

Undertakings to the Commerce Commission under section 46A of the Fair Trading Act 1986 and section 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 section 46A of the Fair Trading Act 1986 and section 74A of the Commerce Act 1986 (via section 113(aa) of the Credit Contracts and Consumer Finance Act 2003) by Ibrahim Mahdi Phee, Company Director, of Hamilton.

2 Background

- 2.1 Xtreme Deals Limited (**Xtreme**) is a mobile trader that sold consumer goods using contracts that contained a variety of deferred payment plans (the **Contracts**). Under the Contracts, customers typically obtain possession of the goods that they have purchased once a specified number of payments have been made. Further payments must then be made by the relevant customers to complete their Contracts.
- 2.2 Between 1 January 2018 and 21 March 2020 (the **Conduct Period**), the Contracts contained provisions which purported to permit Xtreme to delay delivery of products to customers who failed to make one or more payments in accordance with the payment schedule (**Delayed Delivery Provisions**).
- 2.3 Further, when customers sought to cancel the Contract (after having explored alternative products and payment plans suggested by Xtreme), the Contracts provided for a variety of fixed and percentage-based cancellation fees to be paid by the customer, including, in some instances, 'administration fees'. While all customers who elected to cancel their Contracts were charged cancellation fees, only some customers were also charged 'administration fees'.
- 2.4 In respect of Xtreme's use of Delayed Delivery Provisions in its Contracts, the Commission considers that:
- (a) Xtreme likely breached the lender responsibility principles in section 9C of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) by:
 - (i) failing to assist borrowers to reach an informed decision as to whether or not to enter into the Contracts and to be reasonably aware of the full implications of entering into its purchase agreements, through:
 - (A) failing to ensure that the terms of the Contracts relating to delivery timeframes and the consequences of default were expressed in plain language in a clear, concise, and intelligible manner (section 9C(3)(b)(ii));
 - (B) failing to ensure that information relating to those terms was not presented in a manner that was, or was likely to be, misleading, deceptive, or confusing (section 9C(3)(b)(iii)); and

- (ii) failing, through the inclusion of the Delayed Delivery provisions it used in its Contracts and in relying upon them in the event of default, to ensure that the Contracts were not oppressive (section 9C(3)(e)(i)); and
 - (b) the Delayed Delivery Provisions used in Xtreme's Contracts are likely to be unfair contract terms (UCTs) under section 46L of the Fair Trading Act 1986 (FTA).
- 2.5 In response to the Commission's investigation, Mr Phee has on Xtreme's behalf:
- (a) co-operated with the Commission's investigation;
 - (b) upon becoming aware of the Commission's concerns regarding the use of Delayed Delivery Provisions, promptly amended Xtreme's internal practices so as to not enforce or rely upon the Delayed Delivery Provisions in its Contracts;
 - (c) admitted that Xtreme's conduct is likely to have contravened section 9C of the CCCFA in the ways outlined at clause 2.4(a) above;
 - (d) acknowledged that the Delayed Delivery Provisions used in Xtreme's Contracts are likely to be UCTs under section 46L of the FTA as outlined in clause 2.4(b) above; and
 - (e) offered enforceable undertakings to the Commission dated 30 June 2022 (the **Xtreme Undertakings**).
- 2.6 At all relevant times during the Conduct Period, and at the time of entering into these Undertakings, Ibrahim Phee was a director of Xtreme and responsible for the implementation and use of the Contracts in Xtreme's business.
- 2.7 To resolve any remaining concerns the Commission has with the conduct engaged in by him and Xtreme, and with Xtreme's commitment to amend its business practices and remediate certain affected customers, Ibrahim Phee has offered these Undertakings.
- 2.8 Given Ibrahim Phee's continued involvement with Xtreme and his role in the conduct, as well as the Commission's interest in securing performance of Xtreme's commitments, the Commission is satisfied that the provision of these Undertakings is appropriate in the circumstances and has taken these Undertakings into account in determining its enforcement response in relation to both Xtreme and Ibrahim Phee.

3 Purpose of Undertakings

- 3.1 These Undertakings are given by Ibrahim Phee to record his commitment to not:
- (i) provide credit under consumer credit contracts that contain Delayed Delivery Provisions;
 - (ii) act as a director or take part directly or indirectly in the management or control of any company or business that provides credit under consumer credit contracts that contain Delayed Delivery Provisions; or
 - (iii) be in the employ, or act as an agent, of a creditor, in any capacity that allows him to take any part in the negotiation of consumer credit contracts that contain Delayed Delivery Provisions.

- 3.2 These undertakings also record Ibrahim Phee's commitment to use his best endeavours to ensure that Xtreme complies with its obligations under the Xtreme Undertakings.

4 Undertakings

- 4.1 Ibrahim Phee undertakes to the Commission that he will not:

- (i) provide credit under consumer credit contracts;
- (ii) act as a director or take part directly or indirectly in the management or control of any company or business that provides credit under consumer credit contracts; or
- (b) be in the employ, or act as an agent, of a creditor under consumer credit contracts, in any capacity that allows him to take any part in the negotiation of the contracts,

where those consumer credit contracts contain Delayed Delivery Provisions.

- 4.2 Ibrahim Phee undertakes to the Commission that he will use his best endeavours to assist Xtreme to comply with its obligations under the Xtreme Undertakings.

5 Effect of Undertakings

- 5.1 These Undertakings are Court enforceable undertakings in terms of section 46A of the Fair Trading Act 1986 and section 74A of the Commerce Act 1986 (via section 113(aa) of the Credit Contracts and Consumer Finance Act 2003).

6 Commencement of Undertakings

- 6.1 These Undertakings comes into effect when:

- (a) executed by Ibrahim Phee; and
- (b) the Commission confirms its acceptance of, and executes, these Undertakings.

7 Duration of Undertakings

- 7.1 These Undertakings will continue to have effect until the earlier of:

- (a) the Commission for any reason discharging Ibrahim Phee from these Undertakings; or
- (b) 10 years from the date the Commission confirms its acceptance of, and executes, these Undertakings.

8 Compliance with Undertakings

- 8.1 If Ibrahim Phee becomes aware of a breach of these Undertakings, whether advertent or inadvertent, he 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 Ibrahim Phee at any time for the purpose of checking compliance with these Undertakings.

9 Variation of Undertakings

- 9.1 The Commission and Ibrahim Phee may agree at any time to vary these Undertakings.
- 9.2 No variation to these Undertakings will be effective unless it is in writing, executed by Ibrahim Phee, and signed as accepted by the Commission.

10 Miscellaneous

- 10.1 These Undertakings are properly executed if Ibrahim Phee and the Commission sign the same copy, or separate identical copies of the execution page. Where separate copies are signed by Ibrahim Phee or by the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 10.2 Any notice or communication that is given or served under or in connection with these Undertakings must be given in writing by hand delivery or email to:

Commerce Commission
Level 9
44 The Terrace
Wellington 6011

Attention: Chief Legal Counsel, Credit

Email:



- 10.3 Ibrahim Phee 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 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 FTA or CCCFA, or any other statute or law.

Execution

Signed by Ibrahim Phee




Signature of Ibrahim Phee

30 June 2022

Date

In the presence of:




Signature of witness



Name of witness



Occupation




City/town of residence

30/6/2022

Date

Acceptance

Signed by and on behalf of the Commerce
Commission by:



Anna Rawlings, Chair

Date

27 July 2022
