

## Undertakings to the Commerce Commission under s 113(aa) of the Credit Contracts and Consumer Finance Act 2003

### 1 Persons giving Undertakings

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- 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**)<sup>1</sup> by ASB Bank Limited (**ASB**), a company having its registered office at Level 2, ASB North Wharf, 12 Jellicoe Street, Auckland.

### 2 Background

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- 2.1 ASB's fixed rate term loan contracts provide for ASB to charge the borrower an Early Repayment Adjustment Fee (**ERA fee**) where the borrower repays their loan before the end of the agreed term.
- 2.2 Where a borrower on a fixed rate term loan sought to fully or partially settle their loan, ASB would prepare an indicative settlement statement and send it to the borrower's solicitor. The date on which the statement was prepared (**Quote Date**) could precede the expected settlement date (**Settlement Date**) by up to six weeks.
- 2.3 From 1 April 2005 (the date of the commencement of the CCCFA) and 6 December 2016 (the **Relevant Period**) ASB calculated ERA fees as if the prepayment was going to take place on the Quote Date and not on the Settlement Date, and at the Settlement Date, the ERA fee calculation from the Quote Date was reused, rather than being recalculated as at the Settlement Date. As a result, for any loans which were not settled on the same day as the Quote Date, ASB's ERA fee calculation during the Relevant Period resulted in an incorrect ERA fee being calculated and subsequently charged to the borrower on settlement.
- 2.4 In order to remedy this, ASB has agreed with the Commission that it will:
- (a) refund any amounts charged to borrowers that exceeded the amount that could be charged for ERA fees under the loan contract terms and pay a 'use of money' amount to reflect a borrower's lost opportunity to utilise funds;
  - (b) waive any claim in relation to undercharged ERA fees; and
  - (c) make no set-off for undercharged ERA fees against overcharged ERA fees, where those under and overcharges are associated with the same borrower account.
- 2.5 The Commission has issued ASB with a warning letter in relation to the likely breach of s9C(2)(a)(iii) of the CCCFA, dated 1 June 2021 (**Warning Letter**). The Warning Letter has recorded the Commission's view that when charging ERA fees that exceeded the amounts that ought to have been charged under the contract terms, ASB failed to act with the due care, diligence and skill of a responsible lender. ASB accepts that it likely breached s9C(2)(a)(iii) of the CCCFA in relation to the matters described above.

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

### **3 Purpose of the Undertakings**

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- 3.1 These Undertakings are given by ASB to record its commitment to make refunds to all borrowers whom ASB identifies as having been affected by the matters described above (**Affected Borrowers**) and to do so in the manner it has agreed with the Commission.
- 3.2 At the time that these Undertakings are given by ASB:
- (a) ASB has identified up to 60,277 Affected Borrowers and expects to make refunds totalling approximately \$8,892,832 to Affected Borrowers in performance of the undertaking provided in paragraph 4.1 below.
  - (b) ASB has already paid \$7,685,631.54 to 50,134 Affected Borrowers.
- 3.3 If ASB identifies any additional Affected Borrowers, it will make refunds to those additional Affected Borrowers in accordance with these Undertakings.

### **4 Undertakings**

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- 4.1 ASB undertakes to the Commission that it will, by way of refund, credit the account of (or otherwise, in accordance with the terms of these Undertakings, make payment to) each Affected Borrower with an amount calculated by ASB as comprising:
- (a) The difference between:
    - (i) the amount that should have been charged to the Affected Borrower as an ERA fee had the ERA fee been calculated correctly by ASB on the Settlement Date; and
    - (ii) The amount that ASB actually charged to the Affected Borrower;
 together with
  - (b) an amount in compensation for use of money for the period commencing with the Settlement Date and ending with the date the payment is notified to Affected Borrowers, calculated using, for each month of the relevant period for each transaction, the highest interest rate offered by ASB on new lending during that month for the same product type.
- 4.2 ASB further undertakes to the Commission that it:
- (a) waives any and all claims in relation to undercharged ERA fees; and
  - (b) will not make any set-off for undercharged ERA fees against overcharged ERA fees, where those under and overcharges are associated with the same borrower account.
- 4.3 ASB undertakes to the Commission to take the following steps in order to locate and contact Affected Borrowers and make refunds:

*Affected Borrowers with active ASB Bank Accounts*

- (a) For any Affected Borrowers who have an active bank account with ASB (**ASB Account**), ASB will make refunds by direct crediting that borrower's ASB Account. For the avoidance of doubt, this may include crediting an affected borrower's refund against any outstanding balance the borrower may have on a credit contract with ASB.<sup>2</sup>
- (b) Within five (5) business days of the refund referred to above being made, ASB will write to or telephone each borrower to whom a payment has been made to inform them of the refund and the reason why ASB has made it.

*Affected Borrowers without active ASB Bank Accounts*

- (c) For any Affected Borrowers who do not presently have an ASB account (**Affected Borrowers without active ASB Accounts**), ASB will take all reasonable steps using the information that it holds to make contact and to:
  - (i) inform those borrowers of the refund and the reason for it; and
  - (ii) obtain instructions as to a nominated bank account into which the refund can be paid.

(For example, this may include attempting to contact Affected Borrowers without active ASB Accounts by SMS message, email, post or telephone, or any combination where multiple contact details are held).
- (d) If ASB successfully obtains instructions from any Affected Borrowers without active ASB Accounts to pay the refund into a nominated bank account, ASB shall make the refund by direct crediting the nominated bank account, or alternatively by bank cheque or international transfer.
- (e) If within three months of the date of these Undertakings ASB has not been successful in obtaining instructions from any Affected Borrowers without active ASB Accounts, ASB will engage the assistance of a credit reporter to assist in attempting to contact those borrowers (acting in accordance with the Credit Reporting Privacy Code 2004) or use New Zealand Companies Office records for corporate borrowers, and to:
  - (i) inform those borrowers of the refund and the reason for it; and
  - (ii) obtain instructions as to a nominated bank account into which the refund can be paid.
- (f) In contacting Affected Borrowers without active ASB Accounts and obtaining instructions for refunds from them, ASB will inform those Affected Borrowers of the reason why ASB is making refunds.

- 4.4 ASB undertakes to the Commission to report on its progress and to seek direction in respect of any unreturned refunds, as follows:

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<sup>2</sup> We note that any customers for whom the ownership of the loan is different to the ownership of the transactional and/or savings account, or where there are holds on the open account (e.g. deceased customers or dormant accounts) are being dealt with under Phase 2 of ASB's remediation program.

- (a) Following completion of its efforts to contact all Affected Borrowers and make refunds, and in any event within six months of the date of these Undertakings, ASB will provide a report to the Commission confirming the progress it has made in making refunds, including a summary of the payments made to Affected Borrowers pursuant to these Undertakings (**the Payment Update Report**).
- (b) If, at the time it provides the Payment Update Report, ASB has been unable to make refunds to all Affected Borrowers, it will provide sufficient detail for the Commission to understand the number of Affected Borrowers still owed refunds and the amounts owed (**Unreturned Refunds**), and will:
  - (i) Treat any Unreturned Refunds of more than \$100 as unclaimed money under the Unclaimed Money Act 1971 (whether or not the definition at section 4 of that Act is met); or
  - (ii) Pay any Unreturned Refunds of \$100 or less to a consumer or credit focussed charity or charities that is a not-for-profit organisation and not associated with ASB.
- (c) For the purpose of payments to be made under 4.4(b)(ii), ASB shall propose for the Commission's consideration a consumer or credit focussed charity or charities that ASB considers may be suitable.
- (d) ASB will pay the Unreturned Refunds in accordance with 4.4(b) within 30 days of the recipient or recipients in respect of payments to be made under 4.4(b)(ii) being approved by the Commission.
- (e) For the avoidance of doubt, neither ASB's commitment to distribute any Unreturned Refunds to a consumer or credit focussed charity or charities in terms of this clause 4.4(b)(ii), nor doing so at the Commission's direction, will relieve ASB of the obligation to refund an Affected Borrower who later identifies themselves to ASB and claims an Unreturned Refund

## **5 Effect of the Undertakings**

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- 5.1 These Undertakings are Court enforceable undertakings in terms of s 113(aa) of the CCCFA and s 74A of the Commerce Act 1986.

## **6 Commencement of the Undertakings**

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- 6.1 These Undertakings come into effect when:
  - (a) executed by ASB; and
  - (b) the Commission confirms its acceptance of these Undertakings.

## **7 Compliance with the Undertakings**



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- 7.1 If ASB 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.
- 7.2 For the avoidance of doubt, nothing in paragraph 7.1 above prevents the Commission from directly seeking any information from ASB at any time for the purpose of checking compliance with these Undertakings.

## **8 Miscellaneous**

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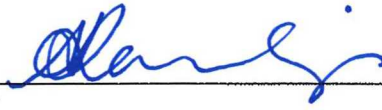
- 8.1 No amendment to these Undertakings will be effective unless it is in writing, executed by the Undertaking Parties, and signed as accepted by the Commission.
- 8.2 These Undertakings are properly executed if each Undertaking Party signs the same copy, or separate identical copies of the execution page. Where separate copies are signed by ASB or by the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 8.3 ASB acknowledges that:
- (a) The Commission will make these Undertakings publicly available including by publishing them on the Commission's enforcement response register on its website.
  - (b) The Commission may, from time to time, make public reference to these Undertakings including in news media statements and in the Commission's publications.
  - (c) 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 ASB Bank Limited**  
\_\_\_\_\_  
~~Director~~/authorised signatory\_\_\_\_\_  
Name*In the presence of:*  
\_\_\_\_\_  
Signature of witness  
\_\_\_\_\_  
Name of witnessCommunications\_\_\_\_\_  
OccupationAuckland\_\_\_\_\_  
City/town of residence01/06/21\_\_\_\_\_  
Date

## Acceptance

Signed by and on behalf of the Commerce  
Commission by:

Chair

A handwritten signature in blue ink, appearing to read 'Anna Rawlings', written over a horizontal line.

ANNA RAWLINGS

Commerce Commission

