

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 Xtreme Deals Limited (**Xtreme**), having its registered office at 593 Te Rapa Road, Te Rapa, Hamilton, 3200, New Zealand.

2 Background

- 2.1 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 Contract.
- 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, Xtreme has:
- (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 its internal practices so as to not enforce or rely upon the Delayed Delivery Provisions in its Contracts;
 - (c) admitted that its 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 these Undertakings to the Commission.
- 2.6 Xtreme's sole director, Ibrahim Phee, has also offered personal enforceable undertakings that record his commitment not to provide credit, or be involved in the provision of credit, under consumer credit contracts containing Delayed Delivery Provisions and use his best endeavours to assist Xtreme to comply with its obligations under the Xtreme Undertakings.
- 2.7 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.

3 Purpose of Undertakings

- 3.1 These Undertakings are given by Xtreme to record its commitment to:
- (a) not include Delayed Delivery Provisions in any consumer credit contracts it enters into from the date of these Undertakings;
 - (b) not rely upon, or enforce, the Delayed Delivery Provisions in its existing Contracts; and
 - (c) remediate certain customers of Xtreme who were charged 'administration fees' when they cancelled their Contracts.

4 Undertakings

- 4.1 Xtreme undertakes to the Commission:
- (a) that it will not enter into any consumer credit contracts that contain Delayed Delivery Provisions;
 - (b) that it will not rely upon, or enforce, the Delayed Delivery Provisions in any Contracts entered into before the date of these Undertakings, and that it will advise relevant customers of this commitment in accordance with clause 4.2 below; and
 - (c) that it will remediate certain customers in accordance with clauses 4.3 to 4.6 below.
- 4.2 In respect of customers under existing Contracts with Xtreme who have not yet received delivery of their products, Xtreme undertakes that it will write to each of those customers in a manner and form agreed with the Commission within 30 days of these Undertakings being accepted and advise them that Xtreme will not be relying upon, or enforcing, the Delayed Delivery Provisions in their Contracts and consequently those customers will receive delivery upon making the minimum number of payments required under the Contract's payment schedule.
- 4.3 Xtreme undertakes to the Commission that, in respect of each customer that has paid 'administration fees' under a Contract entered into during the Conduct Period (**Refund Customer**), Xtreme will make a payment to that Refund Customer of an amount equivalent to 50% of the 'administration fees' charged under the Refund Customer's Contract (the **Refund Amount**).
- 4.4 Xtreme undertakes to the Commission that:
- (a) it will waive any and all outstanding claims in relation to 50% of the 'administration fees' charged to Refund Customers; and
 - (b) it will reduce by at least 50% the 'administration fees' payable by any customers under active Contracts who seek to cancel their Contract.
- 4.5 Xtreme undertakes to the Commission to take the following steps in order to locate and contact Refund Customers and make payments:
- Refund Customers with known bank account details*
- (a) In respect of any Refund Customers for whom Xtreme holds relevant bank account details Xtreme will:
 - (i) within 90 days of the date of these Undertakings being accepted, make payment of the Refund Amount by direct crediting that Refund Customer's bank account. In the event that the Refund Customer has an outstanding balance on a Contract with Xtreme, the Refund Amount may be applied as a credit towards reducing that balance; and
 - (ii) write to each Refund Customer to whom clause 4.5(a)(i) applies, in a manner and form approved by the Commission, to inform them of the payment (or credit) and the reason Xtreme has made it, no later than five (5) business days after the payment (or credit) has been made.

Eligible Customers with unknown bank account details

- (b) In respect of any Refund Customers for whom Xtreme does not presently hold bank account details (**Refund Customers without Known Accounts**), Xtreme will take all reasonable steps using the information that it holds to make contact and obtain instructions as to a nominated bank account into which the Refund Amount can be paid within 90 days from the date of these Undertakings being accepted. For example, this may include attempting to contact Refund Customers without Known Accounts by SMS message, email, post or telephone, or any combination where multiple contact details are held.
- (c) Without limiting clause 4.5(b) above, Xtreme will attempt to contact all Refund Customers without Known Accounts by way of a letter or email approved by the Commission.
- (d) If Xtreme successfully obtains instructions from any Refund Customers without Known Accounts to make the payment into a nominated bank account, Xtreme shall pay the Refund Amount by direct crediting the nominated bank account within 10 working days.
- (e) If, 90 days from the date of these Undertakings being accepted, Xtreme has taken all reasonable steps and not been successful in obtaining instructions from any Refund Customers without Known Accounts in accordance with 4(b), Xtreme will engage the assistance of a credit reporter to assist in attempting to contact and obtain instructions from those customers (acting in accordance with the Credit Reporting Privacy Code 2004).
- (f) When contacting Refund Customers without Known Accounts and obtaining payment instructions from them, Xtreme will inform those Refund Customers of the reason Xtreme is making the payment.

4.6 Xtreme undertakes to the Commission to report on its progress and to treat any outstanding payments, as follows:

- (a) Following completion of its efforts to contact all Refund Customers and make payments, and in any event within six months of the date of these Undertakings, Xtreme will provide a report to the Commission prepared by an independent accountant approved by the Commission (the **Payment Update Report**):
 - (i) stating the progress Xtreme has made in making payments including details of the payments (customer unique identifiers, date of payment, amount of payment) made to Refund Customers pursuant to these Undertakings;
 - (ii) giving detail of steps Xtreme has taken to locate, and make payment to, Refund Customers in compliance with these Undertakings; and
 - (iii) including sufficient detail for the Commission to understand the number of Refund Customers still owed payments (if any) and the amounts owed, including any amounts owed to deceased or bankrupt Refund Customers (**Outstanding Payments**).
- (b) Upon receipt of the Payment Update Report, the Commission will confirm its acceptance of the Payment Update Report or notify Xtreme of further steps which it

considered are required to comply with the requirements of clause 4.5 above. In the case of the latter, Xtreme agrees to take those further steps and to update the Payment Update Report when they are complete.

- (c) Upon the Commission confirming that no further steps are required to comply with clause 4.5 above, Xtreme will treat the Outstanding Payments as unclaimed money under the Unclaimed Money Act 1971 (**UMA**) (and will deal with that unclaimed money in accordance with the UMA by paying it to the Inland Revenue Department) and confirm to the Commission that it has done so.
- (d) Xtreme will pay the Outstanding Payments in accordance with clause 4.6(c) within 10 working days of receiving the Commission's confirmation under that clause.

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 come into effect when:
 - (a) executed by Xtreme; 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 Xtreme from these Undertakings; or
 - (b) 10 years from the date the Commission confirms its acceptance of these Undertakings.

8 Compliance with Undertakings

- 8.1 If Xtreme 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.
- 8.2 For the avoidance of doubt, nothing in clause 8.1 above prevents the Commission from directly seeking any information from Xtreme at any time for the purpose of checking compliance with these Undertakings.

9 Variation of Undertakings

- 9.1 The Commission and Xtreme 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 Xtreme, and signed as accepted by the Commission.

10 Miscellaneous

- 10.1 These Undertakings are properly executed if Xtreme and the Commission sign the same copy, or separate identical copies of the execution pages. Where separate copies are signed by Xtreme 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 Xtreme 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 for and on behalf of Xtreme Deals Limited



Director/authorised signatory

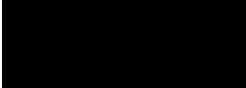
Ibrahim Phee

Name

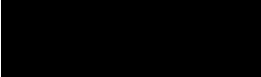
30 June 2022

Date

In the presence of:



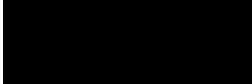
Signature of witness



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

27 July 2022

Date