

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

1 Person giving undertakings

- 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**)¹ by Real Finance Limited (**Real Finance**), a company having its registered office at 69a Manners Street, Te Aro, Wellington (**Undertakings**).

2 Background

- 2.1 Real Finance is a lender with offices in Wellington and Christchurch. It is a 'creditor' for the purposes of the CCCFA as it offers loans to consumer borrowers under consumer credit contracts.
- 2.2 Real Finance charges Establishment, Administration and Default fees (**Fees**) on consumer credit contracts entered into with consumer borrowers.
- 2.3 The Commission has investigated whether Real Finance's Fees were unreasonable for the purposes of s 41 of the CCCFA.
- 2.4 Following the conclusion of its investigation, the Commission filed proceedings in the Wellington High Court alleging that the Fees charged by Real Finance between 1 April 2013 and 31 March 2020 were unreasonable, in breach of s 41 of the CCCFA, because the Fees:
- (a) recovered amounts which exceeded the transaction-specific costs of performing the activities to which each of the Fees related; and
 - (b) were typically determined by charging different fees under different classes of credit contracts, in circumstances where the Commission considered that those classes did not reflect material differences between the expected transaction-specific costs arising under each class of credit contract (the Commission accepting that charging different fees under different classes of contract would be permissible under the CCCFA where there are material differences in the activities undertaken in respect of each class (for instance, for secured and unsecured loans)).
- 2.5 Real Finance admits that between 1 April 2013 and 31 March 2020, in breach of section 41 of the CCCFA, Real Finance's consumer credit contracts provided for Fees that were unreasonable, specifically in that:
- (a) Real Finance's Establishment Fees exceeded the average reasonable costs that Real Finance incurred in connection with an application for credit, processing and considering that application, documenting the consumer credit contract, and advancing the subsequent credit.
 - (b) Real Finance's Administration Fees exceeded the average reasonable costs that Real Finance incurred in relation to activities closely connected with loan administration.

¹ And, via s 113(aa) of the CCCFA, ss 74A to 74C of the Commerce Act 1986.

- (c) Real Finance's Default Fees exceeded the total of the costs incurred by Real Finance on default by a borrower and a reasonable estimate of the loss incurred by Real Finance in relation to a default by a borrower.

2.6 Real Finance further:

- (a) accepts for the purposes of these undertakings the Commission's calculations of its average reasonable costs in relation to each of the Fees for each financial year from FY14 to FY19, as set out in Schedule 1, for each relevant year;
- (b) agrees that for the purpose of these Undertakings, the average reasonable costs for each of the Fees for FY20 and FY21 shall apply as set out in Schedule 1; and
- (c) accepts that, as a result, the aggregate amounts by which the Fees charged to affected Borrowers exceeded Real Finance's average reasonable costs between 1 April 2013 and the date that these undertakings are given were:
- (i) in respect of Establishment Fees, \$456,282.03;
 - (ii) in respect of Administration Fees, \$647,670.12;
 - (iii) in respect of Default Fees, \$43,618.46; and
 - (iv) in total, \$1,147,570.61.

2.7 Contemporaneously with the giving of these Undertakings, the parties will file amended pleadings in the proceedings referred to above, in which Real Finance will admit that the Fees were unreasonable in terms of paragraphs 2.5(a), (b) and (c) above.

2.8 In order to remedy the admitted breaches, Real Finance has offered to give, and the Commission has agreed to accept, pursuant to section 74A of the Commerce Act 1986 via section 113(aa) of the CCCFA, the enforceable Undertakings.

3 Interpretation

3.1 In these Undertakings and the Schedules:

- (a) **Administration Fee** means the fee charged by Real Finance to Borrowers for preparing loan statements and administering repayments, and as further described at paragraphs [11](b) and [17] to [20] of the Second Amended Statement of Claim set out in **Schedule 2** to these Undertakings.
- (b) **Borrower** means a natural person with whom Real Finance either:
- (i) entered into a Contract between 6 June 2015 and the date these Undertakings are executed by Real Finance; or
 - (ii) entered into a Contract between 1 April 2013 and 6 June 2015, where the person was charged a Fee between 28 June 2018 and the date Real Finance executes these Undertakings;

all such persons to be listed in **Schedule 3** to these Undertakings, as set out in paragraphs 4.2-4.4 below.

- (c) **Contract** means a consumer credit contract entered into between Real Finance and any person.
- (d) **Current Loan** means a loan provided under a Contract between Real Finance and a Borrower, under which any amount remains owed prior to Real Finance paying Reparation and Interest to that Borrower in accordance with these Undertakings (and, for the avoidance of doubt, includes a loan where a Borrower is in default, but where Real Finance has not written off the amount owing).
- (e) **Day** means working day as defined in High Court Rule 1.3.
- (f) **De Minimis** means a total sum owed to a Borrower who does not have a Current Loan with Real Finance, in respect of all Fees charged to that Borrower, that is less than \$5.
- (g) **Deceased Borrowers Process** means the process set out in paragraph 5.9(f).
- (h) **Default Fee** means the fee charged by Real Finance each week a Borrower was in default under their Contract, and as further described at paragraphs [11](c) and [21] to [24] of the Second Amended Statement of Claim set out in **Schedule 2** to these Undertakings.
- (i) **Establishment Fee** means the fee charged by Real Finance to Borrowers for establishing loans, and as further described at paragraphs [11](a) and [13] to [16] of the Second Amended Statement of Claim set out in **Schedule 2** to these Undertakings.
- (j) **Fees** means the Establishment Fee, the Administration Fee and the Default Fee.
- (k) **Interest** means interest payable to an individual Borrower, accruing in respect of each Fee from the date the Fee was charged, and at the following rates:
 - (i) until 29 July 2020: at a rate of 5% per annum, compounded annually; and
 - (ii) from 30 July 2020 to the date these Undertakings are executed by Real Finance: at the rate applicable to a court-awarded civil judgment under the Interest on Money Claims Act 2016.
- (l) **Related Parties** of Real Finance include:
 - (i) its past and present directors, officers, employees, and agents; and
 - (ii) its related companies and each related company's past and present directors, officers, employees, and agents, where "related company" has the same meaning as in the Companies Act 1993.
- (m) **Relevant Period** means the period between 1 April 2013 and the date these Undertakings are executed by Real Finance.
- (n) **Reparation** means the reparation payable to an individual Borrower, being the amount by which the Fee(s) that Real Finance charged to a Borrower exceeded the amount(s) set out at **Schedule 1** to these Undertakings (being the amounts Real Finance accepts as reflecting its average reasonable costs during the Relevant Period).

4 Purpose of the Undertakings

4.1 These Undertakings are given by Real Finance to record its commitment to:

- (a) remediate all Borrowers in the manner it has agreed with the Commission, including by:
 - (i) paying Reparation and Interest to identified Borrowers, with the Reparation payable being the amount by which the Fees charged to those Borrowers exceeded the applicable amounts recorded in Schedule 1;
 - (ii) notifying Borrowers of their entitlements regarding the same; and
 - (iii) reporting to the Commission regarding its progress in paying Reparation; and
- (b) keep accurate and complete records of how it calculates the credit and default fees it charges.

Schedule 3 list of eligible Borrowers

- 4.2 **Schedule 3** is to include a list of all Borrowers who are to be paid Reparation and Interest, together with the amounts to be paid. The data provided in **Schedule 3** shall contain an itemised list of Fees charged to Borrowers, including the amount charged, the date charged, the loan account identifier, and the Reparation and Interest payable by Real Finance in respect of those Fees. Where one person has entered into more than one Contract under which a Fee was charged, they will be listed as a separate Borrower in respect of each such Contract.
- 4.3 At the time that these Undertakings are given, Real Finance has provided a draft of **Schedule 3** which identifies the Borrowers to be paid Reparation, and which Real Finance has confirmed is complete, to the best of its knowledge, as at 31 January 2022. A finalised version of **Schedule 3** will be provided by Real Finance within one week of the date these Undertakings commence in accordance with paragraph 7.1 below.
- 4.4 Real Finance is responsible for any errors or omissions in **Schedule 3**. If a Borrower who is entitled to Reparation and Interest in accordance with these Undertakings is omitted from that Schedule, or the amount owing to them is understated, Real Finance confirms that it will pay the correct amount to that Borrower, as required by these Undertakings.

5 Undertakings

- 5.1 Real Finance undertakes to the Commission to give notice to Borrowers that they may be eligible for payment of Reparation and Interest by:
- (a) creating and maintaining a separate page on its website <www.realfinance.co.nz> (**Website**) which contains relevant information and contact details regarding Reparation and Interest that may be payable to Borrowers (the **Information Page**);
 - (b) provide the Commission with the text of the Information Page at least one Day prior to that page being published on the Website; and
 - (c) maintaining, at the top of the homepage of its Website, a prominent hyperlink to the Information Page in the form of the following words: *"Were you a Real Finance client between 1 April 2013 – 31 March 2020? Check if you are owed money here"*;

(referred to collectively as the **Notice Undertaking**).

5.2 Real Finance undertakes to the Commission that it will:

- (a) credit the outstanding loan balance of each Borrower with a Current Loan of the Reparation and Interest those Borrowers are entitled to; and
- (b) carry out the undertaking in paragraph 5.2(a) in accordance with the process provided for in paragraph 5.6 below;

(referred to collectively as the **Crediting Undertaking**).

5.3 Real Finance undertakes to the Commission that it will:

- (a) pay Reparation to Borrowers without a Current Loan, to the extent Reparation remains owing after it has discharged its obligations under paragraph 5.2(a) above, that is after any current loan balance has been credited (and if there is still Reparation and Interest owing); and
- (b) carry out the undertaking in paragraph 5.3(a) in accordance with the process provided for in paragraphs 5.8 to 5.15 below;

(referred to collectively as the **Repayment Undertaking**).

5.4 Real Finance undertakes to the Commission that, if it identifies any additional persons who ought to have been listed in the finalised version of **Schedule 3** provided in accordance with paragraph 4.3 above (because those are persons to whom paragraphs 3.1(b)(i) and/or (ii) above apply), it will pay Reparation and Interest to those persons in accordance with the Crediting Undertaking and/or the Repayment Undertaking (as applicable) (the **Rectification Undertaking**).

5.5 Real Finance undertakes to the Commission that it will:

- (a) report to the Commission regarding its compliance with the Crediting and Repayment Undertakings, and to follow any further directions given by the Commission in respect of the same; and
- (b) carry out the undertaking in paragraph 5.5(a) in accordance with the process provided for in paragraph 5.16 below;

(referred to collectively as the **Reporting Undertaking**).

The Crediting Undertaking

5.6 From the date these Undertakings commence, for any Borrowers who have a Current Loan with Real Finance, Real Finance will:

- (a) as soon as practicable, and in any event within six weeks of the date these Undertakings commence:
 - (i) credit the Reparation and Interest amounts the Borrower is entitled to against the outstanding balance of the Borrower's Current Loan with Real Finance;

- (ii) where the amount owing on the Borrower's loan is less than the amount Real Finance is to pay that Borrower in Reparation and Interest, Real Finance shall credit the Borrower's Current Loan by the amount required to take the balance of that loan to zero dollars, and then pay the outstanding amount to the Borrower in accordance with the Repayment Undertaking, as detailed at paragraphs 5.8 to 5.15 below (and in those paragraphs, a reference to a Borrower who "does not have a Current Loan" is to be read to include a Borrower who is to be paid Reparation and Interest in accordance with this subparagraph); and
 - (iii) update its records – including where Real Finance has already written off all or part of a Borrower's previous loan amount or recorded it as a bad debt – to record the Reparation and Interest credited to each Borrower;
 - (b) make reasonable attempts to contact those Borrowers using the information it holds (for example, this may include contacting the Borrowers by SMS message, email, post and/or telephone) advising:
 - (i) that Real Finance charged unreasonable fees on the Borrower's loan(s) with Real Finance during the Relevant Period in breach of section 41 of the CCCFA;
 - (ii) that Real Finance has undertaken to pay Borrowers Reparation and Interest;
 - (iii) that Real Finance has given the Undertakings to the Commission;
 - (iv) the amount of Reparation and Interest which Real Finance has undertaken to pay the Borrower; and
 - (v) that Real Finance has credited the balance of the Borrower's Current Loan with the Reparation and Interest owed to them under the Undertakings; and
 - (c) maintain a Real Finance contact email address and phone number for Borrowers to ask any queries.
- 5.7 Real Finance will provide the Commission with the pro-forma text of the communications required by paragraph 5.6(b) above at least one Day prior to contacting the first such Borrower.

The Repayment Undertaking

- 5.8 Real Finance will take the steps listed in paragraphs 5.9 to 5.15 below within six months of the date these Undertakings commence.
- 5.9 Real Finance will pay Reparation and Interest in full to Borrowers without a Current Loan with Real Finance in accordance with the process set out at paragraph 5.10 below, except where:
- (a) a Borrower would not be entitled to Reparation and/or Interest after Real Finance has discharged the Crediting Undertaking;
 - (b) a Borrower refuses to accept any payment of Reparation or Interest;
 - (c) Real Finance has previously written-off a Borrower's most recent loan, and in that case, Real Finance will instead pay Reparation and Interest in respect of any Fees charged on the written off loan(s) to the extent that the Reparation and Interest

owing exceeds the sum written off on that loan(s). For the avoidance of doubt, this exception:

- (i) applies only where:
 - (A) the written-off loan is the Borrower's most recent loan with Real Finance; or
 - (B) the Borrower has a number of loans with Real Finance (with one of those being the Borrower's most recent loan from Real Finance) and all of those loans have been written off simultaneously; and
 - (ii) does not apply if Real Finance had written off, but subsequently reinstated, the Borrower's most recent loan(s);
 - (d) Real Finance is aware that a Borrower is bankrupt at the time when the Reparation and Interest is to be paid to them (in which case, the Reparation and Interest shall be paid to the Official Assignee, unless otherwise agreed with the Official Assignee);
 - (e) Real Finance:
 - (i) has previously taken court action against the Borrower, and that action has resulted in a judgment involving concessions as to fees and/or interest, and where the amount of that concession exceeds, or is equal to, the Reparation and Interest owing;
 - (ii) is currently taking court action against the Borrower (and in that case, it will reduce the amount sought in that proceeding by the Reparation and Interest owed);
 - (f) a Borrower is deceased, and in which case:
 - (i) Real Finance will use reasonable endeavours to contact the legally empowered representative(s) of the deceased Borrower informing them of the entitlement to Reparation and Interest (and for the avoidance of doubt, a "legally entitled representative" is a person empowered to administer the deceased estate, by way of a grant of probate or such other operation of law in the relevant case); and shall then
 - (ii) pay Reparation and Interest at the direction (if any) of those representative(s) once Real Finance is reasonably satisfied that the representative(s) is/are legally empowered to administer the estate of the deceased Borrower; and/or
 - (g) such sums would be De Minimis.
- 5.10 If a Borrower does not have a Current Loan with Real Finance, Real Finance will:
- (a) update its records to reflect the Borrower's entitlement to Reparation and Interest (and, where any amount owed on a Borrower's most recent loan has been written off, will amend its records to reduce the amount of the recorded write off by the amount of the Reparation and Interest); and

- (b) take reasonable steps using the information it holds to contact each Borrower (for example, this may include contacting Borrowers on all known contact details for that customer, including by SMS message, email, post and/or telephone) advising:
- (i) that Real Finance charged unreasonable fees on the Borrower's loan(s) with Real Finance during the Relevant Period in breach of section 41 of the CCCFA;
 - (ii) that Real Finance has undertaken to pay Borrowers Reparation and Interest;
 - (iii) that Real Finance has given the Undertakings to the Commission;
 - (iv) the amount of Reparation and Interest which Real Finance has undertaken to pay the Borrower (and if applicable, the extent to which that amount has been reduced to reflect any sums written off the Borrower's most recent loan);
 - (v) that the Borrower should direct Real Finance as to how to pay the Reparation and Interest by providing a bank account number; and
 - (vi) the Real Finance contact email address and phone number (as provided for in subparagraph 5.6(c) above) for any Borrowers who have queries.

5.11 Real Finance will provide the Commission with the pro-forma text of the communications required by paragraph above 5.10(b) at least one Day prior to contacting the first such Borrower.

5.12 If, following Real Finance's communication with Borrowers pursuant to paragraph 5.10 above, a Borrower who does not have a Current Loan with Real Finance instructs Real Finance to pay the Reparation and Interest due to them into a nominated bank account, Real Finance will pay the Reparation and Interest into that account in accordance with paragraph 5.13 below.

5.13 In paying Reparation and Interest into bank accounts nominated by Borrowers under paragraph 5.12 above, Real Finance will make payments in accordance with paragraph 5.14 below, and generally in accordance with the following order of priority:

- (a) First, paying any Reparation and Interest owed to Borrowers who have a Current Loan with Real Finance; and
- (b) Then, in respect of Borrowers who do not have a Current Loan:
 - (i) by paying Reparation and Interest to Borrowers whom Real Finance has had contact with in the past two years (including any Borrowers who contact Real Finance from the website notifications required by the Notice Undertaking, or after being contacted by Real Finance in accordance with paragraph 5.10 above); and then
 - (ii) by paying Reparation and Interest to all other Borrowers to whom such amounts are owed (other than to deceased Borrowers); and then
 - (iii) where the Borrower is deceased, by paying the Reparation and Interest in accordance with the Deceased Borrowers Process.

5.14 In paying Reparation and Interest to Borrowers in accordance with paragraphs 5.7 – 5.10 above, Real Finance will:

- (a) when making payments of Reparation and Interest in accordance with paragraph 5.13(b) above, make such payments to a Borrower within 10 Days of the Borrower nominating a bank account for the payment of Reparation and Interest (or if Real Finance does not have sufficient funds to make payment by that time, then as soon as possible thereafter);
- (b) make reasonable endeavours to ensure that it acts in accordance with the process set out in paragraphs 5.8 and 5.10 above in respect of:
 - (i) at least 15% of all Borrowers within one month of the date on which the Undertakings commence;
 - (ii) at least 50% of all Borrowers within three months of the date on which the Undertakings commence; and
 - (iii) at least 90% of all Borrowers within five months of the date on which the Undertakings commence; and
- (c) use reasonable endeavours to ensure all Borrowers are paid the amount in Reparation and Interest owed to them within six months of the Undertakings commencing.

5.15 To the extent that Real Finance cannot establish contact with a Borrower using the methods set out in paragraph 5.10 above, Real Finance shall use reasonable endeavours to locate and contact those Borrowers, including but not limited to:

- (a) telephoning the Borrower and if necessary leaving a voicemail message;
- (b) sending further SMS and emails to the Borrower;
- (c) contacting that Borrower through any publicly available means of locating that person (including by using any information available through search engines, social media accounts, phone directories, and/or the electoral roll);
- (d) using external credit reporting searches to locate the Borrower; and
- (e) taking any other steps to locate a Borrower that Real Finance would usually take to locate and contact a non-paying debtor who owed Real Finance an amount equivalent to the amount payable to the Borrower in accordance with these Undertakings.

The Reporting Undertaking

5.16 Real Finance will report to the Commission regarding its compliance with the Crediting and Repayment Undertakings, and will follow any further directions given by the Commission in respect of the same, as follows:

- (a) Following completion of its efforts to contact all Borrowers and make refunds, and in any event within seven months of the date these Undertakings commence, Real Finance will provide a report to the Commission setting out the progress it has made in making refunds, including a summary of the payments made to Borrowers pursuant to these Undertakings (**the Payment Update Report**).

- (b) If, at the time it provides the Payment Update Report, Real Finance has been unable to make refunds to all Borrowers, it will include in the Payment Update Report details of the Borrowers still owed refunds and the amounts owed to them (**Unreturned Funds**).
- (c) If there are Unreturned Funds at the time Real Finance provides the Payment Update Report:
 - (i) Real Finance will treat any remaining unpaid amount as unclaimed money under the Unclaimed Money Act 1971 (**UMA**) and will deal with that unclaimed money in accordance with the UMA to the extent it is possible or practical to do so;
 - (ii) to the extent that it is not possible or practical to deal with any remaining unpaid amount in accordance with the UMA, Real Finance will pay the outstanding amount to a registered charity which:
 - (A) is not associated with Real Finance or any of its officers or agents; and
 - (B) offers debt relief, legal advice and/or budgeting services;
 - (iii) Real Finance will notify the Commission of the charity chosen by it in accordance with paragraph 5.16(c)(ii) above at least 3 weeks in advance of any payment being made.
 - (iv) If the Commission objects to the charity chosen by Real Finance:
 - (A) the Commission will notify Real Finance of that objection within 2 weeks of receiving the notification required by paragraph 5.16(c)(iii) above; and
 - (B) the parties will repeat the steps in subparagraphs (ii), (iii) and (iv)(A) above as necessary.

6 Effect of Undertakings

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

7 Commencement of the Undertakings

- 7.1 The Undertakings come into effect when:
- (a) executed by Real Finance; and
 - (b) the Commission confirms its acceptance of the Undertakings.

8 Duration of the Undertakings

- 8.1 The Crediting, Repayment and Reporting Undertakings will continue to have effect until they are performed in full, or the Commission discharges Real Finance from those Undertakings.

- 8.2 The Rectification Undertaking will continue to have effect until the Crediting, Repayment and Reporting Undertakings are performed in full, or the Commission discharges Real Finance from those Undertakings.
- 8.3 The Notice Undertaking will continue to have effect until the Reporting Undertaking is performed in full, or the Commission discharges Real Finance from that Undertaking (whichever is the earlier).

9 Compliance with the Undertakings

- 9.1 If Real Finance 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.
- 9.2 For the avoidance of doubt, nothing in paragraph 9.1 above prevents the Commission from seeking any information from Real Finance at any time for the purpose of checking compliance with the Undertakings.

10 Miscellaneous

- 10.1 No amendment to the Undertakings will be effective unless it is in writing, executed by Real Finance, and signed as accepted by the Commission.
- 10.2 These Undertakings are properly executed if Real Finance and the Commission sign the same copy, or separate identical copies of the execution page. Where separate copies are signed by Real Finance or by the Commission, the signed copy can be the original document, or a faxed or emailed copy.
- 10.3 Real Finance acknowledges that:
- (a) The Commission will make the Undertakings publicly available including by publishing them on the Commission's enforcement response register on its website, except for the confidential information in Schedule 3.
 - (b) The Commission may, from time to time, make public reference to the Undertakings including in news media statements and in the Commission's publications.
 - (c) Nothing in the 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 **Real Finance Limited**




Director/authorised signatory



Name

In the presence of:



Signature of witness



Name of witness



Occupation



City/town of residence




Date



Acceptance

Signed by and on behalf of the Commerce
Commission by:

Chair



Commerce Commission

ANNA RAWLINGS

Date

11/2/22

Schedule 1: base figures for Reparation

Fees charged from 1 April 2013 to 31 March 2021

The Commission's expert's assessment of the reasonable costs that were closely related to the activities giving rise to the Fees applicable for each financial year are as set out below for FY14 to FY19. The figures for FY20 and FY21 are derived using Real Finance's stated costs in comparable financial years.

Table 1

	FY14 NZD	FY15 NZD	FY16 NZD	FY17 NZD	FY18 NZD	FY19 NZD	FY20 and FY21 NZD
Establishment Fee	59.15	37.56	40.74	52.08	67.28	83.13	161
Administration Fee (per month)	6.75	6.58	5.06	6.69	8.06	10.59	11.07
Default Fee (per week)	5.15	4.64	3.19	4.66	5.87	10.34	11.85

Fees charged from 1 April 2021 and 31 May 2021

For fees charged in the period between 1 April 2021 and 31 May 2021, Real Finance will pay reparation to the extent its fees exceeded the amounts it charged on the applicable loan class from 1 June 2021 onwards, as set out below:

Table 2

	"Rapid" NZD	"Mini" NZD	"Maxi" NZD	"Super" NZD	"Consol" NZD
Establishment Fee	128	128	169	209	181
Administration Fee (per month)	0	15	17	17	18
Default Fee (monthly fee, pro-rated on a weekly basis)	18	23	35	35	35

Real Finance acknowledges that the figures above have been adopted for the purposes of these undertakings only, and that these figures do not necessarily represent the views of the Commission or its experts regarding Real Finance's transaction-specific costs within this time period.

Fees charged from 1 June 2021 to the date Real Finance executes these Undertakings

If Real Finance becomes aware that a Borrower has been charged a fee in this period which exceeds the applicable amount in Table 2 above, Real Finance will pay the Borrower the difference between the fee charged and the amount in Table 2 without delay.

Schedule 2: Second Amended Statement of Claim

Second Amended Statement of Claim [to be put on MC intituling]

The Plaintiff by its solicitor says:

The Parties

- 1 The plaintiff, the Commerce Commission (the **Commission**), is a body corporate established under section 8 of the Commerce Act 1986. Its functions include the enforcement of the Credit Contracts and Consumer Finance Act 2003 (the **Act**).
- 2 The defendant, Real Finance Limited (**Real Finance**), is a duly incorporated company having its registered office at 69A Manners Street, Wellington.
- 3 Real Finance was incorporated (under the name Real Finance Group Limited) on 26 September 2008. The company name was changed to Real Finance Limited on 14 June 2011.
- 4 Real Finance's sole director is Rodney Janos Varga, of Kilbirnie, Wellington.

Real Finance's business

- 5 Real Finance is a finance company. As part of its business, it provides secured and unsecured loans to consumer borrowers in New Zealand (**Borrowers**).
- 6 Real Finance provides credit to Borrowers under consumer credit contracts, and is a creditor, as those terms are defined in the Act.
- 7 Real Finance receives and processes applications from Borrowers who apply for credit:
 - (a) in person at Real Finance's physical branches in Wellington and Christchurch;
 - (b) online, via Real Finance's website <realfinance.co.nz> (the **Website**); and
 - (c) by contacting Real Finance by telephone or email.

The credit arrangements between 1 April 2013 and 31 March 2020

- 8 Real Finance provided loans to Borrowers under credit contracts, the terms of which were set out in:
 - (a) a document described as an "Operative Terms Booklet"; and
 - (b) a disclosure statement.(together, the **Contract**)

Particulars of paragraph 8

- (a) The terms of the two documents comprising the Contract have varied over the period 1 April 2013 to 31 March 2020, without material changes to the substance of either document.

- (b) Real Finance's arrangements with some Borrowers also included other documentation, such as guarantor agreements, not forming part of the Contract (as that term is used in this statement of claim).
- 9 The Contract provided for interest, credit fees, and default fees to be charged to Borrowers by Real Finance.
- 10 Real Finance categorised loans into a number of classes (each a **Loan Class**). One of the purposes of that categorisation was to determine the applicable credit and default fees.

Particulars of paragraph 10

- (a) The applicable Loan class was determined by Real Finance in its sole discretion, having regard to matters including the loan principal, the loan term, whether a security interest was taken under the Contract (and if one was, the kinds of property security was taken over), and Real Finance's assessment of the Borrower's risk of defaulting on the loan.

Real Finance's fees

- 11 Between 1 April 2013 and 31 March 2020, the Contracts provided for specified credit fees and, if applicable, default fees. Those fees included:
- (a) an **Establishment Fee**, as pleaded in more detail at paragraphs 13 to 16 below;
 - (b) a monthly **Administration Fee**, as pleaded in more detail at paragraphs 17 to 20 below; and
 - (c) if the Borrower was in default, a weekly **Default Fee**, as pleaded in more detail at paragraphs 21 to 24 below.
- (together, the **Fees**)

Particulars of paragraph 11

- (a) In some instances, Borrowers were not required to pay some or all of the Fees, either because Real Finance exempted some Loan Classes from paying those Fees, or because Real Finance waived the Fees payable by a particular Borrower.
- 12 The amounts of the Fees were set by Real Finance, depending on the assigned Loan Class.

Particulars of paragraph 12

- (a) The fees payable under individual credit contracts varied from standard loan classes from time to time based on the personal and financial circumstances of the borrower.

The Establishment Fee

- 13 Real Finance charged the Establishment Fee to Borrowers as a fee for steps taken by Real Finance in relation to:
- (a) the application for credit by a Borrower;
 - (b) processing and considering a Borrower's credit application;

- (c) documenting the Contract with the Borrower; and
- (d) advancing credit to the Borrower.

14 As defined in s 5 of the Act, the Establishment Fee was:

- (a) an "establishment fee"; and
- (b) a "credit fee".

Particulars of paragraph 14

- (a) The Establishment Fee did not include costs incurred by Real Finance to third parties which undertook Establishment Activities on Real Finance's behalf (for instance, charges by credit checking agencies). Real Finance instead passed those costs on to Borrowers in full, by way of separate additional fees.

15 By reason of paragraph 14 above, the Act required that the amount of the Establishment Fee could not be unreasonable, having regard to Real Finance's reasonable costs in connection with the Establishment Activities (the amount described in the Act is referred to in this pleading as the **Reasonable Establishment Costs**).

16 Real Finance charged Borrowers the Establishment Fee by adding the amount of it to the initial unpaid balance of the loan.

The Administration Fee

17 As defined in s 5 of the Act, the Administration Fee was a "credit fee".

18 Real Finance charged the Administration Fee to Borrowers as a fee for activities required to administer loans, including preparing loan statements and administering repayments.

Particulars of paragraph 18

- (a) On the Website, Real Finance has described the Administration Fee as the "monthly cost of keeping [the Borrower's] loan account active, including providing [the Borrower] with any mandatory loan statements, running repayments, and any other administrative tasks needed".

19 By reason of paragraph 18 above, the Act required that the amount of the Administration Fee could not be unreasonable, having regard to the amount reasonably required to compensate Real Finance for the costs:

- (a) incurred by Real Finance in administering loan accounts; and
- (b) which were of a kind, and in amounts, which could be recovered from a Borrower in accordance with reasonable standards of commercial practice.

(the amount described in the Act is referred to in this pleading as the **Reasonable Administration Costs**)

20 Real Finance charged Borrowers an Administration Fee at the end of each month where an amount remained owing on the Borrower's loan. Where charged, the Administration Fee was added to the loan principal.

The Default Fee

- 21 As defined in s 5 of the Act, the Default Fee is a "default fee".
- 22 Real Finance charged the Default Fee to Borrowers on a pro-rata weekly basis when a Borrower was in arrears (following a two day grace period) in relation to payments due under their Contract.
- 23 By reason of paragraph 22 above, the Act required that the amount of the Default Fee could not be unreasonable, having regard to the amount reasonably required to compensate Real Finance for:
- (a) the costs:
 - (i) incurred by Real Finance upon the Borrower not making a scheduled payment; and
 - (ii) which were of a kind, and in amounts, which could be recovered from a defaulting Borrower in accordance with reasonable standards of commercial practice; and
 - (b) a reasonable estimate of any loss:
 - (i) incurred by Real Finance as a result of the Borrower's acts or omissions; and
 - (ii) which was of a kind which could be recovered from a defaulting Borrower in accordance with reasonable standards of commercial practice.
- (the amount described in the Act is referred to in this pleading as the **Reasonable Default Costs**)
- 24 The Default Fees:
- (a) were set by Real Finance by reference to a notional monthly Default Fee which was pro-rated to a weekly amount;
 - (b) were charged to Borrowers by Real Finance on a weekly basis from the date of the Borrower's default, following a two day grace period, for the period in which the Borrower remains in default; and
 - (c) were added to the Borrower's outstanding loan balance, and were paid by Borrowers by way of subsequent repayments made under their respective loans.

First cause of action: the Establishment Fees were unreasonable

- 25 The Commission repeats paragraphs 1 to 16 above.
- 26 The Establishment Fees charged by Real Finance were unreasonable to the extent that those fees:
- (a) exceeded Real Finance's Reasonable Establishment Costs; and
 - (b) recovered costs not connected with the Establishment Activities.
- 27 As a result of the Contracts providing for payment of unreasonable Establishment Fees, Real Finance has breached s 41 of the Act.

- 28 Of the Borrowers who were required to pay an Establishment Fee:
- (a) those who have repaid their loans in full have paid the Establishment Fee in full; and
 - (b) those who have not repaid their loans in full:
 - (i) have paid part of the Establishment Fee, calculated in proportion to the repayments made under their respective loans; and
 - (ii) have an enlarged debt obligation in their name, to the extent that the Establishment Fee is included in the remaining loan amount.
- 29 Borrowers to whom paragraph 28 applies have suffered loss or damage as a consequence of paying an unreasonable Establishment Fee.

Particulars of paragraph 29

- (a) The Borrowers have suffered the following losses:
 - (i) the amount paid by them in excess of Real Finance's Reasonable Establishment Costs; and
 - (ii) interest on the amount set out above;

Accordingly, the Commission seeks:

- (A) A declaration that Real Finance contravened s 41 of the Act by providing for unreasonable Establishment Fees in Contracts entered into between 1 April 2013 and 31 March 2020.

Second cause of action: the Administration Fees were unreasonable

- 30 The Commission repeats paragraphs 1 to 12 and 17 to 20 above.
- 31 The Administration Fees charged by Real Finance on Contracts entered into between 1 April 2013 and 31 March 2020 were unreasonable to the extent that those fees:
- (a) exceeded Real Finance's Reasonable Administration Costs; and
 - (b) in the period between 1 April 2013 and 31 March 2018, recovered costs not connected with administering loans.

Particulars of paragraph 31(a)

- (a) The Administration Fee:
 - (i) was not set by reference to Real Finance's actual costs of administering loans, or a reasonable estimate of those likely costs;
 - (ii) attributed overheads and staff expenses which were not closely connected with administering loans; and
 - (iii) in the period from 6 June 2015 to 31 March 2018:
 - (A) included allowances for general overheads; and

- (B) was set at a level which allowed Real Finance to profit from charging Administration Fees.

Particulars of paragraph 31(b)

- (b) the costs recovered through the Administration Fee during this period included, but were not limited to, a portion of Real Finance's advertising costs. Such costs were not connected with Real Finance's cost of administering loans.
- 32 As a result of the Contracts providing for unreasonable Administration Fees, Real Finance has breached s 41 of the Act.
- 33 Borrowers have paid Administration Fees to Real Finance, calculated on a monthly basis, for the duration of their Contracts.
- 34 Borrowers have suffered loss or damage as a consequence of paying an unreasonable credit fee.

Particulars of paragraph 34

- (a) The Borrowers have suffered the following losses:
- (i) the amount paid by them in excess of Real Finance's Reasonable Administration Costs; and
- (ii) interest on the amount set out above.

Accordingly, the Commission seeks:

- (A) A declaration that Real Finance contravened s 41 of the Act by providing for unreasonable Administration Fees in Contracts entered into between 1 April 2013 and 31 March 2020.

Third cause of action: the Default Fees were unreasonable

- 35 The Commission repeats paragraphs 1 to 12 and 21 to 24 above.
- 36 The Default Fees charged by Real Finance on Contracts entered into between 1 April 2013 and 31 March 2020 were unreasonable to the extent that those fees exceeded Real Finance's Reasonable Default Costs.
- 37 As a result of the Contracts providing for unreasonable Default Fees, Real Finance has breached s 41 of the Act.
- 38 Of the defaulting Borrowers:
- (a) those who have since made repayments under their loans have paid the Default Fees, either in full or in part; and
- (b) the loan balances for those who have not since made repayments under their loans have increased as a result of being charged the Default Fees.
- 39 Borrowers have suffered loss or damage as a consequence of paying an unreasonable Default Fee.

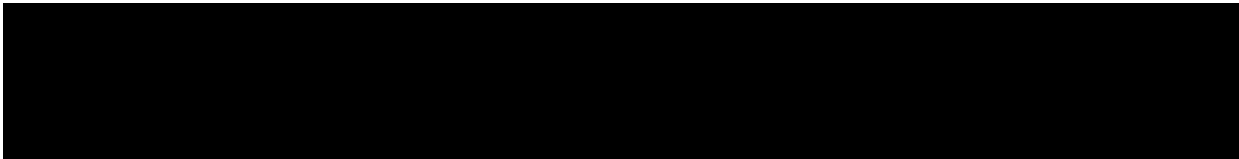
Particulars of paragraph 39

- (a) The Borrowers have suffered the following losses:
- (i) the amount paid by them in excess of Real Finance's Reasonable Default Costs; and
 - (ii) interest on the amount set out above.

Accordingly, the Commission seeks:

- (A) A declaration that Real Finance contravened s 41 of the Act by providing for unreasonable Default Fees in Contracts entered into between 1 April 2013 and 31 March 2020.

Schedule 3: list of Borrowers



A handwritten signature in blue ink, consisting of a stylized 'L' shape followed by a circular flourish.