

Mainland Finance Limited

Enforceable 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 Mainland Finance Limited (**Mainland**), a company having its registered office at Alliot NZ, Suite 1 Floor 2, 142 Broadway, Newmarket, Auckland, 1023.

2 Background

- 2.1 Mainland is a finance company and is a creditor for the purposes of the CCCFA.
- 2.2 Mainland offers loans to borrowers for the purchase of used vehicles within New Zealand under consumer credit contracts.
- 2.3 Between 1 April 2015 and 30 March 2019, Mainland's consumer credit contracts provided for:
- 2.3.1 Establishment Fees of between \$495 and \$595 per new loan, and between \$95 and \$295 per top-up loan;
 - 2.3.2 An Administration Fee of \$5 per week; and
 - 2.3.3 11 different types of Default Fee (excluding those that were passed on at cost to third parties).
- 2.4 The Commission has investigated whether Mainland has breached the CCCFA by providing for unreasonable credit and/or default fees in its consumer credit contracts, in breach of section 41 of the CCCFA, when it charged the fees described in paragraphs 2.3.1 to 2.3.3 above.
- 2.5 Having concluded its investigation, the Commission considers that, between 1 April 2015 and 30 March 2019:
- 2.5.1 Mainland's Establishment Fees exceeded Mainland's average reasonable costs in connection with the application for credit, processing and considering that application, documenting the consumer credit contract, and advancing the credit.
 - 2.5.2 Mainland's Administration Fee exceeded the average reasonable costs that Mainland incurred in relation to activities associated with loan administration, and

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

that Mainland's Administration Fee was not set in accordance with reasonable standards of commercial practice.

- 2.5.3 Mainland's Default Fees exceeded the combined total of the average costs incurred by Mainland on default by a borrower and a reasonable estimate of the loss incurred by Mainland in relation to a default by a borrower, and that Mainland's Default Fees were not set in accordance with reasonable standards of commercial practice.
- 2.5.4 Mainland's consumer credit contracts therefore likely provided for unreasonable credit and default fees in breach of section 41 of the CCCFA.
- 2.6 Mainland admits that between 1 April 2015 and 30 March 2019, in breach of section 41 of the CCCFA, Mainland's consumer credit contracts provided for Establishment Fees, Administration Fees and Default Fees that were unreasonable, specifically in that:
 - 2.6.1 Mainland's Establishment Fees exceeded the average reasonable costs that Mainland incurred in connection with an application for credit, processing and considering that application, documenting the consumer credit contract, and advancing the subsequent credit.
 - 2.6.2 Mainland's Administration Fee exceeded the average reasonable costs that Mainland incurred in relation to activities associated with loan administration, and that Mainland's Administration Fee was not set in accordance with reasonable standards of commercial practice.
 - 2.6.3 Mainland's Default Fees exceeded the combined total of the average costs incurred by Mainland on default by a borrower and a reasonable estimate of the loss incurred by Mainland in relation to a default by a borrower, and that Mainland's Default Fees were not set in accordance with reasonable standards of commercial practice.
- 2.7 Mainland further:
 - 2.7.1 accepts the Commission's calculations of:
 - (a) in respect of Mainland's Establishment Fees, the average reasonable costs to Mainland in connection with the application for credit, processing and considering that application, documenting the consumer credit contract, and advancing the credit;
 - (b) in respect of Mainland's Administration Fee, the average reasonable costs incurred by Mainland in relation to activities associated with loan administration; and
 - (c) in respect of Mainland's Default Fees, the combined total of the average costs incurred by Mainland on default by a borrower and a reasonable estimate of the loss incurred by Mainland in relation to a default by a borrower; and
 - 2.7.2 accepts that, as a result, the aggregate amounts by which its Establishment Fees, Administration Fees and Default Fees charged to Affected Customers between 1 April 2015 and 30 March 2019 exceeded reasonable credit and default fees were:

- (a) in respect of Establishment Fees, \$366,528.37;
- (b) in respect of Administration Fees, \$489,636.21;
- (c) in respect of Default Fees, \$249,588.04; and
- (d) in total, \$1,105,752.

2.8 The parties have entered into a settlement agreement dated *20 July* 2021, which records the basis upon which the parties have agreed to resolve the Commission's investigation.

2.9 As part of that resolution, Mainland has offered to give, and the Commission has agreed to accept, pursuant to section 74A of the Commerce Act 1986 via section 113(aa) of the CCCFA, the Enforceable Undertakings as set out herein.

3 Interpretation

3.1 **Administration Fee** means:

3.1.1 the fee provided for in an Affected Loan Contract that was called a 'facility fee'; and

3.1.2 which was payable by the Affected Customer each week during the loan.

3.2 **Affected Loan Contract** means:

3.2.1 a consumer credit contract entered into between Mainland and an Affected Customer; and

3.2.2 under which one or more of the following fees was charged by Mainland to the Affected Customer between 1 April 2015 and 30 March 2019:

- (a) an Establishment Fee;
- (b) an Administration Fee; and/or
- (c) a Default Fee.

3.3 **Affected Customer** means a borrower under an Affected Loan Contract.

3.4 **Daily Default Fee** means the fee provided for in an Affected Loan Contract that was incurred on a daily basis for every day the Affected Customer remained in default (irrespective of when the fee was debited to the Affected Customer's loan account).

3.5 **Default Fee** means:

3.5.1 any fee provided for in an Affected Loan Contract that was charged due to a default by the Affected Customer; and

3.5.2 which was not passed on at cost to a third party; and

3.5.3 includes the Daily Default Fee.

3.6 **Enforceable Undertakings and Undertakings** means the undertakings set out herein.

3.7 **Establishment Fee** means:

3.7.1 the fee provided for in an Affected Loan Contract that was called an 'establishment fee'; and

3.7.2 which was payable when the Affected Customer entered into the loan or when Mainland advanced further amounts under the loan.

3.8 **Refund** and **Refunds** have the meaning given to those terms in clause 5.2.2.

3.9 **Relevant Period** means the period from 1 April 2015 to 30 March 2019 inclusive.

4 Purpose of the Undertakings

4.1 These Undertakings are given by Mainland to record its commitment to remediate all Affected Customers for the amounts by which its credit and default fees exceeded reasonable credit and default fees, and to do so in the manner it has agreed with the Commission.

5 Undertakings

5.1 Mainland undertakes to:

5.1.1 identify all Affected Loan Contracts;

5.1.2 calculate, in accordance with clause 5.2, the amount to be reimbursed to each Affected Customer as a Refund;

5.1.3 take the steps set out in clauses 5.3 to 5.6 to contact Affected Customers and inform them that they are entitled to a Refund; and

5.1.4 pay Refunds to Affected Customers, whether by credit to the accounts of Affected Customers who have an existing loan contract with Mainland or, for those Affected Customers who do not have an existing loan contract with Mainland, by payment to them as per their instructions in accordance with clauses 5.7 and 5.8 below;

5.1.5 provide interim and final reports to the Commission in accordance with clauses 5.10 to 5.14 below; and

5.1.6 pay any unclaimed Refunds to the Inland Revenue Department as unclaimed money or to a charity, as agreed with the Commission, in accordance with clause 5.15 below.

Calculating the excess credit fees charged

5.2 Mainland undertakes to:

5.2.1 for each Affected Loan Contract calculate:

(a) the amount by which any Establishment Fee charged exceeded:

- (i) in the 2015/16 financial year, \$105.62;
 - (ii) in the 2016/17 financial year, \$121.26;
 - (iii) in the 2017/18 financial year, \$126.92;
 - (iv) in the 2018/19 financial year, \$112.07;
- (b) the amount by which any Administration Fee charged exceeded:
- (i) in the 2015/16 financial year, \$0.66;
 - (ii) in the 2016/17 financial year, \$0.33;
 - (iii) in the 2017/18 financial year, \$0.57;
 - (iv) in the 2018/19 financial year, \$0.85;
- (c) the aggregate of all instances of the Daily Default Fee being charged less any instances of the Daily Default Fee that Mainland has already refunded to the Affected Customer since 9 November 2020; and
- (d) an amount to reflect, for the Affected Loan Contract, a proportion of the total amount of overcharged Default Fees excluding Daily Default Fees, to be calculated by:
- (i) aggregating all Default Fees (not including the Daily Default Fee) charged to that Affected Customer during the Relevant Period;
 - (ii) dividing the amount in (i) by the sum of all Default Fees (not including the Daily Default Fee) charged under all Affected Loan Contracts during the Relevant Period; and
 - (iii) multiplying the quotient in (ii) by the difference between \$249,588 and the sum of all instances of the Daily Default Fee charged under all Affected Loan Contracts during the Relevant Period; and

5.2.2 aggregate each of the amounts in clause 5.2.1 (the total amount for each Affected Customer being the **Refund** due to that Affected Customer and, when referred to collectively, **Refunds**).

Contacting Affected Customers

- 5.3 Within 14 days from the date of this Enforceable Undertaking, Mainland undertakes to provide the Commission with a template letter to be sent to all Affected Customers. The template letter will include the information set out in clause 5.4. Mainland will amend the template letter on request by the Commission if the Commission reasonably considers amendment is required.
- 5.4 Mainland undertakes to, within 28 days from the date of this Enforceable Undertaking, send a letter to each Affected Customer at their last known postal address informing

them:

- 5.4.1 that Mainland has entered into a settlement with the Commission;
 - 5.4.2 that the customer's Affected Loan Contract provided for unreasonable credit and default fees;
 - 5.4.3 that they are entitled to be credited or refunded the amounts specified in clause 5.2.1 in respect of the Establishment Fees, Administration Fees and Default Fees they were charged;
 - 5.4.4 if they have an existing loan contract with Mainland, that the Refund will be credited to their loan account; and
 - 5.4.5 if they do not have an existing loan contract with Mainland, or if the amount of the Refund exceeds the amount remaining on their loan balance, that they should contact Mainland to provide it with payment instructions.
- 5.5 If Mainland does not hold a postal address for an Affected Customer, or the Affected Customer (having been sent a letter to their last known postal address) does not provide Mainland with payment instructions within 30 days of Mainland having sent the letter described at clause 5.4 above, Mainland undertakes to, within 90 days of completing its obligations under clause 5.4:
- 5.5.1 attempt to contact that Affected Customer by SMS message, email, post or telephone, or any combination where multiple contact details are held;
 - 5.5.2 take all other steps that Mainland or its agent or assignee would usually take to locate and establish contact with a non-paying debtor, including searches of Google, Facebook, White Pages and/or the electoral roll, in respect of that Affected Customer; and
 - 5.5.3 if the steps outlined in clauses 5.5.1 and 5.5.2 do not result in Mainland establishing contact with the Affected Customer, engage the assistance of a credit reporter to assist in attempting to contact and obtain instructions from that Affected Customer (acting in accordance with the Credit Reporting Privacy Code 2004).
- 5.6 Where the steps outlined in clause 5.5 are effective at locating and/or establishing contact with an Affected Customer, Mainland undertakes to, by no later than 12 May 2022:
- 5.6.1 obtain payment instructions from the Affected Customer directly; or
 - 5.6.2 where that is not practicable, within 15 days of successfully locating the Affected Customer, send a further letter to the Affected Customer at the address(es) identified through the steps taken in 5.5 outlining how the Affected Customer can provide payment instructions to Mainland to claim their Refund.

Paying the Refund

- 5.7 By no later than 31 July 2021, Mainland undertakes to credit the Refunds against the loan accounts of any Affected Customers who have existing loan contracts with

Mainland. For the avoidance of doubt, where the amount of the Refund exceeds the balance of the loan account, Mainland will proceed as per clause 5.8 below in respect of the difference between the loan balance and the refund.

- 5.8 Otherwise, except where Mainland has paid the Refund to the Inland Revenue Department as unclaimed money in accordance with clause 5.15.1 below, Mainland undertakes to pay the Refund in accordance with the Affected Customer's payment instructions within one month of receiving those instructions.

Interim Report

- 5.9 Mainland undertakes, at its own expense, to provide to the Commission by 12 December 2021 an interim report recording the progress it has made with calculating Refunds, contacting Affected Customers, and paying Refunds. This report will include the following summary information:

- 5.9.1 the Refund each Affected Customer is entitled to receive;
- 5.9.2 where Refunds have been paid to Affected Customers, the date, method (credit or payment), and total amount paid;
- 5.9.3 where Mainland has been unable to locate and contact an Affected Customer who is entitled to receive a Refund, the steps Mainland has taken so far to locate, contact and pay the Affected Customer and what further work it intends to do to locate and contact the Affected Customer; and
- 5.9.4 the total amount of Refunds yet to be paid.

- 5.10 Mainland will provide the interim report in an Excel format.

Final Report

- 5.11 Mainland undertakes, at its own expense, to provide a final report to the Commission by 12 June 2022.

- 5.12 The final report will be prepared by an independent accountant approved by the Commission. The reviewer will review the steps taken by Mainland to remediate Affected Customers in accordance with these Undertakings.

- 5.13 The final report will include:

- 5.13.1 the reviewer's assessment of whether Mainland has undertaken the steps it has committed to take in these Enforceable Undertakings;
- 5.13.2 details of any steps that have not yet been completed, including the reviewer's assessment of whether or not they are likely to be completed by Mainland and, if so, by when;
- 5.13.3 the reviewer's assessment as to any further steps that Mainland could reasonably take to contact Affected Customers who have been unable to be contacted at the time of the final report;
- 5.13.4 a summary of the Refunds made (including any refund of the Daily Default Fee made to Affected Customers before the date of this Undertaking); and

5.13.5 the following information:

- (a) the loan number of Affected Customers who are entitled to receive a Refund;
- (b) the Refund each Affected Customer is entitled to receive;
- (c) where Refunds have been paid to Affected Customers, the date, method (credit or payment), and total amount paid;
- (d) where Mainland has been unable to obtain payment instructions from an Affected Customer who is entitled to receive a Refund, the steps that Mainland took to locate and contact the Affected Customer; and
- (e) the total amount of Refunds yet to be paid.

5.14 Mainland undertakes to provide the final report in an Excel format.

Dealing with unclaimed Refunds

5.15 If, at the time Mainland provides the final report described in clauses 5.11 to 5.14 above, despite having taken the actions required by clause 5.5, Mainland has been unable to obtain payment instructions from an Affected Customer, Mainland undertakes to (once it has received notification of the Commission's approval of the final report):

5.15.1 pay all unclaimed Refunds to the Inland Revenue Department and request that it be treated as unclaimed money under the Unclaimed Money Act 1971; or

5.15.2 in the event that the unclaimed Refunds are unable to be paid to the Inland Revenue Department and treated as unclaimed money for reasons outside of Mainland's control, pay all unclaimed Refunds to a consumer or consumer credit-focused charity agreed by Mainland and the Commission.

5.16 For the avoidance of doubt, despite any direction by the Commission for the unclaimed Refunds to be paid to charity in accordance with clause 5.15.2, Mainland undertakes to pay the Refund owing to an Affected Customer who later identifies themselves to Mainland and claims a previously unclaimed Refund.

6 Effect of the Undertakings

6.1 These Enforceable Undertakings are Court enforceable undertakings in terms of s 113(aa) of the CCCFA through the direct application of ss 74A to 74C of the Commerce Act 1986.

7 Commencement of the Undertakings

7.1 These Enforceable Undertakings come into effect when:

7.1.1 executed by Mainland; and

7.1.2 the Commission confirms its acceptance of these Enforceable Undertakings.

8 Compliance with the Undertakings

- 8.1 If Mainland becomes aware of a breach of these Undertakings, whether advertent or inadvertent, it will notify the Commission within seven days of becoming aware, giving full particulars of the breach.
- 8.2 For the avoidance of doubt, nothing in paragraph 8.1 above prevents the Commission from directly seeking any information from Mainland at any time for the purpose of checking compliance with these Undertakings.

9 Miscellaneous

- 9.1 No amendment to these Undertakings will be effective unless it is in writing, executed by Mainland, and signed as accepted by the Commission.
- 9.2 These Undertakings are properly executed if each of Mainland and the Commission signs the same copy, or separate identical copies of the execution page. Where separate copies are signed by Mainland or by the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 9.3 Mainland acknowledges that:
- 9.3.1 The Commission will make these Enforceable Undertakings publicly available including by publishing them on the Commission's enforcement response register on its website.
 - 9.3.2 The Commission may, from time to time, make public reference to these Enforceable Undertakings including in news media statements and in the Commission's publications.
 - 9.3.3 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
Mainland Finance Limited

[Handwritten signature]

[Redacted signature]

Director/authorised signatory

[Redacted name]

Name

[Handwritten name]

In the presence of:

[Redacted signature]

Signature of witness

[Redacted name]

Name of witness

[Redacted occupation]

Occupation

[Redacted city/town]

City/town of residence

[Redacted date]

Date

Acceptance

Signed by and on behalf of the Commerce
Commission by:

Chair



ANNA RAWLINGS

Commerce Commission