

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
File Number: NSD448/2017  
File Title: CASEY CHERYL SIMPSON v THORN AUSTRALIA PTY LTD T/AS  
RADIO RENTALS ACN 008 454 439  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 10/05/2019 10:14:58 AM AEST

Registrar

### Important Information

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

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Form 17  
Rule 8.05(1)(a)

**Further Amended Statement of claim**

*Filed with leave of Gleeson J granted on 8 May 2019*

No. NSD448 of 2017

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Casey Cheryl Simpson**

Applicant

**Thorn Australia Pty Ltd t/as Radio Rentals (ACN 008 454 439)**

First Respondent

**James Leslie Marshall**

Second Respondent

**AIG Australia Limited (ACN 004 727 753)**

Third Respondent

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## A. THE GROUP MEMBERS

1. The applicant brings this proceeding on her own behalf and on behalf of represented persons pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) being natural persons (**Group Members**) who:
    - (a) entered into one or more contracts styled as 'consumer leases' from 28 March 2011 to 29 March 2017 where the respondent, Thorn Australia Pty Ltd trading as Radio Rentals (**Radio Rentals**) was styled as the 'lessor'; and
    - (b) in respect of which the following applied:
      - (i) *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);
      - (ii) *National Consumer Credit Protection Act 2009* (Cth) (**National Credit Act**);  
and
      - (iii) *National Credit Code* (**National Code**).
- (**Radio Rentals Contracts**).

## B. THE PARTIES

### 2. The applicant (**Ms Simpson**):

- (a) is a natural person and has, since at least 15 June 2012, been a pensioner in receipt of the 'Parenting Payment' and the 'Family Tax Benefit' from Centrelink (**Centrelink Payments**);
- (b) during the period from 28 March 2011 to 29 March 2017 (**Relevant Period**) obtained financial products within the meaning of section 12BAA(7)(k) of the ASIC Act from Radio Rentals for personal, domestic or household purposes; and

#### **Particulars**

*Ms Simpson obtained the financial products the subject of the First, Second, Third and Fourth Simpson Contracts as pleaded in Part D of this Amended Statement of Claim.*

- (c) is a 'consumer' within the meaning of section 12BC of the ASIC Act.

### 3. The First Respondent, Radio Rentals:

- (a) is a company duly incorporated under the laws of Australia;
- (b) is, among other things, in the business of renting, leasing and selling household and electrical goods;
- (c) is a wholly owned subsidiary of Thorn Group Limited Ltd ACN 072 507 147 (**Thorn Group**);
- (d) in its dealings, from time to time in connection with its entry into the Radio Rentals Contracts with Ms Simpson and the Group Members:
  - (i) engaged in 'trade or commerce' within the meaning of section 12BA(1) of the ASIC Act;
  - (ii) dealt in 'financial products' in Australia within the meaning of section 12BAA(7)(k) of the ASIC Act;
  - (iii) provided a 'financial service' pursuant to section 12BAB(1)(b) of the ASIC Act.

### Particulars

*Each of the Radio Rentals Contracts was a credit facility, as defined in section 12BAA(7)(k) of the ASIC Act and clause 2B(1)(a) of the Australian Securities and Investments Commission Regulations 2001 (Cth), because they involved the lease or rental of goods under a contract where the consumer was not required to make full payment before the goods were provided, and was not required to pay a deposit equal to the value of the goods in relation to the return of the goods. Accordingly, each of the Radio Rentals Contracts was a financial product that the credit provider issued and dealt in, within the meaning of ss 12BAB(1)(b) and 12BAB(7) of the ASIC Act, also making it a 'financial service' pursuant to s12BAB(1)(b) and section 12BAB(7) of the ASIC Act.*

#### 3A. The Second Respondent, James Leslie Marshall (Marshall):

- (a) is a natural person;
- (b) from 5 May 2014 to 21 April 2017 was a director of Thorn Group;
- (c) from 5 May 2014 to 21 April 2017 was the Chief Executive Officer and Managing Director of Thorn Group;
- (d) was employed by Thorn Group from 1993 to 21 April 2017 and was, *inter alia*:
  - (i) from some time in 2000 to some time in 2006, the Sales and Operations Manager of RR Australia Ltd, the antecedent of Thorn Group;
  - (ii) from some time in 2006 to June 2013, the General Manager of Radio Rentals and Rentlo;
  - (iii) from June 2013 to 4 May 2014, the Chief Operating Officer of Thorn Group.
- (e) was at all times during the Relevant Period:
  - (i) a person who made or participated in making decisions that affected the whole or a substantial part of the business of Radio Rentals;
  - (ii) a person who had the capacity to significantly affect Radio Rentals' financial standing; and/or
  - (iii) a person in accordance with whose instructions or wishes the directors of Radio Rentals were accustomed to act; and

- (f) by reason of the matters in sub paragraphs (b), (c), (d) and/or (e) above, was during the Relevant Period an officer of Thorn Group and Radio Rentals (within the meaning of section 9 of the *Corporations Act 2001* (Cth) (**Corporations Act**).

3B. The Third Respondent, AIG Australia Limited (ACN 004 727 753) (**AIG**):

- (a) is a company duly incorporated under the laws of Australia and capable of being sued;
- (b) is a wholly-owned subsidiary of American International Group Inc (organisation number 103 399 248);
- (c) carries on a business of providing insurance;
- (d) from at least 2013, provided Thorn Group and its subsidiaries with insurance coverage for, *inter alia*:
- (i) directors and officers liability; and

**Particulars**

- (a) *AIG issued an insurance policy to Thorn Group entitled "Gold Complete" for the period 30 April 2015 to 30 April 2016 in consideration for the payment by Thorn Group of the premium specified by AIG which was subsequently renewed or succeeded annually on relevantly the same terms and has provided and continues to provide insurance coverage (**D&O Policy**) (discovered document THO.055.003.0364);*
- (b) *It can be inferred that AIG also issued other insurance policies in materially the same terms to the D&O Policy for the whole of the Relevant Period (see for example discovered documents THO.049.020.1515 and THO.049.011.4064 at 4223); and*
- (c) *Further particulars may be provided following the service of notices to produce, subpoenas to produce documents and following service of evidence.*
- (ii) professional indemnity.

**Particulars**

- (a) AIG issued a policy to Thorn Group in a document entitled “Civil Liability Insurance for Financial Institutions”, for the period 30 April 2016 to 30 April 2017 in consideration for the payment by Thorn Group of the premium specified by AIG which was subsequently renewed or succeeded annually on relevantly the same terms and has provided and continues to provide insurance coverage (Professional Indemnity Policy) (discovered document THO.049.011.4064 at 4238 and 4245);
- (b) It can be inferred that AIG also issued other insurance policies to Thorn Group in materially the same terms to the Professional Indemnity Policy for the whole of the Relevant Period (discovered document THO.049.011.4064 at 4238); and
- (c) Further particulars may be provided following the service of notices to produce, subpoenas to produce documents and following service of evidence.

**C. RADIO RENTALS’ BUSINESS SYSTEM**

4. Radio Rentals:

- (a) traded under the trading name ‘Radio Rentals’ in all states and territories in Australia, with the exception of South Australia, during the Relevant Period;
- (b) during the Relevant Period used the registered trademarks:
- i. ‘Rent, Try, \$1 Buy’ (trade mark number 1331097) owned by the Thorn Group; and
  - ii. ‘Home of Rent Try \$1\* Buy’ sign (trade mark number 1453935) owned by the Thorn Group, which image is below:



- (c) as of 19 July 2016, operated a national network of over 90 outlets across Australia.
5. During the Relevant Period, Radio Rentals advertised and promoted its services to persons, including Ms Simpson and Group Members, as 'Rent, Try, \$1\* Buy'.

#### Particulars

- (a) *Advertisements and promotions for 'Rent, Try, \$1\* Buy' were made by way of, inter alia:*
- (i) *Printed Radio Rentals pamphlets containing the 'Rent, Try, \$1\* Buy' representation used for letterbox drops (e.g. discovered documents THO.002.002.2197 and THO.002.004.7567);*
  - (ii) *A3 and larger posters containing the 'Rent, Try, \$1\* Buy' representation at Radio Rentals stores (e.g. discovered documents THO.002.004.7224 and THO.001.017.6024);*
  - (iii) *Online advertisements including on the Radio Rentals Website at <https://radio-rentals.com.au/> and, webpage at <https://www.radio-rentals.com.au/rent-try-buy> (e.g. discovered documents THO.052.001.3571 and THO.001.019.3511);*
  - (iv) *Radio and television advertising (e.g. discovered documents THO.001.017.8226 and THO.001.010.0294); and*
  - (v) *Other means of advertising and promotion (e.g. discovered documents THO.002.006.7592 and THO.001.019.5725).*
- (b) *The Radio Rentals Wagga Wagga webpage as at 26 October 2013 contained the phrase: 'Our affordable options include our exclusive Rent, Try, \$1\* Buy plan, a solution that won't break your budget'.*
- (c) *[Deleted]*
- (d) *The Radio Rentals 'Quote Enquiry' forms stated that Radio Rentals was the 'Home of Rent, Try, \$1\* Buy' and included a 'BUYOUT\*/TERM' section.*
- (e) *Further particulars may be provided after subpoenas and notices to produce have been issued.*



6. As a result of the Radio Rentals' advertising and promotion in particulars (a) to (d) of paragraph 5 above, it made a representation to Ms Simpson and Group Members that they could rent specific goods, try those goods and then buy those same goods for \$1 at the end of the rental contract (**Rent Try \$1 Buy Representation**).
- 6A. In Radio Rentals' advertising and promotions it made a further representation that 48 month leases were more affordable than other leases and/or involved lower weekly payments than other leases without explaining that 48 month leases were more costly overall than other leases (**48 Month Lease Representation**).

#### Particulars

*After 2013, Radio Rentals advertised and promoted 48 month leases and in doing so stated, inter alia:*

- (a) *48 month leases were more affordable (e.g. discovered documents THO.002.004.7296 and THO.002.008.3504 at 3505);*
- (b) *48 month leases involved lower weekly payments (e.g. discovered documents THO.002.004.7314 and THO.002.008.3504 at 3505);*
- (c) *Further particulars may be provided after subpoenas and notices to produce have been issued.*

- 6B. Radio Rentals further represented to Ms Simpson and Group Members that the obligation to pay the 'DLR Fee' described in paragraph 8(c)(iii) below would only form part of the Radio Rentals Contracts if Ms Simpson or Group Members had agreed to be charged the DLR Fee (**DLR Fee Representation**).

#### Particulars

*The DLR Fee Representation was express and made in Lease Schedules by providing a 'tick box' in which consumers could indicate their agreement to be charged the DLR Fee.*

7. The Rent Try \$1 Buy Representation was repeated on the cover of Ms Simpson's and Group Members' contract documents.

#### Particulars

- (a) *The First, Second, Third and Fourth Simpson Contracts (pleaded in Section D below) each stated on the front page of the 'Radio Rentals – Home of Rent, Try, \$1\* Buy – Terms and Conditions' document (**Terms and Conditions**)*

*that Radio Rentals was the 'Home of Rent, Try, \$1\* Buy' and 'Whatever your lifestyle or budget – we'll give you a fair go'.*

(b) [Deleted]

8. The Radio Rentals Contracts with Ms Simpson and Group Members were standard form contract documents and included:

(a) [Deleted]

(b) a 'Radio Rentals Lease Schedule' which;

- (i) indicated the length of the lease and when goods would become available for the \$1 'buy';
- (ii) specified a 'Rental Amount' and, in most cases, a 'Damage Liability Reduction Fee/s' (**DLR Fee**) amount and the total amount payable excluding any other fees;
- (iii) stated that the terms and conditions of the contract were also set out in a separate document entitled 'Terms and Conditions for both Consumer and Business Leases';

(c) the Terms and Conditions document, which was over 20 pages long and had a cover page which stated in bold the words 'Radio Rentals' and sign 'Home of Rent, Try, \$1\* Buy', and the words 'Terms and Conditions', the terms of which, *inter alia*:

- (i) did not entitle consumers to buy the 'Goods' they were 'renting' and 'trying' for \$1 (Clauses 13 and 20) ('Goods' is defined in Clause 1.1);
- (ii) did not give consumers the right to buy 'Similar Goods' of the same quality for \$1 (Clause 21) ('Similar Goods' is defined in Clause 1.1 as being goods which are 'similar in age, dimension and feature to the Goods ...' (**Similar Goods**));
- (iii) included an option for consumers to limit their liability to Radio Rentals through 'damage liability reduction' (**DLR**) by paying a DLR Fee, which was purported to provide a cap on liability if the Goods were lost or damaged, but which was only available in very limited circumstances said to be 'beyond' the consumers' control and in some cases not at all (Clause 9.3 effectively excludes 'Computer Equipment' which is defined in Clause 1.1 as including

computers and mobile phones); yet also required that a consumer compensate Radio Rentals for full loss or damage of the Goods in circumstances other than those set out in Clause 9, despite any payment of the DLR Fee, by either paying the cost of repair or the replacement (Clauses 8, 9 and 10);

- (iv) provided that consumers were obliged to continue making rental payments to Radio Rentals for the Goods even if the Goods had broken down, were defective, damaged, under repair or otherwise not in their possession and made no exception if Clause 8 had also been invoked (see Clause 5.5 - noting Clause 8 required the consumer to also pay compensation for any lost or damaged Goods);
- (v) provided that unless a consumer had: a) returned the Goods at the end of the lease period; or b) reached an agreement with Radio Rentals to enter a new lease period; or c) made a written offer to Radio Rentals to purchase the Goods which was accepted by the Radio Rentals (which was entirely at Radio Rentals discretion), the consumer would continue to be charged for the Goods indefinitely (Clause 13) (**Inertia Provision**);
- (vi) did not give consumers the right to terminate the contract without also requiring them to return the Goods to Radio Rentals after the expiry of the Lease Period and the payment of the 'Total Rental Amount' and any other fees which may be payable (Clauses 12 and 13);
- (vii) permitted Radio Rentals to vary unilaterally the contract in a number of circumstances including:
  - A. to change the amount and frequency of payments of any fees and charges and impose new fees and charges at any time without consumers' consent;
  - B. increase the Rental Amount; and
  - C. increase the DLR Fee(Clause 19); and
- (viii) provided that there was only one day on which consumers could exercise their right to buy similar goods for \$1 (**RT\$1B Day**) (Clause 21).

((c)(i)-(viii) together, **Unfair Contract Terms**)

9. At all material times during the Relevant Period, the legal effect of the terms of the Radio Rentals Contracts was that they were not a sale of goods by instalments to which sections 10 of the then *Consumer Credit (New South Wales) Code (NSW Code)*, *Consumer Credit (Queensland) Code (Qld Code)*, *Consumer Credit (Victoria) Code (Victorian Code)*, *Consumer Credit (ACT) Code (ACT Code)* (together **State Codes**) or section 9 of the National Code applied, and as a consequence:
- (a) between 1 July 2010 and 1 July 2013, the transactions in New South Wales were not subject to the maximum interest rate cap under Divisions 2 and 3 of Schedule 3 to the *Credit (Commonwealth Powers) Act 2010* (NSW);
  - (b) between 1 July 2010 and 1 July 2013, the transactions in Queensland were not subject to the maximum interest rate cap under Part 6 of the *Credit (Commonwealth Powers) Act 2010* (Qld);
  - (c) between 1 July 2010 and 1 July 2013, the transactions in Victoria were not subject to the maximum interest rate cap under the *Credit (Commonwealth Powers) Act 2010* (Vic);
  - (d) after 7 October 2010, the transactions in the Australian Capital Territory were not subject to the maximum interest rate cap under Part 6 of the *Fair Trading (Australian Consumer Law) Act 1992* (ACT); and
  - (e) after 1 July 2013, the transactions were not subject to the maximum annual cost rate in Division 4A of Part 2 of the National Code.
- 9A. Radio Rentals had a policy in relation to the Radio Rentals Contracts to divide the monthly amount payable stated in the Lease Schedules by a factor of 2 to identify a fortnightly payment amount and then apply a further ad hoc rounding component (**Instalment Policy**).

#### **Particulars**

*E.g. Discovered document THO.087.001.0966 at 1009.*

- 9B. Radio Rentals' practices concerning DLR and DLR Fees were such that, *inter alia*:

- (a) Radio Rentals advertised prices of goods that would be the subject of Radio Rentals Contracts excluding the DLR Fee;
- (b) Radio Rentals stated prices of goods that would be the subject of Radio Rentals Contracts on Quote Enquiry forms excluding the DLR Fee;
- (c) Radio Rentals instructed its staff to encourage consumers to take up DLR;
- (d) Radio Rentals pre-filled the DLR box in the system used for the administration of Radio Rentals Contracts so that DLR was nominated;
- (e) consumers' liability to Radio Rentals was only reduced in the limited circumstances pleaded in paragraph 8(c)(iii) above;
- (f) they resulted in very few claims being made under DLR; and
- (g) they resulted in Radio Rentals' acceptance of very few claims made under DLR.

**(DLR Policy)**

**Particulars**

*Discovered documents THO.003.004.0083 at 0150 THO.127.001.7614 at 7658, THO.099.002.3453 at 3463, THO.049.018.6341 at 6341 and THO.125.010.0882 at 0888.*

- 9C. Radio Rentals had a policy to continue to collect lease payments in relation to Radio Rentals Contracts following the applicable RT\$1B Day (**Inertia Policy**).

**Particulars**

- (a) *E.g. Discovered document THO.065.001.0876.*
- (b) *The Inertia Provision operated such as to enable Radio Rentals to continue to collect lease payments in relation to Radio Rentals Contracts after the end of the applicable Lease Period.*
- (c) *The contract documents did not specify the RT\$1B Day in circumstances where the RT\$1B Day was known to Radio Rentals.*

- 9D. Ms Simpson and Group Members could have obtained reasonably equivalent goods to the goods the subject of the Radio Rentals Contracts for an amount which in many instances was less than the amount of the Radio Rentals Contracts (**Equivalent Goods**).

#### **Particulars**

- (a) *Equivalent Goods were available for sale at retail prices within a reasonably proximate area of the location in which Radio Rentals Contracts were entered into and could be purchased:*
- (i) *by entering into contracts for the 'sale of goods by instalments' regulated by the State Codes or the National Code (**Regulated Contract**) and agreeing to pay the amount of the Equivalent Goods on the terms provided under the Regulated Contract (**Regulated Equivalent Goods Amount**); or*
  - (ii) *by entering into 'small amount credit contracts' within the meaning of the National Code (**Small Credit Contracts**) to borrow an amount to purchase the Equivalent Goods at their retail price and agreeing to repay the amount borrowed on the terms provided by the Small Credit Contract (**Small Credit Contract Amount**); or*
  - (iii) *by entering into a credit contract within the meaning of the State Codes or the National Code that was not a 'small amount credit contract' (**Other Credit Contracts**) to borrow an amount to purchase the Equivalent Goods at their retail price and agreeing to repay the amount borrowed on the terms provided by the Other Credit Contracts (**Other Credit Contract Amount**).*

## **D. THE SIMPSON CONTRACTS**

### **D1. First Simpson Contract**

10. Sometime in or around June 2012, Ms Simpson attended the Radio Rentals store at 155 Baylis Street, Wagga Wagga, New South Wales (**Radio Rentals Wagga Wagga**) to obtain a bed and a mattress for her domestic use at her home.

- 10A. On 15 June 2012, Ms Simpson took delivery of a 'Sealy 8517 Queen Mattress' (**Sealy Mattress**) and a 'Chapel Queen Bed' (**Chapel Bed**) at her residence from Radio Rentals, both of which were in a used condition.
- 10B. When Ms Simpson took delivery of the Sealy Mattress and the Chapel Bed at her residence, Radio Rentals:
- (a) presented Ms Simpson with a two-page document entitled 'RADIO RENTALS LEASE SCHEDULE' bearing the words 'Contract No. 1546612' (**First Simpson Lease Schedule**); and
  - (b) required Ms Simpson to sign the First Simpson Lease Schedule once on a line provided within a box which was entitled 'Acceptance', the effect of which would be that, *inter alia*, Ms Simpson acknowledged that she had read, understood, accepted and agreed:
    - (i) that she had received the Sealy Mattress and the Chapel Bed; and
    - (ii) to lease the Sealy Mattress and the Chapel Bed for the Lease Period on the Terms and Conditions of the Contract.
11. On 15 June 2012, as a result of the Rent Try \$1 Buy Representation, Ms Simpson signed the First Simpson Lease Schedule and entered contract number 1546612 with Radio Rentals (**First Simpson Contract**) styled as an '18 Months (RTB)' which stated that the 'total amount payable over the Lease Period' was \$1,376.28 for the Sealy Mattress and the Chapel Bed.

#### **Particulars**

- (a) *The First Simpson Contract dated 15 June 2012 stated that:*
  - (i) *'the Lease Period is 18 Months (RTB)';*
  - (ii) *'the number of payments payable over the Lease Period' was 18;*
  - (iii) *the monthly 'Rental Amount' was \$73.13;*
  - (iv) *the monthly 'amount payable by you each Payment Date' was \$76.46;*

- (v) *the 'DLR Fees/s' which was payable each Payment Date was \$3.33 (Ms Simpson does not appear to have selected the DLR Fee tick box);*
- (vi) *the 'RTB Plus Fee/s' which was payable each Payment Date was \$0.00;*
- (vii) *the 'Total Rental Amount' which was payable over the Lease Period was \$1,316.34;*
- (viii) *the 'Similar Goods Purchase Price' was '18m \$264.09, 36m \$1.00' (for the Sealy Mattress) and '18m \$452.69, 36m \$1.00' (for the Chapel Bed);*
- (ix) *the 'DLR3000' was '\$3.33';*
- (x) *the Establishment Fee was \$25; and*
- (xi) *the 'total amount payable over the Lease Period' was \$1,376.28.*

(b) *The First Simpson Contract included an 'Equipment Schedule', which:*

- (i) *listed a 'Sealy 8517 Queen Mattress (Model/Cat no. FSO4QM-B, TIN 04QM621, Manufacturers Serial No. NA0327102801)'; and*
- (ii) *listed a 'Chapel Queen Bed' (Model/Cat no. FSO479-A TIN 04791961).*

12. On 15 June 2012 Ms Simpson also signed a 'Centrelink Deductions' form which cited the service provider's name as 'Radio Rentals' and the service provider's address as the address of Radio Rentals Wagga Wagga and which:

- (a) authorised a weekly deduction of \$19.12 from Ms Simpson's Centrelink Payments to 'Radio Rentals'; and
- (b) did not specify a 'target amount' which, had it been specified, would have automatically ended the deductions once that amount was reached.

13. [Deleted]

14. Between June 2012 and December 2015, Radio Rentals deducted from Ms Simpson's Centrelink Payments amounts allocated to the First Simpson Contract.



**Particulars**

*Discovered documents THO.004.001.0998, THO.013.001.1548 and THO.004.001.0983.*

14A. The Instalment Policy was applied in part to the First Simpson Contract as follows by:

- (a) dividing the monthly payment amount by 2 to arrive at a fortnightly payment amount; and then
- (b) dividing the result of paragraph 14A(a) again by 2 to identify a weekly payment amount.

**Particulars**

*Discovered documents THO.004.001.0437 at 0437 (Quote Enquiry), 0457-0458 (First Simpson Lease Schedule) and 0460-0461 (Centrepay Deductions form).*

15. At the expiry of the 18 month period after the First Simpson Contract was entered into, Ms Simpson was not reminded of her rights under the contract and took no action under the contract.

**Particulars**

- (a) *Radio Rentals Contracts with a Lease Period of 18 months included a right to purchase Similar Goods for the price stated in the Lease Schedule on the day of the expiry of the 18 month Lease Period (**18 Month Purchase Right Day**).*
- (b) *The RT\$1B Day was the day of the expiry of the 36 month lease period.*
- (c) *The 18 Month Purchase Right Day and the RT\$1B Day were the only days on which the Similar Goods could be purchased.*
- (d) *Ms Simpson did not take any action under the contract and could only exercise a right to buy Similar Goods on the RT\$1B Day by paying the monthly amount payable for another 18 months.*
- (e) *Radio Rentals' practice was to not send correspondence to consumers in the period approaching the 18 Month Purchase Right Day to remind them*

*of their rights (e.g. THO.002.002.7092 (18 month contracts are contract type 99: THO.002.003.2557)).*

16. Between December 2013 and June 2015, pursuant to Clause 13.6 of the Terms and Conditions, Radio Rentals continued to deduct from Ms Simpson's Centrelink Payments amounts allocated to the First Simpson Contract.

**Particulars**

*Discovered documents THO.004.001.0998, THO.013.001.1548 and THO.004.001.0983.*

17. At the expiry of the 36 month period after the First Simpson Contract was entered into, Ms Simpson was not reminded of her rights under the contract and took no action under the contract.

**Particulars**

(a) *The Inertia Policy applied such that Radio Rentals would continue to deduct from Ms Simpson's Centrelink Payments amounts allocated to the First Simpson Contract in relation to the First Simpson Contract.*

(b) *Discovered documents THO.004.001.0998, THO.013.001.1548 and THO.004.001.0983.*

- 17A. In the alternative to paragraph 17, if Ms Simpson was reminded of her rights under the First Simpson Contract such reminders were not effective and were presented as advertising and/or promotional material rather than as reminders of her key contractual rights.

**Particulars**

*Discovered documents THO.013.001.1065, THO.013.001.1066 and THO.013.001.1064.*

18. Between June 2015 and January 2016, pursuant to Clause 13.6 of the Terms and Conditions, Radio Rentals continued to deduct from Ms Simpson's Centrelink Payments amounts allocated to the First Simpson Contract.

**Particulars**

*Discovered documents THO.004.001.0998, THO.013.001.1548 and THO.004.001.0983.*

19. In December 2015 Ms Simpson cancelled Radio Rentals' authorisation to deduct monies from her Centrelink Payments.
20. Ms Simpson paid Radio Rentals amounts which were allocated to the First Simpson Contract.

#### **Particulars**

- (a) *Between June 2012 and February 2016, Ms Simpson paid approximately \$2,788.65 to Radio Rentals allocated to the First Simpson Contract.*
  - (b) *The amount payable under the First Simpson Contract was amended to exclude the Sealy Mattress following its replacement with the Second Mattress as pleaded at paragraphs 25 to 25B below.*
  - (c) *As a result of the amendment referred to in particular (a) above, the amount payable under the First Simpson Contract was reduced from \$76.46 per month to \$47.32 per month (discovered documents THO.004.001.0437 at 0457, THO.004.001.0998 at 0998-100, THO.013.001.1548 at 1549 and THO.004.001.0983 at 0983).*
  - (d) *On or around 12 February 2016 Ms Simpson made a final \$1 payment in relation to the First Simpson Contract to Radio Rentals (discovered documents THO.013.001.1548 at 1552 and THO.004.001.0983 at 0986).*
21. The terms of the First Simpson Contract gave Ms Simpson the right to ownership of Similar Goods to the Sealy Mattress and Chapel Bed at the end of 18 months at a total cost of \$2,118.06 and at the end of 36 months, when the Similar Goods could be purchased for '\$1', at a total cost of \$2,779.56.

#### **Particulars**

- (a) *The cost to own Similar Goods to the Sealy Mattress and the Chapel Bed within the terms of the First Simpson Contract is calculated as follows:*
  - (i) *on an 18 month term:  $18 \times \$76.46 + \$264.09 + \$452.69 + \$25.00$  (establishment fee) = \$2,118.06; or*
  - (ii) *on a 36 month term:  $36 \times \$76.46 + \$1.00 + \$1.00 + \$25.00$  (establishment fee) = \$2,779.56.*

- (b) *The right to own Similar Goods was provided for in clause 21 of the applicable Terms and Conditions document.*

22. As at June 2012, the First Simpson Contract Equivalent Goods were advertised for sale in a new condition at retail prices in the Wagga Wagga area and if purchased could be delivered to Ms Simpson's residence for a delivery fee.

#### Particulars

- (a) *An equivalent product to the Sealy Mattress is a 'Chirorest Queen Mattress' (**Chirorest Mattress**) advertised as being sold by Fantastic Furniture (which had a retail outlet in Wagga Wagga) which retailed at \$399 in a new condition at the time of the First Simpson Contract.*
- (b) *An equivalent product to the Chapel Bed is the Balmoral Queen Bed (**Balmoral Bed**) advertised as being sold by Fantastic Furniture. The Balmoral Bed is made with pine and a maple finish with dimensions of L 1650mm x D 2330mm x H 1165mm and is, accordingly, of reasonably similar quality and size to the Chapel Bed. The Balmoral Bed retailed at \$499, in a new condition at the time of the First Simpson Contract.*
- (c) *Delivery of these two products if purchased from Fantastic Furniture Wagga Wagga to Ms Simpson's address at the time of the First Simpson Contract, 29 Chifley Crescent, Koorinal NSW, would have cost an estimated \$104.96, bringing the total cost of goods plus delivery to around \$1,002.96.*

23. In the alternative, as at June 2012, the First Simpson Contract Equivalent Goods were advertised for sale in a used condition in the Wagga Wagga area and if purchased Ms Simpson would be required to pay to transport them to her residence.

#### Particulars

- (a) *The equivalent product to the used Sealy Mattress and the used Chapel Bed would have been a used queen bed and mattress ensemble advertised as being available in the Wagga Wagga area on the online classifieds website Gumtree priced in May 2013 at \$350.*
- (b) *If Ms Simpson was to purchase a used ensemble from Gumtree she would also be required to transport the item to her address at the time,*

*29 Chifley Crescent, Koorinal NSW, at a cost of around \$78 bringing the cost of goods plus delivery to around \$428.*

24. Ms Simpson could potentially have purchased the First Simpson Contract Equivalent Goods in either a new or used condition at a lesser amount including the cost of credit than the amount payable under the First Simpson Contract.

(a) [Deleted]

(b) [Deleted]

### **Particulars**

(a) *Ms Simpson could potentially have purchased the advertised Equivalent Goods in a new condition for the following amounts which include the cost of credit:*

*(i) Regulated Equivalent Goods Amount;*

*(ii) Small Credit Contract Amount; or*

*(iii) Other Credit Contract Amount.*

(b) *Ms Simpson could potentially have purchased the advertised Equivalent Goods in a used Condition for the following amounts which include the cost of credit:*

*(i) Small Credit Contract Amount; or the*

*(ii) Other Credit Contract Amount.*

(c) *Further and better particulars, including the relevant dollar amounts, to be provided after further evidence including any expert evidence.*

### **D2. Second Simpson Contract**

25. In or around November 2013, Ms Simpson telephoned Radio Rentals Wagga Wagga to obtain a mattress to replace the Sealy Mattress for her domestic use at her home.

25A. On 16 December 2013 Ms Simpson took delivery of a '5086-000 Queen Mattress' (**Second Mattress**) at her residence from Radio Rentals.

25B. When Ms Simpson took delivery of the Second Mattress, Radio Rentals:

- (a) presented Ms Simpson with a two-page document entitled 'RADIO RENTALS LEASE SCHEDULE' bearing the words 'Contract No. E000009181' (**Second Simpson Lease Schedule**); and
  - (b) required Ms Simpson to sign the Second Simpson Lease Schedule once on a line provided within a box which was entitled 'Acceptance', the effect of which would be that, *inter alia*, Ms Simpson acknowledged that she had read, understood, accepted and agreed:
    - (i) that she had received the Second Mattress; and
    - (ii) to lease the Second Mattress for the Lease Period on the Terms and Conditions of the Contract.
26. On 16 December 2013, as a result of the Rent Try \$1 Buy Representation, Ms Simpson signed the Second Simpson Lease Schedule and entered contract number E000009181 with Radio Rentals (**Second Simpson Contract**) styled as an '18 MTH RTB' which stated that the 'total amount payable over the Lease Period' was \$698.04 for the Second Mattress.

#### Particulars

- (a) *The Second Simpson Contract dated 16 December 2013 stated that:*
  - (i) *'the Lease Period is 18MTH RTB';*
  - (ii) *'the number of payments payable over the Lease Period' was 18;*
  - (iii) *the monthly 'Rental Amount' was \$38.78;*
  - (iv) *the monthly 'amount payable by you each Payment Date' was \$38.78;*
  - (v) *the 'DLR Fees/s' which was payable each Payment Date was '\$0.00';*
  - (vi) *the 'Total Rental Amount' which was payable over the Lease Period was \$698.04; and*
  - (vii) *the 'total amount payable over the Lease Period' was \$698.04.*
- (b) *The Second Simpson Contract included an 'Equipment Schedule' which:*

- (i) listed a '5086-000 Queen Mattress' (Model/Cat no. FS04QM-N, Manufacturers Serial No. SN0000918); and
- (ii) stated that the 'Similar Goods Purchase Price' was '18m \$469.49, 36m \$1.00'.

27. On 16 December 2013 Ms Simpson also signed a 'Centrepay Deductions' form which cited the service provider's name as 'Radio Rentals' and the service provider's address as the address of Radio Rentals Wagga Wagga and which:

- (a) authorised an increased total weekly deduction of \$21.55 from her Centrelink Payments to 'Radio Rentals'; and
- (b) did not specify a 'target amount' which, had it been specified, would have automatically ended the deductions once that amount was reached.

28. [Deleted]

29. Between December 2013 and June 2015, Radio Rentals deducted from Ms Simpson's Centrelink Payments amounts allocated to the Second Simpson Contract.

#### **Particulars**

*Discovered documents THO.004.001.0983 and THO.013.001.1548.*

29A. The Instalment Policy was applied in part to the Second Simpson Contract as follows by:

- (a) dividing the monthly payment amount by 2 to arrive at a fortnightly payment amount; and then
- (b) dividing the result of paragraph 29A(a) again by 2 to identify a weekly payment amount; and then
- (c) rounding the result of paragraph 29A(b) up.

#### **Particulars**

*Discovered documents THO.004.001.0462 at 0462 (Quote Enquiry), 0472-0473 (Second Simpson Lease Schedule) and 0475-0476 (Centrepay Deductions form).*

30. At the expiry of the 18 month period after the Second Simpson Contract was entered into, Ms Simpson was not reminded of her rights under the contract and took no action under the contract.

**Particulars**

*Ms Simpson repeats the particulars to paragraph 15.*

31. Between June 2015 and December 2015 pursuant to Clause 13.6 of the Terms and Conditions Radio Rentals continued to deduct amounts allocated to the Second Simpson Contract from Ms Simpson's Centrelink Payments.

**Particulars**

*Discovered documents THO.004.001.0983 and THO.013.001.1548.*

32. In December 2015 Ms Simpson cancelled Radio Rentals' authorisation to deduct monies from her Centrelink Payments.
33. Ms Simpson paid to Radio Rentals amounts which were allocated to the Second Simpson Contract.

**Particulars**

- (a) *Between December 2013 and December 2015 Ms Simpson paid approximately \$983.61 to Radio Rentals in relation to the Second Simpson Contract (discovered documents THO.004.001.0983 and THO.013.001.1548).*
- (b) *On or around 28 March 2017 Ms Simpson made a payment to Radio Rentals of \$467.00 in relation to the Second Simpson Contract.*
- (c) *The total amount paid in relation to the Second Simpson Contract was approximately \$1,450.61.*

34. The terms of the Second Simpson Contract gave Ms Simpson the right to ownership of Similar Goods to the Second Mattress at the end of 18 months at a total cost of \$1,167.53 and, at the end of 36 months when the Similar Goods could be purchased for '\$1', at a total cost of \$1,397.08.



### Particulars

(a) *The cost to own Similar Goods to the Second Mattress within the terms of the Second Simpson Contract is calculated as follows:*

*(i) on an 18 month term:  $18 \times \$38.78 + \$469.49 = \$1,167.53$ ; or*

*(ii) on a 36 month term:  $36 \times \$38.78 + \$1.00 = \$1,397.08$ .*

(b) *The right to own Similar Goods was provided for in Clause 21 of the applicable Terms and Conditions document.*

35. As at December 2013, the Second Simpson Contract Equivalent Goods were advertised for sale at retail prices and if purchased could be delivered to Ms Simpson's residence for a delivery fee.

### Particulars

(a) *An equivalent product to the Second Mattress is a 'Chirorest Queen Mattress' (**Chirorest Mattress**) advertised as being sold by Fantastic Furniture (which had a retail outlet in Wagga Wagga) which retailed at \$399 in a new condition at the time of the Second Simpson Contract.*

(b) *Delivery from Fantastic Furniture Wagga Wagga if purchased to Ms Simpson's address at the time of the Second Simpson Contract, 8 Arnott St, Ashmont, NSW, would have cost an estimated \$66.69, bringing the total costs of goods plus delivery to \$465.69.*

36. Ms Simpson could potentially have purchased the Second Simpson Contract Equivalent Goods at a lesser amount including the cost of credit than the amount payable under the Second Simpson Contract.

### Particulars

*Ms Simpson repeats particulars (a) and (c) to paragraph 24.*

### D3. Third Simpson Contract

36A. At a time prior to 23 January 2014, Radio Rentals sent Ms Simpson advertising material which indicated that a furniture package including a dining suite and a two door TV unit (**Furniture Package**) could be rented, tried and that those same goods could be

purchased for \$1 at the end of the rental contract at a lower total cost than obtaining the goods individually.

- 36B. The combined weekly amount payable for the dining suite and a two door TV unit in a Furniture Package was \$16.96 (**Furniture Package Amount**).

#### **Particulars**

*Discovered document THO.013.001.1543 at 1545.*

37. On or about 23 January 2014, as a result of the Furniture Package advertisement, Ms Simpson attended Radio Rentals Wagga Wagga to obtain a dining suite and a two door TV unit for her domestic use at her home.

- 37A. On 24 January 2014 Ms Simpson took delivery of a 'Denison 7PC Dining Suite' (**Denison Suite**) at her residence from Radio Rentals.

- 37B. When Ms Simpson took delivery of the Denison Suite, Radio Rentals:

(a) presented Ms Simpson with a two-page document entitled 'RADIO RENTALS LEASE SCHEDULE' bearing the words 'Contract No. E000023387' (**Third Simpson Lease Schedule**); and

(b) required Ms Simpson to sign the Third Simpson Lease Schedule on a line provided within a box which was entitled 'Acceptance', the effect of which would be that, *inter alia*, Ms Simpson acknowledged that she had read, understood, accepted and agreed:

(i) that she had received the Denison Suite; and

(ii) to lease the Denison Suite for the Lease Period on the Terms and Conditions of the Contract.

38. On 24 January 2014, as a result of the Rent Try \$1 Buy Representation, Ms Simpson signed the Third Simpson Lease Schedule and entered contract number E000023387 with Radio Rentals (**Third Simpson Contract**) styled as a '48MTH RTB' which stated that the 'total amount payable over the Lease Period' was \$2,660.16 for the Denison Suite.

#### **Particulars**

- (a) *The Third Simpson Contract dated 24 January 2014 was Contract E000023387 which stated that:*

- (i) *'the Lease Period is 48MTH RTB';*
- (ii) *'the number of payments payable over the Lease Period' was 48;*
- (iii) *the monthly 'Rental Amount' was \$47.71;*
- (iv) *the monthly 'amount payable by you each Payment Date' was \$55.42;*
- (v) *the 'DLR Fees/s' which was payable each Payment Date was \$7.71 (Ms Simpson does not appear to have selected the DLR Fee tick box);*
- (vi) *the 'Total Rental Amount' which was payable over the Lease Period was '\$2,290.08';*
- (vii) *the 'total amount payable over the Lease Period' was stated to be '\$2,660.16'.*

(b) *The 'Equipment Schedule':*

- (i) *listed a 'Denison 7PC Dining Suite' (Model/Cat no. FS0545-N, Manufacturers Serial No. 05451344); and*
- (ii) *stated that the 'Similar Goods Purchase Price' was '48m \$1.00'.*

39. On 24 January 2014 Ms Simpson also signed a 'Centrepay Deductions' form which cited the service provider's name as 'Radio Rentals' and the service provider's address as the address of Radio Rentals Wagga Wagga and which:

- (a) authorised an increased total fortnightly deduction of \$70.80 from her Centrelink Payments to 'Radio Rentals'; and
- (b) did not specify a 'target amount' which, had it been specified, would have automatically ended the deductions once that amount was reached.

40. [Deleted]

40A. The Instalment Policy was applied in part to the Third Simpson Contract as follows by:

- (a) dividing the monthly payment amount by 2 to arrive at a fortnightly payment amount; and then

- (b) ~~[Deleted] dividing the result of paragraph 40A(a) again by 2 to identify a weekly payment amount; and then~~
- (c) rounding the result of paragraph 40A(~~a~~b) up.

**Particulars**

*Discovered documents THO.004.001.0477 at 0477 (Quote Enquiry), 0484-0485 (Third Simpson Lease Schedule) and 0487-0488 (Centrepay Deductions form), THO.013.001.1548 (Statement of Account).*

- 41. Between February 2014 and December 2015 Radio Rentals deducted from Ms Simpson's Centrelink Payments amounts allocated to the Third Simpson Contract.

**Particulars**

*Discovered documents THO.013.001.1548 and THO.004.001.0983.*

- 42. In December 2015 Ms Simpson cancelled Radio Rentals' authorisation to deduct monies from her Centrelink Payments.
- 43. Ms Simpson paid to Radio Rentals amounts which were allocated to the Third Simpson Contract.

**Particulars**

- (a) *By December 2015 Ms Simpson was less than half way through her 48 month Third Simpson Contract and had paid approximately \$1,443.86 to Radio Rentals in relation to the Third Simpson Contract (discovered documents THO.013.001.1548 and THO.004.001.0983).*
- (b) *On or around 28 March 2017 Ms Simpson made a payment to Radio Rentals of \$1,441.16 in relation to the Third Simpson Contract.*
- (c) *The total amount paid in relation to the Third Simpson Contract was approximately \$2,885.02.*

- 44. The terms of the Third Simpson Contract gave Ms Simpson the right to ownership of Similar Goods to the Denison Suite at the end of 48 months, when the Similar Goods could be purchased for '\$1', at a total cost of \$2,661.16.

### Particulars

- (a) *The cost to own Similar Goods to the Denison Suite within the terms of the Third Simpson Contract is calculated on a 48 month term as follows:  
48 x \$55.42 + \$1 = \$2,661.16.*
- (b) *The right to own Similar Goods was provided for in clause 21 of the applicable Terms and Conditions document or alternatively was implied by a combination of the Third Simpson Lease Schedule and the applicable Terms and Conditions document.*

45. As at January 2014, the Third Simpson Contract Equivalent Goods were advertised for sale at retail prices and could be delivered to Ms Simpson's residence for a delivery fee.

### Particulars

- (a) *The equivalent product to the Denison Suite is a 'Birchgrove Dining Suite' (**Birchgrove Suite**) and was advertised as being available at Fantastic Furniture Wagga Wagga at the time of the Third Simpson Contract for a retail price of \$899.*
- (b) *Delivery from Fantastic Furniture Wagga Wagga to Ms Simpson's address at the time of the Third Simpson Contract, 8 Arnott St, Ashmont NSW, if purchased would have cost around \$66.69 bringing the cost of goods plus delivery to around \$965.69.*

46. Ms Simpson could potentially have purchased the Third Simpson Contract Equivalent Goods at a lesser amount including the cost of credit than the amount payable under the Third Simpson Contract.

### Particulars

*Ms Simpson repeats the particulars (a) and (c) at paragraph 24 above.*

#### D4. Fourth Simpson Contract

46A. On or around 6 February 2014, Ms Simpson informed Radio Rentals during a telephone conversation that she would attend the Radio Rentals' premises and collect a 'Denison 2 door TV unit' (**Denison Unit**).

46B. On 7 February 2014, Ms Simpson attended Radio Rentals' premises and collected the Denison Unit.

46C. When Ms Simpson collected the Denison Unit, Radio Rentals:

- (a) presented Ms Simpson with a two-page document entitled 'RADIO RENTALS LEASE SCHEDULE' bearing the words 'Contract No. E000023470' (**Fourth Simpson Lease Schedule**); and
- (b) required Ms Simpson to sign the Fourth Simpson Lease Schedule once on a line provided within a box which was entitled 'Acceptance', the effect of which would be that, *inter alia*, Ms Simpson acknowledged that she had read, understood, accepted and agreed:
  - (i) that the Denison Unit had been received; and
  - (ii) to lease the Denison Unit for the Lease Period on the Terms and Conditions of the Contract.

47. On 7 February 2014, as a result of the Rent Try \$1 Buy Representation, Ms Simpson signed the Fourth Simpson Lease Schedule and entered contract number E000023470 with Radio Rentals (**Fourth Simpson Contract**) styled as a '48MTH RTB' which stated that the 'total amount payable over the Lease Period' was \$2,131.68 for the Denison Unit.

#### Particulars

- (a) *The Fourth Simpson Contract dated 7 February 2014 stated that:*
  - (i) *'the Lease Period is 48MTH RTB';*
  - (ii) *'the number of payments payable over the Lease Period' was 48;*
  - (iii) *the monthly 'Rental Amount' was \$36.70;*
  - (iv) *the monthly 'amount payable by you each Payment Date' was \$44.41;*
  - (v) *the 'DLR Fees/s' which was payable each Payment Date was \$7.71 (Ms Simpson does not appear to have selected the DLR Fee tick box);*

(vi) *the 'Total Rental Amount' which was payable over the Lease Period was \$1,761.60;*

(viii) *the 'total amount payable over the Lease Period' was \$2,131.68.*

(b) *The 'Equipment Schedule':*

(i) *listed a 'Denison 2 Door TV Unit' (Model/Cat no. FS0547-N, Manufacturers Serial No. SN0004215)'; and*

(ii) *stated that the 'Similar Goods Purchase Price' was '48m \$1.00'.*

48. On 7 February 2014 Ms Simpson also signed a 'Centrepay Deductions' form which cited the service provider's name as 'Radio Rentals' and the service provider's address as the address of Radio Rentals Wagga Wagga and which:

(a) authorised a total weekly deduction of \$46.50 from her Centrelink Payments to 'Radio Rentals'; and

(b) did not specify a 'target amount' which, had it been specified, would have automatically ended the deductions once that amount was reached.

49. In or around February 2014 Ms Simpson collected the Denison Unit from Radio Rentals.

49A. On or around 19 November 2014:

(a) Ms Simpson telephoned and/or attended Radio Rental's premises and asserted that Radio Rentals had charged her the wrong amounts for the goods the subject of the Third and Fourth Simpson Contracts; and

(b) Radio Rentals agreed with Ms Simpson's assertion and arranged for a refund of the associated overpayments (**Furniture Package Refund**).

### **Particulars**

*For a 36 week period in 2014, Ms Simpson was being charged a weekly Rental Amount (excluding the effect of the Instalment Policy) of \$19.48 for the Denison Suite and Denison Unit (\$11.01 for the Denison Suite and \$8.47 for the and Denison Unit) being a total weekly amount \$2.52 greater than the Furniture Package Amount, which entitled Ms Simpson to a Furniture Package Refund as at November 2014 of \$90.72 (being 36 weeks multiplied by \$2.52) (discovered document THO.013.001.1543 at*

*1545) and also entitled Ms Simpson to a reduction in ongoing payments in relation to the Third and Fourth Simpson Contracts.*

50. Between February 2014 and December 2015, Radio Rentals deducted from Ms Simpson's Centrelink Payments amounts allocated to the Fourth Simpson Contract.

**Particulars**

*Discovered documents THO.013.001.1548 and THO.004.001.0983.*

- 50A. The Instalment Policy was applied in part to the Fourth Simpson Contract as follows by:

- (a) dividing the monthly payment amount by 2 to arrive at a fortnightly payment amount; and then
- (b) dividing the result of paragraph 50A(a) again by 2 to identify a weekly payment amount; and then
- (c) rounding the result of paragraph 50A(b) up.

**Particulars**

*Discovered documents THO.004.001.0489 at 0489 (Quote Enquiry), 0499-0500 (Fourth Simpson Lease Schedule) and 0502-0503 (Centrelink Deductions form).*

51. In December 2015 Ms Simpson cancelled Radio Rentals' authorisation to deduct monies from her Centrelink Payments.
52. Ms Simpson paid to Radio Rentals amounts which were allocated to the Fourth Simpson Contract.

**Particulars**

- (a) *The Furniture Package Refund was made on 19 November 2014 (discovered document THO.013.001.1548 at 1551).*
- (b) *The Furniture Package Refund was reversed on 19 November 2014 (discovered document THO.013.001.1548 at 1551).*
- (c) *By December 2015 Ms Simpson was less than half way through her 48 month Fourth Simpson Contract and had paid approximately*



\$1,123.82 to Radio Rentals in relation to the Fourth Simpson Contract (discovered documents THO.013.001.1548 and THO.004.001.0983).

- (d) On or around 28 March 2017 Ms Simpson made a payment to Radio Rentals of \$1,155.68 in relation to the Fourth Simpson Contract.
- (e) The total amount paid in relation to the Fourth Simpson Contract was approximately \$2,279.50.

53. The terms of the Fourth Simpson Contract gave Ms Simpson the right to ownership of Similar Goods to the Denison Unit at the end of 48 months, when the Similar Goods could be purchased for '\$1', at a total cost of \$2,132.68.

#### Particulars

- (a) The cost to own the Similar Goods to the Denison Unit within the terms of the Fourth Simpson Contract calculated on a 48 month term is as follows:  $48 \times \$44.41 + \$1 = \$2,132.68$ .
- (b) The right to own Similar Goods was provided for in clause 21 of the applicable Terms and Conditions document.

54. As at February 2014, the Fourth Simpson Contract Equivalent Goods were advertised for sale at retail prices.

#### Particulars

- (a) The equivalent product to the Denison Unit is an 'Oakley Large Entertainment Unit' (**Oakley Unit**) which was advertised as being retailed at Fantastic Furniture on 24 July 2014 for \$299.
- (b) The Denison Unit is made with radiata pine with dimensions of H 550mm x W 1680mm x D 500mm. The Oakley Unit is made with solid pine and a pine veneer with dimensions of H 620mm x W 1700mm x D 400mm. Accordingly, the products are of reasonably similar quality and size.

55. Ms Simpson could potentially have purchased the Fourth Simpson Contract Equivalent Goods at a lesser amount including the cost of credit than the amount payable under the Fourth Simpson Contract.

### Particulars

*Ms Simpson repeats the particulars (a) and (c) at paragraph 24 above.*

#### E. MISLEADING OR DECEPTIVE CONDUCT AND/OR FALSE OR MISLEADING REPRESENTATIONS – CONTRAVENTIONS OF THE ASIC ACT

56. Contrary to the Rent Try \$1 Buy Representation, Ms Simpson did not have any right to buy and own the goods she was 'renting' and 'trying' for \$1 pursuant to the First to Fourth Simpson Contracts.

### Particulars

*Ms Simpson repeats paragraph 8(c)(i) above.*

- 56A. Contrary to the DLR Fee Representation, the obligation to pay the DLR Fee formed part of the First, Third and Fourth Simpson Contracts.

### Particulars

(a) *The obligation to pay the DLR Fee arose notwithstanding that Ms Simpson did not agree to be charged the DLR Fee by marking the relevant box on the applicable Lease Schedules.*

(b) *Ms Simpson repeats particulars (a)(v) to paragraphs 11, 38 and 47.*

57. In the premises, Radio Rentals contravened:
- (a) section 12DA of the ASIC Act by engaging in conduct that was misleading or deceptive; and/or
  - (b) section 12DB of the ASIC Act by making false or misleading representations in trade or commerce and/or in connection with the promotion of the supply or use of financial services.
58. Ms Simpson suffered loss and damage by the contravening conduct of Radio Rentals and:
- (a) Claims compensation as against Radio Rentals pursuant to section 12GF(1) of the ASIC Act and as against Marshall as a person involved in Radio Rentals'

contraventions within the meaning of section 12GF(1) of the ASIC Act and section 79(c) of the Corporations Act as set out in section GA below; and

#### Particulars

- (a) *Ms Simpson would not have entered into the First, Second, Third or Fourth Simpson Contracts (**First to Fourth Simpson Contracts**) had she known she had no right to buy the goods for \$1 and furthermore had no right to purchase goods of similar quality for \$1.*
  - (b) *The obligation to pay the DLR Fee would not have formed part of the First, Third and Fourth Simpson Contracts if the DLR Fee Representation was true and in such a case Radio Rentals would not be entitled to receive the DLR Fee.*
- (b) In the alternative to paragraph 58(a), pursuant to s 12GM of the ASIC Act, seeks an order varying the terms of the First to Fourth Simpson Contracts to enable Ms Simpson to purchase the goods for a lesser amount including the cost of credit and that Radio Rentals and Marshall (as a person involved in Radio Rentals' contravention within the meaning of section 12GM of the ASIC Act and section 79(c) of the Corporations Act as set out in section GA below) refund the difference between the amounts paid pursuant to the First to Fourth Simpson Contracts and the lesser amount.

#### Particulars

- (a) *Ms Simpson repeats paragraphs 24, 36, 46 and 55 and the particulars thereto.*
- (b) *Ms Simpson seeks an order on one of the following bases that varies the First to Fourth Simpson Contracts such that she could have purchased:*
  - (i) *Equivalent Goods for the Regulated Equivalent Goods Amount;*
  - (ii) *Equivalent Goods for the Small Credit Contract Amount;*
  - (iii) *Equivalent Goods for the Other Credit Contract Amount;*

- (iv) *the actual goods the subject of the relevant Radio Rentals Contracts for an amount calculated on the basis: A) that the Rent Try \$1 Buy Representation was true, and B) that the relevant Radio Rentals Contracts were contracts for the ‘sale of goods by instalments’, and the cost of credit was regulated by the applicable State Codes or the National Code (**Cost of Credit**); and C) that the goods were priced using the ‘Price Masters’ retail prices (eg. THO.122.003.6464) (**Radio Rentals RRP**); and D) that a consumer would have the capacity to pay the amount payable on each Payment Date as stated on the applicable Lease Schedule; and E) the payments in D would cease at a point in time when the combined total of the Cost of Credit and the Radio Rentals RRP had been paid (**Regulated Actual Goods Amount**); or*
- (v) *the actual goods the subject of the relevant Radio Rentals Contract with an 18 month Lease Period on the basis that the Rent Try \$1 Buy Representation was true (**18 Month Actual Goods Amount**).*
- (c) *Further and better particulars, including the relevant dollar amounts, to be provided after further evidence including any expert evidence.*
- (c) Further and in the alternative to paragraph 58(b), claims compensation as against Radio Rentals pursuant to s 12GM of the ASIC Act and as against Marshall as a person involved in Radio Rentals’ contraventions within the meaning of section 12GM of the ASIC Act and section 79(c) of the Corporations Act as set out in section GA below.

#### **Particulars**

- (a) *Ms Simpson repeats paragraphs 24, 36, 46 and 55 and the particulars thereto.*
- (b) *Ms Simpson seeks compensation on the basis that the loss or damage she suffered is the difference between what she paid under the First to Fourth Simpson Contracts and what she would have paid for one of the following:*

- (i) *Equivalent Goods for the Regulated Equivalent Goods Amount;*
  - (ii) *Equivalent Goods for the Small Credit Contract Amount;*
  - (iii) *Equivalent Goods for the Other Credit Contract Amount;*
  - (iv) *the goods for the Regulated Actual Goods Amount; or*
  - (v) *the goods for the 18 Month Actual Goods Amount.*
- (c) *Further and better particulars, including the relevant dollar amounts, to be provided after further evidence including any expert evidence.*

**F. UNFAIR CONTRACT TERMS CONTRAVENTION OF THE ASIC ACT-**

59. Each of the First to Fourth Simpson Contracts, was:
- (a) a 'consumer contract' within the meaning of section 12BF of the ASIC Act;
  - (b) a 'standard form contract' to which sections 12BF and 12BK of the ASIC Act apply; and
  - (c) a 'financial product' as pleaded in paragraph 3(d)(ii) above.
60. The Unfair Contract Terms pleaded in paragraph 8(c) above, and applied in each of the First to Fourth Simpson Contracts, were unfair in that they:
- (a) caused a significant imbalance in the parties rights and obligations arising under those contracts in that Ms Simpson did not obtain the benefit, which she could have if she had purchased the goods by means of finance provided under a credit contract, of the maximum interest rate cap and fee caps pleaded in paragraph 9 above; and
  - (b) were not reasonably necessary to protect the legitimate interests of Radio Rentals and, instead, were a means by which it avoided certain protections of consumer protection legislation pleaded in paragraph 9 above; or
  - (c) in the alternative to (b), were not reasonably necessary to protect the legitimate interests of Radio Rentals; and

- (d) would cause detriment to Ms Simpson for Radio Rentals to rely upon the terms as:
- (i) the effects of Clauses 13, 20 and 21 are contrary to the Rent Try \$1 Buy Representation and allowed the cost of the goods to be significantly inflated;
  - (ii) the effect of Clauses 8, 9 and 10 was to further inflate the cost of the goods with negligible benefit to Ms Simpson;
  - (iii) the effect of Clauses 13.6 and 21 was to further inflate the costs of goods and take advantage of the failure by Ms Simpson to be vigilant about the operation of the contract;
  - (iv) the effect of Clause 19, was to entitle Radio Rentals to unilaterally vary the amount payable by Ms Simpson without her consent; and
- (e) were not transparent as to the length of the contract as a whole and the effect of the Rent Try \$1 Buy Representation.
61. Further, the Unfair Contract Terms pleaded in paragraph 8 above and applied in each of the First to Fourth Simpson Contracts:
- (a) permitted Radio Rentals but not Ms Simpson to vary the terms of the contract within the meaning of section 12BH(1)(d) of the ASIC Act (Clause 19.1 to 19.5); and
  - (b) permitted Radio Rentals to vary the upfront price payable under the contract without the right of Ms Simpson to terminate the contract (Clause 19.1, 19.2).
62. Pursuant to section 12GND of the ASIC Act, Ms Simpson seeks a declaration that each of the Unfair Contract Terms are void under section 12BF(1) of the ASIC Act.
- 62A. Ms Simpson seeks a further declaration that each of the First to Fourth Contracts do not bind the parties because those contracts are not capable of operating without the void Unfair Contract Terms and, accordingly, section 12BF(2) of the ASIC Act does not apply to the First to Fourth Contracts (Void Contracts).
63. Further, Ms Simpson seeks repayment of the monies she paid to Radio Rentals pursuant to the Void Contracts or pursuant to the Unfair Contract Terms in each of the First to Fourth Contracts as she would not have paid those monies if she had known

~~the Unfair Contract Terms were void. suffered loss and damage or is likely to suffer loss and damage by the contravening conduct of Radio Rentals.~~

**Particulars**

*The contract is, prima facie, void and Ms Simpson has paid money for goods she does not and cannot own on the basis conveyed in the Rent Try \$1 Buy Representation. Further, as particularised in particular (a) to paragraph 58(a) above, Ms Simpson would not have entered into the First to Fourth Simpson Contracts had she known she had no right to buy the goods for \$1 and furthermore had no right to purchase goods of similar quality for \$1.*

64. ~~[Deleted] Pursuant to section 12GM of the ASIC Act:~~

- (a) ~~Ms Simpson seeks an order varying the terms of the First to Fourth Simpson Contracts to enable Ms Simpson to purchase the goods for a lesser amount and that Radio Rentals refund the difference between the amounts paid pursuant to the First to Fourth Simpson Contracts and the lesser amount.~~

**Particulars**

*Ms Simpson repeats the particulars to paragraph 58(b).*

- (b) ~~further and in the alternative to paragraph 64(a) above, Ms Simpson claims compensation.~~

**Particulars**

*Ms Simpson repeats the particulars to paragraph 58(c).*

65. ~~[Deleted] In the alternative to paragraph 64, pursuant to section 12GM of the ASIC Act, Ms Simpson seeks compensation in the form of a refund of the amounts paid by her under the First to Fourth Simpson Contracts which are void and no longer capable of operating without the Unfair Contract Terms.~~

**G. UNCONSCIONABLE CONDUCT BY RADIO RENTALS**

66. By entering into each of the First to Fourth Simpson Contracts, Radio Rentals engaged in conduct that was, in all the circumstances, unconscionable in contravention of section 12CB(1) of the ASIC Act in that:

- (a) the bargaining position of Ms Simpson and Radio Rentals was grossly unequal in that:

- (i) Ms Simpson had no bargaining power to bargain for any change to the terms and conditions of the First to Fourth Contracts;
  - (ii) Ms Simpson was in a vulnerable position in that she had been in receipt of Centrelink Payments since at least 15 June 2012, and was in need of the financial service that Radio Rentals represented to her it would supply;
  - (iii) Radio Rentals was a wholly owned subsidiary of the Thorn Group, which is a publicly listed company with a market capitalisation of approximately:
    - A. \$240,239,150.00 at end of financial year 2011;
    - B. \$213,706,040.00 at end of financial year 2012;
    - C. \$299,595,520.00 at end of financial year 2013;
    - D. \$325,898,692.34 at end of financial year 2014
    - E. \$410,125,543.69 at end of financial year 2015; and
    - F. \$226,293,987 at end of financial year 2016; and
  - (iv) Radio Rentals was only willing to provide the goods to Ms Simpson if she executed the First to Fourth Simpson Contracts in the form provided to her and was not willing to negotiate that requirement;
- (b) the Unfair Contract Terms were not necessary to protect the legitimate interests of Radio Rentals and instead were a means by which it avoided the protections of the consumer protection legislation pleaded in paragraph 9 above;
- (c) in the alternative to (b), the Unfair Contract Terms were not reasonably necessary to protect the legitimate interests of Radio Rentals; and
- (d) Radio Rentals used unfair tactics in its dealings with Ms Simpson in that the true nature of the First to Fourth Simpson Contracts, which did not give Ms Simpson the right to buy the goods for \$1 at the end of the contracts and have the protections of the consumer protection legislation pleaded in paragraph 9 above, was not readily discoverable by Ms Simpson because of:
- (i) the length and complexity of the contract documents; and
  - (ii) the misleading effect of the Rent Try \$1 Buy Representation;



**Particulars**

*Ms Simpson repeats paragraphs 8, 60 and 61 above.*

- (e) Radio Rentals used unfair tactics in its dealings with Ms Simpson in that the Rent Try \$1 Buy Representation was misleading or deceptive as to the true nature of the transaction;

**Particulars**

*Ms Simpson repeats paragraphs 60 and 61 above.*

- (f) Ms Simpson could have acquired Equivalent Goods for significantly less cost;

**Particulars**

*Ms Simpson repeats paragraphs 24, 36, 46 and 55 above.*

- (fA) Ms Simpson and Group Members could have acquired identical goods or the Equivalent Goods for the Regulated Equivalent Goods Amount, Small Credit Contract Amount or Other Credit Contract Amount in circumstances where they would have paid significantly less to own the Equivalent Goods.

**Particulars**

*Discovered documents THO.002.003.2557, THO.038.001.0161, THO.038.001.0175, THO.002.002.2536.*

- (g) during the Relevant Period, Ms Simpson and many or most of the Group Members who entered into the Radio Rental Contracts were vulnerable;

**Particulars**

(a) *Ms Simpson was vulnerable in so far as her income comprised predominately her Centrelink Payments at the time of each of the First to Fourth Simpson Contracts;*

(b) *Ms Simpson repeats the particulars to sub-paragraph 66(h) below;*

(c) *Further particulars may be provided after notices to produce have been issued and/or further evidence including any expert evidence.*

- (h) Radio Rentals targeted vulnerable Group Members and used unfair tactics by exploiting their vulnerability;

**Particulars**

(a) *The Thorn Group 2014 Annual Report stated at page 11: '... we believe there is an opportunity to launch a second rental brand that would cater*

*for consumers who may find themselves in challenging circumstances and need access to essential household goods. To this end, work has commenced to further explore this opportunity’;*

- (b) *The Thorn Group 2015 Annual Report stated at page 16: ‘[a] large component of Thorn’s consumer customer base comprises Australians who are excluded from the financial mainstream and it has become increasingly apparent that this is a substantial group: • 16.9 per cent of the Australian adult population, or just over 3 million people, are either fully or severely financially excluded • 42.9 per cent of the Australian adult population, or 7.7 million people, are marginally financially excluded • 56.7 per cent of the Australian adult population, or over 10 million people, do not have a credit card’; and*
- (c) *A Credit Suisse report dated 3 March 2015 entitled ‘Risks in payday lending and goods rentals’ stated at page 3: ‘Focus on CentrePay customers could impact TGA [Thorn Group] significantly: Consumer advocates are also focusing on a key part of the consumer leasing business model, where customers have repayments taken out of their Government benefits through a bill paying facility called CentrePay, operated by the Government. There is pressure to have either this banned for household goods or have the use of it restricted to essential goods, with entertainment and technology items removed. TGA’s Radio Rentals business (86% of TGA’s EBITDA) obtains ~50% of its revenue from CentrePay customers, with about 50% of that estimated to be for entertainment and technology items.’*
- (d) *Radio Rentals’ target customers included the lowest socio-economic quintile, being the FG quintile; those struggling to make ends meet; single parents, young families and retirees surviving on the pension; those who are welfare dependent; and the unemployed, e.g. discovered documents THO.009.001.8041 at 8117 and THO.054.001.2601 at 2601-2602.*
- (e) *Radio Rentals’ core customers live day to day, 77% are unemployed, 44% are aged 60+, with an average income of \$36k and are struggling to make ends meet: discovered document THO.002.005.0253 at 0254.*

(i) Radio Rentals used unfair tactics by:

- (i) systematically overcharging Ms Simpson and Group Members by implementing the Instalment Policy;

**Particulars**

- (a) *Ms Simpson repeats paragraphs 14A, 29A, 40A and 50A and the particulars thereto.*
- (b) *Radio Rentals should have divided the monthly payment amount stated in the Lease Schedules by a factor of 2.1665 (rounded) to identify a fortnightly amount and should not have applied an ad hoc rounding component.*
- (c) *Discovered documents THO.087.001.0966 at 1009, THO.058.002.0160 at 0160 and 0165.*

- (ii) implementing the Inertia Policy;

**Particulars**

*Ms Simpson repeats particulars to paragraphs 9C and 17.*

- (iii) implementing the DLR Policy;

**Particulars**

*Ms Simpson repeats paragraphs 9B and particulars thereto.*

- (iv) charging DLR Fees when Ms Simpson and Group Members did not agree to pay the DLR Fee;

**Particulars**

- (a) *Ms Simpson repeats particulars (a)(v) to paragraphs 11, 38 and 47.*
- (b) *E.g. Discovered documents THO.061.001.3916 at 3916, THO.062.002.6491 at 6491 and THO.062.002.6512 at 6512.*

- (c) *DLR Fees represented a significant portion of the total amount payable under Radio Rentals Contract.*
- (v) engaging in conduct that was misleading or deceptive;

### **Particulars**

- (a) *The misleading or deceptive conduct which Radio Rentals engaged in includes:*
  - (i) *making the Rent Try \$1 Buy Representation in the circumstances described in paragraph 57;*
  - (ii) *making the DLR Fee Representation in the circumstances described in paragraph 57;*
  - (iii) *making the 48 Month Lease Representation which was misleading or deceptive because 48 month leases were overall not more affordable and ultimately more costly than other leases: for example, a Sealy Mattress purchased at the end of the Lease Period would cost \$1,858.19 in total under a 48 month contract whereas it would only cost \$1,602.91 in total if the Sealy Mattress was purchased after 36 months and on equivalent terms to the Second Simpson Contract; and only cost \$1,270.45 in total if the Sealy Mattress was purchased after 18 months and on equivalent terms to the Second Simpson Contract (discovered documents THO.004.001.0462 at 0472-0473 and THO.122.003.6464;*
  - (iv) *further to (iii) above, instructing its staff to make the 48 Month Lease Representation; (e.g. discovered document THO.002.008.3504 at 3505 and 3507); and*
  - (v) *further to (iii) and (iv) above, incentivising its staff to promote the 48 month leases to the exclusion of its cheaper leases by offering prizes to staff or individual stores based on the amount of 48 month leases installed*

*(e.g. discovered documents THO.001.012.5094 at 5107 and THO.001.015.9268 at 9274).*

- (vi) presenting reminders of Ms Simpson's and Group Members' important contractual rights as advertising and/or promotional material;

**Particulars**

*Ms Simpson repeats paragraph 17A.*

- (vii) not reminding Ms Simpson and Group Members of their rights in the period approaching the 18 Month Purchase Right Day and thereby bringing about a situation where consumers had to pay the monthly amount payable for another 18 months before they could exercise their right to buy Similar Goods on RT\$1B Day.

**Particulars**

*Ms Simpson repeats the paragraphs 15 and 30 and the particulars thereto.*

- (j) that Ms Simpson and Group Members were unable to understand, or fully understand, that the documents entitled 'RADIO RENTALS LEASE SCHEDULE':
  - (a) contained the operative financial terms of the contracts; and
  - (b) would upon signing serve the dual purpose of:
    - i. acknowledgement of receipt of goods; and
    - ii. contract formation.

**Particulars**

*Ms Simpson signed the First, Second, Third and Fourth Simpson Contracts pursuant to the requirements pleaded at 10B(b), 25B(b), 37B(b) and 46C(b).*

66A. By engaging in the conduct pleaded in paragraph 66(a) to (j) above and each of them Radio Rentals has engaged in a system of conduct or pattern of behaviour within the meaning of s 12CB(4) of the ASIC Act.

66B. Further to paragraphs 66 and 66A, the conduct of Radio Rentals was unconscionable and in contravention of section 12CB(1) of the ASIC Act in that Radio Rentals knew, or ought to have known having regard to its obligations under s 130 of the National Credit Act, that:

- (a) Ms Simpson was not highly educated;

**Particulars**

*Ms Simpson left school at around the end of year 9 or the start of year 10.*

- (b) at all relevant times, Ms Simpson's only source of income was Centrelink payments;
- (c) Ms Simpson was not financially sophisticated and required a careful ~~oral~~ explanation process to gain a basic understanding of her rights and obligations under the First to Fourth Simpson Contracts; and

**Particulars**

*Paragraphs 6.4.14 – 6.4.18 of the report of Dr Diana Eades annexed as "DME-1" to her affidavit affirmed on 13 March 2019.*

- (d) Ms Simpson was entitled to the Furniture Package Refund.

**Particulars**

*Ms Simpson repeats paragraphs 36B, 49A(b) and 52 and particulars thereto.*

67. Ms Simpson suffered loss and damage by the contravening conduct of Radio Rentals and:

- (a) Claims compensation against Radio Rentals pursuant to section 12GF(1) of the ASIC Act and as against Marshall as a person involved in Radio Rentals' contraventions within the meaning of section 12GF(1) of the ASIC Act and section 79(c) of the Corporations Act as set out in section GA below.

**Particulars**

*Ms Simpson repeats the particulars to paragraph 58(a).*

- (b) In the alternative to paragraph 67(a), pursuant to s 12GM of the ASIC Act, seeks an order varying the terms of the First to Fourth Simpson Contracts to enable Ms Simpson to purchase the goods for a lesser amount and that Radio Rentals and Marshall (as a person involved in Radio Rentals' contraventions within the meaning of section 12GM of the ASIC Act and section 79(c) of the Corporations Act as set out in section GA below) refund the difference between the amounts paid pursuant to the First to Fourth Simpson Contracts and the lesser amount.

**Particulars**

*Ms Simpson repeats the particulars to paragraph 58(b).*

- (c) Further and in the alternative to paragraph 67(b), claims compensation against Radio Rentals pursuant to s 12GM of the ASIC Act and as against Marshall as a person involved in Radio Rentals' contraventions within the meaning of section 12GM of the ASIC Act and section 79(c) of the Corporations Act as set out in section GA below.

**Particulars**

*Ms Simpson repeats the particulars to paragraph 58(c).*

**GA. MARSHALL'S INVOLVEMENT IN THE CONTRAVENTIONS**

**GA1. MISLEADING OR DECEPTIVE CONDUCT AND/OR FALSE OR MISLEADING REPRESENTATIONS**

67A. As at 28 March 2011 and at all material times thereafter, Marshall knew:

- (a) the essential matters pleaded at paragraph 5, namely that Radio Rentals advertised and promoted its services as 'Rent, Try, \$1\* Buy';

**Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:

(i) Paragraph 3A above is repeated;

(ii) Marshall's involvement in Radio Rentals' marketing and branding strategies at all times during the Relevant Period;

(iii) Marshall's role as General Manager of Radio Rentals and Rentlo from some time in 2006 to June 2013;

(iv) Marshall's role as head of Marketing, Sales & Operations and Purchasing during his time as General Manager of Radio Rentals & Rentlo (THO.087.001.0202 at 0207); and

(v) The National Marketing Manager and National Sales & Operations Manager reported to Marshall while he was General Manager of Radio Rentals and Rentlo;

(b) Further particulars may be provided following the service of evidence.

(b) the essential matters pleaded at paragraph 6, namely that Radio Rentals made the Rent Try \$1 Buy Representation;

#### **Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:

(i) Paragraph 3A above is repeated;

(ii) The particulars to paragraph 67A(a) are repeated.

(b) Further particulars may be provided following the service of evidence.

(c) the essential matters pleaded at paragraph 7, namely that the Rent Try \$1 Buy Representation was repeated on the cover of contract documents;

#### **Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:

(i) paragraph 3A above is repeated;

(ii) the particulars to paragraph 67A(a) are repeated;

(iii) Marshall's familiarity with Radio Rentals Contracts (e.g. discovered document THO.125.010.5026).



(b) Further particulars may be provided following the service of evidence.

- (d) the essential matters pleaded at paragraph 56 in relation to Ms Simpson and Group Members, namely that contrary to the Rent Try \$1 Buy Representation, there was no right to buy and own the goods that were 'rented' and 'tried' for \$1.

### **Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:

- (i) Paragraph 3A above is repeated;
- (ii) The particulars to paragraph 67A(a) are repeated;
- (iii) Marshall's response to a query concerning the operation of a Rent Try \$1 Buy contract in which Marshall said, to the effect, that because contracts are regulated as consumer leases they cannot give a customer a contractual right to buy the goods (discovered document THO.063.001.3343 at 3344);
- (iv) Marshall's review of the ASIC Report 447 "Cost of consumer leases for household goods" which stated that under a consumer lease a consumer does not have a contractual right or obligation to purchase the goods at the end of the lease (discovered document THO.063.001.2753 at 2756);
- (v) Marshall's comments in relation to an article which appeared in the Sydney Morning Herald (discovered document THO.063.001.1012);
- (vi) Marshall's response to a Credit Suisse Analysis which stated, inter alia, "the \$1 Buy option may be misleading in that the consumer does not necessarily get to buy the actual product that the customer has been renting but it may be a 'similar product'" (discovered documents THO.055.002.4792 and THO.055.002.4794 at 4802); and

(vii) Marshall's receipt and acknowledgment of an email which stated, to the effect, that consumer leases with the ability for customers to negotiate to buy the goods for a nominal amount at the end of the lease are a fiction designed to facilitate provision of finance to consumers, particularly financially vulnerable consumers (THO.055.002.5957 at 5962).

(viii) Marshall at some or all material times was on the Internal Disputes Resolution Committee which reviewed complaints from customers including in relation to Radio Rentals Contracts (e.g. discovered document THO.063.001.3343 at 3344).

(b) Further particulars may be provided following the service of evidence.

67B. During the Relevant Period, Marshall engaged in the following acts:

- (a) Despite Marshall (as the General Manager of Radio Rentals and Rentlo and the head of Marketing, Sales & Operations and Purchasing since 2006) knowing the matters pleaded in paragraph 67A, he (either alone or together with other officers of Radio Rentals) maintained the Rent Try \$1 Buy Representation;
- (b) From some time prior to October 2012 until about 21 April 2017, Marshall was responsible for a broad ranging corporate strategy project (**Strategy Project**) which included market positioning, marketing, customer base and target market analysis, product review and development and review of the pricing model and he (either alone or together with other officers of Radio Rentals) maintained the use of the Rent Try \$1 Buy Representation (THO.006.001.0093 at 0097 and 0110-0118; THO.002.005.0253 at 0253-0270; THO.006.001.0355 at 0358 and 0363, THO.006.001.0849 at 0849-0852; THO.007.001.2132 at 2134; THO.097.001.0337 at 0344-0345);
- (c) On or about 21 March 2013, Marshall received a document titled 'Thorn Position Paper' which stated to the effect that consumer groups believed that lessors (such as Radio Rentals) were being misleading or deceptive in their conduct by inferring potential for ownership but not giving customers the absolute right and despite this he (either alone or together with other officers

of Radio Rentals) maintained the use of the Rent Try \$1 Buy Representation (discovered documents THO.105.001.1662 and THO.105.001.1667);

- (d) On or about 12 March 2014, Marshall received an email from a journalist employed by the Daily Telegraph which outlined a complaint from a Radio Rentals customer who did not understand that she could not purchase the goods she was renting at the end of 18 months for \$1 and he again (either alone or together with other officers of Radio Rentals) maintained the use of the Rent Try \$1 Buy Representation (discovered document THO.063.001.3343);
- (e) Between 5 May 2014 and 21 April 2017 Marshall was the Chief Executive Officer and Managing Director of the Thorn Group and he had the authority and the autonomy to run Radio Rentals as if it was his own business and at all times he maintained the Rent Try \$1 Buy Representation;
- (f) On or about March 2015, Marshall received and reviewed a report from Credit Suisse which stated to the effect that there had been numerous complaints from consumer advocates that the Rent Try \$1 Buy Representation may be misleading consumers and despite this he (either alone or together with other officers of Radio Rentals) maintained the Rent Try \$1 Buy Representation (discovered documents THO.055.002.4792, THO.055.002.4794 at 4802 and THO.102.001.1704 at 1713);
- (g) On or about 22 April 2015, Marshall sent an email attaching an article published in the Sydney Morning Herald and extracted a paragraph from the article which said to the effect that the Rent Try \$1 Buy Representation is designed to exploit a loophole in the National Credit Act and, despite this, he (either alone or together with other officers of Radio Rentals) maintained the Rent Try \$1 Buy Representation (discovered document THO.063.001.1012).

67C. During the Relevant Period, Marshall engaged in the following omissions:

- (a) Despite Marshall (as the General Manager of Radio Rentals and Rentlo and the head of Marketing, Sales & Operations and Purchasing since 2006) knowing the matters pleaded in paragraph 67A, he (either alone or together with other officers of Radio Rentals) failed to take steps to remove, modify or otherwise correct the Rent Try \$1 Buy Representation;

- (b) From some time prior to October 2012 until about 21 April 2017, Marshall was responsible for the Strategy Project and he (either alone or together with other officers of Radio Rentals) failed to take steps to remove, modify or otherwise correct the Rent Try \$1 Buy Representation (e.g. discovered documents THO.006.001.0093 at 0097, 0110-0118, THO.006.001.0355 at 0358 and 0363, THO.006.001.0849 at 0849-0852, THO.007.001.2132 at 2134, THO.006.001.0355 at 0358);
- (c) On or about 21 March 2013, Marshall received a document titled 'Thorn Position Paper' which stated to the effect that consumer groups believe that lessors (such as Radio Rentals) are being misleading or deceptive in their conduct by inferring potential for ownership but not giving customers the absolute right and he did not recommend the removal, modification or any other correction of the Rent Try \$1 Buy Representation (discovered documents THO.105.001.1662 and THO.105.001.1667);
- (d) On or about 12 March 2014, Marshall received an email from a journalist employed by the Daily Telegraph which outlined a complaint from a Radio Rentals' customer who did not understand that she could not purchase the goods she was renting at the end of 18 months for \$1 and despite this he did not recommend the removal, modification or any other correction of the Rent Try \$1 Buy Representation (discovered document THO.063.001.3343);
- (e) Between 5 May 2014 to 21 April 2017 Marshall was the Chief Executive Officer and Managing Director of the Thorn Group and he had the authority and the autonomy to run Radio Rentals as if it was his own business and at all times he failed to remove, modify or otherwise correct the Rent Try \$1 Buy Representation;
- (f) Between 5 May 2014 to 21 April 2017, Marshall attended Board meetings and he (either alone or together with other officers of Radio Rentals) failed to take steps to remove, modify or otherwise correct the Rent Try \$1 Buy Representation;
- (g) During at least 2014, Marshall attended 'Internal Dispute Resolution Committee' meetings which considered complaints by customers and despite this he (either alone or together with other officers of Radio Rentals) failed to take steps to remove, modify or otherwise correct the Rent Try \$1 Buy Representation (discovered document THO.122.003.7516);

- (h) On or about 3 March 2015, Marshall received and reviewed a report from Credit Suisse which stated to the effect that a there had been numerous complaints from consumer advocates that the Rent Try \$1 Buy Representation may be misleading the consumer and despite this he did not recommend the removal, modification or any other correction of the Rent Try \$1 Buy Representation (discovered documents THO.055.002.4792 and THO.102.001.1704 at 4802);
- (i) On or about 26 April 2015, Marshall sent an email attaching an article published in the Sydney Morning Herald and extracted a paragraph from the article which said to the effect that the Rent Try \$1 Buy Representation is designed to exploit a loophole in the National Credit Act and, despite this, he did not remove, modify or otherwise correct the Rent Try \$1 Buy Representation (discovered document THO.063.001.1012);
- (j) On or about 1 November 2015, Marshall forwarded ASIC's submission to the Treasury Review into Small Amount Credit Contracts and summarised it in an email as saying, *inter alia*, ASIC suggest if leasing contracts include a 'Right to Purchase', they should be deemed credit contracts with a cap of 48% and he did not remove, modify or otherwise correct the Rent Try \$1 Buy Representation (discovered document THO.055.002.6074);
- (k) On or about 20 November 2015, Marshall received and responded to an email from Helen Gordon of the Australian Finance Conference which stated to the effect that consumer groups argue that consumer leases with the ability for customers to negotiate to buy the goods for a nominal amount at the end of the lease are a fiction designed to facilitate provision of finance to consumers, particularly financially vulnerable consumers and, despite receiving this email, he did not remove, modify or otherwise correct the Rent Try \$1 Buy Representation (discovered document THO.055.002.5957);
- (l) Despite knowing the concerns raised by consumer groups referred to in paragraph 67C(k) above, on or around 15 December 2015, Marshall "finalised" a submission under the letterhead of Australian Finance Conference which stated to the effect that consumer leases were not designed to avoid the National Credit Code and he did not remove, modify or otherwise correct the Rent Try \$1 Buy Representation (discovered documents THO.055.004.2804 and THO.055.004.2806);

67D. By reason of the matters pleaded in paragraphs 3A and 67A, 67B and 67C Marshall:

- (a) had knowledge of the essential matters of the contraventions by Radio Rentals of sections 12DA and 12DB of the ASIC Act pleaded in paragraph 57; and
- (b) was directly or indirectly knowingly concerned in or party to the contraventions by Radio Rentals pleaded in paragraph 57 and, accordingly, was a person involved in those contraventions within the meaning of sections 12GF(1) and 12GM of the ASIC Act and section 79(c) of the Corporations Act.

## **GA2. UNCONSCIONABLE CONDUCT**

67E. Marshall knew the following facts or circumstances:

- (a) in relation to the essential matters pleaded at sub-paragraph 66(a) Marshall knew from 28 March 2011 and at all material times thereafter that:
  - (i) the bargaining position of customers (such as Ms Simpson and the Group Members) was grossly unequal to that of Radio Rentals in that:
    - A. customers had no bargaining power to bargain for any change to the terms and conditions of the Radio Rentals Contracts;
    - B. Radio Rentals was a wholly owned subsidiary of the Thorn Group, which is a publicly listed company with a market capitalisation as pleaded in paragraph 66(a)(iii);
    - C. Radio Rentals was only willing to provide the goods the subject of the Radio Rentals Contracts in the form provided to them and was not willing to negotiate that requirement.

### **Particulars**

- (a) The knowledge of Marshall is to be inferred from the facts and circumstances including those pleaded at paragraph 3A and particularised at sub-paragraph 67C(a);
- (b) Further particulars may be provided following the service of evidence.

- (b) in relation to the essential matters pleaded at sub-paragraph 66(b), Marshall knew from 28 March 2011 and at all material times thereafter that the Unfair Contract Terms were not necessary to protect the legitimate interests of Radio Rentals and instead were a means by which it avoided the protections of the consumer protection legislation pleaded at paragraph 9 above;

### **Particulars**

- (a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:

- (i) paragraph 3A above is repeated;
- (ii) the particulars to sub-paragraphs 67A(a) to (d) are repeated;
- (iii) Marshall's familiarity with particular clauses of the Radio Rentals Contracts (e.g. discovered document THO.125.010.5026);
- (iv) Marshall's review of and comments on the ASIC Report 447 entitled "Cost of consumer leases for household goods" which found that in regards to consumer leases consumers will pay significantly more than the retail price of the goods and be charged more than a lender is permitted to charge under a small amount credit contract (THO.063.001.2753 at 2756);
- (v) Marshall's review of the Commonwealth Government's Treasury report entitled "Review of small amount credit contracts laws" which stated in relation to consumer lease providers that "in almost all instances lessors charge in excess of the equivalent of the 48 percent [Annual Percentage Rate] cap that applies to credit contracts more generally" (discovered document THO.055.003.0815 at 0876);
- (vi) Marshall's involvement in Radio Rentals' response to concerns raised by Australian Securities and Investments Commission in relation to the Inertia Policy and DLR Policy (e.g. discovered documents THO.112.001.5865, THO.009.001.6206 at 6211, THO.125.010.5026);

(vii) Marshall at some or all material times was on the Internal Disputes Resolution Committee which reviewed complaints from customers including in relation to Radio Rentals Contracts (e.g. discovered document THO.063.001.3343 at 3344).

(b) Further particulars may be provided following the service of evidence.

(c) in relation to the essential matters pleaded at sub-paragraph 66(c), Marshall knew from 28 March 2011 and at all material times thereafter that the Unfair Contract Terms were not necessary to protect the legitimate interests of Radio Rentals;

### **Particulars**

(a) The knowledge of Marshall is to be inferred from the facts and circumstances including those particularised at sub-paragraph 67E(b):

(b) Further particulars may be provided following the service of evidence.

(d) in relation to the essential matters pleaded at sub-paragraph 66(d), Marshall knew from 28 March 2011 and at all material times thereafter that:

(i) Radio Rentals Contracts, did not give the right to buy the goods for \$1 at the end of the contracts;

(ii) Radio Rentals Contracts did not have the protections of the consumer protection legislation pleaded in paragraph 9 above;

(iii) that the matters pleaded at sub-paragraph (i) and (ii) above, were not readily discoverable by Ms Simpson and Group Members because of the length and complexity of the contract documents;

(iv) that the matters pleaded at sub-paragraph (i) and (ii) above, were not readily discoverable by customers such as Ms Simpson and Group Members because the misleading effect of the Rent Try \$1 Buy Representation.



**Particulars**

- (a) The knowledge of Marshall is to be inferred from the facts and circumstances including those particularised at sub-paragraph 67A(d);
  - (b) Marshall at some or all material times was on the Internal Disputes Resolution Committee which reviewed complaints from customers including in relation to Radio Rentals Contracts (e.g. discovered document THO.063.001.3343 at 3344);
  - (c) Further particulars may be provided following the service of evidence.
- (e) in relation to the essential matters pleaded at sub-paragraph 66(e), Marshall knew from 28 March 2011 and at all material times thereafter that the Rent Try \$1 Buy Representation was misleading or deceptive as to the true nature of the transaction associated with Radio Rentals Contracts;

**Particulars**

- (a) The knowledge of Marshall is to be inferred from facts and circumstances including those at paragraph 67B and those particularised at 67A(d);
  - (b) Further particulars may be provided following the service of evidence.
- (f) in relation to the essential matters pleaded at sub-paragraphs 66(f), Marshall knew from 27 March 2011 and at all material times thereafter that customers such as Ms Simpson and Group Members could have acquired Equivalent Goods for significantly less cost;

**Particulars**

- (a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:
  - (i) Marshall's review of and comments on the ASIC Report 447 entitled "Cost of consumer leases for household goods" which found that in regards to consumer leases consumers will pay significantly more than the retail price of the goods and be

charged more than a lender is permitted to charge under a small amount credit contract (THO.063.001.2753 at 2756);

(ii) Marshall's review of the Commonwealth Government's Treasury report entitled "Review of small amount credit contracts laws" which stated in relation to consumer lease providers that "in almost all instances lessors charge in excess of the equivalent of the 48 percent [Annual Percentage Rate] cap that applies to credit contracts more generally" (discovered document THO.055.003.0815 at 0876).

(b) Further particulars may be provided following the service of evidence.

(g) in relation to the essential matters pleaded at sub-paragraph 66(fA), Marshall knew from 28 March 2011 and at all material times thereafter that customers such as Ms Simpson and Group Members could have acquired identical goods or the Equivalent Goods for the Regulated Equivalent Goods Amount, Small Credit Contract Amount or the Other Credit Contract Amount in circumstances where they would have paid significantly less to own the Equivalent Goods;

#### **Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including those particularised at 67E(f).

(b) Further particulars may be provided following the service of evidence.

(h) in relation to the essential matters pleaded at sub-paragraph 66(g), Marshall knew from 28 March 2011 and at all material times thereafter that many or most of the customers such as the Group Members who entered into Radio Rentals Contracts were vulnerable;

#### **Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:

(i) Those particularised at paragraphs 67A(a) and particulars (b) and (c) to paragraph 67C(c).

(ii) Marshall's awareness of analysis and market research done by Radio Rentals and external companies which described the financial and socio-economic status of Radio Rentals customers and target customers (e.g. discovered documents THO.006.001.0093 at 0110, THO.002.009.2210 at 2212, THO.002.004.7957 and THO.103.001.0821);

(iii) Marshall's receipt and acknowledgment of an email which stated, to the effect, that consumer leases with the ability for customers to negotiate to buy the goods for a nominal amount at the end of the lease are a fiction designed to facilitate provision of finance to consumers, particularly financially vulnerable consumers (e.g. discovered document THO.055.002.5957 at 5962).

(b) Further particulars may be provided following the service of evidence.

- (i) in relation to the essential matters pleaded at sub-paragraph 66(h), Marshall knew from 28 March 2011 and at all material times thereafter that Radio Rentals targeted vulnerable customers such as the Group Members and used unfair tactics by exploiting their vulnerability;

#### **Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including those particularised at sub-paragraph 67E(h);

(b) Further particulars may be provided following the service of evidence.

- (i) in relation to the essential matters pleaded at sub-paragraph 66(i)(ii), Marshall knew from 28 March 2011 and at all material times thereafter that Radio Rentals implemented the Inertia Policy;

#### **Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:

- (i) Marshall's involvement in Radio Rentals' response to concerns raised by Australian Securities and Investments Commission in

relation to the Inertia Policy (e.g. discovered documents THO.112.001.5865 and THO.009.001.6206 at 6211); and

(ii) Marshall's attendance at the Meeting of Directors where "inertia income" was discussed (e.g. discovered document THO.009.001.4569 at 4613).

(b) Further particulars may be provided following the service of evidence.

(k) in relation to the essential matters pleaded at sub-paragraph 66(i)(iii), Marshall knew from 28 March 2011 and at all material times thereafter that Radio Rentals implemented the DLR Policy;

### **Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including the following

(i) Marshall's involvement in Radio Rentals' response to concerns raised by Australian Securities and Investments Commission in relation to DLR Fees (e.g. discovered document THO.125.010.5026 at 5033);

(ii) Marshall's presentation in March 2016 in relation to the agenda item "Amendment to the current structure of Damage Liability Reduction (DLR)" (e.g. discovered document THO.009.001.1860 at 1956);

(iii) Marshall's attendance at 21 August 2013 Thorn Group board meeting in which "ASIC query re Damage Liability Reduction" was discussed (e.g. discovered document THO.006.001.2640 at 2643); and

(iv) Marshall's attendance at the Meeting of Directors on 24 May 2016 where "DLR income" was discussed (e.g. discovered document THO.009.001.4569 at 4613).

(b) Further particulars may be provided following the service of evidence.

(l) in relation to the essential matters pleaded at sub-paragraph 66(i)(v) Marshall knew from 28 March 2011 and at all material times thereafter that, Radio

Rentals engaged in conduct that was misleading or deceptive by making the Rent Try \$1 Buy Representation;

**Particulars**

- (a) The knowledge of Marshall is to be inferred from facts and circumstances including those at paragraph 67B and those particularised at 67A(d);
- (b) Further particulars may be provided following the service of evidence.

(m) in relation to the essential matters pleaded and particularised at subparagraph 66(i)(v), Marshall knew from December 2013 and at all material times thereafter that:

- (i) Radio Rentals made the 48 Month Lease Representation;
- (ii) the 48 Month Lease Representation was misleading or deceptive;

**Particulars**

(a) The knowledge of Marshall is to be inferred from facts and circumstances including the following:

- (i) Marshall's role as the brand spokesperson and his exclusive authority to speak to the press and approve press releases (e.g. discovered document THO.054.001.1923 at 1926);
- (ii) Marshall's involvement in and signing of an ASX Media Release Dated 20 May 2014 which described 48 month contracts as "more affordable" (e.g. discovered document THO.106.002.1013 and THO.106.002.1053); and
- (iii) Marshall's involvement in the preparation and presentation of a director's report for the year ending 31 March 2015 which states that the introduction of longer term leases such as 48 month contracts made certain products more affordable (e.g. discovered document THO.049.005.0985 at 0988).

(b) Further particulars may be provided following the service of evidence.

- (n) in relation to the essential matters pleaded at paragraph 66A Marshall knew from 28 March 2011 and at all material times thereafter that Radio Rentals engaged in a system of conduct or pattern of behaviour within the meaning of s 12CB(4) of the ASIC Act.

### **Particulars**

*The knowledge of Marshall is to be inferred from facts and circumstances including those particularised at sub paragraphs to 67E(a)-(m).*

67F. Ms Simpson repeats paragraphs 67B and 67C.

67G. During the Relevant Period, Marshall engaged in the following acts:

- (a) Despite Marshall knowing the matters pleaded in paragraphs 67E(d), 67E(e), 67E(h), 67E(i) and 67E(l) and holding the positions pleaded in paragraph 3A, he (either alone or together with other officers of Radio Rentals) maintained:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
- (ii) the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action;
- (b) From some time prior to October 2012 until about 21 April 2017, Marshall was responsible for the Strategy Project and he (either alone or together with other officers of Radio Rentals) maintained:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
- (ii) the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action;
- (discovered documents THO.006.001.0093 at 0097, 0110-0118, THO.006.001.0355 at 0363, THO.006.001.0849 at 0849-0852, THO.007.001.2132 at 2134);
- (c) Between 5 May 2014 to 21 April 2017 Marshall was the Chief Executive Officer and Managing Director of Thorn Group and he had the authority and the

autonomy to run Radio Rentals as if it was his own business and he maintained:

- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
  - (ii) the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action.
- (d) Between at least 23 May 2014 and November 2014, Marshall attended 'Internal Dispute Resolution Committee' meetings which considered complaints by customers which, among other things, included complaints relating to the Unfair Contract Terms and the Rent Try \$1 Buy Representation and despite this Marshall (either alone or together with other officers of Radio Rentals) maintained the Unfair Contract Terms and the Rent Try \$1 Buy Representation (discovered documents THO.122.003.7516, THO.122.003.7509, THO.122.003.7515, THO.122.003.7519, THO.127.001.6710, THO.127.001.6712, THO.127.001.6722 and THO.127.001.6724):
- (e) On 22 February 2013, Marshall attended the Board meeting and gave a presentation on the Strategy Project, including 'the move away from the rental concept to a leasing concept and to reflect legislative changes likely to occur in the consumer financing field', which among other things, 'provided[ed] an opportunity for crystallisation of a major rethink of the operations', and he (either alone or together with other officers of Radio Rentals) continued to maintain:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
  - (ii) the DLR Representation and the DLR Policy until December 2016 in response to ASIC action;
- (discovered documents THO.002.005.0253-0270; THO.006.001.0849 at 0852):
- (f) On 25 July 2013, Marshall attended the Board meeting at which:

(i) the Board received a report which, under the heading 'Governance, Legislation & Compliance', stated "ASIC query regarding Damage Liability Reduction (DLR) - Still awaiting formal advice that no further action is to be taken" (THO.006.001.1992 at 2011); and

(ii) the Board discussed the need to follow up this issue with ASIC (THO.006.001.2436 at 2440)

and he (either alone or together with other officers of Radio Rentals) maintained the use of the DLR Representation and the DLR Policy;

(g) On 21 August 2013, Marshall attended the Board meeting at which

(i) it was reported to the Board that the 48 month contract was being developed for launch on 1 October 2013 (THO.006.001.2640 at 2642);

(ii) the Board received a report which, under the heading 'Governance, Legislation & Compliance' it was stated 'ASIC query regarding Damage Liability Reduction (DLR) - Still awaiting formal advice that no further action is to be taken, however consideration needs to be given re no further follow-up' (THO.006.001.2436 at 2448);

(iii) the Board discussed that ASIC had not confirmed in a letter that no further action would be taken but a filenote of an alleged verbal confirmation had been made (THO.006.001.2640 at 2643);

(iv) the Board received a report about proposed reforms to Centrepay (which was automatic deduction process that facilitated, among other things, the Inertia Policy pleaded at paragraphs 9C, 17, 67(i)(ii)) and it was noted this would affect "rental companies" (THO.006.001.2640 at 2643)

and he (either alone or together with other officers of Radio Rentals) continued the process that led to the implementation of the 48 Month Lease Representation and maintained the use of the DLR Representation, the DLR Policy and the Inertia Policy.

(h) On 23 October 2013, Marshall attended the Board meeting where it was reported that "that 'Modelling [was] also underway to determine the viability of a 48 month RTB contract...' for launch on 1 November 2013 and he (either



alone or together with other officers of Radio Rentals) continued the process that led to the implementation of the 48 Month Lease Representation (discovered documents THO.006.001.1992 at 2016, THO.006.001.2825 at 2854);

(i) On 18 November 2013, Marshall attended the Board meeting where the Board received a report which stated that “Early indicators suggesting higher DLR/Theft incident rates for smartphones has *[sic]* led to a number of steps being taken to improve mortality rates for this category, including: - a DLR and rental rate price increase” (discovered document THO.006.001.3264 at 3283) and he (either alone or together with other officers of Radio Rentals) maintained the use of the DLR Representation and DLR Policy until December 2016 when they were discontinued in response to ASIC action;

(i) In or about December 2013, Marshall received the Board Report for the November 2013 reporting period which contained reports on:

(i) the successful launch of the 48 month contract (THO.006.001.3471 at 3507, 3905);

(ii) meetings between senior officers of Radio Rentals and the new Treasury Head of Consumer Finance which indicated a regulatory intention for the “closure of ‘indefinite lease’ loophole” (THO.006.001.3471 at 3483)

and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation and the Inertia Policy;

(k) In or about January 2014, Marshall received the Board Report for the December 2013 reporting period which contained a report on the increased use of the 48 month contract and he (either alone or together with other officers of Radio Rentals) continued to maintain the 48 Month Lease Representation (THO.007.001.0014 at 0057);

(l) In or about March 2014, Marshall received the Board Report for the reporting period February 2014 which contained a report on the increased use of the 48 month contract and he (either alone or together with other officers of Radio Rentals) continued to maintain the 48 Month Lease Representation (THO.007.001.0835 at 0844);

- (m) On 3 March 2014, Marshall received an email of detailing DLR claims made and approved in relation to smartphones (discovered document THO.125.007.2837) and despite this he maintained the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action;
- (n) On 27 March 2014, Marshall attended a Board meeting at which the Board received a report about the progress of the Centrepay reforms which were likely to be implemented in mid to late 2014 and law reform aimed to “resolve problems with indefinite leases” and he (either alone or together with other officers of Radio Rentals) continued to maintain the Inertia Policy (discovered document THO.007.001.0835 at 0843);
- (o) In or about April 2014, Marshall received the Board Report for the reporting period March 2014 which contained a report on the increased use of the 48 month contract and he (either alone or together with other officers of Radio Rentals) continued to maintain the 48 Month Lease Representation (discovered document THO.007.001.1002 at 1010);
- (p) On 15 May 2014, Marshall emailed the “final draft” of a proposed announcement to the ASX which stated that the 48 month contracts were more affordable without explaining that 48 month leases were more costly overall than other leases and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered documents THO.106.002.1013, THO.106.002.1053);
- (q) In or about May 2014, Marshall received the Board Report for the reporting period April 2014 the Board which contained a report on the increased use of the 48 month contract and that installation volumes “finished 131% better than budget”, and he (either alone or together with other officers of Radio Rentals) continued to maintain the 48 Month Lease Representation (discovered document THO.007.001.1618 at 1756 and 1778-1779);
- (r) In or about June 2014, Marshall received the Board Report for the reporting period May 2014 which contained a report on the increased use of the 48 month contract and he (either alone or together with other officers of Radio Rentals) continued to maintain the 48 Month Lease Representation (discovered document THO.007.001.2132 at 2167 - 2168);

- (s) In or about July 2014, Marshall received the Board Report for the reporting period June 2014 which contained a report on the continued high use of the 48 month contract and that installation volumes “finished 113% better than budget”, and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.007.001.2287 at 2330-2331);
- (t) In or about August 2014, Marshall received the Board Report for the reporting period July 2014 which contained a report on the continued high use of the 48 month contract and that installation volumes “finished 115% better than budget” and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.007.001.2541 at 2580, 2603-2604);
- (u) In or about September 2014, Marshall received the Board Report for the reporting period August 2014 which contained a report on the continued high use of the 48 month contract and that installation volumes “finished 116% better than budget” and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.007.001.2764 at 2782, 2804-2805);
- (v) In or about October 2014, Marshall received the Board Report for the reporting period September 2014 which contained a report on the continued high use of the 48 month contract and that installation volumes “finished 58% better than budget” and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.007.001.2947 at 2981, 3002-3003);
- (w) In or about November 2014, Marshall received the Board Report for the reporting period October 2014 which contained a report on the continued high use of the 48 month contract and that installation volumes “finished 40% better than budget” and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.007.001.3341 at 3350, 3371-3372);
- (x) In or about December 2014, Marshall received the Board Report for the reporting period November 2014 which contained a report on the continued high use of the 48 month contract and that installation volumes “finished 38%

better than budget” and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.007.001.3550 at 3648, 3670);

- (y) In or about January 2015, Marshall received the Board Report for the reporting period December 2014 which contained a report on the continued high use of the 48 month contract and that installation volumes “finished 31% better than budget” and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.100.002.0651 at 0717 and 0718);
- (z) In or about March 2015, Marshall received the Board Report for the reporting period February 2015 which contained a report on the increased use of the 48 month contract and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.008.001.1036 at 1053);
- (aa) In or about March 2015, Marshall received and reviewed a report from Credit Suisse which included the concerns of consumer advocates in relation to the use of Centrepay for lease deductions (as particularised at (c) to paragraph 66(h)) and despite this he (either alone or together with other officers of Radio Rentals) maintained the Inertia Policy (discovered documents THO.055.002.4792, THO.055.002.4794 at 4802 and THO.102.001.1704 at 1713);
- (bb) Some time between 20 March 2015 and 26 March 2015, Marshall and two other senior officers of Radio Rentals attended meetings with the Minister and Shadow Minister for Human Services to “put forward Thorn’s position” in response to public criticisms of Radio Rentals’ use of Centrepay and he (either alone or together with other officers of Radio Rentals) maintained the Inertia Policy (discovered document THO.008.001.3096 at 3103);
- (cc) On 9 April 2015, Marshall was emailed a copy of the ‘Customer Complaint Register’ for the previous months by which he was informed that the top complaint issues related to the Unfair Contract Terms and the Rent Try \$1 Buy Representation and despite this Marshall maintained the Unfair Contract Terms and the Rent Try \$1 Buy Representation (discovered documents THO.127.001.6722 and THO.127.001.6724);

- (dd) In or about May 2015, Marshall received the Board Report for the reporting period April 2015 which contained a report on the increased use of the 48 month contract and he (either alone or together with other officers of Radio Rentals) maintained the 48 Month Lease Representation (discovered document THO.100.002.0651 at 0717 and 0718);
- (ee) On 12 May 2015, Marshall was emailed a copy of the 'Customer Complaint Register' for the previous months by which he was informed that the top complaint issues related to the Unfair Contract Terms and the Rent Try \$1 Buy Representation and despite this he maintained the Unfair Contract Terms and the Rent Try \$1 Buy Representation (discovered documents THO.127.001.6710 and THO.127.001.6712);
- (ff) On 9 June 2015, Marshall was emailed a copy of the 'Customer Complaint Register' for the previous months by which he was informed that the top complaint issues related to the Unfair Contract Terms and the Rent Try \$1 Buy Representation and despite this he (either alone or together with other officers of Radio Rentals) maintained the Unfair Contract Terms and the Rent Try \$1 Buy Representation (discovered documents THO.127.001.6662 and THO.127.001.6664);
- (gg) On 21 October 2015, Marshall attended the Board meeting at which it was reported that:
- (i) ASIC's consultation paper into its review into Small Amount Credit Contracts, among other things, "indicated that the lack of a cap on what a lessor can charge for consumer leases of these goods potentially sees consumers paying very high costs" (discovered document THO.008.001.5110 at 5133);
- (ii) ASIC's Corporate Plan included "key activities" of instigating surveillance of consumer leases (discovered document THO.008.001.5110 at 5134);
- (iii) ASIC had issued a statutory notice to Radio Rentals requesting certain files (discovered document THO.008.001.5763 at 5785)

and despite this he (either alone or together with other officers of Radio Rentals) maintained:

- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy;
  - (ii) the DLR Representation and the DLR Policy until December 2016 when it was discontinued in response to ASIC action;
- (hh) On 18 February 2016, Marshall attended a Board meeting at which it was reported that:
- (i) ASIC had notified Thorn that ASIC was intending to move “the review to the Enforcement Section which will commence an investigation into Thorn’s general conduct and responsible lending obligations practices” (discovered document THO.009.001.1860 at 1864); and
  - (ii) in substance, that the Department of Human Services had notified Radio Rentals that it intended to impose conditions on Radio Rentals’ participation in the Centrepay system, with the effect that Radio Rentals was would be unable to maintain the Inertia Policy in respect of customers who made payments via Centrepay (discovered document THO.102.001.0849 at 0863-0864)
- and despite this he (either alone or together with other officers of Radio Rentals) maintained:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
  - (ii) the DLR Representation and the DLR Policy until December 2016 when it was discontinued in response to ASIC action;
- (ii) On 24 March 2016, Marshall attended a Board meeting at which ASIC’s concerns about, in effect, the DLR Policy were reported and discussed in detail including ASIC’s concern that “the continued sale of this product [in its current form] may constitute unconscionable conduct as set out in Subdivision C of Part 2, Division 2 of the Australian Securities and Investments Commission Act 2001” and “given the financially vulnerable class of consumers that are Thorn’s targeted market, and the poor value of DLR to these consumers”, based on the consistently high claims denial ratio and consistently low loss ratio (THO.009.001.1860 at 1974-1975) and despite this Marshall (either alone or together with other officers of Radio Rentals) maintained the DLR

Representation and the DLR Policy until December 2016 when it was discontinued in response to ASIC action;

(ii) On 24 May 2016, Marshall attended a Board meeting at which the Board discussed a paper on the impact on Radio Rentals of pricing caps on consumer leasing proposed by Treasury including that (discovered document THO.009.001.4569 at 4575-4576):

(i) in effect, the DLR Policy and Inertia Policy income would be restricted by the recommended caps;

(ii) Radio Rentals' prevailing pricing on all 24 month contracts and many 36 and 48 month contracts was above that permitted by the recommended caps, excluding the effect of the Inertia Policy;

(iii) "As part of the concern expressed by Westpac [the provider of Thorn's main debt funding] on Thorn's reputation, Westpac would insist that [Radio Rentals'] pricing be adjusted to move under the permitted caps as soon as practicable."

and despite this he (either alone or together with other officers of Radio Rentals) maintained:

(i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy;

(ii) the DLR Representation and the DLR Policy until December 2016 when it was discontinued in response to ASIC action;

(kk) On or after 22 September 2016, Marshall became aware that ASIC had commenced a further investigation into whether various provisions of the Terms and Conditions were 'unfair contract terms', including terms relating to DLR, end of lease options, inertia and unilateral variation of fees and charges (discovered document THO.009.001.6206 at 6341) and despite this he (either alone or together with other officers of Radio Rentals) maintained:

(i) the Rent Try \$1 Buy Representation, the 48 Month Representation, and the Inertia Policy;

- (ii) the DLR Representation and the DLR Policy until December 2016 when it was discontinued in response to ASIC action;
- (II) On at least 1 January 2011, 1 January 2012, 1 June 2012, 1 July 2013, 1 February 2014, 1 September 2014 and 1 June 2016 Radio Rentals updated the Terms and Conditions and Marshall (either alone or together with other officers or Radio Rentals) maintained the Unfair Contract Terms (discovered documents THO.084.001.0372, THO.061.001.1445, THO.004.001.0267, THO.004.001.0295, THO.004.001.0240, THO.062.002.4645, THO.049.028.2111, THO.001.034.4617).
- 67H. During the Relevant Period, Marshall engaged in the following omissions:
- (a) Despite Marshall knowing the matters pleaded in paragraphs 67E(d); 67E(e); 67E(h); 67E(i) and 67E(l) and holding the positions pleaded in paragraph 3A, he (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
- (ii) the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action;
- (b) From some time prior to October 2012 until about 21 April 2017, Marshall was responsible for the Strategy Project and he (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation, the Inertia Policy; and
- (ii) the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action;
- (discovered documents THO.006.001.0093 at 0097, 0110-0118, THO.006.001.0355 at 0363; THO.006.001.0849 at 0849-0852 and THO.007.001.2132);
- (c) Between 5 May 2014 to 21 April 2017 Marshall was the Chief Executive Officer and Managing Director of the Thorn Group and he had the authority and the



autonomy to run Radio Rentals as if it was his own business and he failed to remove, modify or otherwise correct:

- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
- (ii) the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action;
- (d) Between 5 May 2014 to 21 April 2017, Marshall attended Board meetings and he (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct;

  - (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
  - (ii) the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action;
- (e) On or about 27 June 2011, Marshall received an email complaint about an 87 year old customer who had been paying her contract for 12 years and failed to remove, modify or otherwise correct the Inertia Policy (THO.085.001.0984);
- (f) In or about September 2013, Marshall received a Board Report which included that “[t]he current credit scorecard and DLR pricing structure for smartphones is under review as a result of early indications suggesting higher DLR/Theft incident rates for this category” and he (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct the DLR Policy and DLR Representation until December 2016 when they were discontinued in response to ASIC action (THO.006.001.2640 at 2664);
- (g) On 18 November 2013, Marshall attended the Board meeting where the Board received a report which stated that “Early indicators suggesting higher DLR/Theft incident rates for smartphones has *[sic]* led to a number of steps being taken to improve mortality rates for this category, including: - a DLR and rental rate price increase” and he (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct the DLR Representation and DLR Policy until December 2016 when they were discontinued in response to ASIC action (THO.006.001.3264 at 3283);

- (h) During at least 2014, Marshall attended 'Internal Dispute Resolution Committee' meetings which considered complaints by customers and despite this he failed to remove, modify or otherwise correct:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
- (ii) the DLR Policy until December 2016 when it was discontinued in response to ASIC action;
- (discovered documents THO.122.003.7516, THO.122.003.7509, THO.122.003.7515, THO.122.003.7519, THO.127.001.6710, THO.127.001.6712, THO.127.001.6722 and THO.127.001.6724);
- (i) On 3 March 2014, Marshall received an email detailing DLR claims made and approved in relation to smartphones and despite this he failed to remove, modify or otherwise correct the DLR Policy and DLR Representation until December 2016 when they were discontinued in response to ASIC action (THO.125.007.2837);
- (i) On 1 October 2014, Marshall received a summary of the findings of the Federal Court of Australia in relation to a prosecution by ASIC of the Cash Store Pty Ltd which found that the Cash Store Pty Ltd engaged in unconscionable conduct by selling an insurance-like product to customers despite it providing little value based on customer demographics and low claim rates and despite this, Marshall did not remove, modify or otherwise correct the DLR Policy or DLR Representation until December 2016 in response to ASIC action (discovered documents THO.055.003.5170 and THO.055.003.5171);
- (k) In or about March 2015, Marshall received and reviewed a report from Credit Suisse which included the concerns of consumer advocates in relation to the use of Centrepay for lease deductions (as particularised at (c) to paragraph 66(h)) and despite this he failed to remove, modify or otherwise correct the Inertia Policy (discovered documents THO.055.002.4792, THO.055.002.4794 at 4802 and THO.102.001.1704 at 1713);
- (l) Some time between 20 March 2015 and 26 March 2015, Marshall and two other senior officers of Radio Rentals attended meetings with the Minister and

Shadow Minister for Human Services to “put forward Thorn’s position” in response to public criticisms of Radio Rentals’ use of Centrepay and he (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct the Inertia Policy (discovered document THO.008.001.3096 at 3103):

(m) On 26 March 2015, Marshall attended a Board meeting:

(i) at which the Board received a report about the penalties imposed by the Court in ASIC’s prosecution of the Cash Store Pty Ltd which included a \$1.3 million penalty for “selling consumer credit insurance which, in context, was described as ‘useless’” (discovered document THO.008.001.1036 at 1051);

(ii) at which the Board discussed under the topic ‘Governance, Legislation and Compliance’ the “NCCL – Responsible Lending Breaches & Unconscionable Conduct in Selling CCI” (with “CCI” being a reference to Consumer Credit Insurance) (discovered document THO.008.001.3096 at 3102)

and despite this, Marshall (either alone or together with other officers of Radio Rentals) did not remove, modify or otherwise correct the DLR Policy and DLR Representation until December 2016 when they were discontinued in response to ASIC action;

(n) On 9 April 2015, Marshall was emailed a copy of the ‘Customer Complaint Register’ for the previous months by which he was informed that the top complaint issues related to the Unfair Contract Terms and the Rent Try \$1 Buy Representation and despite this Marshall (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct the Unfair Contract Terms and the Rent Try \$1 Buy Representation (discovered documents THO.127.001.6722 and THO.127.001.6724);

(o) On 12 May 2015, Marshall was emailed a copy of the ‘Customer Complaint Register’ for the previous months by which he was informed that the top complaint issues related to the Unfair Contract Terms and the Rent Try \$1 Buy Representation and despite this Marshall (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct the

Unfair Contract Terms and the Rent Try \$1 Buy Representation (discovered documents THO.127.001.6710 and THO.127.001.6712);

- (p) On 9 June 2015, Marshall was emailed a copy of the 'Customer Complaint Register' for the previous months by which he was informed that the top complaint issues related to the Unfair Contract Terms and the Rent Try \$1 Buy Representation and despite this Marshall (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct the Unfair Contract Terms and the Rent Try \$1 Buy Representation (discovered documents THO.127.001.6662 and THO.127.001.6664);
- (q) On or around 4 February 2016, Marshall met with Treasury and discussed the differences between Small Amount Credit Contracts and consumer leases and he failed to remove, modify or otherwise correct:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; and
- (ii) the DLR Representation and the DLR Policy until December 2016 when they were discontinued in response to ASIC action
- (discovered document THO.058.004.2597);
- (r) On or after 22 September 2016, Marshall became aware that ASIC had commenced a further investigation into whether various provisions of the Radio Rentals Rent Try \$1 Buy contract were 'unfair contract terms', including terms relating to DLR, end of lease options, inertia and unilateral variation of fees and charges (discovered document THO.009.001.6206 at 6341) and despite this he (either alone or together with other officers of Radio Rentals) failed to remove, modify or otherwise correct:
- (i) the Rent Try \$1 Buy Representation, the 48 Month Representation and the Inertia Policy; or
- (ii) the DLR Policy and DLR Representation until December 2016 when they were discontinued in response to ASIC action.
- (s) On at least 1 January 2011, 1 January 2012, 1 June 2012, 1 July 2013, 1 February 2014, 1 September 2014 and 1 June 2016 Radio Rentals updated the Terms and Conditions and Marshall (either alone or together with other

officers or Radio Rentals) failed to remove, modify or otherwise correct the Unfair Contract Terms (discovered documents THO.084.001.0372, THO.061.001.1445, THO.004.001.0267, THO.004.001.0295, THO.004.001.0240, THO.062.002.4645, THO.049.028.2111 and THO.001.034.4617).

67I. By reason of the matters pleaded in paragraphs 3A and 67E, 67F, 67G and 67H Marshall:

- (a) had knowledge of the essential matters of the contraventions by Radio Rentals of s 12CB of the ASIC Act pleaded in paragraph 66;
- (b) had knowledge of the essential matters of the contraventions by Radio Rentals of s 12CB of the ASIC Act pleaded in paragraph 66A;
- (c) by reason of sub paragraph (a) and 67E, 67F, 67G and 67H was directly or indirectly, knowingly concerned in or party to the contraventions by Radio Rentals pleaded in paragraph 66 and, accordingly, was a person involved in those contraventions within the meaning of section 12GF(1) and 12GM of the ASIC Act and section 79(c) of the Corporations Act;
- (d) by reason of sub paragraph (b) and 67E, 67F, 67G and 67H was directly or indirectly, knowingly concerned in or party to the contraventions by Radio Rentals pleaded in paragraph 66A and, accordingly, was a person involved in those contraventions within the meaning of section 12GF(1) and 12GM of the ASIC Act and section 79(c) of the Corporations Act.

## **H. CLAIMS OF GROUP MEMBERS**

68. From time to time, Group Members entered into Radio Rentals Contracts in the circumstances pleaded in paragraphs 5 to 9D above.

69. By reason of the matters referred to in paragraph 68:

- (a) Radio Rentals contravened:
  - (i) section 12DA of the ASIC Act by engaging in conduct that was misleading or deceptive; and/or

- (ii) section 12DB of the ASIC Act by making false or misleading representations in trade or commerce and/or in connection with the promotion of the supply or use of financial services;

**Particulars**

~~That~~ The material facts and particulars of the claims of Group Members are the same as or similar to those pleaded at ~~the particulars to paragraphs 56 to 58.~~

- (b) the Unfair Contract Terms in the Radio Rentals Contracts are void pursuant to section 12BF of the ASIC Act;

**Particulars**

~~That~~ The material facts and particulars of the claims of Group Members are the same as or similar to those pleaded at paragraphs 59 to 61.

- (c) the Radio Rentals Contracts are unconscionable in contravention of section 12CB(1) of the ASIC Act.

**Particulars**

~~That~~ The material facts and particulars of the claims of Group Members are the same as those pleaded at paragraphs 66 and 66A with the exception of subparagraphs 66(a)(ii) and (f) in which their circumstances are similar to those of Ms Simpson.

70. By reason of the matters referred to in paragraphs 69 and Part GA the Group Members, pursuant to:

- (a) pursuant to section 12GF(1) of the ASIC Act, are entitled to recover the amount of their loss or damage as against Radio Rentals and Marshall in respect of the contraventions of sections 12DA, 12DB and 12CB(1) of the ASIC Act;

**Particulars**

The Group Members' loss or damage is similar to that pleaded by Ms Simpson at paragraphs 58(a), 62A, 63 and 67(a) and may also include that they would have obtained goods for the

*Regulated Equivalent Goods Amount, the Small Credit Contract Amount or the Other Credit Contract Amount.*

- (b) pursuant to section 12GND of the ASIC Act, seek a declaration that each of the Unfair Contract Terms are void under section 12BF(1) of the ASIC Act;
- (ba) seek a further declaration that each of the Radio Rentals Contracts do not bind the parties because those contracts are not capable of operating without the void Unfair Contract Terms and, accordingly, section 12BF(2) of the ASIC Act does not apply to the Radio Rentals Contracts (**Void Radio Rentals Contracts**);
- (bb) seek repayment of the monies they paid to Radio Rentals pursuant to the Void Radio Rentals Contracts or pursuant to the Unfair Contract Terms in each of the Radio Rentals Contracts as they would not have paid those monies if they had known the Unfair Contract Terms were void;
- (c) pursuant to section 12GM of the ASIC Act:
- (i) seek orders varying the terms of the Radio Rentals Contracts to enable each Group Member to purchase the goods for a lesser amount including the cost of credit and that Radio Rentals and Marshall refund the difference between the amounts paid pursuant to the Radio Rentals Contracts and the lesser amount; and

#### **Particulars**

*The variation is similar to that pleaded by Ms Simpson at paragraphs 58(b), 64(a) and 67(b).*

- (ii) further and in the alternative to paragraph 70(c)(i), claim compensation as against Radio Rentals and Marshall.

#### **Particulars**

*The compensation is similar to that pleaded by Ms Simpson at paragraphs 58(c), 64(b) and 67(c).*

- (d) ~~[Deleted] in the alternative to paragraph 70(c) pursuant to section 12GM of the ASIC Act, seek compensation in the form of a refund of the amounts paid by him or her under the Radio Rentals Contracts which are now void and no longer capable of operating without the Unfair Contract Terms.~~

- (e) A declaration that AIG is liable:
  - (i) to indemnify Radio Rentals and Marshall pursuant to the D&O Policy as pleaded in Part I1. below;
  - (ii) to indemnify Radio Rentals and Marshall pursuant to the Professional Indemnity Policy as pleaded in Part I2. below; and
  - (iii) to pay to Ms Simpson and Group Members the AIG D&O Indemnity Amount and the Professional Indemnity Amount as pleaded in paragraphs 75 and 78 below.
- (f) Further to (e), judgment against AIG in the amount of the:
  - (i) AIG D&O Indemnity Amount; and
  - (ii) Professional Indemnity Amount.

## **I. CLAIMS OF RELIEF AGAINST AIG**

### **I1. The D&O Policy**

71. There were express terms of the D&O Policy, inter alia:
- (a) that AIG would pay the “Loss for, or on behalf of, any Insured for any Management Liability...”;
  - (b) “Management Liability” was defined to include any claim against a “Manager” for any “Wrongful Act”;
  - (c) a “Wrongful Act” was defined to include any actual, alleged or proposed act, error or omission, breach of duty, breach of trust, misleading statement or breach of warranty or authority by an Insured;
  - (d) “Insured” was relevantly defined to include any “Manager” and “Insured Entity”;
  - (e) “Manager” was defined to include any natural person who was, is or becomes a director, officer or committee member or an Employee of any “Insured Entity”;
  - (f) an “Insured Entity” was defined to include “the Policyholder” and “any Subsidiary”;  
and



(g) “Loss” was defined to include any amount which the “Insured” is legally liable to pay including awards of damages and awards of costs or settlements.

72. At all material times, within the meaning of the D&O Policy:

(a) Radio Rentals was relevantly:

(i) a “Subsidiary” which a “Policyholder” “Controls”;

(ii) thus, an “Insured Entity”;

(iii) thus, an “Insured”.

(b) Marshall was:

(i) at least one of the following: a director of an Insured Entity, an officer of an Insured Entity, an Employee;

### **Particulars**

*Paragraph 3A is repeated*

(ii) thus, a “Manager” of an “Insured Entity”; and

(iii) thus, an “Insured”.

73. The liability of Marshall to Ms Simpson and Group Members in respect of the claims against Marshall set out above is:

(a) a liability in respect of which Marshall and Radio Rentals are entitled to be indemnified by AIG within the terms of the D&O Policy;

(b) thus, within the meaning s 4(1) of *the Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), an insured liability of:

(i) Marshall and Radio Rentals, who are both an “insured person”; to

(ii) Ms Simpson and Group Members, being claimants.

74. By reason of ss 4(1) and 4(2) of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) Ms Simpson and Group Member as claimants, may recover from AIG as insurer, the amount of indemnity payable by AIG pursuant to the D&O Policy in

respect of the of the liability of Marshall or Radio Rentals as insured persons, to Ms Simpson and Group Members.

75. By reason of the matters in paragraphs 71 to 74 above, AIG and the insurers who provide excess layer policies to the D&O Policy, are liable to pay to Ms Simpson and Group Members an amount up to the limit of the D&O Policy and excess layer policies to the D&O Policy and up to the limit of the D&O Policy (the **AIG D&O Indemnity amount**).

### **Particulars**

The form of the D&O Policy was AIG Gold Complete & follow form (discovered document THO.056.005.0158 at 0175).

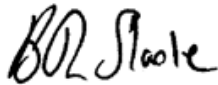
## **I2. Professional Indemnity Policy**

76. There were express terms of the Professional Indemnity Policy inter alia:
- (a) that AIG agreed to pay, *inter alia*, the “Loss as a result of a Civil Liability of any Insured arising out of a Claim...”;
  - (b) “Loss” includes damages and related costs awarded pursuant to a final judgment or a settlement negotiated with the Insurer’s written consent;
  - (c) “Civil Liability” includes a legally enforceable obligation to a third party arising from any “Claim” for “Misleading or Deceptive Conduct” of the “Insured”;
  - (d) “Misleading or Deceptive Conduct” includes any actual or alleged misleading or deceptive conduct under the ASIC Act;
  - (e) A “Claim” includes a civil proceeding.
77. The liability of Radio Rentals to Ms Simpson and Group Members in respect of the claims against Radio Rentals set out above is:
- (a) a liability in respect of which Radio Rentals and Marshall are entitled to be indemnified by AIG within the terms of the Professional Indemnity Policy;
  - (b) thus, within the meaning s 4(1) of *the Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), an insured liability of:

- (i) Radio Rentals and Marshall, who are both an insured person; to
- (ii) Ms Simpson and Group Members, being claimants.

78. By reason of ss 4(1) and 4(2) of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) Ms Simpson and Group Member as claimants, may recover from AIG as insurer, the amount of indemnity payable by AIG pursuant to the Professional Indemnity Policy in respect of the of the liability of Radio Rentals and Marshall as insured persons to Ms Simpson and Group Members (**Professional Indemnity Amount**).

Date: 9 May 2019 ~~9 November 2018~~



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Signed by Ben Slade  
Lawyer for the applicant

This pleading was prepared by Rachel Francois and James Mack of counsel and Steven Finch of Senior Counsel.

**Certificate of lawyer**

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

Date: 9 May 2019 ~~9 November 2018~~



Handwritten signature of Ben Slade in black ink, written in a cursive style. The signature is positioned above a horizontal dotted line.

Signed by Ben Slade  
Lawyer for the applicant

**Schedule**

No. NSD448 of 2017

Federal Court of Australia

District Registry: New South Wales

Division: General

**Respondents**

First respondent: Thorn Australia Pty Ltd t/as Radio Rentals (ACN 008 454 439)  
Level 1, 62 Hume Highway, Chullora, NSW, 2190

Second Respondent: James Leslie Marshall  
79 Crawford Road, Rd 1, Tauranga, 3171, New Zealand

Third Respondent: AIG Australia Limited (ACN 004 727 753)  
Level 19, 2 Park Street, Sydney NSW 2000