

20 February 2023

Attn: [REDACTED] – Director
Tiny Loans Limited

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

By email only to: [REDACTED]

Dear Ms [REDACTED]

Outcome of Commerce Commission’s investigation into Tiny Loans Limited and its compliance with the Credit Contracts and Consumer Finance Act 2003 - Warning

1. The Commerce Commission (Commission) has been investigating Tiny Loans Limited (Tiny Loans) in relation to its compliance with the high-cost lending rules, fees provisions and the initial disclosure obligations 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 outcome.
2. The Commission considers that Tiny Loans is likely to have breached several provisions of the CCCF Act, including:
 - 2.1 sections 45F and 45G (prohibition on lending to repeat borrowers);
 - 2.2 sections 45J and 41 (unreasonable default fees); and
 - 2.3 section 17 (initial disclosure).
3. We note Tiny Loans has confirmed that it stopped offering loans on 17 August 2021.
4. The Commission has determined that in the circumstances of this case it is appropriate to issue Tiny Loans with this warning letter. A warning is not a final 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 against Tiny Loans.¹

¹ Please see the Commission’s published *Enforcement Response Guidelines* at para [41]
https://comcom.govt.nz/_data/assets/pdf_file/0030/62589/Enforcement-Response-Guidelines-October-2013.pdf

The law

5. The following provisions of the CCCF Act are relevant to the Commission's investigation into Tiny Loans.

Repeat borrowing – sections 45F and 45G

6. Sections 45F and 45G prohibit lenders from entering a high-cost consumer credit contract (HCCC) with borrowers in circumstances where the borrower:
 - 6.1 has an unpaid balance on any HCCC with another lender (section 45F(1)(a)); or
 - 6.2 had an unpaid balance on any HCCC with another lender within the preceding 15 days (section 45F(1)(b)); or
 - 6.3 has entered into two or more HCCCs in the preceding 90 days (section 45G(1)).
7. A lender has a defence to breaching sections 45F and 45G if it can prove that before entering the contract:
 - 7.1 it complied with section 9C in respect of the requirement to make reasonable inquiries; and
 - 7.2 it had reasonable grounds to believe that during the relevant period the borrower did not have an unpaid balance on any HCCC (in relation to section 45F);² or
 - 7.3 it had reasonable grounds to believe that the borrower had not entered 2 or more HCCCs during the relevant period (in relation to section 45G).³
8. Sections 45F and 45G came into effect on 1 June 2020.

Default fees – sections 41 and 45J

9. Section 41 states that a consumer credit contract must not provide for a credit fee or a default fee that is unreasonable.
10. Section 45J applies in respect of high-cost loans and states that a default fee exceeding the prescribed amount (\$30) must be presumed to be unreasonable, unless the lender proves on the balance of probabilities that it is reasonable.
11. Section 44A provides that, in determining whether a default fee is unreasonable, the court must have regard to whether the fee reasonably compensates the lender for:

² Please see section 45F(2).

³ Please see section 45G(2).

- 11.1 any cost incurred by the lender:
- 11.2 a reasonable estimate of any loss incurred by the lender because of the borrower's acts or omissions.
12. In *Sportzone Motorcycles (in liquidation) v Commerce Commission*⁴ (*Sportzone*) the New Zealand Supreme Court confirmed that a fee will be unreasonable when a lender has sought to recover costs that are not closely relevant to the transaction in respect of which the fee is charged.
13. Further detail on the approach the Commission takes to assessing the reasonableness of credit and default fees, including the *Sportzone* judgment, can be found in the Commission's Consumer Credit Fee Guidelines. These can be found on the Commission's website at:
https://comcom.govt.nz/_data/assets/pdf_file/0024/90078/Consumer-credit-fees-guidelines-September-2022.pdf (see in particular paragraph [160] onwards).

Initial disclosure

14. Section 17 requires every lender under a consumer credit contract to disclose as much of the key information set out in Schedule 1 as is applicable to the contract to the borrower before the contract is entered into.
15. From 1 May 2020, the CCCF Act introduced additional disclosure obligations for lenders offering HCCCs. These are found in Schedule 1 of the CCCF Act at (na), (nb), (nc), and (uaa).

The investigation

16. In October 2020, the Commission issued Tiny Loans with a statutory notice requiring it to provide a sample of borrower files. On 6 November 2020 Tiny Loans provided 23 borrower files to the Commission which were assessed for compliance with the new provisions of the CCCF Act relating to high-cost lending.
17. On 18 August 2022, you attended a voluntary interview with the Commission. Prior to the interview, you responded to several requests for further information on behalf of Tiny Loans.
18. We thank you for your cooperation with the investigation.

Repeat borrowing

19. Our review of the 23 sample files identified eight instances where Tiny Loans had entered a HCCC with a borrower in circumstances that may have been prohibited under sections 45F and 45G of the CCCF Act.

⁴ [2016] NZSC 53.

20. We investigated these eight instances of likely breach further, and were able to confirm:
 - 20.1 Tiny Loans entered HCCC's with five borrowers when they had an existing unpaid HCCC with another lender (likely breach of section 45F(1)(a));
 - 20.2 Tiny Loans entered a HCCC with one borrower within 15 days of them having an unpaid HCCC with another lender (likely breach of section 45F(1)(b)); and
 - 20.3 Tiny Loans entered HCCCs with two borrowers when the borrowers had already entered two or more HCCCs within 90 days (likely breach of section 45G).

Default fees

21. Tiny Loans' HCCC provided for a default fee of \$30. Our review of the 23 sample files identified four instances where Tiny Loans charged that fee, more than once.
22. We requested information from Tiny Loans about its default fee, in particular information from Tiny Loans to prove that its default fee was reasonable (as required by section 45J(3) where Tiny Loans charged default fees that exceeded \$30). Our investigation was initially focussed on the default fees charged that exceeded \$30, as we considered that these might be in breach of section 45J of the CCCF Act.
23. Tiny Loans confirmed that in the period 1 June 2020 to 17 August 2021 32 borrowers were charged default fees of \$30 or more, sixteen of which were charged over \$30. Tiny Loans also confirmed that the maximum default fees that any borrower had been charged was \$90.
24. Tiny Loans provided information about how it calculated its default fee. The \$17.50 portion of the default fee concerned us. That portion was for future debt collection costs which might not be incurred if the debt did not enter debt collection. It was not always the case that the defaulting borrower's debt would enter debt collection. Default fees should only recover costs that are in fact incurred. Default fees which include costs that are not yet incurred, or might not be incurred are unreasonable,⁵ and may also falsely represent that the lender has undertaken an action that it did not, which is likely to breach the Fair Trading Act 1986.
25. It is therefore our view that the \$30 default fee was unreasonable. Tiny Loans was likely in breach of section 41 of the CCCFA for every contract where it provided for that default fee, even where it did not charge that fee.

⁵ We investigated UDC Finance Limited for similar issues; please see <https://comcom.govt.nz/case-register/case-register-entries/udc-finance-limited3> for more information.

Initial disclosure

26. Our review of the 23 borrower files identified that Tiny Loans failed to make the following disclosures to borrowers when required:
 - 26.1 that the loan was a HCCC (na); and
 - 26.2 that Tiny Loans' dispute resolution scheme would not charge a fee to investigate or resolve a complaint (uaa).
27. We initially identified 23 contracts where Tiny Loans had failed to make the above disclosures (the entire sample). However, following further discussion with Tiny Loans, it confirmed that between 1 June 2020 and 17 August 2021, 283 borrowers did not receive all the initial disclosure information required by section 17 of the CCCF Act.
28. Tiny Loans' failure between 1 June 2020 and 17 August 2021 to disclose as much of the key information set out in Schedule 1 as was applicable to the contracts was a likely breach of section 17 of the CCCF Act.

Tiny Loans' response

Repeat borrowing

29. You explained at interview that it was Tiny Loans' policy to ask each applicant to confirm in their application whether they had HCCC's with any other lenders. You stated that Tiny Loans would rely on the information applicants provided, and only lent to borrowers when they stated any existing loans were not HCCCs. You also confirmed that Tiny Loans would make further enquiries about existing loans when they appeared on a borrower's Credit Sense report. However, you accept that on some occasions Tiny Loans entered HCCCs with borrowers in circumstances that are prohibited under section 45F and 45G of the CCCF Act.
30. The Commission identified five examples of this. You explained that due to process improvements that took place after July 2020, there are not likely to be further instances of repeat borrowing across Tiny Loans' loan book. We note that Tiny Loans has refunded each of the five impacted borrowers identified by the Commission their total costs of borrowing (interest and fees).⁶

Initial disclosure

31. You explained that Tiny Loans was not aware of the disclosure requirements that came into force on 1 May 2020, and that the disclosure issue was unintentional. You noted that while Tiny Loans missed the statement that the loan was high-cost on its contracts, the application process clearly communicated to borrowers that they were about to submit a loan application for a high-cost contract.

⁶ One of the five borrowers did not receive a refund as they did not pay Tiny Loans any cost of borrowing.

32. You identified 283 borrowers who did not receive all of the initial disclosure information required by section 17 of the CCCF Act between 1 June 2020 and 17 August 2021.
33. We note that Tiny Loans provided all affected borrowers with corrective disclosure after it was made aware of the issue.

The Commission's view

34. In this case, having fully considered the relevant information received, the Commission's view is that it is likely Tiny Loans' conduct breached sections 41 and 45J (unreasonable default fees), 45F and 45G (repeat borrowing), and 17 (disclosure) of the CCCF Act.
35. As outlined above, we have reached this view because:
 - 35.1 283 borrowers received a loan contract that likely provided for an unreasonable default fee;
 - 35.2 32 borrowers were charged default fees that were likely unreasonable;
 - 35.3 five borrowers entered into HCCC's with Tiny Loans in circumstances likely prohibited by the repeat borrowing provisions of the high-cost rules; and
 - 35.4 283 borrowers likely did not receive complete initial disclosure as required by section 17 of the CCCFA.

Warning

36. After weighing up the factors set out in our Enforcement Response Guidelines, the Commission has decided the likely breaches of the CCCF Act warrant this warning being issued to Tiny Loans.
37. The Commission has taken the following factors into account:
 - 37.1 Tiny Loans' quick responses to requests for information and overall co-operation with the investigation;
 - 37.2 The harm was restricted to a small number of borrowers and was not widespread;
 - 37.3 There is no ongoing harm as Tiny Loans stopped entering new loans in 2021 and is in the process of closing the business; and
 - 37.4 Tiny Loans has taken steps to remediate impacted borrowers through refunds and corrective disclosure.

38. This warning represents our opinion that the conduct which Tiny Loans has engaged in is likely to have breached the CCCF Act and that legal action remains available to the Commission in future if the conduct continues or is repeated.
39. We may draw this warning letter to the attention of the courts in any subsequent proceedings brought by the Commission against Tiny Loans.
40. This warning letter is public information and will be published on the Commission's case register on our website.
41. Finally, we note that this warning letter will be available to the Commission's certification team for their consideration.

Consequences for breaching the CCCF Act

42. Only the courts can decide if there has been a breach of the CCCF Act. The court can impose severe penalties where it finds the law has been broken.
43. Lenders who breach the CCCF Act may:
 - 43.1 be unable to enforce the contract or any right to recover property or any security interest;
 - 43.2 have to refund all interest and fees charged to the borrower during the period of non-compliance or pay compensation;
 - 43.3 have to pay statutory damages;
 - 43.4 be ordered to pay a pecuniary penalty up to \$600,000 per breach for companies and \$200,000 for individuals;
 - 43.5 be issued with an infringement notice with a fine of \$1,000 for each infringement offence;
 - 43.6 have contracts changed by the court if the contracts are oppressive; and
 - 43.7 be banned from operating within the finance industry.

Further information

44. We recommend that Tiny Loans seeks legal advice and encourage it to regularly review its compliance procedures and policies if it decides to resume lending.
45. 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 Tiny Loans' obligations and the Commission's role in enforcing the CCCF Act.

46. You can also view the CCCF Act and other legislation at www.legislation.co.nz.
47. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED]@comcom.govt.nz if you have any questions about this letter.

Yours sincerely

[REDACTED]

[REDACTED]

Credit Investigations and Compliance Manager
Credit Branch - Auckland