

17 August 2022

Xtreme Deals Limited
593 Te Rapa Road
Te Rapa
Hamilton 3200

Attention: [REDACTED]

By email only: [REDACTED]

Dear Mr [REDACTED]

**Credit Contracts and Consumer Finance Act 2003 and Fair Trading Act 1986:
Warning for breach of responsible lending principles and for using unfair
contract terms**

1. The Commerce Commission (**Commission**) has been investigating Xtreme Deals Limited trading as Xtreme Kiwi Deals (**Xtreme**) for compliance with the provisions of the Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**) and the Fair Trading Act 1986 (**FT Act**). We have now completed our investigation and are writing to you to summarise our findings and enforcement response.
2. In summary, the Commission considers that between 1 January 2018 and 21 March 2020 (the **Conduct Period**):
 - 2.1 Xtreme is likely to have breached the responsible lending principles under section 9C of the CCCF Act by failing to assist borrowers to reach an informed decision as to whether or not to enter into its purchase agreements; and
 - 2.2 provisions contained in Xtreme's purchase agreement, 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**), are likely to be unfair contract terms (**UCTs**) under section 46L of the FT Act.

3. After weighing the factors set out in our Enforcement Response Guidelines,¹ and having regard to the court enforceable undertakings offered by Xtreme which the Commission accepted on 27 July 2022, we have decided to issue Xtreme with this warning. A warning is not a 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.²
4. Separate compliance advice will be given to you about the part of the investigation relating to Xtreme's cancellation fees.

The investigation

5. During the Conduct Period, Xtreme was a mobile trader that sold consumer goods³ using contracts that contained a variety of deferred payment plans (the **Contracts**). Under the Contracts, customers typically obtained possession of the goods that they purchased once a specified number of payments had been made. Further payments were then required by the relevant customers to complete their Contract:
 - 5.1 For example, on 6 April 2018, a customer purchased a Samsung S9 Combo after an Xtreme door-to-door sales agent visited his home. The total price payable under the contract was \$4,810 and the customer was to receive delivery after 27 payments of \$60.125 had been made (with a further 53 payments required to pay off the goods). At the time of the purchase, a Samsung S9 64G was available in mainstream retail for \$1,399.⁴
6. The Commission opened an investigation into Xtreme in April 2020, after receiving complaints about Xtreme, including that:
 - 6.1 customers had not understood when they would receive their goods under the Contracts;
 - 6.2 customers had difficulties when seeking to cancel their Contracts; and
 - 6.3 customers had to pay sizeable cancellation fees if they elected to cancel their Contracts before delivery of the goods.
7. During the investigation Xtreme provided the Commission with three versions of the Contract used during the Conduct Period, as well as a number of completed customer contracts which we reviewed for compliance with the responsible lending

¹ The Commerce Commission Enforcement Response Guidelines are available at: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-response-guidelines>.

² Commission's published *Enforcement Response Guidelines* at [41].

³ Mostly mobile phones and other consumer electronics.

⁴ It is noted the package came with a free S9 case. A handwritten note on the contract also stated that the customer would not need to pay for the last seven weeks if he did not miss any payments, which amounted to a \$420 rebate.

principles under the CCCF Act, and for terms that may be declared unfair contract terms under the FT Act.

8. The information we have gathered established to our satisfaction that:
- 8.1 The sales were commonly made by Xtreme’s sales agents with the assistance of catalogues, which disclosed the number of payments required before delivery and/or the size of the weekly payments, but did not display the total price of the goods offered for purchase. Once the contract was signed by the customer, the sales representative would make a call to Xtreme’s call centre in Fiji, from the customer’s home. Xtreme described this as a “sales verification” call, where the call centre operator would read out a script with sales verifications questions in order to confirm that the customer understood and was aware of key details in the contract.
- 8.2 Four payment plans were available: Gold, Standard, Ezy term and Custom. Each plan had a different total number of weekly instalment payments that customers had to make in order to fulfil the contract:
- 8.2.1 Ezy term plan: 65 weekly payments, with goods delivered after 22 payments.
- 8.2.2 Standard plan: 45 weekly payments, with goods delivered after 15 payments.
- 8.2.3 Gold plan: 30 weekly payments, with goods delivered after 10 payments.
- 8.2.4 Custom plans did not have a default number of total weekly payments or number of payments required before delivery. These would be negotiated between Xtreme and its customers, but would typically be for longer periods than the other payment plans.
- 8.3 During the Conduct Period, Xtreme’s Contract contained Delayed Delivery Provisions. These provisions allowed Xtreme to increase the minimum number of payments required to receive delivery of the goods in the event that the customer missed one or more payments.
- 8.4 It is noted that references to delayed delivery were scattered throughout the Contract, which was 17 pages long. In particular:
- 8.4.1 The first mention of the possibility of delivery being delayed due to missed payments was on the checklist on page 10 of the contract, under the heading “Delivery” which stated:

You will only be entitled to delivery of the Products once you have made certain number of payments [sic]. The number of minimum payments before you are entitled to delivery of the Products may be increased IF you

default under the Agreement. Please refer to clause 3 of the Terms and Conditions.⁵

- 8.4.2 In Versions 1 and 2 of the Contract, a revised delivery schedule was set out on the last page (page 17). In Version 3 of the Contract (in use from May 2019), the revised delivery schedule was set out after clause 3.1 on page 14.
- 8.4.3 The revised delivery schedule explained how delivery would be delayed for Gold, Standard or Ezy term plans; it did not mention Custom plans. A copy of the revised delivery schedule is at **Attachment A**.
- 8.5 Further, when the customers sought to cancel the contract after the five working day cooling-off period but before the delivery of the goods, the Contract provided for a variety of fixed and percentage-based cancellation fees to be paid by the customer, including selling costs of 10-13% and administration fees of 1-10%.⁶
- 8.6 Xtreme entered into 3,950 contracts during the Conduct Period. Of those:
- 8.6.1 2,026 contracts were cancelled during the cooling off period; and
- 8.6.2 688 contracts were completed; that is, paid in full or cancelled before delivery of the goods.
- (a) 311 of those were cancelled before delivery of the goods, and Xtreme charged \$218,404 to customers in cancellation fees.⁷
- (b) 433 (63%) of those were Custom plans.
9. The Commission sought information from Xtreme; in particular, the rationale for the Delayed Delivery Provisions. Xtreme advised:
- 9.1 If a customer was showing signs that they were going to default, Xtreme was taking a risk by delivering the goods. Xtreme had a legitimate business interest for the provisions because they allowed it to reduce the risk of defaulting customers. The delivery could not simply be delayed in proportion with the number of missed payments because the increased risk profile

⁵ Version 3 of the Contract contains the following additional sentence: 'A copy of the deferred delivery table is at the back of this Checklist.' However, none of the signed contracts within the customer files provided from May 2019 (when Version 3 in use), contain a copy of the payment schedule at the back of the Checklist.

⁶ Administration fees were introduced from Version 2 of the contract in use from June 2018.

⁷ It is noted that the amount of cancellation fees charged was not necessarily collected by Xtreme.

meant Xtreme wanted to take extra steps to protect its interests and recover more payments before delivery.

- 9.2 The most common types of Custom plans were:
- 9.2.1 80 weekly payments, with delivery after 27 payments.
 - 9.2.2 104 weekly payments, with delivery after 52 payments.
 - 9.2.3 130 weekly payments, with delivery after 65 payments.
- 9.3 Its staff were trained and instructed to explain to customers what happened if they missed payments. During the sales verification call, customers were asked about the number of payments required before they qualify for delivery and whether they understood that delivery would be deferred if they missed payments.
- 9.4 It stopped entering into new contracts with customers after 21 March 2020.
- 9.5 It has been choosing to not enforce or rely upon the Delayed Delivery Provisions where customers have missed payments since September 2020.

The law

CCCF Act

10. Lenders entering into consumer credit contracts on or after 6 June 2015 are required to comply with the Lender Responsibility Principles set out in section 9C of the CCCF Act.
11. The relevant parts of section 9C to this investigation are:

9C Lender Responsibility Principles

- (1) Every lender must comply with the lender responsibility principles.
- ...
- (3) The lender responsibilities are that a lender must, in relation to an agreement with a borrower, -
- ...
- (b) assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that...
 - (ii) the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner; and
 - (iii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; ...

...

- (e) ensure, in the case of an agreement to which Part 5 applies, that
 - (i) the agreement is not oppressive;

12. The Responsible Lending Code (the **Code**) provides guidance as to how lenders can comply with the responsible lending principles. Paragraph 7.2 of the Code states:⁸

7.2. To assist a borrower to make an informed decision as to whether to enter into an agreement and to be reasonably aware of the full implications of entering that agreement, **a lender should inform the borrower of the key features of the agreement. The lender (or their agent) should clearly highlight those features in a way that draws the borrower's attention to that information.** This information should be provided at a time that assists the borrower to make an informed decision. The key features should include:

...

- h. key risks and characteristics of the specific product. For instance, where applicable;
 - i. that secured property is at risk if the borrower defaults or does not make the repayments ...

...

(emphasis added)

13. Paragraphs 7.24 to 7.26 of the Code state that:

Plain language agreement

7.24 To comply with the lender responsibility to ensure that the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner, a lender should:

- a. set out agreements using a layout and font size that can be easily read;
- b. set out the terms in a logical order that is easy for borrowers to follow;
- c. highlight important information; and
- d. explain complex information in plain language and include a clear explanation of any necessary jargon.

7.25 "Concise" refers to the presentation of specific information rather than the overall length of the communication or document. A longer but clearly written document, may take less time to read and understand than a shorter, but poorly written one.

⁸ Responsible Lending Code, revised June 2022: available at <https://www.mbie.govt.nz/dmsdocument/21456-responsible-lending-code-june-2022>. A previous version of the Code was in effect during the Conduct Period; however, the differences are immaterial.

- 7.26 “Intelligible” involves an overall assessment of whether the terms are understandable and comprehensible to borrowers in the target market

14. Paragraphs 7.27 to 7.28 state (relevantly) that:

- 7.27 To ensure that any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing, a lender should apply the following Guidance to all information provided to the borrower in relation to the agreement before it is entered into, regardless of the form and time at which information is given.

- 7.28 A lender should comply with the following practices to ensure that information provided to the borrower is not misleading, deceptive or confusing:

- a. make sure important information is legible or audible, or both, and take care to disclose information in a level of detail that is commensurate with the importance of it;

...

FT Act

15. Under section 26A of the FT Act, a term in a standard form consumer contract which has been declared unfair by a court cannot be applied, enforced or relied upon.

16. Unfair contract terms are defined in Section 46L of the FT Act as follows:

46L When term in consumer contract is unfair

- (1) A term in a consumer contract is unfair if the court is satisfied that the term—
- (a) would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
 - (b) is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
 - (c) would cause detriment (whether financial or otherwise) to a party if it were applied, enforced, or relied on.
- (2) In determining whether a term of a consumer contract is unfair, the court may take into account any matters it thinks relevant, but must take into account—
- (a) the extent to which the term is transparent; and
 - (b) the contract as a whole.
- (3) For the purpose of subsection (1)(b), a term in a consumer contract must be presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

...

The Commission's view

Responsible lending principles

17. In our view, Xtreme has likely breached section 9C(1) of the CCCF Act by failing to comply with the responsible lending principles set out in sections 9C(3)(b)(ii), 9C(3)(b)(iii) and 9C(3)(e)(i).
18. We have formed this view because at the time of entering into the Contract, information provided by Xtreme staff to borrowers about the Delayed Delivery Provisions was presented in a manner that was, or was likely to be, misleading, deceptive, or confusing. Xtreme also failed to express the Delayed Delivery Provisions in plain language in a clear, concise, and intelligible manner. As a consequence of the Delayed Delivery Provisions, the Commission's view is also that the agreement was likely to be oppressive.
19. The nature and extent of a right of delayed delivery as a consequence of late payment is critical to consumers' understanding of the full implications of entering into the contract. It is critical that information about any such right is clearly expressed, and not misleading or confusing. The Commission considers that information provided by Xtreme about the Delayed Delivery Provisions was likely to be misleading, deceptive or confusing because:
 - 19.1 When the topic of default was mentioned in the first nine pages of Xtreme's Contract (when consumers were more likely to be reading in detail), there was no mention that a deferral in delivery was a consequence of defaulting on payments.
 - 19.2 When the possibility of deferred delivery was raised on page 10 of Xtreme's Contract, it did not set out the full consequences of missed payments, but instead cross-referenced to a different part of the Contract.
 - 19.3 In versions 1 and 2 of the Contract, the primary clause of the Delayed Delivery Provisions (cl 3.1) made no mention of the delayed delivery schedule, which was positioned in an entirely different part of the Contract (some three pages later). There was no mention of the delayed delivery schedule earlier in the Contract.
 - 19.4 When the delayed delivery schedule did appear on the final page of versions 1 and 2 of the Contract, page 15, it was not labelled, and was not clearly distinguished or separated from the privacy waiver that immediately preceded it.

20. The lack of clarity was even more concerning regarding the consequences for Custom plans, on which the delayed delivery schedule was silent, despite Xtreme using common types of Custom plans.⁹ We note this would have affected an important part of Xtreme's customer base, considering 63% of the completed contracts during the relevant Conduct period were Custom plans.
21. We consider that Xtreme's customers were not sufficiently informed as to the consequence of missed or dishonoured payments, nor were those provisions highlighted in a way that drew customers' attention to them. The Delayed Delivery Provisions were not expressed in plain language, in a clear, concise and intelligible manner. In addition to the issues mentioned at [19] above, the Commission also identified that:
- 21.1 Clause 3.1 of the General Terms of Xtreme's Contract was contained within 4 pages of size 8 font text in a dual column layout.¹⁰
- 21.2 Information relating to the Delayed Delivery Provisions was not presented in a logical way, given no mention of their effect was made until page 10 and the actual term (clause 3.1) was not discoverable until page 12.¹¹ In versions 1 and 2 of the Contract, the Delayed Delivery Schedule also appeared nowhere near clause 3.1 and with no cross-reference.
- 21.3 Despite the significant impact the Delayed Delivery Provisions could have on when customers might receive their products, the terms were not given any prominence in the contract material.¹²
22. In relation to the oppressive nature of the agreement, we also consider that:
- 22.1 Delaying delivery in a manner that was grossly disproportionate to the number of payments missed was unjustly burdensome;
- 22.2 The withholding of key information concerning the Delayed Delivery Provisions resulted in a lack of informed consent when consumers were entering the contract.

Unfair Contract Terms

23. The Commission's view is that the Delayed Delivery Provisions were likely to be considered unfair contract terms for the purpose of section 46L of the FT Act.

⁹ Of the 20 customer files sampled, 19 were Custom plans. Of those, 9 plans were 65/130 (130 total payments, delivery after 65 payments), 8 plans were 27/80 and 2 were 54/102.

¹⁰ See cl 7.24(a) of the Code.

¹¹ See cl 7.24(b) of the Code.

¹² See cl 7.24(c) of the Code.

24. We have formed this view because:
- 24.1 The purchase agreement is a standard form consumer contract. The terms of the contract, and in particular the general terms and conditions, were not subject to effective negotiation between the parties.
 - 24.2 The Delayed Delivery Provisions created a significant imbalance in the parties' rights as the length of the delays were grossly disproportionate to the rights that Xtreme sought to protect. The consequence of even one missed payment for a customer was several weeks without possession of a product. In contrast, Xtreme only had a "best endeavours" obligation and liability limited to the extent permitted by law for late delivery (clause 3.2).
 - 24.3 Xtreme did not need the protection of the length of the delay, given it usually only acquired goods once customers grew closer to completing their pre-delivery payment obligations. The length of the delay was not justified when Xtreme usually did not assume a material risk of having the relevant products depreciate.
 - 24.4 The Delayed Delivery Provisions caused detriment to the customer in that, if they were enforced or relied upon, the customer would typically be deprived of possession for at least several weeks.
25. We also refer to the High Court judgment of 6 December 2021 in *Commerce Commission v Ace Marketing Limited* (reissued on 8 December 2021),¹³ where Robinson J ruled that similar clauses to those used in Xtreme's purchase agreement were unfair contract terms within the meaning of section 46L(1) of the FT Act.

Xtreme's response

26. You (on your own account and on Xtreme's behalf) have offered enforceable undertakings to the Commission, which we have accepted.¹⁴ Pursuant to these undertakings, we have accepted commitments from you and/or Xtreme to:
- 26.1 no longer enforce or rely upon the Delayed Delivery Provisions in existing Contracts;
 - 26.2 no longer use Delayed Delivery Provisions in future consumer contracts to which Xtreme is a counterparty (or, in your case, be involved with an entity that uses them in their consumer contracts); and
 - 26.3 make partial refunds of cancellation fees to customers that entered into Contracts during the Conduct Period.

¹³ The reasons judgment of that decision was delivered on 25 July 2022.

¹⁴ Enforceable undertakings from Xtreme Deals Limited and from Ibrahim Phee dated 27 July 2022, available on the Commission's case register.

Warning

27. The Commission has considered the factors set out in our Enforcement Response Guidelines and the appropriate enforcement response. Having considered the particular circumstances of this matter, including the provision of enforceable undertakings to remedy the potential harm of Xtreme's conduct, the Commission has decided to issue Xtreme with this warning.
28. The Commission has taken the following factors into account:
- 28.1 the scope for harm in Xtreme's use of the Delayed Delivery Provisions;
 - 28.2 the fact that Xtreme has ceased engaging in the relevant conduct;
 - 28.3 Xtreme's co-operation with the investigation; and
 - 28.4 the enforceable undertakings described at [26] above.

This letter is published

29. This warning letter and the enforceable undertakings you have provided are public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

30. The Commission is responsible for enforcing and promoting compliance with a number of laws that promotes competition in New Zealand, including the CCCF Act and the FT Act.

Penalties for breaching the CCCF Act and FT Act

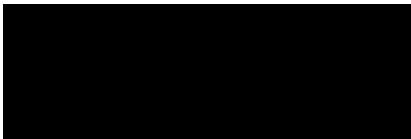
31. Only the courts can decide if there has been a breach of the CCCF Act and FT Act. The court can impose severe penalties where it finds the law has been broken.
32. Creditors who breach section 9C of the CCCF Act after 20 December 2019 can be liable for pecuniary penalties of up to \$600,000 for a company and \$200,000 for an individual. They can also be liable to pay statutory damages to borrowers.
33. Where a lender fails more than once to comply with any of the provisions of the CCCF Act, the court may make an order prohibiting or restricting any person (including a director or a principal officer of a lender) from:
- 33.1 providing credit under a consumer credit contract;
 - 33.2 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

- 33.3 being in the employ or acting as an agent of a credit in any capacity that allows the person to take part in the negotiation of a consumer credit contract involving the provision of credit by the creditor.
34. If a court declares a term of a standard form consumer contract unfair under the FT Act, a person can no longer include it in its standard form contracts or enforce it, and is liable for prosecution by the Commission if it does so.

Further information

35. We have published a series of fact sheets and other resources to help businesses comply with the CCCF Act, the FT Act and the other legislation we enforce. These are available on our website at www.comcom.govt.nz.
36. You can also view the CCCF Act, the FT Act and other legislation at www.legislation.co.nz.
37. Thank you for your assistance with this investigation. Please contact Sophie Ridoux on [REDACTED] or by email at [REDACTED] if you have any questions in relation to this letter.

Yours sincerely



Kylie Higgs
Acting Credit Investigations and Compliance Manager

Attachment A – Revised Delivery Schedule

Revised Delivery Schedule	% age of PMTS Required	Xpress Term	Gold Term	Standard	Ezy Term
1 missed payment, delivery deferred to:	40%	6 PMTS	12 PMTS	18 PMTS	26 PMTS
2 missed payments, delivery deferred to:	50%	8 PMTS	15 PMTS	23 PMTS	33 PMTS
3 missed payments, delivery deferred to:	60%	9 PMTS	18 PMTS	27 PMTS	39 PMTS
4 missed payments, delivery deferred to:	70%	11 PMTS	21 PMTS	32 PMTS	45 PMTS
5 missed payments, delivery deferred to:	85%	13 PMTS	25 PMTS	39 PMTS	55 PMTS
6 missed payments, delivery deferred to:	100%	15 PMTS	30 PMTS	45 PMTS	65 PMTS