

COMMERCE COMMISSION

PROFILE FINANCE LIMITED

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SETTLEMENT AGREEMENT

DATED 17<sup>th</sup> April 2020

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THIS AGREEMENT is made on the 17<sup>th</sup> day of April 2020

### Parties

1. The Commerce Commission is a statutory body established under section 8 of the Commerce Act 1986 (**Commission**).
2. Profile Finance Limited is a registered limited liability company in New Zealand (company number 822189) having its registered address at 14 Okara Drive, Whangarei, 0110, New Zealand (**Profile Finance**).

### Interpretation

3. **Affected Loan** means a consumer credit contract entered into during the Relevant Period where Profile Finance was the creditor and where it provided disclosure to Borrowers using the Disclosure Statement. The Affected Loans are detailed in Schedule 1.
4. **Agreed Amount** means \$945,334 being the amount which Profile Finance has agreed to refund to Borrowers in accordance with this Agreement.
5. **Agreement** means this Settlement Agreement.
6. **Best Endeavours** includes using information currently known to Profile Finance, as well as searches of Facebook, White Pages and/or the electoral roll, and taking any steps that Profile Finance would usually make to locate a non-paying debtor.
7. **Borrower** means any borrower who had an Affected Loan.
8. **CCCFA** means the Credit Contracts and Consumer Finance Act 2003.
9. **Costs of Borrowing** means any or all of the following costs charged by Profile Finance on Affected Loans during the Relevant Period:
  - 9.1 credit fees;
  - 9.2 default fees; and
  - 9.3 interest charges.
10. **Current Borrower** means a Borrower under an Affected Loan and who has as at the date that Profile Finance seeks to apply the Refund Amount in the period specified in clause 31 of this Agreement, any loan in relation to which Profile was the original creditor (whether or not still owned or managed by Profile Finance) and that has an unpaid balance.
11. **Disclosure Statement** means the documents 'Loan contract', 'Disclosure acknowledgment and acceptance of extended warranty/insurance', 'Extended Warranty disclosure document (if applicable)', and Melville's Home Centre goods invoice' documents used by Profile Finance during the Relevant Period.

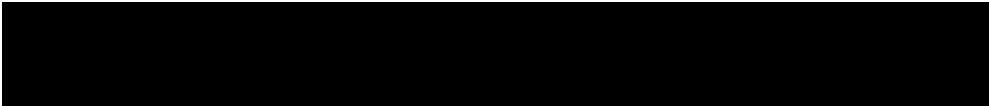




12. **Former Borrower** means a Borrower under an Affected Loan but who does not have, as at the date that Profile Finance seeks to apply the Refund Amount in the period specified in clause 31 of this Agreement, a loan with Profile Finance that has an unpaid balance.
13. **Refund Amount** means:
  - 13.1 the maximum statutory damages amount calculated in relation to each Borrower set out at Schedule 1; and
  - 13.2 a proportion of an amount totalling \$100,000 to be distributed between Borrowers. The amount payable to each Borrower is set out at Schedule 1 and is pro-rated by dividing the advances made by the Borrower by the total advances made under all Affected Loans and multiplying by \$100,000.
14. **Relevant Period** means the period between 6 June 2015 and 28 November 2017 inclusive.

## Background

15. Profile Finance is a creditor for the purposes of the CCCFA.
16. Profile Finance provides finance to customers purchasing goods at Melville's Home Centre, a store in Whangarei which sells consumer electronics, appliances and furniture.
17. The Commission opened an investigation into Profile Finance on 13 November 2017 after receiving a complaint. An initial review of the loan contract by Commission staff raised concerns whether Profile Finance's Disclosure Statement complied with the initial disclosure requirements under the CCCFA.
18. Profile Finance has co-operated with the Commission's investigation.
19. During its investigation, the Commission considered information provided by Profile Finance and reviewed copies of Profile Finance's consumer credit contracts.
20. The information gathered established to the Commission's satisfaction that:
  - 20.1 During the Relevant Period Profile Finance entered into 2,119 Affected Loans.
  - 20.2 The disclosure provided to those Borrowers, set out in the Disclosure Statement, did not include all of the key information applicable to the contracts set out in Schedule 1 of the CCCFA.
  - 20.3 The total Cost of Borrowing charged by Profile Finance during the Relevant Period was \$4,201,815.
21. The Commission considers that Profile Finance has likely breached section 17 of the CCCFA by failing to correctly disclose to borrowers the following information in its Disclosure Statement:



- 21.1 Failing to disclose hardship rights (Schedule 1(sa));
  - 21.2 Failing to disclose FSPR registration details (Schedule 1(ub) and (uc));
  - 21.3 Failing to disclose dispute resolution scheme details (Schedule 1(ua));
  - 21.4 Incomplete or inaccurate disclosure of the security interest taken (Schedule 1(q)(iii) and (iv));
  - 21.5 Failing to correctly disclose a debtor's right to cancel (Schedule 1(s));
  - 21.6 On some contracts failing to disclose information relating to continuing disclosure statements (Schedule 1(t)); and
  - 21.7 On some contracts inaccurately disclosing the total amount of the payments as it did not include the \$1.50 weekly administration fee (Schedule 1(o)(iii)).
22. Under section 99(1A) of the CCCFA, a borrower is not liable for the Costs of Borrowing in relation to any period during which the creditor has failed to comply with section 17 of the CCCFA.
23. The Commission considers that under sections 88 and 89 of the CCCFA, Profile Finance is also liable to pay statutory damages to Borrowers. Profile Finance has calculated that its maximum liability for statutory damages is \$845,334.00.
24. Once made aware of the Commission's views, Profile Finance:
- 24.1 Accepted that during the Relevant Period it failed to properly disclose all of the information required by section 17 of the CCCFA.
  - 24.2 Updated its standard form disclosure statement.
  - 24.3 Made corrective disclosure to Borrowers which was completed by 1 December 2017.
25. Profile Finance has nevertheless agreed to pay in total \$945,334.00 to Borrowers in respect of any potential liability under the CCCFA.
26. 
27. Profile Finance has advised the Commission that  will be providing the finance for Profile Finance to refund Borrowers with Affected Loans in accordance with this Agreement. Undertaking provided by  that it will provide this finance are detailed in Schedule 2 of this Agreement.
28. This Agreement sets out the terms on which the parties have agreed to resolve the Commission's investigation.

### **Acknowledgement of likely breach**

29. Profile Finance acknowledges that during the Relevant Period it failed to properly disclose all required information in likely breach of section 17 of the CCCFA, as per clause 21 above.

### **Overview of action to be taken**

30. To resolve the Commission's claim that Profile Finance has breached section 17 of the CCCFA, Profile Finance will in accordance with this agreement:
- 30.1 Pay the Agreed Amount to the Borrowers in accordance with clauses 31 to 36;
  - 30.2 write to the Borrowers advising them about the effect of this Agreement on them in accordance with clauses 37 to 39 of this Agreement;
  - 30.3 provide the Commission with an interim and a final report in accordance with clauses 40 to 47 of this Agreement.

### **Crediting and paying the Refund Amount**

31. Profile Finance must:
- 31.1 Credit each Current Borrower the Refund Amount to their current loan account in accordance with clauses 32 to 33.1; and
  - 31.2 pay each Current and Former Borrower the Refund Amount as set out at clauses 33.2 to 36.

### **Current Borrowers**

32. Profile Finance must credit the Refund Amount to each Current Borrower's loan balance(s) within 12 months of the date of this Agreement.
33. If the Refund Amount owing to a Current Borrower is more than the total loan balance(s) owing, Profile Finance must:
- 33.1 credit that part of the Refund Amount to the Current Borrower's loan balance(s) which will reduce the loan account(s) to a zero balance within 12 months of the date of this Agreement; and
  - 33.2 pay the remaining Refund Amount to the Current Borrower by direct credit to their nominated bank account, by cheque, or as directed by that Current Borrower within 18 months of the date of this Agreement subject to having received payment instructions from the Current Borrower.

### **Former Borrowers**

34. Profile Finance must pay the Refund Amount to each Former Borrower by direct credit to their nominated bank account, by cheque, or as directed by that Former Borrower.



35. If Profile Finance holds current contact details for a Former Borrower, Profile Finance must pay the Refund Amount within 18 months of this Agreement subject to having received payment instructions from the Former Borrower.
36. If Profile Finance does not hold current contact details for a Former Borrower, Profile Finance must:
- 36.1 use its Best Endeavours for a period of three months from the commencement of this Agreement to contact the Former Borrower and provide them with the information set out in clause 37;
  - 36.2 pay the Refund Amount to the Former Borrower in accordance with any instructions received from the Former Borrower within 18 months of this Agreement subject to having received payment instructions from the Former Borrower; or
  - 36.3 comply with clause 39 of this Agreement.

#### **Contacting Current Borrowers and Former Borrowers**

37. Profile Finance must within three weeks from the date of this Agreement send a posted letter or email to each Current Borrower and Former Borrower at their last known address or email address (where held) advising:
- 37.1 that Profile Finance failed to properly disclose all of the information required by section 17 of the CCCFA during the Relevant Period to the Current Borrower or Former Borrower;
  - 37.2 that Profile Finance has entered into an Agreement with the Commission;
  - 37.3 that the Agreement does not limit any liability Profile Finance may have to the Current Borrower or Former Borrower;
  - 37.4 the amount of the Refund Amount which Profile Finance has agreed to pay to the Current Borrower or Former Borrower;
  - 37.5 in relation to payment of the Refund Amount, either:
    - 37.5.1 that the Current Borrower's loan balance(s) will be credited in accordance with clauses 32 to 33 within 12 months of the date of this Agreement; or
    - 37.5.2 seeking payment instructions from the Current Borrower or Former Borrower where payment is required to be made under clause 33 to 36.
38. Profile Finance shall in complying with clause 37 use the form of posted letter or email to be sent to Current Borrowers and Former Borrowers agreed with the Commission prior to entering into this Agreement. Profile Finance must amend the



template letters and email on request by the Commission if the Commission reasonably considers amendment is required to give effect to this Agreement.

### **Payments where Borrowers cannot be located**

39. If, after using its Best Endeavours for a period of three months from the date of this Agreement as required by clause 36.1, Profile Finance is unable to locate a Former Borrower who is eligible for a payment pursuant to this Agreement or does not receive payment instructions from such a Former Borrower or Current Borrower where clause 31.2 applies, Profile Finance undertakes:
- 39.1 to record a credit for the amount of the Refund Amount against the account of the Former Borrower or Current Borrower; and
  - 39.2 if after three years from the date of this Agreement, the Former Borrower or Current Borrower has not contacted Profile Finance to arrange payment of the Refund Amount, Profile Finance will reverse the credit made under clause 39.1 and will pay the Refund Amount which would otherwise have been owing to the Former Borrower or Current Borrower within seven days to an organisation agreed to by the Commission and Profile Finance. If Profile Finance and the Commission cannot agree which organisation the money will be paid to, Profile Finance agrees to treat the payments as if it were unclaimed money under the Unclaimed Money Act 1971. Any agreement as to the recipient organisation can be varied in accordance with clause 51 below.

### **Interim report**

40. Profile Finance undertakes, at its own expense, to provide to the Commission 12 months from the date of this Agreement an interim report recording the progress it has made with calculating the Refund Amounts, and locating, crediting, and refunding Current Borrowers and Former Borrowers.
41. The interim report will be in the form of:
- 41.1 a spreadsheet for Current Borrowers which identifies for each loan number each Current Borrower by name, what refund the Current Borrower is due, whether a credit has been made and the date of the credit, and whether a repayment has been made (where an account is in credit) and the date and amount of the payment;
  - 41.2 a spreadsheet for Former Borrowers which identifies for each loan number each Former Borrower by name, what refund the Former Borrower is due and whether a payment has been made and the date of the payment. If the Former Borrower has not contacted Profile Finance to arrange payment of the Refund Amount, identify what efforts Profile Finance has used as part of its Best Endeavours to contact the Former Borrower.
42. The Commission requires that the interim report be provided in an Excel format.

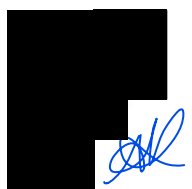


### **Final report**

43. Profile Finance undertakes, at its own expense, to provide a final report to the Commission 20 months from the date of this Agreement.
44. The final report must be prepared by an independent accountant approved by the Commission who has reviewed the steps taken by Profile Finance. The reviewer must confirm that Profile Finance has undertaken all steps it has agreed to take in this Agreement.
45. The final report must include:
  - 45.1 the reviewer's opinion on whether Profile Finance has undertaken the steps it has agreed to take in this Agreement.
  - 45.2 details of any steps that have not yet been completed, including when they are likely to be completed by Profile Finance.
  - 45.3 the reviewer's opinion (having reviewed a reasonable random sample of accounts of Former Borrowers) as to whether Profile Finance has complied with its obligation to take Best Endeavours to contact Former Borrowers who have been unable to be contacted at the time of the final report.
  - 45.4 a summary of the total value of credits and payments made.
46. The final report must also attach:
  - 46.1 a spreadsheet for Current Borrowers which identifies for each loan number each Current Borrower by name and loan number, what refund the Current Borrower is due, whether a credit has been made and the date of the credit, and whether a repayment has been made (where an account is in credit) and the date of the payment;
  - 46.2 a spreadsheet for Former Borrowers which identifies for each loan number each Former Borrower by name and loan number, what refund the Former Borrower is due and whether a payment has been made and the date and amount of the payment.
47. The Commission requires that the spreadsheets attached to the final report be provided in an Excel format.

### **No further action by Commission**

48. The Commission will close its investigation into Profile Finance upon the execution of this Agreement.
49. Provided that Profile Finance completes all of its obligations set out in this Agreement, the Commission will not issue, encourage or assist (except as required by law) any civil or criminal proceeding against Profile Finance and/or its director(s) in relation to the conduct to which this Agreement applies other than any proceedings





that may be brought as a consequence of Profile Finance's failure to comply with this Agreement.

### **Effect and implementation of this Agreement**

50. Profile Finance and the Commission will each take such steps as are necessary or desirable to give full effect to the terms of this Agreement.
51. If necessary to give effect to the Agreement, the terms of this Agreement may be amended by the written agreement of the parties.
52. Nothing in this Agreement will limit or affect the ability of:
  - 52.1 the Commission to issue proceedings against Profile Finance in respect of matters related to this investigation in the event that Profile Finance does not complete all of its obligations set out in this Agreement;
  - 52.2 the Commission to issue proceedings against Profile Finance in respect of matters not related to this investigation, or in respect of conduct engaged in by Profile Finance after the date of this Agreement or for breach of this Agreement;
  - 52.3 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 CCCFA or under any other law.

### **Miscellaneous**

53. This Agreement will be governed and interpreted in accordance with the laws of New Zealand.
54. The parties agree that:
  - 54.1 neither the Agreement nor the fact that Profile Finance has entered into the Agreement are confidential;
  - 54.2 the Agreement may be published on the Commission's website after it has been signed;
  - 54.3 the Commission may issue a media release about the Agreement;
  - 54.4 either Profile Finance or the Commission may make public statements (either separately or jointly) in relation to the Agreement after it has been signed; and
  - 54.5 any public statement must be consistent with the matters set out in the Agreement.
55. Profile Finance 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. This media release will be published on the same day the Commission posts its notice of this Agreement on the Commission's website.

56. This Agreement is not intended to be enforceable by any registered charity that may benefit from clause 39.2 and the parties to this Agreement may agree to vary the recipient of the Refund Amount in accordance with section 15(b) of the Contract and Commercial Law Act 2017.

57. 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:

57.1 If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission  
Level 9, 44 The Terrace,  
Wellington

Attention: Dot Benson  
Email: dot.benson@comcom.govt.nz

57.2 If addressed to Profile Finance, by hand delivery or email to the following address:

Profile Finance Limited  
14 Okara Drive, Whangarei, 0110  
New Zealand

Attention: [REDACTED]  
Email: [REDACTED]

EXECUTED as an Agreement on the date first written above:

by the **Commerce Commission**



Signature of authorised representative

*Anna Rawlings*  
Name of authorised representative  
*(Chair)*

[REDACTED]  
by **Profile Finance Limited**



[REDACTED]  
Name of director

**Schedule 1**

## Schedule 2

### Undertakings to the Commerce Commission given by [REDACTED]

#### Person giving the undertaking

1. These undertakings are given to the Commerce Commission (Commission) by [REDACTED] (the Undertakings).

#### Background

2. The Commission opened an investigation into Profile Finance Limited (Profile Finance) on 13 November 2017 after receiving a complaint. The information gathered during the investigation established to the Commission's satisfaction that:
  - 2.1 from 6 June 2015 to 28 November 2017 Profile Finance entered into 2,119 loans (Affected Loans).
  - 2.2 the disclosure provided to borrowers with Affected Loans did not include all of the key information applicable to the contracts set out in Schedule 1 of the Credit Contracts Consumer Finance Act 2003 (CCCFA).
3. Profile Finance accepted that it likely failed to properly disclose all of the information required by section 17 of the CCCFA.
4. [REDACTED]

#### Undertakings between the Commission and [REDACTED]

5. [REDACTED] undertakes to take the following steps to enable Profile Finance to comply with its obligations under the agreement between the Commission and Profile Finance on or about the date of these Undertakings (Agreement):
  - 5.1 Applying credits to loans held by borrowers of Affected Loans; and
  - 5.3 Providing an amount identified by Profile Finance in order to comply with the requirements identified in the Agreement where the Agreement requires payment to be made to a borrower of an Affected Loan (rather than by credit to the borrower of an Affected Loan)

(together, Financed Amount), equal to a total of \$945,334.00.
6. [REDACTED] will provide Profile Finance with the Financed Amount within a timeframe that enables Profile Finance to comply with its obligations detailed in the Agreement.
7. [REDACTED] will provide evidence to the Commission within 18 months of the commencement of the Undertakings of the Financed Amount being, as applicable,

either paid to Profile Finance or credited against loans held by borrowers of Affected Loans.

#### Purpose of the Undertakings

8. These Undertakings are given by [REDACTED] in order to:
- 8.1 record [REDACTED] guarantee to Profile Finance to provide the Financed Amount; and
  - 8.2 provide the Commission with a means to enforce that guarantee.

#### Commencement and duration of Undertakings

9. The Undertakings come into effect when executed by [REDACTED] and the Commission confirms acceptance of the Undertakings.
10. These Undertakings will continue to have effect until the earlier of:
- 10.1 the Financed Amount being provided to Profile Finance for it to comply with the Agreement; or
  - 10.2 the Commission agrees to discharge [REDACTED] from the Undertakings.

#### Compliance with Undertakings

11. If [REDACTED] 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.
12. For the avoidance of doubt, nothing in paragraph 11 above prevents the Commission from directly seeking any information from [REDACTED] at any time for the purpose of checking compliance with the Undertakings for the duration of the Undertakings.

#### Miscellaneous

13. No amendment to the Undertakings will be effective unless it is in writing, executed by [REDACTED] and signed as accepted by the Commission.
14. These Undertakings are properly executed if [REDACTED] signs the same copy, or identical copy of the execution page as the Commission. Where there are separate copies, signed on behalf of [REDACTED] and the Commission, the signed copy can be the original document or an email copy.
15. [REDACTED] acknowledges that nothing in the Undertakings is intended to restrict the right of the Commission, or the right of any other person, to take action under any statute or law.
16. The Commission acknowledges that [REDACTED] agreement to provide the Undertakings is highly commercially sensitive and confidential. The Commission will take all reasonable steps to preserve the confidentiality of the fact that [REDACTED] is providing the

Undertakings including in consideration and response to any request for disclosure of that fact pursuant to the Official Information Act 1982.

**Execution**

Signed by and behalf of [redacted]  
[redacted]

[redacted]  
Signature of director

[redacted]  
Name of director

*In the presence of:*  
Witness Name: [redacted]  
Witness Address: [redacted]  
Witness Occupation: [redacted]  
Date: [redacted]

**Acceptance**

Accepted by the Commerce Commission  
by:

  
Signature of authorised representative

*Anna Rawlings*  
Name of authorised representative  
*(Chair)*

*In the presence of:*  
Witness Name:  
Witness Address:  
Witness Occupation:  
Date: