurance Representations as made on the website as a single course of conduct.

266 In my view the making of the Insurance Representations in the quote emails should be treated as a further course of conduct. While the representations were in substance the same as the ones made on the website, they concerned specific proposed vehicles and were made, not to the public at large, but to specific individuals who had expressed at least enough interest in the hire of a vehicle to have provided their details and requested a quote. The making of the Insurance Representations in the emails was obviously designed to increase the chance that the potential customer would act on the quote and book the vehicle. These representations arose out of the same act, namely settling on the wording of the standard form quote emails. This is a different course of conduct to the making of statements on the website, albeit the two courses of conduct were linked by their motives and their consequences, in that they were designed to encourage customers to hire a vehicle from A4WD and in that the person requesting the quote had inevitably viewed the website and may have seen the Insurance Representations there and been influenced by them to request a quote.

267 As for the unconscionable conduct, the ACCC submitted that it involved a single course of conduct, although it also submitted that the conduct involved 31 separate unconscionable acts, each of which should attract a separate penalty. I do not consider it useful to analyse the unconscionable conduct as a single course of conduct. It is true that there were similarities in the emails directed to each customer, and it can be inferred that they all reflected an approach which Mr Roesch and Ms Kosukhina determined that A4WD should adopt. But there were also differences between each customer in the wording of the emails, the nature of the allegations made, the funds deducted from the security bonds and the extent to which there was follow up correspondence which, as I have described, often degenerated into a more contemptuous, vituperative and threatening tone on A4WD's part. A4WD chose to take the particular approach that it did in relation to each customer, and to extract some or all of the funds deposited as a bond from them. The ACCC has adduced evidence as to the particular correspondence with each customer.

268 In my view, there was in substance a separate contravention in relation to each one of the 31 customers. It is the whole of the conduct that, in relation to each customer, meets the statutory description of 'unconscionable' which gives rise to the liability to pay a civil penalty; it is not a single action or event: *Geowash* at [82]. So the matter is not to be approached on the basis that each objectionable email to a customer, say, is a distinct unconscionable act. Here, a separate penalty should be fixed for the conduct in relation to each of the 31 customers, although the totality principle will also need to be observed.

### Matters to which the court will have regard in fixing penalty

269 Section 224(2) provides:

In determining the appropriate pecuniary penalty, the court must have regard to all relevant matters including:

(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and

(b) the circumstances in which the act or omission took place; and

(c) whether the person has previously been found by a court in proceedings under Chapter 4 or this Part to have engaged in any similar conduct.

270 Apart from these factors to which regard must be had, there are well-known lists of other factors which can be relevant in the appropriate case, which have been developed in decisions such as *Trade Practices Commission v CSR Ltd* [1991] ATPR 41-076 at 52,152-52,153 (***TPC v CSR***); and *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 291-292. I will consider them, as far as they are relevant, below, noting that they are not exhaustive and do not regiment the discretionary sentencing function. There are some factors which are common to both the misleading representations and the unconscionable conduct. I will consider those first, before turning to give separate consideration to factors which bear on each of those sets of contraventions in different ways.

### Common factors relevant to penalty

#### The size of A4WD and its financial position and those of Mr Roesch and Ms Kosukhina

271 A4WD was a small private company. The only permanent staff members were Mr Roesch, Ms Kosukhina, Mr Kuykendall, Ms Trudgett and Michele McMahon (who sent emails containing Insurance Representations in which her title appeared in the email signature as 'Sales & Administration Manager'). However, it had a substantial fleet of vehicles, being the registered owner of between 83 and 92 vehicles at the date of its liquidation.

272 There are unaudited financial reports in evidence which A4WD produced to the ACCC from the financial years ending 30 June 2017 and 30 June 2018. These reports tend to show that A4WD was trading profitably in those years, with turnover between $3 million and $4 million and assets (although also liabilities) in the order of $4 million to $5 million.

273 There was apparently a downturn in business after 30 June 2018. During the period 1 July 2018 to 30 September 2018, financial statements showed turnover of just over $1 million for that period and a little more than that in expenses, producing a modest net loss of $40,129.21. There are similar profit and loss statements in evidence covering the period 1 October 2018 to 31 December 2018 which show that A4WD continued to operate at a loss.

274 It is difficult to put much weight on any of the financial reports because the numbers are unaudited and there are significant unexplained features such as 'M/V - Other'. Furthermore, there is a liquidator's report in evidence which provides a more recent and reliable assessment of A4WD's current financial position. A4WD now has a mere $322.61 in realised assets and creditors of at least $2.8 million, so its present financial resources are effectively nil. In *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146; (2007) 161 FCR 513 the Full Court said at [20]-[21]:

… a court may impose a penalty on a company in liquidation if, to do so, would clearly and unambiguously signify to, for example, companies or traders in a discrete industry that a penalty of a particular magnitude was appropriate (and was of a magnitude which might be imposed in the future) if others in the industry sector engaged in the same or similar conduct …

No general principle can be stated about whether or not a penalty should be imposed on a company in liquidation. Whether a penalty is imposed would depend on all the circumstances including the fact that the company was in liquidation and special facts, if any, surrounding the liquidation. We agree that the bare fact that a company is in liquidation is not, in itself an immutable reason for not imposing a penalty. Nonetheless the fact that the company is in liquidation could be a factor militating against the imposition of a penalty. However there will be cases where other factors make it clearly desirable to impose a penalty on a company even though it is in liquidation.

275 There may be a public interest which justifies the imposition of a pecuniary penalty against a company in liquidation to assist in identifying the egregious nature of the contravening conduct, and setting an appropriate penalty will operate as a general deterrent to others as to the cost of contravention: see the discussion in *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 5)* [2019] FCA 1544 at [31]‑[36] (Gleeson J).

276 I consider here that imposing appropriate penalties on A4WD will have utility from the point of view of general deterrence and I will not refrain from doing so for the reason that the company is in liquidation.

277 Ms Kosukhina is, similarly, a bankrupt so there is no basis for the court to conclude that she has any substantial financial resources. I have found that any penalty against her will not be provable in her bankruptcy and so will be payable even after she ceases to be a bankrupt. So there will be utility in ordering penalties against her from the point of view of specific deterrence. I will do so on the assumption that her financial resources at that time will be limited, as there is no evidence supporting any other conclusion. The ACCC submits that the penalty should not take effect until after Ms Kosukhina is discharged from bankruptcy (see the orders made in *Australian Competition and Consumer Commission v Morild Pty Ltd* [2017] FCA 1308) and I agree that is appropriate.

278 Mr Roesch became a bankrupt in 2016 but, according to searches conducted by the ACCC, he is not currently a bankrupt. His financial resources and ability to pay any penalty ordered against him are unknown.

279 Another matter I take into account in this regard is that the business which, evidently, Mr Roesch and Ms Kosukhina were conducting through A4WD has been sold, for minimal consideration, and the company is in liquidation. It is impossible to say the extent to which the ACCC's investigation and this proceeding have contributed to that state of affairs, but senior counsel for the ACCC, properly, accepted that they did make some contribution, and submitted that those matters and the associated stress they have caused for Mr Roesch and Ms Kosukhina, are matters I should take into account in setting penalty, and I will do so.

#### Senior management engaged in contravening conduct

280 As I have said, Mr Roesch and Ms Kosukhina have taken responsibility for the content of the website and knew the true position regarding insurance coverage of the vehicles. Ms Kosukhina was the sole director at all material times from October 2015 and Mr Roesch was a senior manager (at least). There is no suggestion in the evidence that anyone else was knowingly responsible for the making of the representations. The contravening conduct arose out of the conduct of senior management.

#### No corporate culture conducive to compliance

281 While the February Response mentions that the company took legal advice on its obligations from time to time, there is no evidence of any real compliance programs or other measures taken to ensure compliance with the ACL. That is hardly surprising for a small company like A4WD. It is not a factor on which I place any weight one way or another.

#### Disposition to cooperate with the ACCC

282 On balance the respondents' lack of cooperation with the ACCC is not in their favour. I say on balance because it should be acknowledged that they did give ostensibly fulsome responses to the compulsory s 155 notices, including annexing documents such as the insurance schedules which established the falsity of the Insurance Representations from November 2017. And they did admit some allegations in their concise statement which reduced, to a modest extent, the time and resources that the ACCC had to devote to investigating and establishing their contravening conduct. Also, as the ACCC has acknowledged, A4WD did amend its terms and conditions in May 2019 to introduce a causal connection between wear and tear and the amounts deducted from bonds (see [87] and [109]‑[110] above).

283 Nevertheless, the relief sought by the ACCC was actively opposed until the winding up of A4WD and Ms Kosukhina's bankruptcy caused that opposition to evaporate. That opposition was coupled with a failure to comply with discovery obligations as ordered by the court, which I detailed in *Smart Corporation (No 1)*. The respondents sought to justify that failure by presenting an implausible explanation about email destruction practices, requiring the court to order that specific inquiries be made into their systems. It appears that the further orders made failed to result in the production of obviously discoverable material, such as emails to customers justifying retention of money from their security bonds. But A4WD did produce affidavits capable of explaining that failure if the evidence in them is accepted. It is not possible or necessary to make a firm finding as to whether the respondents complied with their discovery obligations after *Smart Corporation (No 1)*.

284 In any event, the ACCC has been unable to ascertain the true extent of the contravening conduct and, in the case of the unconscionable conduct, has had to confine its case to the 31 customers where emails were available for one reason or another. I cannot, of course, assume that the conduct was significantly more extensive than that, but I do conclude that A4WD's refusal or inability to produce further customer emails in discovery means that the ACCC (and the court) has no way of knowing.

285 More broadly, the basis on which the respondents contested the proceeding and their responses to the s 155 notice indicate that they feel no remorse about their conduct, have no insight into it and display no contrition. They continued with the impugned conduct even after they were aware that the ACCC had begun investigating it.

#### Whether the respondent has engaged in similar conduct in the past

286 The ACCC had not commenced any other proceedings against the respondents before this proceeding, and there is no evidence of any adverse findings being made against them in other courts in relation to misleading conduct or unconscionable conduct in the past.

### False or misleading representations - specific penalty factors

#### Nature and extent of the contravening conduct, circumstances in which it took place, and the amount of loss or damage caused

287 The conduct involved placing misleading promotional representations at various points on A4WD's website. It was misleading between at least January 2014 and August 2019. For the whole of that period, it was misleading because the presence of the Insurance Discretion Clause in A4WD's standard hiring terms and conditions meant that the customer in fact had no guarantee of indemnity in cases of single vehicle accidents because A4WD had a discretion not to claim. That was compounded by the company's undisclosed ability under that clause to pursue the customer for the full pay‑out value of the vehicle under any finance contract A4WD had for its purchase.

288 From at least November 2017 until August 2019, the Insurance Representations made on the website were misleading for the further reason that some of the vehicles that A4WD hired to customers had no insurance for damage to the vehicle. From November 2018 the number of uninsured vehicles was over half, and while there are no figures available for the period before then, it can be inferred that it was still a substantial part of the company's fleet.

289 The circumstances in which the misleading Insurance Representations took place were typically ones in which potential customers of the company were assessing the merits of hiring a vehicle from A4WD or, potentially, competing businesses. This was done either at the stage of researching the possible hire of vehicles or at the stage of deciding whether to accept a quote and book a hire. It can be inferred that the extent of insurance coverage was important to these customers and likely to influence their decision as to whether to hire a vehicle from A4WD. Many of these customers are likely to have been influenced by the Insurance Representation not to purchase their own insurance and so would have been left exposed to potential loss if there was an accident. From the point of view of A4WD, the relevant circumstances were its desire to increase its business by persuading potential customers to commit to a hire and so potentially deprive competitors of business.

290 It is not possible to say how many users of the website were exposed to the Insurance Representations during the approximately 5½ years or so in which they have been established to have been made and to have been misleading. In the Sch 1 Response A4WD gave approximate figures for the number of hire contracts it entered into in the financial year ending 30 June 2017 (2,000), the financial year ending 30 June 2018 (3,000) and the period 1 July 2018 to 29 November 2018 (848). Since there must have been many more people visiting the website who did not end up hiring vehicles from A4WD, it can be inferred that several thousand people were exposed to the misleading representations that were broadcast on the website. It can be inferred from those numbers too that several thousands of persons requested quotes on the website and so received the standard emails containing a misleading Insurance Representation. But nothing more precise than that can be said with any confidence.

291 As for the representations that were made by way of email, while they may also have been widespread, they were likely to have been seen by significantly less people than those who viewed the representations on the website. It appears that the emails were only sent to website users who requested a quote, which not all users would have done, and the evidence as to those emails being sent only covers the period April 2017 to February 2018.

292 Nor is it possible to estimate how many users of the website were influenced by the representations to hire a vehicle from A4WD, or how many of those users suffered loss when they found out after the vehicle they were hiring was damaged that they were not in fact insured. Only one customer (Jane-Marie Forrest) gave affidavit evidence that she had been misled by the Insurance Representations. Nor is it possible to quantify any such losses. According to the Sch 1 Response, between 10 and 80 customers per year did not receive their full bond back, but this is claimed to only include customers charged for 'excessive wear and tear' so it is not possible to say how many of those were affected by a lack of insurance. Some ten examples of customers who had to pay for damage to vehicles were given in the Sch 1 Response, but it is not possible to know how many of them relied on the Insurance Representations. All this means that the court must take a conservative approach to evaluating the extent of the conduct and its consequences. It is impossible to make any meaningful estimate of the amount of loss or damage caused.

#### Market share and reach

293 In *TPC v CSR* French J identified as relevant (at 52,152) 'the degree of power it [the contravening company] has, as evidenced by its market share and ease of entry into the market'. This was said in the context of breaches of the competition law provisions then found in Part IV of the *Trade Practices Act 1974* (Cth) and is not applicable in the same way to a case of consumer law breaches. Nevertheless, in the context of misleading representations in the course of marketing, the market share and market reach of the contravening company can be relevant. The greater market share or greater visibility in the market it has, the more likely it is that contravening conduct will have caused harm to customers and competitors. This can be conceived of as a factor relevant to determining the extent of loss or damage caused by the contravening conduct.

294 There is no evidence about the size of either the vehicle hire market in Australia or that of the smaller niche of hire of four wheel drive vehicles for recreational off-road use. The customer and turnover numbers I have given above, however, lead to the conclusion that A4WD was a reasonably small player which did not have extensive market reach.

#### The deliberateness of the contraventions, and whether they were systematic and/or covert

295 The making of the Insurance Representations was obviously deliberate, as distinct from inadvertent, and in both of the Sch 1 and Sch 2 Responses Mr Roesch and Ms Kosukhina took responsibility for all content on the site. From at least October 2017, they were aware that the representations were potentially misleading: see [32] above. They knew the true position about both the actual extent of insurance coverage and the existence of the Insurance Discretion Clause. Their calculation, in 2017, that the problem could be solved by removing the words 'fully comprehensively' from before the words 'insured' on the website was mistaken. To that extent, the conduct was deliberate.

296 As the representations appeared at various places on the website and extended from 2014 to 2019, and were repeated in standard form emails, the conduct can also be characterised as systematic. Since the true position was known only to A4WD and could not be discovered easily or at all by others, it can be called covert.

297 The representation that all vehicles were insured was (at least from November 2017) obviously wrong and the respondents knew it to be so. The representation that all damage was insured was falsified by the Insurance Discretion Clause, but it was less obviously false than the representation that all vehicles were insured. The Insurance Discretion Clause functioned more as a significant qualification to the representations, which made them misleading in the circumstances. I will take that into account in setting the penalties.

### Unconscionable conduct - specific penalty factors

#### Nature and extent of the contravening conduct, circumstances in which it took place, and the amount of loss or damage caused

298 The unconscionable conduct described above occurred in relation to 31 different customers over a period of time from April 2017 to August 2019. In the context of the size of A4WD's business, that is a significant number of customers over a significant period of time. The conduct was serious in nature. That is perhaps inevitable when there has been a finding of unconscionable conduct, given how far outside societal norms of acceptable commercial behaviour it must be so as to warrant condemnation as conduct that is offensive to conscience. I need not repeat all the matters I set out at [182]‑[192] above which have led me to conclude that the conduct here was unconscionable.

299 I have already discussed the seriousness of the unconscionable conduct in a general way above, in connection with the question of disqualification. It is appropriate to make some more specific observations here. Looked at from the point of view of the customer, it is conduct that is likely to have caused some distress. These were people who were on holiday. After their holiday, or in some cases during it, they were subject to written attack in a strident form impugning their behaviour and, in some cases, their honesty. This was at a time when they were in a position of vulnerability, because they had paid large security bonds which they had little practical ability to get back. That would have been compounded in the case of overseas tourists who had returned to their own countries.

300 The aim of subjecting the customers to all this was to ensure that they did not challenge A4WD's refusal to return their bonds. A4WD achieved this by conduct which oscillated across the borders between dishonesty ('Christine Burgess', the speeding fines), bad faith (the claims of hundreds of speeding violations), simple aggression, threats of legal proceedings and threats to report alleged infringements to the authorities. I have already alluded to the fact that the context was holidaymaking, not a matter of life and death. The seriousness of the conduct should not be exaggerated. But in that context, the conduct of A4WD, Mr Roesch and Ms Kosukhina was reprehensible and likely to significantly dampen, if not destroy, the customer's enjoyment of their vacations and lead to stress and unhappiness afterwards, as well as financial loss.

301 The amount of financial loss or damage can be quantified, albeit not exactly. The relevant amounts of money deducted from customer bonds add up to $28,140.62, but it is not possible to state the precise figure because it appears that up to five customers may have received full or partial refunds, and the evidence does not reveal the amount of the refund to be quantified. The relevant amounts deducted ranged from $120 to $4,760 per customer. Those amounts are not large compared to the damages that can be experienced in commercial cases, but as an unexpected and unwelcome expense added to the cost of the holidays taken, it was significant.

#### The deliberateness of the contraventions, and whether they were systematic and/or covert

302 Clearly, the emails were deliberate. They were in extreme terms which were calculated to intimidate the customers into taking the matter no further. The similarities in the emails sent to different customers may merit the description of a 'system'. But I do not consider the evidence goes so far as to establish that the conduct was part of a preconceived plan to put contractual arrangements and vehicle GPS tracking in place so as to permit A4WD to extract money from customers' security bonds after the hire. It may have been more opportunistic conduct, in which Mr Roesch and/or Ms Kosukhina decided to engage in relation to certain specific customers in order to extract extra profit from those customers when the circumstances arose. The similarities between the emails may be explained simply because each one provided a convenient template for the next. Either way, the conduct is reprehensible, but I am not prepared to find that it was the execution of a preconceived plan.

303 While as I have said there are elements of deception involved, for the most part what the company was doing was in plain sight, so I would not describe the conduct as covert.

### Penalties to be ordered

304 The ACCC has submitted that penalties in the following ranges are appropriate:

(1) As against A4WD:

(a) in respect of the Insurance Representations - $250,000-$350,000; and

(b) in respect of the unconscionable conduct -$500,000-$700,000,

being a total pecuniary penalty of $750,000-$1.1 million.

(2) As against each of Mr Roesch and Ms Kosukhina:

(a) in respect of the Insurance Representations - $50,000-$70,000; and

(b) in respect of the unconscionable conduct - $100,000-$130,000,

being a total pecuniary penalty of $150,000-$200,000 each.

305 I have considered those submissions, the matters I have set out above, and the overriding need to set a level of penalty which will both deter others from contravening conduct of this kind and (in the case of Mr Roesch and Ms Kosukhina) deter the contraveners from any repetition of it.

306 In the case of Mr Roesch and Ms Kosukhina, I need to set the penalties at a level which will not be ruinous, although it is hard to calibrate this precisely in the absence of any information about their financial positions, beyond the mere fact of Mr Roesch's past bankruptcy and Ms Kosukhina's present one.

307 In relation to A4WD, I consider that the penalty for the false or misleading representations in breach of s 29(1)(g) should be $300,000. It is to be approached as two courses of conduct, and in terms of scope, seriousness and likely effect I would apportion $250,000 to the website representations, which was in effect 'broadcast', and $50,000 to the email representations.

308 The maximum penalties are meaningless as a yardstick in relation to these contraventions. Nor can any assessment of the likely loss to customers or gain to A4WD serve as a measure in these circumstances. But if A4WD had in the order of 5,000 customers in the relevant period and, say, another 5,000 people who did not end up as customers, all of whom were misled by the website representations, that would equate to $25 per website contravention. That is not excessive: see the similar assessment Mansfield J made in *Australian Competition and Consumer Commission v Excite Mobile Pty Ltd (No 2)* [2013] FCA 1267 at [102]. In truth, it is likely that the number of people who were misled was higher than this, so it is a conservative number. As for the seriousness of the misrepresentations, they were deliberate and, at least in the case of the representation that all vehicles in the fleet were insured, there was no room for argument - A4WD knew it was simply false. The representations related to a matter which was likely to have been particularly important for customers planning to take vehicles off-road. There are few if any mitigating factors.

309 In relation to each of Mr Roesch and Ms Kosukhina, I would order penalties in relation to the breaches of s 29(1)(g) of $60,000 each, apportioned as to $50,000 for the website and $10,000 for the emails. They each have full responsibility for the contravening conduct and there is no basis to distinguish between their respective contributions to and knowledge of it. But there is little to go on in terms of their ability to pay, a factor which is relevant to specific deterrence and, in the example of financial 'pain' it sets, to general deterrence. Their recent and current bankruptcies suggests that they have little ability to pay, but given the not infrequent ability of persons to draw on financial resources which are out of the reach of the creditors of their bankrupt estate, it is only a suggestion. On the other hand, there is no basis to conclude that they do in fact have access to extensive resources. Since the conduct, while serious, was not egregious, I consider that the court should if anything err on the side of caution to ensure that the penalties are not crushing and do not, for example, prevent Ms Kosukhina from re‑establishing herself financially when she emerges out of bankruptcy.

310 For the unconscionable conduct, it is necessary to take a different approach, because a penalty needs to be set for each contravention, that is, in relation to each customer. And while there are similarities which permitted me to express my evaluative findings above compendiously, I must have regard to the respondents' specific conduct in relation to each. For that reason, Appendix B to this judgment sets out a brief summary of the relevant conduct towards each customer and the penalty I have assessed in relation to each, having regard to the ACCC's submissions and the matters I have set out above. In relation to the penalties against Mr Roesch and Ms Kosukhina, I have again had regard to their nearly identical levels of responsibility for the unconscionable conduct (item 25 of Appendix B sets a higher penalty for Mr Roesch because of his greater involvement with one customer) and the need to avoid imposing a penalty on them as individuals which is crushing. I have also had regard to the penal effect of the disqualification orders to be imposed, which are at the lower end of the range of durations commonly ordered by the court.

311 I have taken the maximum penalties into account in setting the penalties for unconscionable conduct. The penalties I have specified in Appendix B are a small fraction of the statutory maxima, which at 31 contraventions total $34,100,000 for A4WD and $6,820,000 for each of Mr Roesch and Ms Kosukhina.

312 Each penalty set out in Appendix B is adapted to the particular circumstances of the customer as described in that appendix. Many of the customers received the initial email, had an amount of $550 deducted, and there is no evidence of any follow up. These could be described as the base cases. A few (NJ, MK, CM, TMcC, DM and TM) did not have money deducted for 'excessive wear and tear', so that has reduced the amount that I would otherwise have ordered the respondents to pay by way of penalty in respect of those customers. Others experienced increasingly threatening follow up correspondence. Some had significantly more money deducted from their bonds. A few received false claims of speeding fines. At least five (VV, DB, Mr Bomford, Mr Roach and TMcC) felt it necessary to engage lawyers or commence legal action. The presence of these matters are aggravating factors which have been taken into account according to their magnitude and extent.

313 I have also had regard to the sum of the penalties to be ordered from the point of view of the totality principle and in my view they represent amounts of money which are appropriate to provide special deterrence to the respondents, and general deterrence to other businesses who might be tempted to engage in similar conduct in relation to their customers.

314 In the result, the penalties I order in relation to the unconscionable conduct total $570,000 for A4WD, $119,000 for Mr Roesch and $114,000 for Ms Kosukhina. The ACCC proposes that the penalty against Ms Kosukhina become payable only on the discharge of her bankruptcy and I accept that is appropriate.

## Other orders

315 The ACCC seeks an order that the reasons for judgment be retained on the court file for the purposes of s 83 and s 137H(3) of the CACA to facilitate proof of the contravening conduct in subsequent proceedings. That is appropriate, although only s 137H is applicable to proceedings under the ACL such as the present proceeding.

316 The ACCC also seeks an order requiring Mr Roesch and Ms Kosukhina to pay its costs of the proceeding, to be taxed if not agreed. No costs are sought against A4WD, presumably because its winding up would make that futile. Since Mr Roesch and Ms Kosukhina would ordinarily be jointly and severally liable with A4WD to pay the ACCC's costs, leaving the company out of the costs order does not prejudice them. The order sought as to costs will be made.

|  |
| --- |
| I certify that the preceding three hundred and sixteen (316) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson. |

Associate:

Dated: 15 April 2021

# APPENDIX A

(All errors are in the originals.)

1 After Benjimen Bomford received the version of A4WD's initial email to relevant customers referred to at [173] above, he sent an email disagreeing that the vehicle would need to be cleaned, supported by photographs showing that on drop-off the vehicle was in a generally clean condition. 'Christine Burgess' replied to him on 29 March 2018:

Our terms and conditions have been drafted by top legal specialists in Australia, in accordance with ALL Australian Consumer Protection Agencies and regulations as well as all state and federal laws, we have full confidence in their ability to be enforced.

The DBR is provided to us by a publicly listed, 3rd party company, who receive their data directly from the transport departments in each state an territory, all information contained in the report is received via live fed data monitoring.

It was purely your choice to operate the vehicle in such a dangerous and reckless manner, at this stage we couldn't care less if the vehicle was returned clean or not, your bond would be forfeited in full.

Of course, you are more than welcome to dispute this in any way you see fit, however you must understand that you will face the consequences of doing so.

If you wish to dispute this matter further, we will happily involve top specialist in our industry, and gather all necessary statements to confirm your gross, negligent misuse of our vehicle.

…

As per our previous email, our Business Owner has reserved and will exercise his right to sue you on a full indemnity basis for any subsequent damage that may be found to this vehicle following your hire.

2 Email sent to Customer GS on 14 July 2018:

We have forwarded your email to our legal representatives, who have thoroughly reviewed your offer [a demand by GS that his money be returned in 10 days or else he would commence proceedings] and they have advised us that your offer is nothing but an attempt to extort and or blackmail our business.

….

If you are willing to provide us with a legal undertaking that you agree to no longer use our name in any public forum or anyone and this matter is settled once and for all on full confidential bases, we will refund $500.00 to you.

If you are not prepared to agree to this, we are welcome to any of your action and will gladly submit all evidence available regarding your deliberate, negligent misuse of our vehicle over the course of your hire.

3 Email sent to Customer MK on 11 December 2017:

Your lack of understanding the basics of your contract show just how arrogant you really are.

…

You are absolutely idiotic if you think that all of the damage mentioned was not of your doing, in fact, there was even further damage found that we have elected not to pursue you for, however we reserve the right to do so.

Your statement regarding the servicing of the vehicle also shows your stupidity as we do not service vehicles according to the manufacturers recommendations, if you were actually paying attention you would see this was placed there by Toyota when the vehicle was manufactured.

…

We take note of your claim that we have purposefully provided you with a vehicle that we knew would break and will keep record of it as we will not tolerate customers blackmailing or commercially extorting us with defamation, and we highly suggest you seek legal advice and have them explain to you your position In this matter as we take these claims very seriously.

4 Email to Customer CM on 6 July 2019:

It appears as though your ego and arrogance are so great that they overshadow your ability to understand the matter at hand and the seriousness of the situation.

You have absolutely no legal or professional capacity to make any claims to the admissibility of the GPS data.

You have signed a legally binding contract, which we have clear unmistakable evidence showing you have blatantly disregarded the terms to which you have agreed.

There is no refunds on early returns.

We suggest that you seek the professional advice of quality legal representatives and have them advise you on your legal standing in this matter.

Your actions and behavior whilst operating our vehicle are absolutely unacceptable, however delaying return of your bond is based entirely on the clear, tangible damage you have caused to the vehicle during your hire and you failing to replay to our emails.

5 Customer JH, who also defended himself in forthright terms in an email to A4WD, received a response which said the following:

We suggest that you stop embarrassing yourself, get the facts right and that you seek legal advice and get their professional opinion before you do or say anything that you might regret and will be held accountable for later.

Your verbal diarrhoea is completely ignorant and lacking of any sense or meaning whatsoever.

With respect to the DBR, we will happily provide this as evidence to any authority necessary and we are certain this evidence is more than sufficient as all data is supplied by a publicly listed 3rd party which obtains all data directly through the Transport Department in each state and territory.

You can be certain that it would not be us who would need to explain ourselves should this be handed over.

Many of your claims are highly defamatory and lacking of any evidence and substance whatsoever, we suggest you have a legal professional explain to you the seriousness of these statements before saying anything further.

This type of blatant stupidity is not something we take lightly and we will happily progress to legal action if necessary.

With respect to your threats with bad reviews - not only we will sue personally for defamation (which would be significant amount as we have now your own emails as evidence) but we also guaranty that we will publish same way all your rental agreements, all relevant information and all your threatening emails and report you to any relevant agencies.

Your claim that we have been aggressive is absolutely false as we have, at all times, been highly professional and have backed all of our statements with physical evidence.

With respect to the surcharge on the security bond, you obviously lack the basic skills to figure out the sum we have charged, as it is only including the 3% taken when the bond was processed.

…

Your email is complete nonsense, and we are very confident that our fact based stance will hold up over your whinging in any court.

As suggested before we suggest you seek legal advice before commenting any further and let your lawyers explain to your legal position.

Should you wish you wish to push this matter any further we will only accept communication through your legal adviser as your obviously are too stupid to know any better.

6 John Moriarty sent an email to A4WD in response to the initial 'Christine Burgess' email which challenged the validity of the GPS readings as well as the company's entitlement to take them. Customer JM described the alleged 414 speeding violations in his case as 'a bunch of crap'. The response he received from 'Christine Burgess' (on 1 January 2018) was (emphasis in original):

We have had a good laugh reading through your verbal diarrhea, as your stupidity amazes us.

We suggest that you stop embarrassing yourself, get the facts right and that you seek legal advice and get their professional opinion about your legal position and obligation with us before you do or say anything that you might regret and will be held accountable for later.

As with every hire, your hire is governed by the contract that you have signed, It is your obligation to read and **understand** the terms and conditions fully, which obviously you have not done.

It is clear you have had some trouble reading the driver behaviour report as we have clear evidence of each time you exceeded the speed limit, and the only thing that is 'a bunch of crap' is your behaviour and arrogance.

…

We have absolutely no interest in your lies, and to say that the camping equipment provided was unusable is complete rubbish, had there actually been an issue any wise individual would have informed us straight away and we would gladly have resolved the issue for you.

We even have your signature on the checkout paperwork stating that the vehicle and all equipment was received in clean and good working order, claiming that it was unusable well after you have returned the vehicle is just a sad, pathetic attempt to avoid your responsibility.

With regard to the fuel, you seriously must need new glasses as we have not charged you for fuel, we have a same level fuel policy and require customers to bring back the vehicle with the same amount it went out, which is just another thing you did manage to get right.

To state that we did not tell you that the vehicle needs to be cleaned is another outright lie, your signature on the cleaning agreement form proves this and it is also clearly listed in our terms and conditions.

…

To state you were unaware of this, and that it is illegal, is absolutely idiotic and defamatory and you just confirmed in writing your multiple breach of contract.

We have never come across someone so utterly stupid and unaware of their obligations under the contract and you are delusional if you think that we are going to make any exceptions for a customer like you.

You are welcome to go to your card provider, you are obviously too stupid to realise that the bond was paid via bank transfer and that you have no legal basis to recover the funds for the rental paid by credit card, as we have provided the services to you.

You have no idea of how many friendly highly professional and respected lawyers and QC's we have and herewith confirm receiving of your threats of commercial defamation and extorsion in writing below, and have forwarded on to them.

Your threats of negative reviews on public forum, with no basis for your claims, are something we take very seriously and it should be noted that we have recently obtained a Federal Court Order against Google and another 2 individuals making similar threats and accusations.

We will not hesitate to apply for your inclusion under these order, which will come with a high financial disaster to yourself.

If you wish to take this any further, as per the terms of your hire, the contract falls under the jurisdiction of the QLD Magistrates Court and we invite you to file your suit and we will immediately file a counter claim and also serve application for costs.

We look forward to you continuing to make a fool of yourself in court.

Please Note - If we have not received a written apology from you within 24 hours, we reserve the right without further notice to you to sue you for commercial extortion and defamation.

Again, we strongly suggest you seek quality and not (friendly) legal advice and get their professional opinion about your legal position and obligations under the contract, because it is quite apparent you have absolutely no idea what you are on about.

This prompted a reply from Mr Moriarty apologising for the tone of his previous email and saying that, while he considered that the GPS reading was just separate data points rather than separate incidents, he did not intend to take the matter further ($550 in total had been deducted from the security bond of this customer). 'Christine Burgess' replied to this acknowledging receipt and saying that no further action was required.

7 Matthew Roach, who challenged the initial email he received, said that if he did not hear back from A4WD he would, among other things, alert other customers through reviews. He received a response (on 6 April 2018) which said, among other things:

With respect to your threats of spreading misleading information about our company on a public forum, this is a clear threat of commercial defamation and extortion, which we will not tolerate.

Please Note: That we have recently successfully obtained 2 Federal Court Orders against Google LLC and another 2 individuals making similar threats and accusations, without any further notice to you we will apply for you to be included under this existing Federal Court Orders which will be a financial disaster for you. We have attached copy of this order for your information.

Everything that has been done is in strict accordance with our terms and conditions, therefore, herewith, we now put you on notice, you have 24 hours to provide us with a written apology, if you do not, we will not hesitate to apply for your inclusion in this court order without further notice to you.

We strongly suggest you seek legal advice and have them explain your legal position before you find yourself in very expensive court proceedings and ask them to search and read the abovementioned Federal Court Orders.

If you wish to take this matter further, we will happily provide all evidence of your breaches of contract as well as your blatant disregard of the law by consistently speeding, we can assure you that no court will look favourably on your reckless dangerous driving.

Should this be the case, not only will Matthew risk losing his license but [HL] will be heavily fined, and may affect future trips to Australia.

It is not clear whether any 'Federal Court Order' was attached to the email; if so it was not in evidence.

# APPENDIX B

**Instances of unconscionable conduct and penalties**

**1. VV: 30 April 2017**

Customer VV received an initial email from A4WD deducting $4,390 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. The initial email also threatened VV with litigation and claimed that A4WD had forwarded VV's DBR to the 'authorities'. This email also stated that A4WD would be happy to 'publish your driving data to all agencies in Australia and Overseas to ensure you never hire another vehicle again'. There was also intemperate language used in this email, which described VV's behaviour as 'despicable', 'barbaric' and 'stupid'. VV made a complaint to the ACCC and instructed a solicitor to respond to the initial email, but there is no evidence that A4WD replied to this correspondence.

**Penalties**: A4WD $22,500, Roesch $4,500, Kosukhina $4,500

**2. Ian Davison and Jane-Marie Forrest: 29 May 2017 - 6 June 2017**

Both of these customers gave affidavit evidence in this proceeding. Jane-Marie Forrest received an initial email from A4WD deducting $1,000 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. No other charges were made against the bond. The initial email also threatened to forward the DBR to the authorities. This email was forwarded to Ian Davison, who responded. Mr Davison received a follow-up email containing intemperate language, in addition to a further threat to 'hand over all evidence we have to law enforcement authorities', and another threat of litigation.

**Penalties**: A4WD $20,000, Roesch $4,000, Kosukhina $4,000

**3. JH: 1 June 2017 - 19 June 2017**

Customer JH received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. The initial email also threatened JH with litigation, and threatened to forward JH's DBR to the 'authorities'. JH disputed the deduction, and A4WD replied using intemperate language (describing JH's complaint as 'verbal diarrhoea') and again threatening JH with litigation.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**4. GS: 5 June 2017 - 13 August 2018**

Customer GS received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. The initial email also threatened GS with litigation and threatened to forward his DBR to 'the authorities'. It appears that GS did not respond to this email or dispute the deduction until about a year afterwards when GS learned of similar experiences suffered by other customers of A4WD. Jake Kuykendall replied to GS offering GS $500 in exchange for GS's confidentiality, and failing that, another threat of litigation. GS did not accept this offer, and reiterated his demand to be repaid. Jake Kuykendall replied once again in an email which contained intemperate language.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**5. LM: 21 June 2017 - 23 June 2017**

Customer LM received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $45 'processing fee' calculated as 3% of the total bond value of $1,500. No other charges were made against the bond. The initial email also threatened LM with litigation, and threatened to forward LM's DBR to 'the authorities'. LM disputed the charges and received a follow-up email containing intemperate language, further threats of litigation, and a threat to escalate the matter to 'law enforcement'.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**6. PF: 12 July 2017 - 17 July 2017**

Customer PF received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. The initial email also threatened PF with litigation, and threatened to refer PF's DBR to 'the authorities'. PF apparently disputed the deductions (this email is not in evidence), and the 'Business owner' replied an email comprised of two words: 'fuck off'. PF sought a more detailed response, to which A4WD replied in an email containing intemperate language.

**Penalties**: A4WD $20,000, Roesch $4,000, Kosukhina $4,000

**7. JL: 19 July 2017**

Customer JL received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. The initial email also threatened JL with litigation, and threatened to forward LM's DBR to 'the authorities'. There was no other evidence of intemperate language.

**Penalties**: A4WD $12,500, Roesch $2,500, Kosukhina $2,500

**8. RW: 24 July 2017**

Customer RW received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, and $50 as an 'admin fee'. No other charges were made against the bond. There was no other evidence of intemperate language, threats of referral to the 'authorities' or threats of litigation.

**Penalties**: A4WD $12,500, Roesch $2,500, Kosukhina $2,500

**9. PH: 3 August 2017 - 14 August 2017**

Customer PH received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. PH disputed the deduction, to which A4WD replied with an intemperately worded email (using terms such as 'extreme arrogance' and 'stupidity'), which threatened PH with litigation and threatened to refer PH's DBR to the 'authorities'.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**10. WR: 12 September 2017 - 25 September 2017**

Customer WR received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $45 'processing fee' calculated as 3% of the total bond value of $1,500. WR disputed the deduction, and A4WD sent a follow-up email containing intemperate language, threats of litigation and threats to refer the matter to 'law enforcement' and 'the authorities'. This email also claimed that A4WD had 'had this exact conversation with a NSW Magistrate Judge (as a customer), who also wished to dispute these charges and quickly retracted his dispute when he took the time to actually read and understand his legal position and obligations with us'.

**Penalties**: A4WD $20,000, Roesch $4,000, Kosukhina $4,000

**11. BP: 20 September 2017**

Customer BP received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. There is no evidence that BP responded to this email, or that A4WD engaged in any other unconscionable conduct in respect of this customer.

**Penalties**: A4WD $12,500, Roesch $2,500, Kosukhina $2,500

**12. NC: 27 September 2017 - 5 October 2017**

Customer NC received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. A friend of NC's responded to the initial email on her behalf, and offered to promote A4WD on his media platform in exchange for A4WD waiving the excessive and/or severe wear and tear and administrative fees. A4WD expressed interest in this deal, but the evidence is inconclusive as to whether it actually went through and the withheld bond money was returned. There is no evidence that A4WD engaged in any other unconscionable conduct in respect of this customer.

**Penalties**: A4WD $12,500, Roesch $2,500, Kosukhina $2,500

**13. MV: 3 October 2017 - 4 October 2017**

Customer MV received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $45 'processing fee' calculated as 3% of the total bond value of $1,500. No other charges were made against the bond. MV's husband replied to the email and disputed the deduction. A4WD responded to MV's husband with intemperate language, threats of litigation and referrals to 'law enforcement' and 'the authorities'.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**14. AK: 19 October 2017**

Customer AK received an initial email from A4WD deducting $1,000 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. No other charges were made against the bond. There is no evidence that AK responded to this email, or that A4WD engaged in any other unconscionable conduct in respect of this customer.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**15. NJ: 3 November 2017**

Customer NJ received an initial email from A4WD deducting $2,589.17 in total from the security bond. However, nothing was deducted for excessive and/or severe wear and tear or a night driving fee. The amount was claimed to have been deducted in respect of damage allegedly caused to the vehicle's air conditioner while NJ was hiring it. NJ apparently did not reply to this email, although he did submit a complaint to the ACCC, who followed the complaint up with A4WD. In its response to the ACCC, A4WD claimed that NJ's credit card provider had granted him a full chargeback in respect of the amounts claimed in the initial email.

**Penalties**: A4WD $10,000, Roesch $2,000, Kosukhina $2,000

**16. SL: 9 November 2017 - 10 November 2017**

Customer SL received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $150 'processing fee' calculated as 3% of the total bond value of $5,000. A4WD stated that two of the car's doors had been replaced while it was hired out to SL, for which they charged a separate fee, and stated that they had referred the incident to the local police. The allegation about the car doors proved to be incorrect, but A4WD insisted that the excessive and/or severe wear and tear deduction was still valid. There was no other evidence of intemperate language, threats of referral to the 'authorities' or threats of litigation.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**17. MK: 30 November 2017 - 11 December 2017**

Customer MK received an initial email from A4WD deducting $7,537.11 in total from the security bond. However, nothing was deducted for excessive and/or severe wear and tear or a night driving fee. MK disputed the initial email, to which A4WD replied using intemperate language (describing MK as 'arrogant' and 'idiotic'), threatening MK with litigation and referral to 'law enforcement'.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**18. CL: 5 December 2017 - 7 December 2017**

Customer CL received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear and $50 as an 'admin fee'. No other charges were made against the bond. CL disputed the deduction, to which A4WD sent a follow-up email containing intemperate language, threats of litigation and of referring CL to 'law enforcement'.

**Penalties**: A4WD $17,500, Roesch $3,500, Kosukhina $3,500

**19. John Moriarty: 11 January 2018 - 12 January 2018**

John Moriarty was sent an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, and $50 as an 'admin fee'. No other charges were made against the bond. Mr Moriarty disputed the deduction, to which A4WD sent a follow-up email containing vituperative and threatening language (at one point referring to Mr Moriarty's complaint of being charged for excessive and/or severe wear and tear as 'verbal diarrhea'), and threatened Mr Moriarty with a counterclaim should he file suit in the Magistrates Court of Queensland. That correspondence deterred Mr Moriarty from pursuing the matter. It left him feeling intimidated, embarrassed and frustrated.

**Penalties**: A4WD $22,500, Roesch $4,500, Kosukhina $4,500

**20. TMcC: 16 January 2018**

Customer TMcC received an initial email from A4WD deducting $11,690 from the security bond. However, nothing was deducted for excessive and/or severe wear and tear or a night driving fee. The amount was instead apparently deducted because TMcC filled the vehicle with the wrong fuel which damaged the engine and because TMcC had abandoned the vehicle at a place described as 'TCM' in Miriam Vale, Queensland. It appears that TMcC disputed liability for this deduction, but that correspondence was not in evidence. As such there is no evidence that A4WD used intemperate language with TMcC, or threatened to refer TMcC to the authorities. TMcC made a complaint to the ACCC, which followed the matter up with A4WD. In its response to the ACCC, A4WD stated TMcC had received a chargeback from his bank, and that A4WD was accordingly pursuing legal proceedings against TMcC.

**Penalties**: A4WD $10,000, Roesch $2,000, Kosukhina $2,000

**21. JK: 6 February 2018 - 12 February 2018**

Customer JK received an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear, and $50 as an 'admin fee'. No other charges were made against the bond. The initial email also claimed that A4WD had received two speeding fines issued during the course of JK's hire which were sent back to the appropriate 'authorities'. JK sent an email back in which he asked A4WD to rethink its decision to keep the deducted amount. A4WD responded and proposed that they would return the money that had been deducted from the security bond on the condition that JK post a 'couple of 5 star review [sic] on our Google page, as well as post a review on TripAdvisor'. JK accepted this offer, and after he uploaded the review on TripAdvisor, A4WD sent him an email stating that his refund had been approved by upper management and would be processed after his Google reviews were uploaded. However, the evidence is inconclusive as to whether the refund was in fact processed. There was no evidence of intemperate language or threats of litigation.

**Penalties**: A4WD $12,500, Roesch $2,500, Kosukhina $2,500

**22. HY: 27 February 2018 - 13 March 2018**

Customer HY received an initial email from A4WD deducting $1,164.66 from the security bond for excessive and/or severe wear and tear, $50 as an 'admin fee', and a $75 'processing fee' calculated as 3% of the total bond value of $2,500. HY disputed the email, and received a follow-up email containing intemperate language and a threat of litigation. HY again disputed the claims, to which A4WD again replied with intemperate language and further threats of litigation. A4WD apparently discovered a negative review about them on Google, which they attributed to HY. Of their own motion, A4WD emailed HY again demanding that HY take down the review, or else they would sue HY, and if HY did not appear, that would 'result in your arrest under the Hague Convention'. HY replied again in dispute, to which A4WD replied with even more intemperate language (describing HY as an 'idiot' and a 'monkey'). A4WD claimed that HY's 'personal documents' had been supplied to the police. There was one more round of emails to similar effect from both parties.

**Penalties**: A4WD $30,000, Roesch $6,000, Kosukhina $6,000

**23. Benjimen Bomford: 28 March 2018 - 29 March 2018**

Benjimen Bomford was sent an initial email from A4WD deducting $4,710 from the security bond for excessive and/or severe wear and tear and $50 as an 'admin fee'. The initial email also claimed that two speeding fines had been received (of which subpoenas have shown that the police departments of Western Australia and the Northern Territory have no record). Mr Bomford disputed the deduction and received an intemperate follow-up email which claimed that Mr Bomford's details had been forwarded to the police, and threatened Mr Bomford with litigation.

**Penalties**: A4WD $35,000, Roesch $7,000, Kosukhina $7,000

**24. SM: 28 March 2018 - 12 August 2018**

Customer SM received an initial email from A4WD deducting $70 from the security bond for excessive and/or severe wear and tear and $50 as an 'admin fee'. The initial email also stated that A4WD had received two speeding fines during SM's hire and that they had been sent back the appropriate 'authorities'. SM queried some of the charges and the speeding fines (but not the excessive and/or severe wear and tear charge), to which A4WD replied stating that the fine would be sent to SM in SM's name, and that they could not give SM a copy of the fine in A4WD's name. SM requested an itemised bill pursuant to the ACL, which A4WD had claimed it had already sent to SM. A4WD emailed SM again intemperately demanding that SM take down a review on the internet which A4WD attributed to SM, or else it would refer the matter to its legal representative and forward the details to the appropriate 'authorities'.

**Penalties**: A4WD $15,000, Roesch $3,000, Kosukhina $3,000

**25. Matthew Roach: 5 April 2018 - 3 October 2018**

Matthew Roach was not sent the initial email himself. It was sent to a friend of his, 'HL', who had signed the hire contract. Mr Roach is a solicitor and acted on HL's behalf. HL was sent an initial email from A4WD deducting $500 from the security bond for excessive and/or severe wear and tear and $500 for a night driving fee, and $50 as an 'admin fee'. No other charges were made against the bond. The initial email also stated that they would forward HL's details to the 'appropriate authorities' on the basis of a purported speeding fine, of which the Queensland police have no record and so was never issued. Mr Roach responded to this email on behalf of HL and was sent a follow-up email containing intemperate language and threats of litigation. The bond money was eventually refunded by way of settlement after Mr Roach launched proceedings in the Queensland Civil and Administrative Tribunal (which generated a number of other intemperately worded emails from A4WD and Mr Roesch personally).

**Penalties**: A4WD $35,000, Roesch $12,000, Kosukhina $7,000. This is the one instance in which Mr Roesch's greater involvement in an instance of unconscionable conduct justifies a greater penalty than Ms Kosukhina.

**26. Kenneth Hitchcock: 11 April 2018 - 16 April 2018**

Mr Hitchcock was sent an initial email from A4WD deducting $3,002.15 from the security bond for excessive and/or severe wear and tear and $50 as an 'admin fee'. Mr Hitchcock also received a follow-up email which contained intemperate language, claimed that Mr Hitchcock's details had been forwarded to the police, and threatened Mr Hitchcock with litigation. A4WD falsely claimed that speeding fines had been received for Mr Hitchcock's driving of the vehicle.

**Penalties**: A4WD $35,000, Roesch $7,000, Kosukhina $7,000

**27. DB: 29 April 2018 - 1 May 2018**

A4WD sent some emails to Customer DB before he returned the hired vehicle, because its GPS tracker had indicated that DB had been speeding and that the vehicle was being driven at night outside of a built up area. DB disputed A4WD's intention to deduct money for night time driving. DB received an 'initial' email from A4WD deducting $1,000 as a night driving fee and $50 as an 'admin fee'. This email also threatened DB with litigation. DB apparently disputed this charge (although this is not in evidence), because he received a follow-up email which contained intemperate language (describing DB as 'lazy') and another threat of litigation. DB wrote a negative online review about his experience with A4WD. In response, A4WD instructed its solicitors to issue a letter of demand to DB, claiming that his review was defamatory, and demanding that DB undertake to apologise to A4WD, retract the 'defamatory' statements contained in the review, take the review down and also not disclose 'any information' about A4WD. This caused DB to instruct lawyers of his own to reply to the letter of demand, in which he relied primarily on the defence of truth as a ground for refusing the demands.

**Penalties**: A4WD $30,000, Roesch $6,000, Kosukhina $6,000

**28. MM: 13 November 2018**

Customer MM received an initial email from A4WD deducting $193.81 from the security bond for excessive and/or severe wear and tear and $50 as an 'admin fee'. This email stated that A4WD was contacted by WA Traffic Police regarding an alleged incident of Reckless Driving and High Range Speeding at the time MM was hiring the vehicle. In this instance, A4WD was being truthful, and attached correspondence with WA police to its initial email to MM. However, the initial email also claimed that MM had managed to accumulate 2,318 'speeding violations' according to the DBR, which it used to justify the retention of a portion of the bond. There was no other evidence of intemperate language or threats of litigation.

**Penalties**: A4WD $12,500, Roesch $2,500, Kosukhina $2,500

**29. DM: 10 January 2019**

Customer DM received an initial email from A4WD deducting $1,525.74 in total from the security bond. However, nothing was deducted for excessive and/or severe wear and tear or a night driving fee. It appears the amount was deducted in respect of damage claimed to have been sustained to the paint and panel of the vehicle over the term of the hire. However, no invoice or other evidence was attached to the initial email which supported this allegation. The initial email did, however, attach the DBR, and said that the 'excessive speeding violations' shown therein 'are clear negligence and serious breaches of our contract, showing continuous disregard for our property and the law'. However, the email also said that, despite the alleged speeding violations, A4WD had 'made the commercial decision not to charge additional costs for the excessive wear and tear caused by your reckless driving'.

**Penalties**: A4WD $10,000, Roesch $2,000, Kosukhina $2,000

**30. CM: 5 July 2019 - 6 July 2019**

A4WD sent some emails to Customer CM before he returned the vehicle, because its GPS tracker had shown that CM had been speeding and was being driven at night outside of a built up area. In these emails, A4WD both threatened to refer CM to the local police, and then stated that it had in fact contacted Northern Territory police about the matter. Upon discovering that his bond had not been returned, CM sent an email to A4WD requesting that it be returned in full. A4WD replied intemperately, and said that in order to proceed, 'you will need to contact the Tennant Creek Police Station regarding your driver behaviour'. This email described the deduction of $1,940.59 (but nothing was deducted for excessive and/or severe wear and tear or a night driving fee). CM reiterated his request, and threatened A4WD with legal action if they did not comply. A4WD sent another intemperate email, threatening litigation of their own and stating that 'we still will be obtaining advise [sic] of this matter from Police of your state and supply them with any evidence if required'.

**Penalties**: A4WD $12,500, Roesch $2,500, Kosukhina $2,500

**31. TM: 22 August 2019**

Customer TM received an initial email from A4WD deducting $1,194.01 from the security bond. However, nothing was deducted for excessive and/or severe wear and tear or a night driving fee. Although there was subsequent correspondence regarding TM missing a flight due to the alleged lateness of some of A4WD's representatives in conducting a post-hire inspection, A4WD did not use intemperate language, threaten TM with litigation, or threaten to involve the 'authorities'.

**Penalties**: A4WD $10,000, Roesch $2,000, Kosukhina $2,000