

COMMERCE COMMISSION

AND

AOTEA FINANCE LIMITED,

AOTEA FINANCE (MANUKAU) LIMITED,

AOTEA FINANCE (PANMURE) LIMITED,

AOTEA FINANCE (WEST AUCKLAND) LIMITED

SETTLEMENT AGREEMENT

DATED *15th* *July* JUNE 2019

This Agreement is made on the 15th ^{July} day of ~~June~~ 2019

Parties

1. The Commerce Commission is a statutory body established under section 8 of the Commerce Act 1986 (**Commission**).
2. Aotea Finance Limited, Aotea Finance (Manukau) Limited, Aotea Finance (Panmure) Limited and Aotea Finance (West Auckland) Limited are registered limited liability companies each having their registered offices at Adsett Braddock Chartered Accountants, Level 5, 110 Symonds Street, Auckland (together, the **Lender**).

Interpretation

3. **Affected Loan** means a consumer credit contract entered into in the Relevant Period where one of the companies comprising the Lender:
 - 3.1 is the creditor; and
 - 3.2 provided disclosure to Current Borrowers and Former Borrowers using the Disclosure Statement.
4. **Agreed Amount** means \$2,800,000 being the amount which the Lender has agreed to refund to Current Borrowers and Former Borrowers in accordance with this Agreement.
5. **Agreement** means this Settlement Agreement.
6. **Best Endeavours** includes using information currently known to the Lender, as well as searches of Facebook and/or the electoral roll, and sending a SMS message to the Borrower's last known cellphone number (if held).
7. **CCCFA** means the Credit Contracts and Consumer Finance Act 2003.
8. **Costs of Borrowing** means any or all of the following costs charged by the Lender on Affected Loans during the Relevant Period:
 - 8.1 credit fees;
 - 8.2 default fees; and
 - 8.3 interest charges.
9. **Current Borrower** means a borrower under an Affected Loan who took out a loan with the Lender during the Relevant Period and who has, as at the date of this Agreement, an open loan with the Lender. Current borrowers under Affected Loans who have already received a credit or refund from the Lender, as referred to at clause 26.4, are excluded from this definition.

10. **Disclosure Statement** means the consumer credit contract comprised of the 'Disclosure Statement' document and 'General Terms' document used by the Lender during the **Relevant Period**.
11. **Former Borrower** means a borrower under an Affected Loan who took out a loan with the Lender during the Relevant Period but who does not have, as at the date of this Agreement, an open loan with the Lender. Former borrowers under Affected Loans who have already received a credit or refund from the Lender, as referred to at clause 26.4, are excluded from this definition.
12. **Net Agreed Amount** means the Agreed Amount less \$106,983.53 already refunded, being \$2,693,016.47.
13. **Refund Amount** means the amount calculated in accordance with the formula at clause 29.
14. **Relevant Period** means the period between 6 June 2015 and 25 February 2016 inclusive.

Background

15. The companies comprising the Lender are separately registered, but are operated as four branches with a single General Manager. They have a common director and common shareholders.
16. The companies comprising the Lender are all creditors for the purposes of the Credit Contracts and Consumer Finance Act 2003 (CCCFA).
17. The companies comprising the Lender provide personal loans to consumers in their respective local geographic areas under consumer credit contracts. The companies are not payday lenders, nor do they run an online platform.
18. Prior to June 2015, the Lender sought comprehensive legal advice on compliance with the CCCFA including changes to the CCCFA which came into effect from June 2015. The Lender followed that advice including by adopting the form of contract and form of disclosure recommended by its legal advisers. The Disclosure Statement used by the Lender was in the form recommended by its legal advisers.
19. In August 2015, the Commission requested copies of contracts entered into by the Lender and these were voluntarily provided by the Lender to the Commission the same month.
20. In February 2016, the Commission decided to investigate the Lender after reviewing the Disclosure Statement because it appeared not to comply with the disclosure obligations set out in the CCCFA. No complaint about the Lender's disclosure had been received by the Commission prior to its decision to investigate.
21. The Lender has co-operated with the Commission's investigation.

22. During its investigation, the Commission considered information provided by the Lender and reviewed sample copies of contracts for the Lender's consumer loans.
23. The information gathered established to the Commission's satisfaction that:
- 23.1 During the Relevant Period, the Lender entered into 14,442 consumer credit contracts (**Affected Loans**).
- 23.2 The disclosure provided to borrowers under the Affected Loans, set out in the Disclosure Statement, did not include all of the CCCFA's Schedule 1 information applicable to the contracts.
- 23.3 The Lender has likely failed to comply with section 17 of the CCCFA by failing to correctly disclose to borrowers the following Schedule 1 information in its Disclosure Statement:
- 23.3.1 an explanation of the extent to which the borrower would remain indebted to the Lender if there was a shortfall in the proceeds of sale of any property subject to a security interest, and the consequences if the borrower was to give any other person a security interest over property already subject to a security interest by the Lender (as required by Schedule 1(q)(iii) and (iv) of the CCCFA);
- 23.3.2 a statement of the borrower's right to apply for changes on the grounds of unforeseen hardship (as required by Schedule 1(sa) of the CCCFA); and
- 23.3.3 the Lender's registration number on the Financial Service Providers Register (as required by Schedule 1(ub) of the CCCFA).
- 23.4 The Commission says that the total Costs of Borrowing charged by the Lender under the Affected Loans was \$8,658,481, and the Lender says it was approximately \$7 million (the parties disagree as to the types of fees that should be included in the Costs of Borrowing).
24. Under section 99(1A) of the CCCFA, a borrower is not liable for the Costs of Borrowing in relation to any period during which the creditor has failed to comply with section 17 or 22. Section 99(1A) is currently under review by the Government.
25. Under sections 88 and 89 of the CCCFA, the Lender is also liable to pay statutory damages to affected borrowers. The Commission estimates that the Lender's liability for statutory damages calculated under section 89 is between \$2,890,000 and \$3,600,000. The Lender can make an application to the Court under section 91 for the amount of the statutory damages to be reduced or extinguished. The Lender contends that a Court would likely determine that no statutory damages would be payable as it asserts there was a lack of prejudice to affected borrowers and that it relied on legal advice.

26. Once it was made aware of the Commission's views, the Lender:
 - 26.1 Acknowledged that the Disclosure Statement, which was recommended to it by its lawyers, failed to properly disclose all of the information required by section 17 of the CCCFA.
 - 26.2 Corrected its standard form disclosure statement. All consumer credit contracts entered into by the Lender from 25 February 2016 used the updated disclosure statement.
 - 26.3 Provided corrective disclosure on 18 March 2016, and amended corrective disclosure on 22 and 26 April, to affected borrowers with outstanding loan balances at those dates. Because amendment was required, the latter of those dates is the effective date of correction.
 - 26.4 Credited to 103 borrowers under 204 Affected Loans the sum of \$106,983.53.
27. This Agreement sets out the terms on which the parties have agreed to resolve the Commission's investigation.

Action to be taken by the Lender

Overview of action to be taken

28. To resolve the Commission's claim that the Lender has breached section 17 of the CCCFA, the Lender will in accordance with this agreement:
 - 28.1 credit the Refund Amount to each Current Borrower;
 - 28.2 pay the Refund Amount to each Former Borrower;
 - 28.3 write to Current Borrowers and Former Borrowers advising them about the effect of this settlement on them;
 - 28.4 publish the fact of this settlement on its website in a form agreed with the Commission; and
 - 28.5 provide the Commission with an interim and a final report certifying that it has credited the Refund Amounts to each Current Borrower and paid the Refund Amounts to each Former Borrower.

Calculating the Refund Amounts

29. The Lender will calculate the Refund Amount for each Current or Former Borrower by dividing the Net Agreed Amount by the number of Affected Loans not already refunded (being 14,442 less 204), and then multiplying that amount by the number of Affected Loans entered into by the Current or Former Borrower. Set out as a formula, the Refund Amount is calculated as follows:

$$\left(\frac{\text{Net Agreed Amount}^1}{\text{Number of Affected Loans not already refunded}^2} \right) \times \text{Number of Affected Loans entered into by the Current or Former Borrower} = \text{Refund Amount for that Current or Former Borrower}$$

¹ The Net Agreed Amount is \$2,800,000 less \$106,983.53.

² The Number of Affected Loans not already refunded is 14,442 less 204.

Crediting and paying the Refund Amounts

30. The Lender must:

30.1 credit each Current Borrower the Refund Amount to their current loan account; and

30.2 pay each Former Borrower the Refund Amount

as set out at clauses 31 to 39 below.

Current Borrowers

31. The Lender must credit the Refund Amount to each Current Borrower's loan balance(s) within 3 months of the date of this Agreement.
32. If the Refund Amount owing to a Current Borrower is more than the total loan balance(s) owing by the Current Borrower to the Lender, the Lender must:
- 32.1 credit that part of the Refund Amount to the Current Borrower's loan balance(s) which will reduce the loan account(s) to a zero balance; and
- 32.2 pay the remaining Refund Amount to the Current Borrower by direct credit to their nominated bank account, by cheque, or as directed by that Current Borrower within 3 weeks of the date of receiving payment instructions from the Current Borrower.

Former Borrowers

33. The Lender must pay the Refund Amount to each Former Borrower by direct credit to their nominated bank account, by cheque, or as directed by that Former Borrower.

34. If the Lender does not hold current contact details for a Former Borrower, the Lender must:
- 34.1 use its Best Endeavours for a period of 3 months to contact the Former Borrower and provide them with the information set out in 35;
 - 34.2 pay the Refund Amount to the Former Borrower in accordance with any instructions received from the Former Borrower within 3 weeks of the date of receiving payment instructions from the Former Borrower; or
 - 34.3 comply with clause 39 of this Agreement.

Contacting Current Borrowers and Former Borrowers

35. The Lender must within three weeks from the date of this Agreement send a posted letter or email to each Current Borrower and Former Borrower at their last known address or email address (where held) advising:
- 35.1 that the Lender failed to properly disclose all of the information required by section 17 of the CCCFA during the Relevant Period to the Current Borrower or Former Borrower;
 - 35.2 that the Lender has entered into an Agreement with the Commission;
 - 35.3 that the Agreement does not limit any liability the Lender may have to the Current Borrower or Former Borrower;
 - 35.4 the amount of the Refund Amount owed to the Current Borrower or Former Borrower;
 - 35.5 in relation to payment of the Refund Amount, either:
 - 35.5.1 that the Current Borrower's loan balance(s) will be credited in accordance with clauses 30 to 32 and the new loan balance; or
 - 35.5.2 seeking payment instructions from the Current Borrower or Former Borrower where payment is required to be made under clause 32 or 33.
36. The form of the letters and emails to be sent to Current Borrowers and Former Borrowers shall be in the form agreed with the Commission prior to entering into this Agreement. The Lender must amend the template letters and email on request by the Commission if the Commission reasonably considers amendment is required to give effect to this Agreement.

Locating Former Borrowers

37. The Lender must for 6 months from the date of this Agreement prominently publish a notice concerning the settlement in the form agreed with the Commission on the main website currently operated by the Lender being www.aoteafinance.co.nz or its replacement.

38. The Lender must update the details on its website within one week of any request by the Commission to do so if the Commission reasonably considers amendment is required.
39. If, after using its Best Endeavours for a period of 3 months from the date of this Agreement as required by clause 34.1, the Lender is unable to locate a Former Borrower who is eligible for a payment pursuant to this Agreement or does not receive payment instructions from such a Former Borrower, the Lender undertakes:
- 39.1 to record a credit for the amount of the Refund Amount against the account of the Former Borrower; and
- 39.2 if after 3 years from 1 July 2019, the Former Borrower has not contacted the Lender to arrange payment of the Refund Amount, the Lender will reverse the credit made under clause [39.1] and will pay the Refund Amount which would otherwise have been owing to the Former Borrower within seven days to Consumer Foundation (registered charity number CC35315), or in the event that entity no longer exists to its successor organisation if one exists or a similar entity to be agreed between the Lender and the Commission. Any agreement as to the recipient organisation can be varied in accordance with clause 51 below.

Interim report

40. The Lender undertakes, at its own expense, to provide to the Commission two months from the date of this Agreement an interim report recording the progress it has made with calculating the Refund Amounts, and locating, crediting, and refunding Current Borrowers and Former Borrowers.
41. The interim report will be in the form of:
- 41.1 a spreadsheet for Current Borrowers which identifies for each loan number each Current Borrower by name, whether a credit has been made and the date of the credit, and whether a repayment has been made (where an account is in credit) and the date and amount of the payment;
- 41.2 a spreadsheet for Former Borrowers which identifies for each loan number each Former Borrower by name, and whether a payment has been made and the date of the payment.
42. The Commission requires that the interim report be provided in an Excel format.

Final report

43. The Lender undertakes, at its own expense, to provide a final report to the Commission nine months from the date of this Agreement.
44. The final report must be prepared by an independent accountant approved by the Commission who has reviewed the steps taken by the Lender. The reviewer must

confirm that the Lender has undertaken all steps it has agreed to take in this Agreement.

45. The final report must include:
 - 45.1 The reviewer's opinion on whether the Lender has undertaken the steps it has agreed to take in this Agreement.
 - 45.2 Details of any steps that have not yet been completed, including when they are likely to be completed by the Lender.
 - 45.3 The author's opinion (having reviewed a reasonable random sample of accounts of Former Borrowers) as to whether the Lender has complied with its obligation to take Best Endeavours to contact Former Borrowers who have been unable to be contacted at the time of the final report.
 - 45.4 A summary of the total value of credits and payments made.
46. The final report must also attach:
 - 46.1 a spreadsheet for Current Borrowers which identifies for each loan number each Current Borrower by name and loan number, whether a credit has been made and the date of the credit, and whether a repayment has been made (where an account is in credit) and the date of the payment;
 - 46.2 a spreadsheet for Former Borrowers which identifies for each loan number each Former Borrower by name and loan number, and whether a payment has been made and the date and amount of the payment.
47. The Commission requires that the spreadsheets attached to the final report be provided in an Excel format.

No further action by Commission

48. The Commission will close its investigation into the Lender upon the execution of this Agreement.
49. Provided that the Lender completes all of its obligations set out in this Agreement, the Commission will not issue, encourage or assist (except as required by law) any civil or criminal proceeding against the Lender and/or its director(s) in relation to the conduct to which this Agreement applies other than any proceedings that may be brought as a consequence of the Lender's failure to comply with this Agreement.

Effect and implementation of this Agreement

50. The Lender and the Commission will each take such steps as are necessary or desirable to give full effect to the terms of this Agreement.
51. If necessary to give effect to the Agreement, the terms of this Agreement may be amended by the written agreement of the parties.

52. Nothing in this Agreement will limit or affect the ability of:
- 52.1 the Commission to issue proceedings against the Lender in respect of matters related to this investigation in the event that the Lender does not complete all of its obligations set out in this Agreement;
 - 52.2 the Commission to issue proceedings against the Lender in respect of matters not related to this investigation, or in respect of conduct engaged in by the Lender after the date of this Agreement or for breach of this Agreement;
 - 52.3 any person who has not consented to be bound by the terms of this Agreement from pursuing any rights available to him, her or it under the CCCFA or under any other law.

Miscellaneous

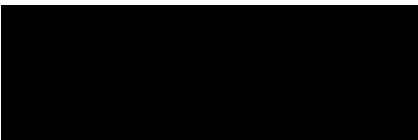
53. This Agreement will be governed and interpreted in accordance with the laws of New Zealand.
54. The parties agree that:
- 54.1 neither the Agreement nor the fact that the Lender has entered into the Agreement are confidential;
 - 54.2 the Agreement may be published on the Commission's website after it has been signed;
 - 54.3 the Commission may issue a media release about the Agreement;
 - 54.4 either the Lender or the Commission may make public statements (either separately or jointly) in relation to the Agreement after it has been signed; and
 - 54.5 any public statement must be consistent with the matters set out in the Agreement.
55. The Lender agrees that it will not make any public comment in relation to the Agreement until after the Commission has issued any media release notifying the public of it. This media release will be published on the same day the Commission posts its notice of this Agreement on the Commission's website.
56. This Agreement is not intended to be enforceable by any registered charity that may benefit from clause 39.2 and the parties to this Agreement may agree to vary the recipient of the Refund Amount in accordance with section 15(b) of the Contract and Commercial Law Act 2017.

57. 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:

57.1 If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
44 The Terrace, Wellington

Attention:



Email:

57.2 If addressed to the Lender, by hand delivery or email to the following address:

Aotea Finance Limited
27 East Tamaki Road, Hunters Corner
Papatoetoe, Auckland

Attention: Terry Cooke

Email:



EXECUTED as an Agreement on the date first written above:

by the **Commerce Commission**

by **Aotea Finance Limited**


Signature of authorised representative

Signature of director

Name of authorised representative


Name of director

by Aotea Finance (Manukau) Limited


Signature of director


Terry Cooke
Name of director

by Aotea Finance (Panmure)
Limited


Signature of director

Terry Cooke
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