

Dated 26 August 2021

# Settlement Agreement

Commerce Commission

Harmony Limited

Harmony Investor Trustee Limited

---

---

---

## Parties

**Commerce Commission** a statutory body established under s 8 of the Commerce Act 1986 (**Commission**)

**Harmony Limited (Harmony)** and **Harmony Investor Trustee Limited (HITL)**, incorporated companies under the Companies Act 1993

(collectively the **Parties**)

## 1 Introduction

---

- 1.1 The Commission filed proceedings in the Auckland High Court (CIV-2017-404-1970, the **Proceeding**) alleging that the Platform Fees charged by Harmony and HITL were unreasonable, in breach of s 41 of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).
- 1.2 The Parties have agreed to resolve the Proceeding on the basis of this Agreement.
- 1.3 This Agreement will be made public by the Commission (including on the Commission's website).

## 2 Interpretation

---

- 2.1 For the purposes of this Agreement, in addition to those terms defined in the body of this Agreement:

**Agreement** means this Settlement Agreement.

**Borrower** means a person who entered into a Contract with Harmony and HITL and/or any of their Related Parties during the Claim Period or the Compensation Period as the context requires and was charged a Platform Fee in respect of that Contract.

**Claim Period** means the period from 26 August 2014 to 12 February 2020 (inclusive).

**Compensation Period** means the period from 26 August 2014 to the day before the Commencement Date as defined in the Undertakings (inclusive).

**Contract** means a consumer credit contract entered into between Harmony, HITL (and/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'.

**Day** means working day as defined in High Court Rule 1.3.

**Execution Date** means the date on which this Agreement has been fully executed by all Parties to the Agreement.

**Platform Fee** means the establishment fee charged to a Borrower under a Contract.

**Related Parties** of Harmoney and/or HITL include, in respect of either or both entities:

- (a) their past and present directors, officers, employees, and agents; and
- (b) 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.

**Undertakings** means the enforceable undertakings given to the Commission by Harmoney, HITL and Harmoney Corp Limited under s 113(aa) of the CCCFA, as executed by Harmoney, HITL and Harmoney Corp Limited on 26 August 2021.

### **3 Breach of CCCFA**

---

#### **The Proceeding**

- 3.1 During the Claim Period, 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 Platform Fee to Harmoney.
- 3.2 In the Proceeding, the Commission alleges that, in relation to Contracts entered into during the Claim Period, the Platform Fees charged by Harmoney and HITL were unreasonable, in breach of s 41 of the CCCFA.

#### **Admitted breaches and basis of resolution**

- 3.3 Following discussions between the Parties, the Commission has concluded, based on its Enforcement Criteria, that it would be in the public interest to resolve the Proceeding on the basis that Harmoney and HITL will:
- (a) admit the breaches of s 41 of the CCCFA as pleaded in the Second Amended Statement of Claim by filing the notice of admissions set out at **Appendix One**;
  - (b) consent to the High Court making declarations that Harmoney and HITL breached s 41 of the CCCFA, to the extent admitted in the notice of admissions; and
  - (c) give the Undertakings to the Commission, contemporaneously with them executing this Agreement, which record their commitment to:
    - (i) 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, subject to the terms and eligibility criteria set out in the Undertakings; and
    - (ii) not charge an establishment fee greater than \$165 for a period of five years as set out in the Undertakings.

## 4 Terms of settlement

---

4.1 The Parties have agreed to resolve the issues arising out of the Proceeding on the terms set out below.

### Admissions

4.2 Harmony and HITL admit that they charged unreasonable establishment fees to Borrowers on Contracts entered into during the Claim Period. The terms of that admission are set out in full in the notice of admissions (as set out at **Appendix One** to this Agreement and to be filed pursuant to clause 4.4 below).

4.3 The admissions under this Agreement are limited to those admissions expressly made. Nothing in this Agreement constitutes any wider admission of liability by Harmony, HITL, or their Related Parties.

### Court procedure for declaratory order

4.4 Within one Day of the Execution Date, Harmony and HITL will:

- (a) file the notice of admissions as set out in **Appendix One** to this Agreement; and
- (b) return to the Commission's solicitors signed copies of the joint memorandum referred to in clause 4.5 and the notice of discontinuance referred to in clause 4.12.

4.5 Within one Day of Harmony and HITL complying with their obligations under clause 4.4 above, the Commission will file an interlocutory application seeking a declaratory order on admission of facts in the form attached at **Appendix Two**, and a joint memorandum of counsel in the form attached at **Appendix Three**, seeking that the declaratory order is made without a hearing.

4.6 Harmony and HITL will consent to the Court making the declaration sought by the Commission in accordance with clause 4.5 above. Harmony and HITL further agree to take any steps that the Commission may reasonably require of them in the course of and for the purpose of the Court determining the Commission's application (including by filing submissions in support (or adopting a joint submission) should anything further be requested by the Court).

4.7 The Parties agree to provide to each other, before filing, any Court documents that either intends to file (other than the Appendices to this Agreement), and to provide a reasonable opportunity for the recipient to provide comments on the contents of those documents.

4.8 The Commission agrees that it will not seek any relief in the Proceeding other than the declaration sought in accordance with clause 4.5 above.

4.9 If the Court requires a hearing, the Parties will cooperate to arrange for the Commission's application to be heard and determined by the Court as soon as reasonably possible.

4.10 The other provisions of this Agreement remain in force irrespective of the outcome of the Commission's application for a declaratory order under clause 4.5 above.

- 4.11 If the Court declines to grant the Commission's application:
- (a) the Commission may appeal that decision;
  - (b) if the Commission appeals, Harmony and HITL agree to not oppose that appeal, including by not opposing any application for leave to appeal (if leave is required); and
  - (c) the Parties will each bear their own costs on any appeal (subject to any order from the Court directing otherwise) and neither Party will seek any costs order against the other (or, if applicable, against any of Harmony or HITL's Related Parties).
- 4.12 The Commission will file the notice of discontinuance in the form attached at **Appendix Four**:
- (a) if the Court grants the Commission's application, within two Days of receiving the Court's judgment;
  - (b) if the Court declines to grant the Commission's application, then within two Days of (as applicable):
    - (i) the final determination of any appeal(s); or
    - (ii) the expiry of the applicable appeal period.

## **5 Other proceedings**

---

- 5.1 The Commission undertakes not to issue any legal proceedings against Harmony, HITL and/or each of their Related Parties in respect of fees charged during the Compensation Period.
- 5.2 This Agreement is entered into without prejudice to the rights of Borrowers in respect of Harmony and HITL's admitted breaches, which rights the Commission is not compromising on their behalf.
- 5.3 Nothing in this Agreement limits or affects the ability of the Commission to issue proceedings against Harmony and/or HITL in respect of matters not related to the Proceeding, or in respect of conduct, including any fees charged, by Harmony and/or HITL after the date of this Agreement or for breach of this Agreement or a breach of the Undertakings.

## **6 Public statements**

---

- 6.1 Subject to clause 6.2 below, the Parties and/or any of Harmony or HITL's Related Parties may make public statements in relation to the settlement after this Agreement has been executed. The Parties agree that any public statements relating to the Proceeding will be made in good faith and consistent with the spirit and intent of this Agreement and the Undertakings.
- 6.2 Except as required by law (including market listing rules) or as expressly authorised or required by this Agreement or the Undertakings, Harmony and HITL agree that they will not make any public statement in relation to this Agreement or the Proceeding,

until after the Commission has issued any public statement notifying the public of this settlement. For the avoidance of doubt, this clause does not prevent Harmoney, HITL and/or any of their Related Parties advising their funders and auditors of the terms of this Agreement on a confidential basis.

- 6.3 The Parties agree to provide written copies of their draft initial press release to the other party at least two hours in advance of their release to allow the other party the opportunity to comment. A Party will not be obliged to accept the comments of the other party.

## **7 Miscellaneous**

---

- 7.1 The Commission acknowledges that some of the information provided by Harmoney, HITL and/or their Related Parties in the course of the investigation and Proceeding may be confidential and/or commercially sensitive and/or subject to privilege. The Commission agrees that, if it receives a request pursuant to the Official Information Act 1982 that covers or might cover and/or record or reveal all or some of that information it will notify Harmoney, HITL and/or their relevant Related Party (as applicable) of that request and will consult with Harmoney, HITL and/or the Related Party as to whether there are grounds for the requested material to be withheld under Part 1 and section 18 of the Official Information Act 1982.
- 7.2 Each Party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 7.3 The Parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Agreement, and to demonstrate good faith in performing their obligations under this Agreement and in resolving any issues arising under this Agreement.
- 7.4 The Parties by written agreement may vary any of the time periods stipulated in this Agreement, in which instance all other dependent time periods will be extended by the same amount of time.
- 7.5 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 7.6 The Parties agree that the New Zealand courts will have exclusive jurisdiction to determine any proceedings arising out of or in connection with this Agreement and the matters to which it relates, including any proceedings brought by the Commission.
- 7.7 This Agreement, and the Undertakings given contemporaneously with it, constitutes the entire agreement between the Parties in relation to resolving the Proceeding. It supersedes all prior communications, understandings or representations whether oral or written between the Parties.
- 7.8 For the purposes of sections 12 and 13 of the Contracts and Commercial Law Act 2017, all promises contained in this Agreement that confer, or purport to confer, a benefit on any of the Related Parties of Harmoney and/or HITL are intended to create, in respect of the benefit, obligations enforceable by each beneficiary.
- 7.9 No amendment to this Agreement will be effective unless it is in writing and signed by all of the Parties.

7.10 Any failure by any Party to enforce any provision of this Agreement at any time will not operate as a waiver of that provision in respect of that act or omission or any other act or omission.

7.11 Any person signing this Agreement on behalf of one of the Parties warrants that by signing it they have all the necessary authority from that Party to sign this Agreement on their behalf.

7.12 The Parties may enter into this Agreement by signing any number of counterparts, each of which will be treated as an original. All of the counterparts taken together will constitute a single document. A Party may execute this Agreement by one signatory executing one counterpart and another signatory executing a different counterpart. A Party's delivery of a signed PDF counterpart of this Agreement by email will have the same legal effect as that Party's delivery of a signed original counterpart.

7.13 Any notice or communication that is given or served under or in connection with this Agreement must be given in writing in the following manner:

(a) If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission  
Level 12  
55 Shortland Street  
Auckland 1010

Attention: Louise Unger, General Manager, Credit, Commerce  
Commission

Email: Louise.Unger@comcom.govt.nz

(b) If addressed to Harmoney and/or HITL, by hand delivery or email to the following address:

Harmoney Limited/Harmoney Investor Trustee Limited

Harmoney  
Ground Floor, 79 Carlton Gore Road  
Newmarket  
Auckland 1023

Attention: [REDACTED]

Email: [REDACTED]

**Execution**

**Signed by and on behalf of the Commerce Commission**



Chair

Anna Rawlings, Chair

Commerce Commission

**Date of execution by Commerce Commission:**

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



Director/authorised signatory



Harmony Limited

**Date of execution by Harmony Limited:**

26 August 2021

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



Director/authorised signatory



Harmony Investor Trustee Limited

**Date of execution by Harmony Investor Trustee Limited**

26 August 2021

## Appendix One

*[to insert DLA intituling]*

**To:** the Registrar of the High Court at Auckland

**And to:** the plaintiff

### **This document notifies you that -**

- 1 The first and second defendants admit the following paragraphs of the plaintiff's second amended statement of claim dated 23 December 2020:
  - (a) Paragraphs 1-76;
  - (b) **First cause of action:** paragraphs 77, 78(a), 79, 84, 85, 86;
  - (c) **Second cause of action:** paragraphs 87, 88(a), 89(a) 91, 92 and 93;
  - (d) **Third cause of action:** paragraphs 94, 95(a), 96(a), 98, 99 and 100;
  - (e) **Fourth cause of action:** paragraphs 101, 102(a), 103(a), 105, 106 and 107;
  - (f) **Fifth cause of action:** paragraphs 108, 109(a), 110(a), 112, 113 and 114;
  - (g) **Sixth cause of action:** paragraphs 115, 116(a), 117(a), 119, 120 and 121;
  - (h) **Seventh cause of action:** paragraphs 122, 123(a), 124(a), 126, 127 and 128;
  - (i) **Eighth cause of action:** paragraphs 129, 130(a), 131(a), 133, 134 and 135;
  - (j) **Ninth cause of action:** paragraphs 136, 137(a), 138(a), 140, 141 and 142; and
  - (k) **Tenth cause of action:** paragraphs 143, 144(a), 145(a), 147, 148 and 149.

**Dated this** [to insert]

.....  
I Thain | M Bell | I Scorgie

## Appendix Two

# Interlocutory application for declaratory order

**To:** The Registrar of the High Court at Auckland

**And To:** The Defendants

**This document notifies you that:**

- 1 The applicant, the Commission, applies to the court for a declaratory order as sought in the First to Tenth causes of action in the Second Amended Statement of Claim (**Claim**), in the following terms:
  - (a) A declaration that Harmoney Limited and Harmoney Investor Trustee Limited breached s 41 of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) by charging unreasonable establishment fees on consumer credit contracts entered into by them between 26 August 2014 and 12 February 2020.
- 2 The grounds on which the order is sought are as follows:
  - (a) The defendants have filed a notice of admissions admitting facts pleaded in the Claim, including the breaches of s 41 of the CCCFA;
  - (b) Declaratory relief is available for breaches of the CCCFA, even when there has been a settlement between the parties;
  - (c) It is in the interests of justice to grant the declaratory order sought, which would give effect to the parties' settlement;
  - (d) There is a strong public interest in the making of the declaratory order in this case;
  - (e) Upon the grounds set out in the affidavit of James Richard McIvor affirmed on [date: to insert] and filed with this application; and
  - (f) The defendants consent to the application for a declaratory order, as confirmed in the joint memorandum of counsel filed with this application.
- 3 This application is made in reliance on:
  - (a) Rule 15.15 High Court Rules; and
  - (b) *Commerce Commission v ANZ Bank New Zealand Limited* [2015] NZHC 1168 and *Commerce Commission v Ferratum New Zealand Limited* [2020] NZHC 1607.

Date:

.....  
J Every-Palmer QC | J Cairney | A Luck  
Counsel for the Plaintiff

## Appendix Three

# Joint memorandum of counsel regarding interlocutory application for declaratory order

### May it please the Court:

- 1 The Commerce Commission has filed an interlocutory application for a declaratory order on admission of facts, under r 15.15 High Court Rules. That application relies on the admissions made by Harmony and HITL in the notice of admissions dated [date: to insert].
- 2 The defendants consent to the declaratory order sought being made. In light of that fact, under r 7.37 High Court Rules, the Court may grant the order sought with or without a hearing.
- 3 The parties respectfully seek that the order sought be made without a hearing. However, in the event the Court considers it would be assisted by written and oral submissions, then the parties agree that a one hour hearing would be sufficient, with timetabling directions for the exchange of synopses of submissions. The parties respectfully request that any hearing be held without delay.
- 4 Accordingly, the parties seek:
  - (a) In the event the Court is prepared to make the order sought on the papers:
    - (i) the declaratory order sought for the first to tenth causes of action in the Second Amended Statement of Claim; and
    - (ii) an order that costs are to lie where they fall.
  - (b) Or, in the event the Court wishes to convene a hearing to consider the application, the parties seek the following orders:
    - (i) the Registry to consult with the parties to set a one hour hearing on the first available date;
    - (ii) Commission to file its synopsis of submissions five working days before the hearing;
    - (iii) the defendants to file any synopsis of submissions three working days before the hearing.
- 5 In the event the Court makes the declaration sought, the Commission will file a notice of discontinuance in respect of the balance of the relief sought in the Second Amended Statement of Claim.

Date:

.....  
J Every-Palmer QC | J Cairney | A Luck  
Counsel for the Plaintiff

.....  
I Thain | M Bell | I Scorgie  
Counsel for the Defendants

## Appendix Four

### Notice of discontinuance

**To:** the Registrar of the High Court at Auckland

**And to:** the Defendants

**This document notifies you that:**

- 1 The plaintiff, the Commerce Commission, discontinues this proceeding against the defendants, Harmony Limited and Harmony Investor Trustee Limited.
- 2 There are no issues as to costs.

Date:

.....  
J Every-Palmer QC | J Cairney | A Luck  
Counsel for the Plaintiff

.....  
I Thain | M Bell | I Scorgie  
Counsel for the Plaintiff