

1 June 2021

**ASB Bank Limited**

Level 2, ASB North Wharf,  
12 Jellicoe Street,  
Auckland 1010.

Attention: [REDACTED]

Dear [REDACTED]

**Credit Contract and Consumer Finance Act 2003 and Fair Trading Act 1986:  
Warning**

1. The Commerce Commission (**Commission**) has been investigating ASB Bank Limited (**ASB**) under the Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**) and the Fair Trading Act 1986 (**FT Act**), following ASB's self-report of an error in its calculation of Early Repayment Adjustment (**ERA**) fees.
2. The error reported to the Commission related to how ERA fees were charged to borrowers who chose to repay their fixed rate term loans early between April 2005 and 6 December 2016. ASB identified a total of 58,842 instances where the incorrect ERA fees were charged, as follows<sup>1</sup>:
  - 2.1 A total of 48,179 ERA fees over-charged, resulting in total overpayments of \$4,071,606.03; and
  - 2.2 A total of 10,663 ERA fees under-charged, resulting in total underpayments of \$3,668,321.79.
3. We have now completed our investigation and are writing to inform you about our views.
4. In summary, the Commission considers that ASB is likely to have breached its obligations under the CCCF Act and the FT Act, as follows:
  - 4.1 Section 9C(2)(a)(iii) of the CCCF Act, by failing to act with the care, diligence and skill of a responsible lender in subsequent dealings with the borrower in relation to the agreement, by overcharging ERA fees between 6 June 2015 and

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<sup>1</sup> We note that a further 121,413 ERA transactions occurred during the period April 2005 to 6 December 2016 but were not impacted by the ERA calculation error.

5 December 2016. ASB accepts that it may have breached its obligations under section 9C(2)(a)(iii) of the CCCF Act.

- 4.2 Section 13(i) of the FT Act, by making a false or misleading representation of its right to charge the incorrectly quoted ERA fee.
5. Having considered the factors set out in our Enforcement Response Guidelines<sup>2</sup>, we have decided to conclude this investigation by issuing ASB with a warning for the likely responsible lending failures and misrepresentations. We also considered the fact that ASB has agreed to provide the Commission with Enforceable Undertakings in relation to providing refunds to affected borrowers for ERA fees that had been previously overcharged. The Enforceable Undertakings were provided by ASB to the Commission in recognition of its admission of a likely breach of section 9C(2)(a)(iii) of the CCCF Act. We note that ASB has not made any admission in relation to a likely breach of section 13(i) of the FT Act. We acknowledge that only a Court can determine a breach of the FT Act, and this issue is addressed further at paragraphs 23 to 26 below.

### **The Commission's role**

6. The Commission is responsible for enforcing and promoting compliance with laws that promote competition in New Zealand, including:
  - 1.1 The CCCF Act which protects consumers when they are borrowing money and enable them to make informed choices about using credit; and
  - 1.2 The FT Act which prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

### **The investigation**

7. In December 2018, ASB contacted the Commission to report an error it had identified in its calculation of ERA fees for borrowers who had terminated their fixed rate term loan contracts between April 2005 and 6 December 2016. Of the affected loans, the majority of them were home loans; with a small number being business loans, asset finance, commercial, personal and rural loans.
8. During the course of the Commission's investigation, ASB has cooperated with the Commission, regularly provided updates on its remediation actions and met with the Commission.

#### *The Early Repayment Adjustment fee*

9. ASB's fixed rate term loan contracts provide for ASB to charge the borrower an ERA fee where the borrower repays their loan before the end of the agreed term. Under the CCCF Act, a lender can charge a borrower a fee on a prepayment of their loan provided that the fee is disclosed to the borrower and does not exceed a reasonable estimate of the lender's loss arising from the prepayment.<sup>3</sup>
10. Between April 2005 and December 2016, ASB used two different loan terms and conditions that provided for different methods for calculating the ERA fee:

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<sup>2</sup> The Commerce Commission Enforcement Response Guidelines are available at: [Enforcement Response Guidelines \(October 2013\)](#)

<sup>3</sup> Refer to sections 17, 41, 43, 51 and 54 of the CCCF Act.

- 10.1 The terms applicable to loan contracts entered into between April 2005 and 1 April 2015 provided that the ERA fee would be calculated in accordance with the formula set out in the Credit Contracts and Consumer Finance Regulations (**Safe Harbour Method**)<sup>4</sup>; and
- 10.2 The terms applicable to loan contracts entered into from April 2015 provided that the ERA fee would be calculated based on a methodology developed by ASB, that was based on changes in the wholesale interest rates (**Wholesale Method**).

*The Early Repayment process*

- 11. Where a borrower on a fixed rate term loan wanted to fully or partially settle their loan, ASB would prepare an indicative settlement statement and send it to the borrower's solicitor. The date on which the statement was prepared (**Quote Date**) could precede the expected settlement date (**Settlement Date**) by up to six weeks.

*The ERA fee error*

- 12. On the Quote Date, an indicative ERA was calculated using the current details as at that date. The error identified by ASB was that, at the Settlement Date, the ERA fee calculation from the Quote Date was reused, rather than being recalculated as at the Settlement Date.
- 13. Unless the loan was settled on the same day as the Quote Date, ASB's ERA fee calculation method as described at paragraph [12] created an error as, in most cases, the ERA fee calculated as at the Settlement Date under either the safe harbour formula or the wholesale method would differ from an ERA fee calculated as at the Quote Date, because:
  - 13.1 Where the Settlement Date occurred after the Quote Date, the remaining unexpired period of the loan term is shorter as at the Settlement Date than at the Quote Date;
  - 13.2 The comparison interest rate used in calculations may be different as at the Quote Date and as at the Settlement Date; and
  - 13.3 For ERA fees calculated using the Safe Harbour Method, the number of days between the payment due date that immediately preceded the date of prepayment and the date of actual full prepayment would be longer at the Settlement Date than at the Quote Date.

*Identification of the ERA calculation error*

- 14. In March 2016, following a review of settlement data conducted by ASB, discrepancies were identified between the ERA fees charged to borrowers and the actual costs incurred by ASB as a result of the prepayment of loans. At the time, ASB identified the ERA fee miscalculation error and the fact that it could result in borrowers being undercharged.

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<sup>4</sup> The regulation formula can be referred to as the 'safe harbour formula'. This is due to the fact that when a lender uses the procedure in the regulations (correctly) to calculate its early repayment fee then the CCCF Act provides that the amount charged is to be treated in any court as a reasonable estimate of the lender's loss (section 54 of the CCCF Act).

15. In October 2016, during the system testing for the proposed changes, ASB identified that as well as undercharging borrowers, the error also had the potential to result in overcharging borrowers.
16. On 6 December 2016, new functionality was deployed to ASB's settlement system to fix the ERA error and enable for the ERA fees to be recalculated to the Settlement Date. ASB has told the Commission that since this date, ERA fees have been correctly calculated and charged.

#### *ASB remediation programme*

17. ASB's approach to remediation is to:
  - 17.1 Refund any amounts charged to borrowers that exceed the amount that could be charged for ERA fees under the loan contract terms if the fee had been calculated correctly;
  - 17.2 Waive any claim in relation to undercharged ERA fees;
  - 17.3 Make no set-off for undercharged ERA fees against overcharged of ERA fees, where those under and overcharges are associated with the same customer account; and
  - 17.4 Pay a 'use of money' amount to each affected borrower as part of the refund of the amounts overcharged.<sup>5</sup>
18. ASB proposed to remediate the affected borrowers in two stages:
  - 18.1 The first stage focused on borrowers who are still active with ASB and who are easily contactable.
  - 18.2 The second stage focuses on the inactive borrowers who no longer bank with ASB.<sup>6</sup>
19. ASB commenced borrower remediation on 24 June 2020. As at 1 June 2021, ASB had made payment to 50,134 borrowers totalling \$7,685,631.54 (inclusive of use of money).

#### **The law**

20. The relevant sections of the CCCF Act and FT Act are set out at **Attachment A**.

#### **The Commission's view**

##### *Responsible lending*

21. The Commission's view is that ASB likely breached its obligation under section 9C(2)(a)(iii) of the CCCF Act. Specifically, where borrowers prepaid their loans after 6 June 2015 and were charged an ERA fee that exceeded the amount that ought to have been charged under the contract terms, the Commission's view is that ASB failed to act with the due care, diligence and skill of a responsible lender.
22. ASB accepts that it has likely breached s9C(2)(a)(iii) of the CCCF Act.

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<sup>5</sup> ASB has calculated 'use of money' by applying the highest interest rate offered on new lending for the particular product type during the month that settlement occurred.

<sup>6</sup> We note that a small number of borrowers from the first stage were remediated as part of the second stage. For example: where there were holds on a customer account.

*False or misleading representation*

23. The Commission's view is that ASB likely breached section 13(i) of the FT Act by making a false or misleading representation in relation to a right to charge an incorrectly calculated ERA fee.
24. We consider that ASB misrepresented to each affected borrower its right to charge a specified ERA fee. By providing for the inaccurate fee in its settlement statements ASB made a misleading representation that it had a right to charge that fee in circumstances where the fee exceeded the amount ASB was contractually entitled to charge.
25. ASB does not accept that it has likely breached s13(i) of the FT Act. It has advised the Commission that in its view it has not made a misleading representation concerning the existence, exclusion or effect of any right. This is on the basis that it has the right to charge an ERA. ASB says that in each instance, the ERA was initially correctly calculated, and correctly presented to borrowers as payable, but their error was in failing to re-calculate the ERA payable as at settlement. The Commission has considered ASB's position but does not agree that including the original (and no longer accurate) ERA in its settlement statements was not misleading. As outlined in the previous paragraph, our view is that by including the incorrect ERA in the settlement statement provided to the borrower, ASB made a misleading representation that the fee (specifically, the amount of the fee) was payable.
26. We note that even though the Commission is of the view that ASB has likely breached section 13(i) of the FT Act, only the court can decide if a breach of the FT Act has occurred.

**Warning**

27. The Commission has given careful consideration to what is an appropriate enforcement response. Having considered our Enforcement Response Guidelines and the particular circumstances, the Commission has decided to issue ASB with a warning.
28. When formulating its enforcement response, the Commission has taken the following factors into account:
  - 28.1 ASB's proactive conduct in self-reporting the error and subsequent co-operation with the Commission's investigation.
  - 28.2 ASB's remediation programme, and the fact that it has been externally reviewed by an independent third party (KPMG).
  - 28.3 ASB's decision to:
    - 28.3.1 refund any amounts charged to borrowers that exceeded the amount that could be charged for ERA fees under the loan contract terms and pay a 'use of money' amount to reflect a borrower's lost opportunity to utilise funds;
    - 28.3.2 waive any claim in relation to undercharged ERA fees; and
    - 28.3.3 make no set-off for undercharged ERA fees against overcharged ERA fees, where those under and overcharges are associated with the same customer account; and

- 28.4 That ASB has offered to provide the Commission with enforceable undertakings relating to the distribution of remedial payments to affected borrowers, as well as the fact that it has accepted that its conduct resulted in a likely breach of section 9C(2)(a)(iii) of the CCCF Act.
- 28.5 ASB's confirmed actions and process changes following discovery of the ERA fee calculation error to ensure that the problem does not reoccur.
29. The Commission is concerned that there were significant delays between the time that the error was identified, when it was reported to the Commission, and when remedial payments were commenced. The Commission is also concerned that the problem was able to exist for a considerable length of time before it was identified and rectified. These factors have also been considered in determining an appropriate enforcement response.
30. The Commission expects lenders to ensure that their systems and processes are designed appropriately to ensure compliance with its obligations. We also expect a properly designed compliance programme to not only prevent errors from occurring, but also to ensure that any errors that do occur are quickly identified and rectified within a reasonable timeframe. It does not appear to have occurred in this instance.
31. The Commission will not take further action against ASB at this time in relation to this conduct. We will take this warning into account if ASB was to engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings.

**This letter is published**

32. This letter is public information and will be published on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

**Penalties for breaching the CCCF and/or FT Acts**

33. Only the court can decide if a breach of the CCCF Act and/or the FT Act has occurred.
34. The court can make certain orders where it finds the law has been broken, including:
- 34.1 If it is found that a lender has breached section 9C of the CCCF Act, the court can make a declaration that a lender has breached its responsible lending obligations and may make orders where appropriate as provided for in s 94 of the CCCF Act.
- 34.2 If the court finds that a company has breached the FT Act, the company can be fined up to \$600,000 and an individual up to \$200,000 per offence.
35. ASB should be aware that our decision to issue this warning letter does not prevent any other person or entity from taking private action through the court.

**Further information**

36. We have published a series of fact sheets and other resources to help businesses comply with the CCCF Act and the FT Act as well as the other legislation we enforce. These are available on our website at: [www.comcom.govt.nz](http://www.comcom.govt.nz).

37. Thank you for your assistance with this investigation. Please contact [REDACTED] on 09-[REDACTED] or by email at: [REDACTED] if you have any questions about this letter.

Yours sincerely

[REDACTED]

Credit Investigations and Compliance Manager

Credit Branch

Auckland

Cc- [REDACTED]

By email: [REDACTED]

**Attachment A: Relevant sections of the CCCF Act and the FT Act**

**CCCF Act – Section 9C:** Lender responsibility principles

- (1) Every lender must comply with the lender responsibility principles.
- (2) The lender responsibility principles are that every lender must, at all times,—
  - (a) exercise the care, diligence, and skill of a responsible lender—
    - (i) in any advertisement for providing credit or finance under an agreement or for providing credit-related insurance under a relevant insurance contract; and
    - (ii) before entering into an agreement to provide credit or finance or a relevant insurance contract and before taking a relevant guarantee; and
    - (iii) in all subsequent dealings with a borrower in relation to an agreement or a relevant insurance contract or a guarantor in relation to a relevant guarantee; and
  - (b) comply with all the lender responsibilities specified in subsections (3), (4), and (5).

**FT Act – Section 13:** False or misleading representations

No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services,—

- (a) make a false or misleading representation that goods are of a particular kind, standard, quality, grade, quantity, composition, style, or model, or have had a particular history or particular previous use; or
- (b) make a false or misleading representation that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification, or skill, or by a person who has other particular characteristics; or
- (c) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
- (d) make a false or misleading representation that goods are new, or that they are reconditioned, or that they were manufactured, produced, processed, or reconditioned at a particular time; or
- (e) make a false or misleading representation that goods or services have any sponsorship, approval, endorsement, performance characteristics, accessories, uses, or benefits; or
- (f) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or



(g) make a false or misleading representation with respect to the price of any goods or services; or

(h) make a false or misleading representation concerning the need for any goods or services; or

(i) make a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee, right, or remedy, including (to avoid doubt) in relation to any guarantee, right, or remedy available under the Consumer Guarantees Act 1993; or

(j) make a false or misleading representation concerning the place of origin of goods or services.