

10 October 2019

WeCare Finance Limited  
348 Te Rapa Road  
Beerescourt  
Hamilton  
*via email only:*

ref:12.3/PRJ004347

**Attention:** [REDACTED] Director  
cc. [REDACTED] Director and Board Chair

Dear [REDACTED]

### Credit Contracts and Consumer Finance Act 2003: Warning

1. The Commerce Commission (**Commission**) has been investigating WeCare Finance Limited (**WCFL**) under the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).
2. We have now completed our investigation and are sending this letter to warn WCFL about matters that we consider raise concerns under the CCCFA.<sup>1</sup>
3. The investigation has focused on a loan that WCFL advanced to [REDACTED] (**Borrower**) in October 2017.
4. In summary, the Commission considers that:
  - 4.1 WCFL is likely to have breached section 9C(1) of the CCCFA by failing to comply with the lender responsibility principles. Specifically, WCFL:
    - 4.1.1 failed to exercise the care, diligence and skill of a responsible lender before entering into an agreement to provide credit to the Borrower (section 9C(2)(a)(ii));
    - 4.1.2 did not make reasonable inquiries before entering into a consumer credit contract with the Borrower so as to be satisfied that it was likely that she would make the repayments without suffering substantial hardship (section 9C(3)(a)(ii)); and
    - 4.1.3 failed to treat the Borrower reasonably and in an ethical manner when it repossessed her vehicle (section 9C(3)(d)(iii)).

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1 The CCCFA can be viewed in full at <http://www.legislation.govt.nz>

- 4.2 WCFL is likely to have breached section 83E of the CCCFA by repossessing the Borrower's vehicle on the basis that it was "at risk" when WCFL did not have reasonable grounds to believe that was the case.
5. After weighing up the factors set out in our Enforcement Response Guidelines,<sup>2</sup> the Commission has decided that it is appropriate to conclude this investigation by issuing this warning to WCFL.

### The investigation

6. The investigation was opened in August 2018 after the Commission received a complaint from a financial mentor that WCFL had repossessed the Borrower's vehicle a week after she had entered into a No Asset Procedure (NAP), even though she was not in default under the loan.
7. The investigation established the following.
- 7.1 On 13 October 2017 the Borrower applied to WCFL for a loan of \$5,490 to purchase a vehicle.
- 7.2 On her loan application the Borrower stated that she and her partner had a total income of \$601 per week and total expenses of \$150.
- 7.3 In support of her loan application, the Borrower provided WCFL with a copy of a statement for the bank account she held jointly with her partner. It covered a four-week period from 11 September to 6 October 2017.
- 7.4 The bank statement showed that the only income deposited to the joint account during that period were WINZ payments, totalling approximately \$600 per week for the Borrower and her partner, and a single payment of \$246.36 from Trustpower.
- 7.5 During the period covered by the bank statement, expenses for the Borrower and her partner averaged approximately \$564 per week. The account balance at the end of the statement was \$3.46 OD.
- 7.6 On 13 October 2017 WCFL advanced a loan of \$5,490 to the Borrower. The total amount that she had to repay, including fees, interest and insurance was \$10,495.68. The loan was to be repaid via 156 weekly payments of \$67.28. WCFL took a security interest in the Borrower's vehicle.

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<sup>2</sup> The Enforcement Response Guidelines are available at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

- 7.7 On 22 January and 29 January 2018, the Borrower's loan repayments were dishonoured for insufficient funds.
- 7.8 On 2 February 2018 the Borrower made an arrangement with WCFL to reduce her repayments to \$45 per week. WCFL's diary note for that date records that the Borrower and her partner had separated.
- 7.9 The Borrower's first loan repayment at the reduced rate was due on 5 February 2018. It was dishonoured because of insufficient funds. The Borrower made the subsequent payments due on 12, 19 and 26 February 2018.
- 7.10 On 21 February 2018 the Borrower entered into a NAP.
- 7.11 On 28 February 2018 the New Zealand Insolvency and Trustee Service sent an email to WCFL advising that the Borrower had been admitted into the NAP.
- 7.12 WCFL repossessed the Borrower's vehicle on 28 February 2018 on the basis that it was "at risk".
- 7.13 WCFL issued a post-repossession notice to the Borrower on 1 March 2018 and her vehicle was sold on 8 June 2018.
- 7.14 WCFL issued a statement of account after sale to the Borrower on 12 June 2018. It showed that the vehicle had been sold for \$5,790 and that a loan balance of \$3,988.68 was still owing. WCFL wrote this off and did not pursue the Borrower for it.

#### **WCFL's response to the Commission's investigation.**

8. WCFL cooperated with the investigation although its response to our requests for information was hindered by the lack of information it held on file about the Borrower's particular loan and by the fact the staff member who had dealt with her loan file had left the business.
9. WCFL advised the Commission that its staff member had acted outside the scope of its internal practice guidelines when it repossessed the Borrower's vehicle on an "at risk" basis.
10. As a result of its discussions with the Commission, WCFL has now revised its consumer lending and repossession policies and it has also addressed the Borrower's complaint directly with her.

## Credit Contracts and Consumer Finance Act 2003

### *Application of the CCCFA*

11. The CCCFA protects consumers when they borrow money or buy goods on credit. It sets out the rules that must be followed by lenders when they provide loans to consumers in New Zealand.
12. The contract that WCFL entered into with the Borrower is a consumer credit contract under section 11 of the CCCFA.<sup>3</sup>

### *Responsible lending principles*

13. Lenders entering into consumer credit contracts after 6 June 2015 are required to comply with the Lender Responsibility Principles set out in section 9C of the CCCFA.<sup>4</sup>
14. Sections 9C(2)(a)(ii), 9C(3)(a)(ii) and 9C(3)(d)(iii) of the CCCFA are relevant to this investigation. They state:
  - (2) The lender responsibility principles are that every lender must, at all times, ....
    - (a) exercise the care, diligence and skill of a responsible lender ...before entering into an agreement to provide credit or finance ...
    - (ii) before entering into an agreement to provide credit or finance and before taking a relevant guarantee;
  - (3) 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...
    - (d) treat the borrower and their property ... reasonably and in an ethical manner, including ...
      - (iii) during a repossession process ...
15. The Responsible Lending Code (Code)<sup>5</sup> provides guidance on how lenders can comply with the Responsible Lending Principles. Paragraph 5.7 of the Code suggests the type of inquiries a lender should make into a Borrower's income and expenses in order to be satisfied that a borrower will make the payments under the agreement without suffering substantial hardship.

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<sup>3</sup> Under section 11 of the CCCFA, a credit contract will be a consumer credit contract if the loan is to a natural person, if the loan is primarily for domestic or household purposes, and if interest or fees are payable on the loan or if security is taken for the loan.

<sup>4</sup> Section 9C(1) states: "Every lender must comply with the lender responsibility principles."

<sup>5</sup> The Responsible Lending Code can be viewed in full at <https://www.consumerprotection.govt.nz/assets/uploads/responsible-lending-code-june-2017.pdf>.

16. The Code also suggests that a lender should make more extensive inquiries where the consequences of not being able to make the payments may be serious, including where a borrower may lose a significant asset.<sup>6</sup>

### *Repossession*

17. The statutory provisions relating to the repossession of consumer goods are set out in Subpart 2 of the CCCFA. Section 83E provides that consumer goods can be repossessed if the debtor is in default under the credit contract<sup>7</sup> or if the goods are “at risk”<sup>8</sup>.
18. If a debtor is in default, section 83G of the CCCFA provides that the creditor must issue a repossession warning notice before taking possession.
19. If goods meet the definition of “at risk” a creditor can repossess them immediately. Consumer goods will be “at risk” if a creditor believes on reasonable grounds that one of the events listed in section 83E(2) of the CCCFA will occur.
20. Section 83E(2) provides that goods are “at risk” if the creditor believes, on reasonable grounds, that those goods have been, or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold or otherwise disposed of contrary to the credit contract.
21. Where any question arises about whether goods were, or are, at risk, the creditor has the onus of proving that the grounds it relied on were reasonable.<sup>9</sup> The Code notes that the fact that a borrower is in default under a loan agreement is unlikely, on its own, to provide a lender with reasonable grounds for a belief that goods are at risk.<sup>10</sup>

### **The Commission’s view**

22. The Commission’s view is that WCFL is likely to have breached the following sections of the CCCFA:
- 22.1 sections 9C(2)(a)(ii) and 9C(3)(a)(ii) because it did not make reasonable inquiries to be satisfied that the Borrower would make the repayments without suffering substantial hardship (section 9C(3)(a)(ii)) and therefore did not exercise the care, diligence and skill of a responsible lender (section 9C(2)(a)(ii))

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<sup>6</sup> Responsible Lending Code para 5.12 page 19.

<sup>7</sup> Section 83E1(a)(i).

<sup>8</sup> Section 83E(1)(a)(ii).

<sup>9</sup> Section 83E(4).

<sup>10</sup> Responsible Lending Code page 52.

- 22.2 section 9C(3)(d)(iii) of the CCCFA as it failed to treat the Borrower reasonably and in an ethical manner by repossessing her vehicle on an “at risk” basis when the vehicle was not within the definition of “at risk” as set out at section 83E(2); and
- 22.3 section 83E of the CCCFA as it repossessed the Borrower’s vehicle on an “at risk” basis when the vehicle was not in fact at risk.

*Assessing the Borrower’s ability to make payments*

23. WCFL failed to consider that the loan would be entered into by only the Borrower. The Borrower’s partner was not a party to the loan and was therefore not liable for the repayments. As such, WCFL should have inquired further into the Borrower’s own income and expenses, and assessed loan affordability for her alone, taking only her income and expenses into account.
24. The information provided to the Commission indicates that in assessing the Borrower’s loan application, WCFL based its decision on information that related to the borrower and her partner, particularly information in the application form and in the bank statements the borrower provided. The information in these documents was for both the Borrower and her partner.
25. We do not consider that WCFL could have been reasonably satisfied that the Borrower’s income on its own was sufficient to cover the loan repayments. Sample test calculations<sup>11</sup> carried out by the Commission, based on the Borrower’s income alone and using the bank statement she provided to WCFL, show that for three of the four weeks<sup>12</sup> covered by that statement, her outgoings, including the projected loan repayments, exceeded her income.
26. Further, as noted in paragraph 16 above, the Commission considers that in this particular case, the lender responsibility principles required WCFL to make more extensive inquiries because of the Borrower’s particular circumstances.
27. The Code suggests that more extensive inquiries into a borrower’s income, expenses and the likelihood of repayment are appropriate where the consequences of a borrower not being able to make loan repayments may be serious, including the potential loss of a significant asset.
28. At the time the Borrower entered into the loan agreement, she had limited financial means and the consequences of her not being able to make the loan repayments, were likely to mean that she lost her vehicle.

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<sup>11</sup> Set out in Attachment A, below.

<sup>12</sup> The bank statement covered only 6 days for the week beginning 2 October 2017.

### *Repossession*

29. The Commission considers that WCFL is also likely to have breached section 83E(1) of the CCCFA by repossessing the Borrower's vehicle on the basis that it was "at risk" when WCFL had no grounds for believing that to be the case.
30. Pursuant to section 83E(2) of the CCCFA, consumer goods will be "at risk" only in very specific circumstances, including where the creditor believes on reasonable grounds that the goods will be destroyed, sold, or disposed of contrary to the provisions of the relevant consumer credit contract.
31. WCFL repossessed the Borrower's vehicle because she had entered into a NAP. There is no indication in WCFL's diary notes that the vehicle was about to be sold or disposed of in any way that would justify an "at risk" classification; entry into an insolvency process is not a relevant factor in determining whether goods are "at risk" and does not cause secured assets to be sold if a debtor wishes to retain them. Accordingly, WCFL is likely to have breached section 83E(1) by repossessing the Borrower's vehicle when it had no right to do so.
32. In the Commission's view, WCFL's conduct in repossessing the Borrower's vehicle is also likely to constitute a breach of section 9C(3)(d)(iii) of the CCCFA which requires lenders to treat borrowers reasonably and in an ethical manner during a repossession process. We consider that WCFL did not treat the Borrower reasonably or ethically when it arrived at her home, without prior notice, and repossessed her vehicle without the right to do so.

### **Warning and next steps**

33. The Commission has decided that it is appropriate to conclude this investigation by issuing this warning. The Commission will not be taking any further action against WCFL at this time in relation to the conduct identified in this investigation.
34. We will however take this warning into account if WCFL were to engage 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 WCFL.
35. The Commission recommends that WCFL seeks legal advice and takes all steps necessary to ensure that it is complying with all relevant obligations, including its obligations as a responsible lender.
36. This warning letter is public information and will be published on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

### **The Commission's role**

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

### **Penalties for breaching the CCCFA**

38. Only the courts can decide if there has actually been a breach of the CCCFA.
39. A lender who breaches section 9C of the CCCFA may:
- 39.1 have a declaration concerning that breach made against it by a court;
  - 39.2 be subject to injunctive relief requiring the lender to comply with the lender responsibility provisions;
  - 39.3 be ordered to pay the losses or damages of a borrower;
  - 39.4 be ordered to pay exemplary damages to a borrower; and/or
  - 39.5 have a credit contract re-opened.
40. Lenders who breach the repossession provisions of the CCCFA are liable upon conviction for fines of up to \$200,000 per offence if the lender is an individual and up to \$600,000 per offence if the lender is a company.
41. Where a lender fails more than once to comply with any of the provisions of the CCCFA the court may make an order prohibiting or restricting any person (including a director or principal officer of a lender) from:
- 41.1 providing credit under a consumer credit contract;
  - 41.2 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
  - 41.3 being in the employ or acting as an agent of a credit in any capacity that allows the person to take any part in the negotiation of a consumer credit contract involving the provision of credit by the creditor.
42. You should be aware that the decision outlined in this letter does not prevent any other person or entity from taking private action through the courts.

**Further information**

43. We have published a series of fact sheets and other resources including a responsible lenders' guide to help businesses comply with the CCCFA and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the CCCFA.
44. You can view the CCCFA and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz)
45. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely

[REDACTED]  
Competition and Consumer Branch  
Auckland

## ATTACHMENT A

## Analysis of bank statement information

11 Sept – 17 Sept 2017

	Borrower & Partner - Income & Expenditure		Borrower alone - Income & expenditure
Income (Borrower & Partner)	\$602.20	Income Borrower only	\$343.59
Total expenditure (2people)	\$507.86	Sample expenditure (half the 2 people rate)	\$253.93
Balance	\$94.34	Balance	\$89.66
Anticipated loan repayment	67.28	Anticipated loan repayment	\$67.28
Residual balance	\$27.06	Residual Balance	<b>\$22.38</b>

18 Sept 2017 – 24 Sept 2017

	Borrower & Partner - Income & Expenditure		Borrower alone - Income & expenditure
Income (Borrower & Partner)	\$595.20	Income Borrower only	\$336.59
Total expenditure (2 people)	\$595.64	Sample expenditure (half the 2 people rate)	\$297.82
Balance	<b>-( \$0.44)</b>	Balance	\$ 38.67
Anticipated loan repayment	\$67.28	Anticipated loan repayment	\$ 67.28
Residual balance	<b>-(67.72)</b>	Residual Balance	<b>-( \$28.61)</b>

25 Sept 2017 – 1 October 2017

	Borrower & Partner - Income & Expenditure		Borrower alone - Income & expenditure
Income (Borrower & Partner)	595.20	Income Borrower only	336.59
Total expenditure (2 people)	604.55	Sample expenditure (half the 2 people rate)	302.75
Balance	<b>-( \$9.35)</b>	Balance	33.84
Anticipated loan repayment	\$67.28	Anticipated loan repayment	\$67.28
Residual balance	<b>-( \$76.63)</b>	Residual Balance	<b>-( \$33.44)</b>

## 2 Oct 2017 - 6 Oct 2017

	<b>Borrower &amp; Partner - Income &amp; Expenditure</b>		<b>Borrower alone - Income &amp; expenditure</b>
Income (Borrower & Partner)	\$595.20	Income Borrower only	\$336.59
Total expenditure (2 people)	\$548.50	Sample expenditure (half the 2 people rate)	\$274.25
Balance	\$46.70	Balance	\$62.34
Anticipated loan repayment	\$67.28	Anticipated loan repayment	\$67.28
Residual balance	<b>-\$20.58</b>	Residual Balance	<b>-\$5.46</b>