

Undertakings to the Commerce Commission under s 113(aa) of the Credit Contracts and Consumer Finance Act 2003

1 Persons giving undertakings

- 1.1 These undertakings are given to the Commerce Commission (**Commission**) for the purposes of s 113(aa) of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**)¹ by Harmoney Limited (**Harmoney**), Harmoney Corp Limited (**HCL**), and Harmoney Investor Trustee Limited (**HITL**), being related companies of each other, and having their registered offices at Ground Floor, 79 Carlton Gore Road, Newmarket, Auckland (**Undertakings**).

2 Background

- 2.1 At relevant times, Harmoney provided a peer-to-peer lending service which allowed consumer borrowers seeking funds to obtain loans from HITL, using funds advanced by investors. Loans obtained in that manner:
- (a) were arranged by Harmoney; and
 - (b) required borrowers to pay a fee to Harmoney (that fee referred to variously as the “Origination Fee”, the “Platform Fee” or the “Establishment Fee”, and which is referred to in these Undertakings as the **Platform Fee**).
- 2.2 Harmoney and HITL are both subsidiaries of HCL.
- 2.3 The Commission filed proceedings in the Auckland High Court against Harmoney and HITL alleging that the Platform Fees charged in the period between 26 August 2014 and 12 February 2020 (inclusive) (**Claim Period**) were unreasonable, in breach of s 41 of the CCCFA. The Commission alleged that those fees recovered amounts which exceeded Harmoney and HITL’s transaction-specific costs of providing loans to borrowers.
- 2.4 Harmoney and HITL admit that the Platform Fees charged in the Claim Period were unreasonable establishment fees, in breach of s 41 of the CCCFA.
- 2.5 Contemporaneously with the giving of these Undertakings, Harmoney and HITL will file a notice of admissions admitting that the Platform Fees charged in the Claim Period were unreasonable establishment fees.
- 2.6 In order to remedy the admitted breaches, Harmoney, HCL and HITL have offered to give, and the Commission has agreed to accept, pursuant to s 74A of the Commerce Act 1986 via s 113(aa) of the CCCFA, the Undertakings.

¹ And, via s 113(aa) of the CCCFA, ss 74A to 74C of the Commerce Act 1986 (power to accept undertakings).

3 Interpretation

3.1 In these Undertakings and the Schedules:

- (a) **Borrower** means a person who entered into a Contract with Harmony and HITL and/or any of their Related Parties during the Compensation Period and was charged a Platform Fee in respect of that Contract.
- (b) **Commencement Date** means the date provided for in paragraph 7.1.
- (c) **Compensation Amount** means the sum of \$7,000,000, to be paid to Borrowers in accordance with the Compensation Undertaking.
- (d) **Compensation Period** means the period from 26 August 2014 to the day before the Commencement Date (inclusive).
- (e) **Completion Date** means the earlier of:
 - (i) the date two years from the Commencement Date; or
 - (ii) the date three months following Harmony reporting an annual audited profit in its published general purpose financial statements.
- (f) **Consumer** means a natural person resident in New Zealand who has entered, or who proposes to enter into, a consumer credit contract (as that term is defined in s 11 of the CCCFA) with Harmony, HITL and/or any of their Related Parties.
- (g) **Contract** means a consumer credit contract entered into between Harmony, HITL (or any of their Related Parties) and a Borrower, and for the avoidance of doubt, excludes any contract where the stated purpose of the credit was for 'business cash flow'.
- (h) **Day** means a working day as defined in High Court Rule 1.3.
- (i) **Establishment Fee** has the same meaning as in the CCCFA and, for the avoidance of doubt, includes the fee previously described by Harmony and HITL as the "Origination Fee", "Platform Fee" or "Establishment Fee", and any equivalent fee. Where more than one establishment fee is charged in respect of a single Contract, the Establishment Fee is the sum of such fees.
- (j) **Related Parties** of Harmony, HCL and HITL include:
 - (i) their past and present directors, officers, employees and agents; and
 - (ii) their related companies and each related company's past and present directors, officers, employees and agents, where "related company" has the same meaning as in the Companies Act 1993 and "related companies" has a corresponding meaning.
- (k) **Subsidiary** has the same meaning as in the Companies Act 1993.

4 Purpose of the Undertakings

Undertakings

- 4.1 These Undertakings are given by:
- (a) Harmony, HCL, and HITL to record their commitment to charge no more than \$165 in Establishment Fees for five years from the Commencement Date; and
 - (b) Harmony and HITL to record their commitment to pay, or arrange for any of their Related Parties to pay, \$7,000,000 compensation to Borrowers who entered into Contracts during the Compensation Period, and to do so subject to the terms and eligibility criteria set out in these Undertakings.

Schedule 1 list of eligible Borrowers

- 4.2 **Schedule 1** is to contain a list of all Borrowers who are to be paid compensation under clause 5 together with the amount of compensation to be paid. Where one person has entered into more than one Contract under which a Platform Fee was charged, they will be listed as a separate Borrower in respect of each such Contract.
- 4.3 A Borrower will not be included in Schedule 1, and will be excluded from the definition of Borrower under clause 5, in respect of a Contract where:
- (a) the Platform Fee(s) charged to the Borrower under the Contract was \$165 or less;
 - (b) the compensation amount that would have been payable under the Compensation Undertaking would have been less than \$5, had it been included in Schedule 1; or
 - (c) the Contract was one on which the Borrower defaulted and which had been written off on or before 19 August 2021 with more than half of the initial loan amount for that Contract unpaid.
- 4.4 For the purposes of paragraph 4.3(c) above, where a Borrower has entered into a Contract to refinance one or more previous Contracts, and the most recent Contract in that sequence was written off on or before 19 August 2021, Harmony and HITL may treat the previous and refinanced Contract(s) as a single Contract. In that case:
- (a) the “initial loan amount for that Contract” is deemed to be the highest of the initial amounts under each of those Contracts;
 - (b) the “unpaid” amount is the aggregate amounts unpaid at the time of the write-off; and
 - (c) if more than half of the initial loan amount for that Contract was unpaid, then all of those Contracts will be excluded (and otherwise they will all be included).
- 4.5 At the time that these Undertakings are given, HCL, Harmony and HITL have provided a draft of **Schedule 1** which identifies the Borrowers to be paid compensation. A finalised

version of **Schedule 1** will be provided by Harmony, HCL and HITL within one month of the Commencement Date.

- 4.6 Harmony and HITL are responsible for any errors in the finalised version of **Schedule 1** provided in accordance with paragraph 4.5 above. If a Borrower who is entitled to be paid compensation in accordance with the Compensation Undertaking and this clause 4 has been omitted from Schedule 1 or the compensation due to that Borrower is understated in **Schedule 1**, then Harmony and HITL will pay, or arrange for any of their Related Parties to pay, the correct amount to that Borrower, and will do so even if that causes the total compensation payable to exceed \$7,000,000. For the avoidance of doubt, no payments listed in the finalised version of Schedule 1 will be reduced or any listed Borrowers removed.

5 Undertakings

Fee undertaking

- 5.1 From the Commencement Date and for a period of five years:
- (a) Harmony, HCL and HITL each undertake to the Commission that they will not charge a Consumer an Establishment Fee exceeding \$165; and
 - (b) HCL undertakes to the Commission that no Subsidiary will charge a Consumer an Establishment Fee exceeding \$165;
- (together, the **Fee Undertaking**).
- 5.2 The Commission agrees that it will not be a breach of the Fee Undertaking if a charge over \$165 occurs within 60 days of the Commencement Date, provided the relevant party credits the Consumer the difference between the amount charged and \$165 without delay.

Compensation undertaking

- 5.3 Harmony and HITL undertake to the Commission that they will:
- (a) pay, or arrange for any of their Related Parties to pay, the Compensation Amount by the Completion Date;
 - (b) in order to discharge the obligation under paragraph 5.3(a) above, pay, or arrange for any of their Related Parties to pay, each Borrower's pro rata share of the Compensation Amount in accordance with the formula: $A = (B/C) * \$7,000,000$; where:

A is the compensation owed to the Borrower

B is the amount by which the Platform Fee(s) charged to that Borrower exceeded \$165

C is the sum of all Bs;

with all such amounts adding to \$7,000,000 and to be recorded in **Schedule 1**;

- (c) as far as practicable, pay amounts to Borrowers in the order that those Borrowers were first charged a Platform Fee;
- (d) carry out the further steps provided for in paragraphs 5.5 to 5.8 below; and
- (e) use their best endeavours, in carrying out the further steps provided for in paragraphs 5.5 to 5.8 below, to pay, or arrange for any of their Related Parties to pay, not less than \$1,750,000 in every six month period from the Commencement Date, until the Compensation Amount is paid in full.

(together, the **Compensation Undertaking**).

- 5.4 Nothing in the undertaking offered at paragraph 5.3(b) above constitutes any admission by Harmony, HITL or any of their Related Parties that the maximum permissible Platform Fee amount was \$165 at any time during the Compensation Period.

Steps to contact Borrowers

- 5.5 From the Commencement Date, Harmony and HITL will (or will arrange for any of their Related Parties to) maintain a register of the contact email address and phone number for Borrowers to contact them regarding the compensation payable under these Undertakings, and update their records to reflect each Borrower's entitlement to compensation.

- 5.6 Harmony and HITL will (or will arrange for any of their Related Parties to):

- (a) within one month of the Commencement Date, put a notice on Harmony's website (with a link to this from a prominent place on its homepage, <www.harmony.co.nz>) notifying the public that:
 - (i) Harmony and HITL have given undertakings to the Commission that they or their Related Parties will pay compensation to Borrowers who entered into a Contract during the Compensation Period; and
 - (ii) while Harmony and HITL or their Related Parties will contact Borrowers who entered into a Contract during the Compensation Period regarding the payment of compensation, customers may also contact Harmony and HITL or their Related Parties to:
 - (A) see whether they are to be paid compensation; and
 - (B) provide a bank account for any compensation to be paid into; and
- (b) when ready to pay compensation to a Borrower, using the most recent contact information they hold, attempt to contact that Borrower by SMS message, email, post and/or telephone call) advising:
 - (i) that Harmony and HITL charged unreasonable fees on the Borrower's loan(s) in breach of s 41 of the CCCFA;
 - (ii) that Harmony and HITL have undertaken to pay, or arranged for any of their Related Parties to pay, Borrowers compensation;
 - (iii) that Harmony and HITL have given the Undertakings to the Commission;

- (iv) the amount of compensation which Harmony and HITL have undertaken will be paid to the Borrower;
 - (v) that the Borrower should nominate a bank account for the payment of compensation to be made to;
 - (vi) the timeframe for when the Borrower can expect to receive compensation, after nominating a bank account number; and
 - (vii) the contact email address and phone number (as provided for in paragraph 5.5 above); and
- (c) provide to the Commission:
- (i) the text of the website notice and the link to that notice required by subparagraph (a) above at least one Day prior to those being published on Harmony's website; and
 - (ii) the pro-forma text of the communications with Borrowers required by subparagraph (b) above at least one Day prior to contacting the first such Borrower.

5.7 To the extent that Harmony and HITL cannot establish contact with a Borrower using the methods set out in paragraph 5.6 above, Harmony and HITL shall (or will arrange for any of their Related Parties to) use further reasonable endeavours to locate and contact each of those Borrowers, by (to the extent that the information required is known):

- (a) telephoning the Borrower and if necessary leaving a voicemail message;
- (b) sending an SMS and an email to the Borrower;
- (c) contacting the Borrower through any contact details obtained from a search using an internet search engine and/or the electoral roll;
- (d) contacting the Borrower through any contact details obtained from an external credit reporting search; and
- (e) taking any other electronic steps that Harmony and/or HITL would usually take to locate and contact a non-paying debtor.

5.8 Harmony and HITL will (or will arrange for their Related Parties to) report to the Commission on their progress in paying the Compensation Amount, and will follow any further reasonable directions given by the Commission in respect of the same, as follows:

- (a) providing an update to the Commission every six months from the Commencement Date, until they have provided the report required by subparagraph (b) below, recording the total amount paid to Borrowers pursuant to these Undertakings;
- (b) following completion of their efforts to contact all Borrowers and pay compensation, and in any event by the Completion Date, by providing the Commission with a report detailing the payments made to Borrowers pursuant to these Undertakings (the **Payment Report**);

- (c) if, at the time they provide the Payment Report, Harmoney and HITL have been unable to pay compensation to all Borrowers, they will (or will arrange for their Related Parties to) provide sufficient detail for the Commission to understand the number of Borrowers who have not been paid compensation and the amounts payable to them (**Unreturned Funds**);
- (d) if the payments made to Borrowers pursuant to the Compensation Undertaking plus the Unreturned Funds total less than \$7,000,000, then the Unreturned Funds shall instead be equal to \$7,000,000 minus the payments made to Borrowers pursuant to the Compensation Undertaking; and
- (e) if there are Unreturned Funds at the time Harmoney and HITL provide the Payment Report:
 - (i) Harmoney and HITL will (or will arrange for their Related Parties to) treat any remaining unpaid amount as unclaimed money under the Unclaimed Money Act 1971 (**UMA**) and will deal with that unclaimed money in accordance with the UMA to the extent it is possible or practical to do so;
 - (ii) to the extent that it is not possible or practical to deal with any remaining unpaid amount in accordance with the UMA, Harmoney and HITL will (or will arrange for their Related Parties to) pay the outstanding amount to a registered charity which:
 - (A) is not associated with Harmoney, HITL, or any of their Related Parties; and
 - (B) offers debt relief, legal advice and/or budgeting services;
 - (iii) Harmoney and HITL will (or will arrange for their Related Parties to) notify the Commission of the charity chosen in accordance with paragraph 5.8(e)(ii) above at least five Days in advance of any payment being made to that charity; and
 - (iv) if the Commission objects to the charity chosen by Harmoney and HITL:
 - (A) the Commission will notify them of that objection within four Days of receiving the notification required by paragraph 5.8(e)(iii) above; and
 - (B) Harmoney and HITL will choose a new charity and the parties will repeat the steps in subparagraphs (iii) and (iv)(A) above as necessary.

6 Effect of the Undertakings

- 6.1 These Undertakings are Court enforceable undertakings in terms of s 113(aa) of the CCCFA and s 74A of the Commerce Act 1986.

7 Commencement of the Undertakings

- 7.1 These Undertakings come into effect when:
- (a) executed by Harmoney, HITL and HCL; and
 - (b) the Commission confirms its acceptance of these Undertakings by notice in writing to Harmoney, HCL and HITL.

8 Duration of the Undertakings

- 8.1 The Fee Undertaking will continue to have effect until:
- (a) the Commission discharges Harmoney, HITL and HCL from that undertaking; or
 - (b) in any event, on the date five years following the Commencement Date.
- 8.2 For the avoidance of doubt, the Commission may discharge Harmoney, HITL and HCL from the Fee Undertaking at its sole and absolute discretion but will act reasonably in exercising that discretion, particularly where Harmoney, HITL and/or HCL or any of their Related Parties provide the Commission with evidence showing, to the Commission's reasonable satisfaction, that their average reasonable costs in connection with the application for credit, processing and considering that application, documenting the consumer credit contract, and advancing the credit, exceed \$165.
- 8.3 The Compensation Undertaking will continue to have effect until it is performed in full or the Commission discharges Harmoney and HITL from that undertaking.

9 Compliance with the Undertakings

- 9.1 If Harmoney, HITL and/or HCL become aware of a breach of these Undertakings, whether advertent or inadvertent, they will notify the Commission within five Days of becoming so aware, giving full particulars of the breach.
- 9.2 For the avoidance of doubt, nothing in paragraph 9.1 above prevents the Commission from seeking any information from Harmoney, HITL and/or HCL at any time for the purpose of monitoring their compliance with these Undertakings.

10 Miscellaneous

- 10.1 No amendment to these Undertakings will be effective unless it is in writing, executed by the Undertaking Parties, and signed as accepted by the Commission.
- 10.2 These Undertakings are properly executed if each Undertaking Party signs the same copy, or separate identical copies of the execution page. Where separate copies are signed by Harmoney, HITL, HCL and/or by the Commission, the signed copy can be the original document, or a faxed or emailed copy.

10.3 Harmony, HITL and HCL acknowledge that:

- (a) The Commission will make these Undertakings (excluding Schedule 1) publicly available including by publishing them on the Commission's enforcement response register on its website.
- (b) The Commission may, from time to time, make public reference to these Undertakings including in news media statements and in the Commission's publications.
- (c) Nothing in these Undertakings is intended to restrict the right of the Commission, or the right of any other person, to take action under the CCCFA or any other statute or law.

Execution

Signed by and on behalf of **Harmony Limited**

[Redacted Signature]

Director/authorised signatory

[Redacted Name]

Name

In the presence of:

[Redacted Signature]

Signature of witness

[Redacted Name]

Name of witness

Solicitor

Occupation

Northcote, Auckland, New Zealand

City/town of residence

26 August 2021

Date

Signed by and on behalf of **Harmoney Investor Trustee Limited**

[Redacted signature]

Director/authorised signatory

[Redacted name]

Name

In the presence of:

[Redacted signature]

Signature of witness

[Redacted name]

Name of witness

Solicitor

Occupation

Northcote, Auckland , New Zealand

City/town of residence

26 August 2021

Date

Signed by and on behalf of **Harmony Corp Limited**

12



Director/authorised signatory



Name

In the presence of:



Signature of witness



Name of witness

Solicitor

Occupation

Northcote, Auckland, New Zealand

City/town of residence

26 August 2021

Date

Acceptance

Signed by and on behalf of the Commerce Commission by:



Chair

Anna Rawlings, Chair

Commerce Commission

Date 26 August 2021

Schedule 1: List of Borrowers

[Drafting note: to be withheld from public version on Commission's website. List to be provided by Harmony and to include: borrower name, loan number, dollar value of the Platform Fee paid, date Platform Fee paid, the amount of compensation to be paid, and whether the loan was funded through Harmony Investor Trustee Limited or Harmony Nominee Limited]