

26 March 2021

Austin Motor Company Limited
275 Colombo Street
Sydenham
Christchurch 8023

By email only: [REDACTED]

Attention: [REDACTED] director

Dear [REDACTED]

Credit Contracts and Consumer Finance Act 2003: Warning

1. The Commerce Commission (the **Commission**) has been investigating Austin Motor Company Limited (**AMC**) under the Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**). We have now completed our investigation and are writing to inform you of the investigation.
2. The Commission considers that in October 2017, AMC did not make reasonable inquiries before entering into a consumer credit contract with a borrower so as to be satisfied that it is likely that the borrower would make payments under the agreement without suffering substantial hardship (as required by s 9C(3)(a)(ii) of the CCCF Act).
3. In particular, AMC failed to make reasonable inquiries into the borrower's expenses. In addition, in assessing the information provided by the borrower, AMC failed to appropriately take into account the fact that the borrower was defaulting on repayments on an existing car loan the borrower had obtained from AMC one month prior.
4. As a consequence, AMC is likely to have breached section 9C(1) of the CCCF Act (by likely failing to comply with the lender responsibility in section 9C(3)(a)(ii)).

5. After weighing up the factors set out in our Enforcement Response Guidelines¹, we have decided to conclude this investigation by issuing this warning. A warning is not a finding of non-compliance; only the courts can decide whether a breach of the law has occurred, and we have determined that at this time we will not be bringing legal action.²

The investigation

6. The Commission opened an investigation into AMC following receipt of a complaint from a community law centre alleging that AMC had not made reasonable inquiries into [REDACTED] (**the borrower**) ability to repay the loan at the time of entering into the agreement in October 2017.

Loan origination process

7. As part of the Commission's investigation, it was established that:
 - 7.1 At the relevant time, AMC was a Motor Trade Finance (**MTF**) originator which meant that it accessed and used an MTF facility, and provided finance to customers purchasing cars from AMC;
 - 7.2 AMC collected information from borrowers, in accordance with a process set out by MTF, including details of a customer's income and outgoings. AMC completed a standard-form MTF document referred to as an 'application for finance' which was signed by the customer, containing details of the amount of credit sought and the customer's financial circumstances;
 - 7.3 The application for credit was then progressed through a number of automated and manual processes, and after obtaining further information from MTF, AMC would make a lending decision as to whether to agree to provide finance to a borrower; and
 - 7.4 AMC would then enter a consumer credit contract with the borrower, the terms of which provided for AMC's rights under the contract to be immediately transferred to MTF.

Borrower's loan

8. The relevant facts regarding the borrower are as follows:
 - 8.1 The borrower applied for her first loan of \$9,900 on 27 September 2017 to purchase a Mazda Atenza, and the funds were advanced to her on the same day (**the first loan**). The loan totalled \$11,689.31 including the loan principal, fees charged at the outset of the loan, and insurance. She was required to make her first payment of \$157.98 on 4 October 2017 and payments were

¹ The Commerce Commission Enforcement Response Guidelines are available at https://comcom.govt.nz/data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf.

² Commission's published *Enforcement Response Guidelines* at [41].

then due to be made on a fortnightly basis after that. The borrower defaulted on the first payment on 4 October 2017, and instead made the payment two days later, on 6 October 2017. The borrower also defaulted on her second payment of \$157.98 due on 18 October 2017.

- 8.2 On 26 October 2017, having not made any further payments on the first loan, the borrower went to AMC to purchase a Ford Falcon. She traded in a Honda Stream and applied for a loan of \$7,990 to finance the car (**the second loan**). The loan totalled \$9,879.35 including the loan principal, fees charged at the outset of the loan, and insurance.
- 8.3 The borrower was retired and received an income comprising of New Zealand Superannuation and a Work and Income New Zealand (**WINZ**) benefit for her two grandchildren in her care.
- 8.4 AMC completed an application for finance form for the second loan which was signed by the borrower:
 - 8.4.1 The application included monthly expenses for rent, utilities (given as power, gas, water), vehicle costs, insurance, food/groceries, phone/mobile/internet and the loan payments for the first loan and proposed payments for the second loan; and
 - 8.4.2 The application included a "\$0" allowance for clothing, medical expenses, and 'other personal' expenses and no amount was recorded for loan payments under any other existing lending (other than for the first or second loans).
- 8.5 Bank statements obtained by AMC disclosed expenses for which no allowance was made in the application, and in respect of which AMC appears not to have made further inquiry of the borrower, including:
 - 8.5.1 loan payments to a finance company totally \$220 per month;
 - 8.5.2 payments to a pharmacy totally \$46.16 per month;
 - 8.5.3 payments to a charity totalling \$55.20 per month; and
 - 8.5.4 payments to a budgeting service.
- 8.6 Bank statements also show regular insurance payments and payments for phone/internet which exceed the monthly amounts recorded in the loan application.
- 8.7 AMC advises that it did not complete the box in the application form specifying the number of dependents of the borrower (in this case two) but that it was aware of them.
- 8.8 AMC advises that the borrower told them that she received boarder income of \$400 per week. It is not clear the extent to which AMC relied on this

income when making its affordability assessment. However, given that there was no evidence of this in bank statements, in our view a responsible lender would not be able to rely on this without further inquiry/evidence as to its existence.

- 8.9 AMC said that when the borrower advised that she had defaulted on the first loan, when applying for the second loan, they did not check how many times she had defaulted, despite being able to do this by logging into the MTF origination system online and checking the borrower's account. AMC said that they relied on what the borrower told them, which was that she was having some trouble with the bank and was sorting it out.
9. In the Commission's view, AMC did not make reasonable inquiries, before entering into the loan, so as to be satisfied that it was likely that the borrower would be able to make payments under the agreement without suffering substantial hardship. We have formed this view for the following reasons:
- 9.1 The application form did not accurately record the borrowers' actual expenses as evidenced by a copy of her bank statements. An alternative assessment of the borrower's expenses based on bank statements is set out at **Attachment A**;
- 9.2 Expenses in the application form were understated in circumstances in which AMC held evidence indicating actual expenses incurred by the borrower, leading to AMC overstating the borrower's surplus income;
- 9.3 AMC also did not take into account the fact that the borrower had very recently defaulted on payments she was required to make on the first loan from AMC. She had defaulted on two occasions, one of which was just eight days prior to applying for the second loan; and
- 9.4 Despite knowing that the borrower had very recently defaulted on payments for the first loan (which included one of the defaults being from the week prior), AMC approved the application for the second loan.

The law

10. Lenders entering into consumer credit contracts on or after 6 June 2015 are required to comply with the Lender Responsibility Principles set out in section 9C of the CCCF Act.
11. Relevant to this investigation are:

Section 9C(1)

Every lender must comply with the lender responsibility principles

Section 9C(2)(a)(ii)

"The lender responsibility principles are that every lender must, at all times –

- (a) exercise the care, diligence and skill of a responsible lender –...
 - (i) before entering into an agreement to provide credit or finance ...”
- (b) comply with all the lender responsibilities specified in subsection (3), (4) and (5).

Section 9C(3)(a)(ii)

The lender responsibilities are that a lender must, in relation to an agreement with a borrower, -

- (a) make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that
 - (ii) the borrower will make the payments under the agreement without suffering substantial hardship.

12. The Responsible Lending Code (the **Code**) provides guidance as to how lenders can comply with the responsible lending principles. Paragraphs 5.5 to 5.6 of the Code state:

5.5 To meet this lender responsibility, a lender should make reasonable inquiries into a borrower’s income, expenses and likelihood of repayment.

5.6 A lender should be satisfied that the scope and methods of inquiry are reasonable and will provide a sufficient basis for the lender to be satisfied that it is likely that the borrower will make payments under the agreement without suffering substantial hardship.

13. Paragraphs 5.7 – 5.9 of the Code outline the scope of which a lender’s inquiries into a borrower’s income, expenses and likelihood of repayment might include and paragraph 5.11 of the Code outlines the method of inquiries which may be used by a lender to obtain information in making reasonable inquiries. This includes obtaining information directly from the borrower.

The Commission’s view

14. In our view, AMC has likely breached of section 9C(1) of the CCCF Act by failing to comply with the responsible lending principles set out in section 9C(3)(a)(ii).
15. At the time that the borrower applied for the second loan, AMC knew that the borrower had defaulted on payments on the previous loan she had recently obtained but did not make further inquiries into these defaults.
16. AMC was provided with bank statements during the application process, however the Commission is of the view that these were not used appropriately as part of the reasonable inquiries AMC was expected to make under the responsible lending principles. Instead, AMC appears to have solely relied on what the borrower told them and incorrectly recorded the borrower’s expenses. The Commission is of the view that AMC did not make reasonable inquiries so as to be satisfied that the

borrower could make payments under the agreement without suffering substantial hardship.

Next steps

17. We recommend that AMC seeks legal advice and takes all steps necessary to ensure that the company complies with its obligations as a responsible lender.
18. While we will not be taking any further action against AMC at this time, we will take this warning into account if this conduct continues or if AMC engages in similar conduct in the future. We may also draw this warning to the attention of a court in subsequent proceedings brought by the Commission against AMC.
19. This warning letter is public information and will be published on the case register on our website. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

20. The Commission is responsible for enforcing and promoting compliance with a number of laws in New Zealand, including the CCCF Act. The CCCF Act protects the interests of consumers in connection with credit contracts and other consumer finance.

Penalties for breaching the CCCF Act

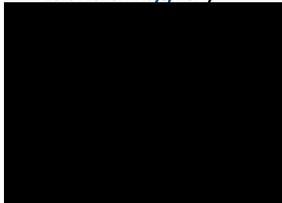
21. Only the courts can decide if there has actually been a breach of the CCCF Act. A lender which breaches section 9C of the CCCF Act may:
 - 21.1 Have a declaration concerning that breach made against it by the court;
 - 21.2 Be subject to injunctive relief requiring the lender to comply with the lender responsibility provisions;
 - 21.3 Be ordered to pay the losses or damages of a borrower;
 - 21.4 Be ordered to pay civil pecuniary penalties of up to \$200,000 for an individual or \$600,000 for a company;
 - 21.5 Be ordered to pay statutory damages;
 - 21.6 Be ordered to pay exemplary damages to a borrower; and
 - 21.7 Have a credit contract re-opened.
22. Where a lender fails more than once to comply with any of the provisions of the CCCF Act, the court may make an order prohibiting or restricting any person (including a director or a principal officer of a lender) from:
 - 22.1 Providing credit under a consumer credit contract;

- 22.2 Acting as a director or taking part directly or indirectly in the management or control of any company or business that provides credit under a consumer credit contract; or
- 22.3 Being in the employ or acting as an agent of a credit in any capacity that allows the person to take part in the negotiation of a consumer credit contract involving the provision of credit by the creditor.
23. AMC should be aware that the decisions outlined in this letter do not prevent any other person or entity from taking private action through the courts.

Further information

24. We have published a series of fact sheets and other resources to help businesses comply with the CCCF Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the CCCF Act.
25. You can also view the CCCF Act and other legislation at www.legislation.co.nz.
26. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions in relation to this letter. We are also happy to discuss this letter with you if that would assist.

Yours sincerely

A large black rectangular redaction box covering the signature of the sender.

Manager, Auckland
Competition and Consumer Branch