

COMMERCE COMMISSION

DEALER FINANCE LIMITED

SETTLEMENT AGREEMENT

DATE

2016

sp3 

THIS AGREEMENT is made on the _____ day of _____ 2016

Parties

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

DEALER FINANCE LIMITED, a limited liability company registered in New Zealand (company number 134626) with a registered office at Unit 4, 213 Blenheim Road, Riccarton, Christchurch (“**DFL**”).

Purpose of the Agreement

1. The Commission has conducted an investigation into an allegation that DFL has breached the Credit Contracts and Consumer Finance Act 2003 by not crediting part prepayments made by borrowers against the unpaid balance of the loan as soon as practicable and, as a consequence, charging the borrower interest on an incorrect unpaid balance (the **investigation**).
2. This Settlement Agreement sets out the terms on which the parties have agreed to resolve the Commission’s investigation.

Interpretation

Affected loan means a consumer credit contract entered into on or after 1 April 2005 where DFL is the creditor and where the borrower has made a part prepayment or prepayments.

Agreement means this Settlement Agreement.

Best endeavours includes using information currently known to DFL, as well as searches of other media or sources which may include Google, Facebook, White Pages and/or the electoral roll, and taking any steps that DFL would usually make to locate a non-paying debtor.

CCCF Act means the Credit Contracts and Consumer Finance Act 2003.

Overcharged interest means the difference between

- the amount of interest that DFL has charged on the affected loan; and
- the amount of interest that DFL would have charged on the affected loan if the part prepayment or prepayments had been credited against the unpaid balance of loan as soon as practicable.

Part prepayment or prepayments means a payment or payments by a borrower to DFL under a loan of an amount less than the unpaid balance before that amount is payable under the loan and that DFL has not credited to unpaid balance as soon as practicable.

Uplift payment means 5% of the overcharged interest,



The Investigation

3. DFL is a creditor for the purposes of the CCCF Act. It provides finance to borrowers under consumer credit contracts so that they can purchase motor vehicles. It is based in Christchurch and is owned by a group of 15-20 Christchurch car dealers, and operates as a co-operative company.
4. The Commission conducted the investigation in response to information received from a DFL borrower.
5. DFL has co-operated with the investigation.

The Commission's views

6. Section 46 of the CCCF Act requires creditors to credit payments (including any part-prepayment¹) against the unpaid balance:
 - 6.1 as soon as practicable;² or
 - 6.2 where the contract expressly provides that payments will be credited in accordance with a specified schedule of payments, in accordance with that schedule.³
7. DFL breached section 46 because it did not credit part prepayments made by borrowers as soon as practicable and its loan contract did not expressly permit it to credit those part prepayments in accordance with a schedule of payments. Effectively, DFL held a part prepayment made by borrowers and applied it to the unpaid balance of the loan in the amount and at the time that periodic payments were due on the loan. The borrower did not receive the full benefit of making early payments. Their payments did not immediately reduce the unpaid daily balance on which interest has been calculated.
8. Section 39 of the CCCF Act states that the maximum interest that creditors' can charge on a consumer credit contracts is the amount determined by applying the daily interest rate to the unpaid daily balance (or average unpaid daily balance).
9. DFL breached section 39 by applying a daily interest rate to a balance that did not take into account payments made by borrowers in circumstances where DFL should have taken those part prepayments into account.
10. DFL estimates this conduct has resulted in total overcharged interest to 5,881 borrowers of \$653,104.

Acknowledgment of breach

11. DFL accepts that it has breached sections 46 and 39 of the CCCF Act by:

¹ Under section 49 of the CCCF Act, a creditor must accept part-prepayment from a debtor unless the contract expressly permits the contract to decline part-prepayments.

² Section 46(1) CCCF Act.

³ Section 46(3) CCCF Act.

- 11.1 using an incorrect unpaid daily balance when calculating interest on Loans; and
- 11.2 failing to credit part prepayments on affected loans as required by the CCCF Act.

Actions to be taken by DFL

- 12. To resolve the Commission's claim that DFL has breached the CCCF Act, DFL will:
 - 12.1 correctly describe in the loan agreement the way in which it will credit part prepayments in consumer credit contracts entered into after 16 April 2015;
 - 12.2 recalculate interest on all affected loans that have a current unpaid balance in accordance with clause 14;
 - 12.3 recalculate interest on affected loans that have been fully repaid and pay compensation to borrowers in accordance with clauses 15 and 16;
 - 12.4 write to some categories of borrowers advising them about the effect of this settlement on them in accordance with clause 17;
 - 12.4 publish the fact of this settlement and the availability of refunds on a website and in newspapers in accordance with clause 18; and
 - 12.5 provide the Commission with reports certifying that it has made refunds and paid compensation in accordance with clauses 20 to 23.

Recalculating interest and paying compensation to affected borrowers

- 13. To the extent that it has not already done so DFL will calculate the overcharged interest on each affected loan by 1 April 2016.

Recalculating interest on current affected loans

- 14. To the extent that it has not already done so, DFL will:
 - 14.1 by 24 March 2016, adjust the unpaid balance on all affected loans that have a current unpaid balance. DFL will re-calculate the interest charged on the loan on the basis that all prepayments are credited to the unpaid balance on the loan as soon as practicable and calculate interest by applying a daily interest rate to the unpaid daily balance; and
 - 14.2 write to the borrower in accordance with clause 17 of this Agreement.

Adjusting the unpaid balance of current loans

- 15. Where a borrower holds a loan with DFL at the date of this agreement and has previously held an affected loan that is now closed DFL will:
 - 15.1 deduct the overcharged interest on the affected loan and the uplift payment, from the unpaid balance of the current loan held by the borrower; and

15.2 write to the borrower in accordance with clause 17 of this Agreement.

Paying compensation to borrowers who held affected loans that are now closed

16. If a borrower held an affected loan that is closed and if they have not received an adjustment to the unpaid balance of a current loan under clause 15 above, DFL will:

16.1 use its best endeavours to locate the borrower including writing to the borrower in accordance with clause 17 of the agreement, if the overcharged interest on the affected loan is \$200 or more; and

16.2 pay the borrower within 7 days of receiving their instructions:

16.2.1 the amount of overcharged interest; and

16.2.2 an uplift payment.

16.3 If the overcharged interest is less than \$200 DFL will pay the borrower in accordance with clause 16.2 if the borrower contacts DFL seeking compensation under this settlement.

Notice requirements

17. If required to under clauses 14.2, 15.2 or 16.1 DFL will, by 31 March 2016, send a letter to the borrower at their last known address in a form approved by the Commission advising the borrower:

17.1 that DFL has entered into a settlement with the Commission; and

17.2 that DFL has overcharged interest on the affected loan; and

17.3 the unpaid balance of the affected loan or current loan at the date of the letter, if the affected loan or current loan has a current unpaid balance. This may be undertaken by the provision of a loan statement, should DFL decide this is an appropriate way to provide the information; and

17.4 if a payment is required under this agreement under clause 16.2:

17.4.1 the amount of overcharged interest and the uplift payment, and the total amount payable to the borrower; and

17.4.2 that the borrower should contact DFL to arrange for that payment to be made to them.

Locating Affected Borrowers

18. DFL will by 30 April 2016 provide the following information either on a website specifically created for this purpose or on a website currently operated by DFL and at least twice in advertisements placed in The Press, Christchurch Mail, Southern News Western News, and Nor'West News in April and May 2016:

- 18.1 that DFL has entered into a settlement with the Commission;
 - 18.2 that DFL has overcharged interest on affected loans since 2005;
 - 18.3 the names and addresses of all dealers who entered into affected loans;
 - 18.4 that DFL will provide compensation of overcharged interest and an uplift payment to affected borrowers; and
 - 18.5 DFL's contact details.
19. If, after using its best endeavours, DFL is unable to locate a borrower who is eligible for a payment pursuant to clause 16.1 of this Agreement by 1 August 2016, DFL undertakes to treat the payment as if it were unclaimed money under the Unclaimed Money Act 1971, unless the parties agree otherwise.

Interim Report

20. DFL undertakes to provide to the Commission by 1 September 2016, an interim report recording the progress it has made with recalculating interest, adjusting loan balances and locating and refunding borrowers in accordance with clauses 14 to 16 of this agreement. This report must include the following information:
- 20.1 the name of the borrower that is entitled to receive a payment or have the unpaid balance of a loan adjusted in accordance with this agreement;
 - 20.2 the amount of the overcharged interest and the uplift payment the borrower is entitled to receive;
 - 20.3 where the borrower has had the unpaid balance of a loan adjusted in accordance with clauses 14 and 15 the loan number and the date of the adjustment;
 - 20.4 where the borrower has been paid in accordance with clause 16 and the date and method that the payment or adjustment was made;
 - 20.5 where the borrower is entitled to but has not received a payment under clause 16, the steps that DFL has taken to locate the borrower, and what further work it intends to do to locate the borrower; and
 - 20.6 the total value of payments and adjustments made and not yet made.
21. The Commission may suggest, and DFL agrees to consider, further steps to locate borrowers if DFL has been unsuccessful in locating them under clause 16.1.

Final Report

22. DFL undertakes to provide to the Commission by 1 December 2016, a final report. This report must include an opinion by a third party accountant or solicitor approved by the Commission who has reviewed the work undertaken by DFL. The reviewer should confirm that DFL has undertaken the steps it has agreed to take.


23. In summarising the refunds made to borrowers, the final report must include the following information:
- 23.1 the name of the borrower that is entitled to receive a payment or have the unpaid balance of a loan adjusted in accordance with this agreement;
 - 23.2 the amount of the refund the borrower is entitled to receive;
 - 23.3 where the borrower has had the unpaid balance of a loan adjusted in accordance with clause 14 and 15 the loan number and the date of the adjustment;
 - 23.4 where the borrower has been paid in accordance with clause 16 the date and method that the payment or adjustment was made;
 - 23.5 where the borrower is entitled to but has not received a payment under clause 16, the steps that DFL has taken to locate the borrower, and what further work it intends to do to locate the borrower; and
 - 23.6 the total value of payments and adjustments made and not yet made.

No Further Action by Commission

- 24. The Commission will close its investigation into DFL upon the signing of this Agreement.
- 25. The Commission will not issue or encourage any civil or criminal proceeding against DFL 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 DFL's failure to comply with this Agreement.

Effect and Implementation of this Agreement

- 26. DFL and the Commission will each take such steps as are necessary or desirable to give full effect to the terms of this Agreement.
- 27. If necessary to give effect to the Agreement, the terms of this Agreement may be amended by the agreement of the parties.
- 28. Nothing in this Agreement:
 - 28.1 will limit or affect the ability of the Commission to issue proceedings against DFL in respect of matters not related to this investigation, or in respect of conduct engaged in by DFL after the date of this agreement or for breach of this agreement; or
 - 28.2 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 CCCF Act or under any other law.



Miscellaneous

- 29. This Agreement will be governed and interpreted in accordance with the laws of New Zealand.
- 30. DFL and the Commission agree that:
 - 30.1 neither the agreement nor the fact that DFL has entered into the Agreement is confidential;
 - 30.2 the Agreement may be published on the Commission’s website after it has been signed;
 - 30.3 the Commission may issue a media release about the Agreement;
 - 30.4 either DFL or the Commission may make public statements (either separately or jointly) in relation to the Agreement after it has been signed; and
 - 30.5 any public statement must be consistent with the matters set out in the Agreement.
- 31. DFL 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.
- 32. 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:
 - 32.1 if addressed to the Commission, by hand delivery or email to the following address:

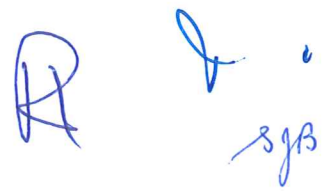
Commerce Commission
44 The Terrace
Wellington

Attention: Dot Benson
Email: Dot.Benson@comcom.govt.nz
 - 32.2 if addressed to DFL, by hand delivery or email to the following address:


Dealer Finance Limited
Unit 4, 213 Blenheim Road
Riccarton
Christchurch

Attention:
Email:

EXECUTION

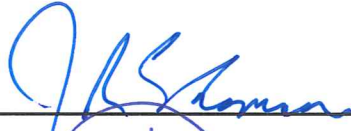


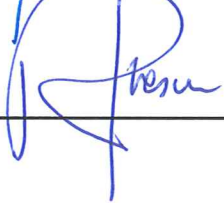
SIGNED for and on behalf of
COMMERCE COMMISSION



~~Dr Mark Berry~~ Susan Begg
Acting Chair

SIGNED for and on behalf of
DEALER FINANCE LIMITED



J. S. Thomas Director


P. Resu Director