

COMMERCE COMMISSION

BROADLANDS FINANCE LIMITED

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SETTLEMENT AGREEMENT

DATE 22 September 2014

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**THIS AGREEMENT** is made on the          day of                                  2014

**Parties**

**COMMERCE COMMISSION**, a statutory body established under s 8 of the Commerce Act 1986 (“Commission”).

**BROADLANDS FINANCE LIMITED**, a limited liability company registered in New Zealand (company number 662530) with a registered office at Level 3, 445 Karangahape Road, Newton, Auckland (“Broadlands”).

**Purpose of the Agreement**

1. The Commission has conducted an investigation into allegations that Broadlands contravened the Fair Trading Act 1986 by charging interest and fees after the repossession and sale of consumer goods under a security agreement.
2. The Commission considers that Broadlands’ conduct is likely to have breached section 9 and section 13(i) of the Fair Trading Act 1986.
3. Broadlands does not admit that its conduct has breached sections 9 and 13(i) of the Fair Trading Act 1986.
4. This Settlement Agreement sets out the terms on which the parties have agreed to resolve the Commission’s investigation.

**Interpretation**

In this Settlement Agreement and its attached Undertakings -

**Affected Customer** means the holder of an Affected Loan Account.

**Affected Loan Accounts** means those loan accounts in respect of which Broadlands charged fees and interest after it had taken Repossession and Sale Action and includes accounts that are now closed.

**Agreement** means this Settlement Agreement and its attached Undertakings.

**FTA** means the Fair Trading Act 1986.

**Refund Owning** means the amount of fees and/or interest charged to an Affected Loan Account after the date Broadlands sold goods subject to Repossession and Sale Action.

**Repossession and Sale Action** means the repossession and sale of consumer goods pursuant to a security agreement.

**Undertakings** means the Undertakings contained in Schedule 1 of this Agreement.



## Background

5. Broadlands provides consumer loans, commonly motor vehicle finance and small business commercial finance. It frequently takes a security interest in consumer goods under those loans.
6. In February 2012, the Commission began an investigation into allegations that Broadlands may have breached the FTA by representing that it had a right to add fees (including Court filing fees) and/or interest to some customer accounts after it had taken Repossession and Sale Action.
7. Broadlands has co-operated with the Commission's investigation.
8. The Commission's investigation prompted Broadlands to undertake a review of its loan book. The purpose of the review was to determine:
  - 8.1 the number of loans on which it had charged interest and fees after it had taken Repossession and Sale Action; and
  - 8.2 the total amount it had charged to all debtors in these circumstances.
9. Broadlands' review identified that:
  - 9.1 \$3.3 million in interest and fees were added to 807 loans after Broadlands had taken Repossession and Sale Action; and as a result
  - 9.2 it had received \$262,000 in interest and fees charged after Repossession and Sale Action on 222 of those loans.

## The Commission's View

10. The Credit (Repossession) Act 1997 (CRA) governs the repossession and sale of consumer goods by a creditor under a security agreement. A creditor who has repossessed and sold consumer goods pursuant to a security agreement must comply with section 35 of the CRA. Section 35 of the CRA prohibits a creditor from recovering more than the balance outstanding after deducting the net proceeds from the sale of those assets from the amount owing by the debtor.
11. The FTA prohibits false and misleading conduct in trade. It is an offence under section 9 of the FTA to engage in conduct that is misleading or deceptive, or likely to mislead or deceive. It is an offence under section 13(i) of the FTA to make a misleading representation as to the existence, exclusion or effect of any right, including a statutory right.
12. In the Commission's opinion a representation that a creditor has a right to recover fees and interest after it has taken Repossession and Sale Action is misleading or false because, by virtue of section 35 of the CRA, the creditor has no such right.

13. The Commission considers that Broadlands has represented that it had the right to charge fees and interest after it has taken Repossession and Sale Action when it was prohibited from charging interest and fees in those circumstances and that it has consequently misrepresented the amounts owed by customers.
14. The Commission considers that Broadlands' conduct in adding interest and fees to loans after Repossession and Sale action is likely to be a breach of sections 9 and 13(i) of the FTA.

### **Broadlands' Position**

15. Broadlands acknowledges the Commission's view that it has engaged in conduct and made representations that breach the FTA, as set out in paragraph 13, above, but makes no admission of liability in relation to breaches of section 9 and/or section 13(i) of the FTA.
16. Broadlands advises that it has:
  - 16.1 identified 807 Affected Loan Accounts in respect of which fees and interest totalling \$3.3 million were charged;
  - 16.2 identified overpayments totalling \$262,000 in respect of 222 of those Affected Loan Accounts;
  - 16.3 ceased charging interest and fees in respect of loans where it has taken Repossession and Sale Action;
  - 16.4 altered its processes and practices to ensure that, in the future, interest and/or fees will not be charged on loans after it takes Repossession and Sale Action.

### **Enforceable Undertakings by Broadlands**

17. To resolve the Commission's claim that Broadlands' practice of charging interest and fees after it had taken Repossession and Sale Action breaches the FTA, Broadlands has offered, and the Commission has agreed to accept, pursuant to section 46A of the FTA, the Undertakings contained in Schedule 1 of this Agreement.

### **No Further Action by Commission**

18. The Commission will send a warning letter to Broadlands outlining its concerns about Broadlands' conduct. The Commission will then close its investigation.
19. The Commission will not issue or encourage any civil or criminal proceeding against Broadlands and/or its Directors in relation to the conduct to which this Agreement applies other than any proceedings that may be brought as a consequence of Broadlands' failure to comply with this Agreement.

## Effect and Implementation of this Settlement Agreement

20. Broadlands and the Commission will each take such steps as are necessary or desirable to give full effect to the terms of this Agreement.
21. Nothing in this Agreement:
  - 21.1 constitutes an admission by Broadlands of liability;
  - 21.2 will limit or affect the ability of the Commission to issue proceedings against Broadlands in respect of matters not related to this Agreement, or in respect of conduct engaged in by Broadlands after the date of this Agreement;
  - 21.3 will limit or affect the ability of any person who has not consented to be bound by the terms of this Agreement from pursuing any rights available to him, her or it under the FTA or under any other law.
22. If the Commission considers that Broadlands has breached a term of its Undertakings, the Commission may apply to the Court under section 46B of the FTA for an order:
  - 22.1 directing Broadlands to comply with the term;
  - 22.2 directing Broadlands to pay to the Crown an amount not exceeding the amount of any financial benefit that Broadlands has obtained directly or indirectly and that is reasonably attributable to the breach;
  - 22.3 directing Broadlands to compensate any other person who has suffered loss or damage as a result of the breach; and/or
  - 22.4 for any other consequential relief the Court thinks appropriate.

## Miscellaneous

23. This Agreement will be governed and interpreted in accordance with the laws of New Zealand.
24. Broadlands and the Commission agree that:
  - 24.1 neither the Agreement nor the fact that Broadlands has entered into the Agreement or given the Undertakings is confidential.
  - 24.2 the Agreement may be published on the Commission's website after it has been signed.
  - 24.3 the Commission may issue a media release about the Agreement.
  - 24.4 either Broadlands or the Commission may make public statements (either separately or jointly) in relation to the Agreement after it has been signed.



- 24.5 any public statement must be consistent with the matters set out in the Agreement.
- 25. Broadlands agrees that it will not make any public comment in relation to the Agreement until after the Commission has issued any media release notifying the public of it.
- 26. Any notice or communication that is given or served under or in connection with this Agreement must be given in writing in the following manner:
  - 26.1 if addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission  
Level 19, 135 Albert Street  
Auckland 1143

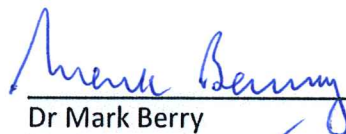
Attention: Nicola Schaab  
Email: nicola.schaab@comcom.govt.nz
  - 26.2 if addressed to Broadlands, by hand delivery or email to the following address:

Broadlands Finance Limited  
Level 3, 445 Karangahape Road,  
Auckland


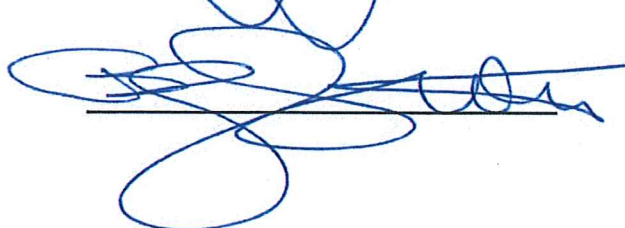
Attention: Bruce Scott  
Email: bruces@broadlands.co.nz

**EXECUTION**

**SIGNED for and on behalf of  
THE COMMERCE COMMISSION**

  
\_\_\_\_\_  
Dr Mark Berry  
Chair

**SIGNED for and on behalf of  
BROADLANDS FINANCE LIMITED**

  
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## SCHEDULE 1 – ENFORCEABLE UNDERTAKINGS

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### Introduction

These Undertakings are offered by Broadlands for acceptance by the Commerce Commission, pursuant to section 46A of the Fair Trading Act 1986.

These Undertakings form part of and are attached to the Settlement Agreement between Broadlands and the Commerce Commission.

These Undertakings are to be read consistently with the terms of the Agreement and the terms used in the Agreement also apply in respect of these Undertakings.

### Enforceable Undertakings by Broadlands

#### *Adjustments to Affected Loan Accounts and Payments to be made to Affected Customers*

1. Broadlands undertakes that, before 30 September 2014, it will credit the Refund Owing to each Affected Loan Account.
2. Broadlands undertakes that if an Affected Loan Account has a positive balance after crediting the Refund Owing in accordance with Clause 1 of this Undertaking, Broadlands will:
  - 2.1 notify the Affected Customer in accordance with Clauses 4 and 5 of this Undertaking; and
  - 2.2 pay the following amounts to the Affected Customer in accordance with the Affected Customer's instructions:
    - 2.2.1 the amount of the positive balance; and
    - 2.2.2 an additional 5% of the positive balance in recognition of the fact that the Affected Customer has not had use of that money.
3. If the Affected Loan Account is closed, Broadlands will (in the following order):
  - 3.1 restore (ie write back) any amount written off to the Affected Loan Account,
  - 3.2 credit the Refund Owing to the Affected Loan Account; and
  - 3.3 if the Affected Loan Account has a positive balance, reopen the account; and
    - 3.3.1 notify the Affected Customer in accordance with Clauses 4 and 5 of this Undertaking; and
    - 3.3.2 pay the following amount to the Affected Customer in accordance with the Affected Customer's instructions:
      - (i) the amount of the positive balance; and

- (ii) an additional 5% of the positive balance in recognition of the fact that the Affected Customer has not had use of that money.

*Notice requirements*

4. Broadlands will, by 31 October 2014, send a letter to each Affected Customer at their last known address.
5. That letter will be in a form approved by the Commission and will:
  - 5.1 advise the Affected Customer that Broadlands has entered into a settlement with the Commission and has given enforceable undertakings pursuant to section 46A of the Fair Trading Act;
  - 5.2 advise the Affected Customer of the amount of the Refund Owing;
  - 5.3 where the Affected Customer has an existing Loan Account advise the Affected Customer of any amount credited to their Affected Loan Account and the balance of that account as at the date of the letter.
  - 5.4 where the Affected Customer is entitled to a payment in accordance with clause 2.2 or clause 3.3 of this Undertaking:
    - 5.4.1 advise the Affected Customer of the amount of that payment;
    - 5.4.2 advise that the Affected Customer should contact Broadlands to arrange for that payment to be made to them.
6. If, after using its best endeavours, Broadlands is unable to locate an Affected Customer who is eligible for a payment pursuant to clause 2.2 or 3.3 of this Undertaking, Broadlands undertakes to treat the payment as if it were unclaimed money under the Unclaimed Money Act 1971, unless the parties agree otherwise. "Best endeavours" includes using information currently known to Broadlands, as well as searches of Google, Facebook, White Pages and/or the electoral roll, and any other efforts Broadlands would usually make to locate a non-paying debtor.

*Confirmation of adjustments to Affected Loan Accounts and payments to Affected Customers*

7. Broadlands undertakes to provide to the Commission by 28 February 2015, and at its own cost, an independent audit report prepared by a third party approved by the Commission, confirming that Broadlands has credited and paid, where applicable, the Refund Owing or any positive balance in accordance with Clauses 1, 2 and 3 of this Undertaking.
8. This report must include the following details:
  - 8.1 the total value of all Refunds Owing;
  - 8.2 the total value of all credits made to Affected Loan Accounts;
  - 8.3 the number of Affected Loan Accounts to which credits have been made;



- 8.4 the total of all payments made to Affected Customers in accordance with Clauses 2 and 3 above;
- 8.5 the total value of the payments made to Affected Customers in accordance with Clauses 2.2.2 and 3.3.2(ii) of this Undertaking;
- 8.6 the number of Affected Customers (if any) who have not received a payment to which they are entitled, together with the name, date of birth and last known address of each such Affected Customer, the amount due to each Affected Customer, the reasons for the failure to make the payment and the steps taken to attempt to locate the Affected Customer;
- 8.7 an opinion as to whether Broadlands has made payments in accordance with the Agreement and the Undertakings; and
- 8.8 an opinion as to whether the calculation of the payments made or amount credited to Affected Customers under Clause 1, 2 and 3 of this Undertaking is accurate.

*Loan account practices, systems and processes*

9. Broadlands also undertakes that:

- 9.1 it has ceased charging interest and/or fees on consumer loans after it takes Repossession and Sale Action;
- 9.2 it will not, in the future, charge interest and/or fees on consumer loans after it takes Repossession and Sale Action unless the law changes and the parties agree that this conduct will not breach the FTA;
- 9.3 it will provide to the Commission, by 28 February 2015 and at its own expense, confirmation from an independent auditor that its compliance programme and its systems and processes have been modified to ensure that in future it will not charge interest and/or fees on consumer loans after it takes Repossession and Sale Action.

*Miscellaneous*

10. Broadlands further undertakes that it will:

- 10.1 request credit reference agencies to update their records to reflect customers' revised account balances;
- 10.2 confirm to the Commission by 30 November 2014 that it has requested credit reference agencies to update their records; and
- 10.3 provide any documents and information requested by the Commission from time to time for the purpose of assessing Broadlands' compliance with the terms of this Undertaking.

