

COMMERCE COMMISSION

AUTO FINANCE DIRECT LIMITED

SETTLEMENT AGREEMENT

DATE 17 December 2018

THIS AGREEMENT is made on the 17th day of December 2018

Parties

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

AUTO FINANCE DIRECT LIMITED, a limited liability company registered in New Zealand (company number 2228282) with a registered office at Alliot NZ Limited, Level 2, 142 Broadway, Newmarket, Auckland, 1023, New Zealand (Auto Finance Direct).

1 The Commission's investigation

- 1.1 Auto Finance Direct is a creditor for the purposes of the Credit Contracts and Consumer Finance Act 2003 (CCCFA). Auto Finance Direct offers motor vehicle finance to borrowers within New Zealand under consumer credit contracts through a network of motor vehicle dealers.
- 1.2 The Commission has investigated whether the consumer credit contracts entered into between Auto Finance Direct and its customers contravene the CCCFA by providing for unreasonable credit or default fees.
- 1.3 Auto Finance Direct has fully co-operated with the Commission's investigation. During the investigation, Auto Finance Direct provided the Commission with information regarding the cost activities that Auto Finance Direct asserted were closely connected to each of the Establishment Fee, Early Settlement Fee, and Variation Fee.
- 1.4 The Commission considers that, from 1 April 2015 to 13 August 2018, Auto Finance Direct is likely to have entered into consumer credit contracts that provided for unreasonable credit fees in breach of section 41 of the CCCFA, by including in the fees costs that were not closely related to the fee to be charged. The unreasonable credit fees provided for included Auto Finance Direct's Establishment Fee, Early Settlement Fee, and Variation Fee.
- 1.5 During the Commission's investigation, Auto Finance Direct:
 - 1.5.1 reduced its Early Settlement Fee to \$80 on 17 May 2017 and on 13 August 2018 set this fee at \$65; and
 - 1.5.2 reduced its Variation Fee to \$55 on 24 May 2018.
- 1.6 Auto Finance Direct will set its Establishment Fee at \$190 on 1 February 2019.
- 1.7 This Agreement sets out the terms on which the parties have agreed to resolve the Commission's investigation.
- 1.8 The Commission has agreed to resolve its investigation by entering into this settlement agreement taking into account Auto Finance Direct's co-operation with the investigation, that Auto Finance Direct voluntarily reduced its Early Settlement Fee and Variation Fee early in the Commission's investigation, and has agreed to remediate borrowers.

2 Interpretation

Affected Loan Contract means any Loan Contract which provided for payment of one or more of the following fees:

- (a) an Establishment Fee in excess of \$190;
- (b) an Early Settlement Fee in excess of \$65 and/or
- (c) a Variation Fee in excess of \$55.

Affected Customer means a borrower under an Affected Loan Contract.

Agreement means this Settlement Agreement.

Best Endeavours means taking any steps that Auto Finance Director its agent or assignee would usually make to locate a non-paying debtor and includes using information currently known to Auto Finance Direct, including email addresses, phone numbers, and physical and/or postal addresses, to attempt to contact Affected Customers, as well as searches of Google, Facebook, White Pages and/or the electoral roll.

CCCFA means the Credit Contracts and Consumer Finance Act 2003.

Commissioner means the Commissioner of Inland Revenue as defined in the Tax Administration Act 1994

Early Settlement Fee means the fee provided for in a Loan Contract that is payable when the Affected Customer pays their loan in full prior to the expiry of the term of a Loan Contract, whether due to repayment in full or refinancing to a different lender. For the avoidance of doubt, this includes any Early Settlement Fee paid in the period from 1 April 2015 to 13 August 2018.

Establishment Fee means the fee provided for in a Loan Contract that is payable when the Affected Customer enters into a Loan Contract. For the avoidance of doubt, this includes any Establishment Fee paid in the period from 1 April 2015 to 3 January 2018.

Loan Contract means a consumer credit contract entered into from 1 April 2015 to 13 August 2018 between Auto Finance Direct and a borrower.

Refund means the amount calculated pursuant to clause 4.2.1.

Variation Fee means the fee provided for in a Loan Contract that is payable when the Loan Contract is varied, assigned, or an unscheduled part prepayment is made. For the avoidance of doubt, this includes any Variation Fee paid in the period from 1 April 2015 to 24 May 2018.

3 Acknowledgment of breach

- 3.1 Auto Finance Direct acknowledges that, between 1 April 2015 and 13 August 2018, it entered into Affected Loan Contracts that provided for a total of 7,228 fees that were likely to be unreasonable credit fees in contravention of section 41 of the CCCFA.

4 Actions to be taken by Auto Finance Direct

4.1 Overview of action to be taken

4.1.1 Auto Finance Direct agrees to:

- (a) reimburse Affected Customers in accordance with clauses 4.2 and 4.3 of this Agreement;
- (b) write to Affected Customers in accordance with clause 4.4 of this Agreement;
- (c) publish the fact of this settlement and the availability of the Refund in accordance with clause 4.5.2 of this Agreement;
- (d) provide the Commission with an interim and a final report in accordance with clauses 4.6 and 4.7 of this Agreement respectively; and
- (e) conduct an annual review of the fees it charges borrowers and keep a written record of how it calculates its fees.

4.2 Calculating the Refund amounts

4.2.1 Auto Finance Direct must:

- (a) identify all Affected Loan Contracts;
- (b) for each Affected Loan Contract calculate:
 - (i) the amount by which any Establishment Fee charged exceeded \$190.00; and
 - (ii) the amount by which any Early Settlement Fee charged exceeded \$65.00; and
 - (iii) the amount by which any Variation Fee charged exceeded \$55;
- (c) aggregate each of the amounts in clause 4.2.1(b), and add 5% to that aggregated amount to reflect the Affected Customer's loss of use of the money.

4.3 Paying the Refund

- 4.3.1 Within three months of the date of this Agreement, Auto Finance Direct must credit the Refund against the loan account of any Affected Customer who has an existing loan contract with Auto Finance Direct.
- 4.3.2 Otherwise, but subject to clause 4.5.4, Auto Finance Direct must pay the Refund in accordance with the Affected Customer's instructions within one month of receiving those instructions.

4.4 Contacting Affected Customers

- 4.4.1 Within one month from the date of this Agreement, Auto Finance Direct must provide the Commission with a template letter to be sent to all Affected Customers. The template letter must include the information set out in clause 4.4.2. Auto Finance Direct must amend the template letter on request by the Commission if the Commission reasonably considers amendment is required.
- 4.4.2 Auto Finance Direct must within seven weeks from the date of this Agreement send a letter to each Affected Customer at their last known postal address informing them:
- (a) that Auto Finance Direct has entered into a settlement agreement with the Commission;
 - (b) that Auto Finance Direct's loan contract provided for an unreasonable Establishment Fee, Early Settlement Fee, and Variation Fee;
 - (c) that they are entitled to be credited or refunded the amount by which the fee (or fees) they paid exceeds in the case of the Establishment Fee \$190, in the case of the Early Repayment Fee \$65 and in the case of the Variation Fee \$55;
 - (d) how the Refund has been calculated;
 - (e) if they have an existing loan contract with Auto Finance Direct, that the Refund will be credited to their loan account; and
 - (f) if they do not have an existing loan contract with Auto Finance Direct, that they should contact Auto Finance Direct to provide it with payment instructions.

4.5 Locating Affected Customers whose address is unknown, and dealing with unclaimed Refunds

- 4.5.1 If the address for an Affected Customer is unknown, Auto Finance Direct must use its Best Endeavours to locate the Affected Customer and provide them with the letter described in clause 4.4.2.
- 4.5.2 Auto Finance Direct must for 13 months from the date of this Agreement prominently publish information to the effect set out below on its lending website:
- (a) that Auto Finance Direct has entered into a settlement with the Commission;
 - (b) that Auto Finance Direct's consumer credit contracts provided for credit fees higher than the aggregate of the closely related cost activities for each of those credit fees during the period of 1 April 2015 to 13 August 2018;

- (c) that Auto Finance Direct will pay the Refund to Affected Customers;
 - (d) that any Affected Customer who was a customer of Auto Finance Direct during this period but who has not received a letter from Auto Finance Direct needs to contact Auto Finance Direct to provide updated contact details for their Refund; and
 - (e) Auto Finance Direct's contact details.
- 4.5.3 Auto Finance Direct must update the details on the website within one week of any request by the Commission to do so if the Commission reasonably considers amendment is required.
- 4.5.4 Auto Finance Direct must use its Best Endeavours to locate every Affected Customer who is entitled to receive a Refund. If Auto Finance Direct is unable to locate an Affected Customer who is entitled to receive a Refund, Auto Finance Direct undertakes:
- (a) to hold any unclaimed Refunds in an interest bearing account for 13 months from the date of the Agreement; and
 - (b) to treat all unclaimed Refunds as if they were Unclaimed Money pursuant to section 4 of the Unclaimed Money Act 1971. For the avoidance of doubt, this means that Auto Finance Direct must treat an unclaimed Refund as Unclaimed Money whether or not it exceeds \$100, and pay all unclaimed Refunds to the Commissioner in accordance with the Unclaimed Money Act 1971.

4.6 Interim Report

- 4.6.1 Auto Finance Direct undertakes, at its own expense, to provide to the Commission seven months from the date of this Agreement an interim report recording the progress it has made with repaying Affected Customers, and paying Refunds. This report must include the following information:
- (a) the total amount of Refunds Affected Customers are entitled to receive;
 - (b) where Refunds have been paid to Affected Customers, the dates, methods, and total amount of these payments; and
 - (c) the total amount of Refunds yet to be paid.
- 4.6.2 Auto Finance Direct agrees to provide the interim report in an Excel format.

4.7 Final Report

- 4.7.1 Auto Finance Direct undertakes, at its own expense, to provide a final report to the Commission 13 months from the date of this Agreement.
- 4.7.2 The final report must be prepared by an independent accountant approved by the Commission who has reviewed the work undertaken by Auto Finance Direct. The reviewer must confirm that Auto Finance Direct has undertaken the steps it has agreed to take in this Agreement.

- 4.7.3 The final report must include:
- (a) the reviewer's opinion on whether Auto Finance Direct has undertaken the steps it has agreed to take in this Agreement;
 - (b) details of any steps that have not yet been completed, including when they are likely to be completed by Auto Finance Direct;
 - (c) the reviewer's opinion as to the adequacy of any further steps that Auto Finance Direct ought reasonably to take to contact Affected Customers who have been unable to be contacted at the time of the final report;
 - (d) a summary of the Refunds made; and
 - (e) the following information:
 - (i) the loan number of Affected Customers who are entitled to receive a Refund;
 - (ii) the total amount of Refunds Affected Customers are entitled to receive;
 - (iii) where Refunds have been paid to Affected Customers, the dates, methods, and total amount of the payments;
 - (iv) where Auto Finance Direct has been unable to contact an Affected Customer who is entitled to receive a Refund, the steps that Auto Finance Direct took to locate and contact the Affected Customer; and
 - (v) the total amount of Refunds yet to be paid.

4.7.4 Auto Finance Direct agrees to provide the matters in 4.7.3(e) in Excel format.

4.7.5 Auto Finance Direct must, within 14 days from providing the final report to the Commission, confirm in a letter to the Commission the amount of unclaimed Refunds remaining.

4.7.6 On receipt of the final report the Commission will confirm within 14 days whether it requires Auto Finance Direct to take any other steps to meet its obligations under this Agreement.

5 No Further Action by Commission

- 5.1 The Commission will close its investigation into Auto Finance Direct upon the signing of this Agreement by Auto Finance Direct.
- 5.2 The Commission will not issue or encourage any civil or criminal proceeding against Auto Finance Direct 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 Auto Finance Direct's failure to comply with this Agreement.

6 Effect and Implementation of this Agreement

- 6.1 Auto Finance Direct and the Commission will each take such steps as are

necessary or desirable to give full effect to the terms of this Agreement.

- 6.2 The terms of this Agreement may be amended by the written agreement of the parties.
- 6.3 Nothing in this Agreement will limit or affect the ability of:
 - 6.3.1 the Commission to issue proceedings against Auto Finance Direct in respect of matters not related to this investigation, or in respect of conduct engaged in by Auto Finance Direct after the date of this Agreement or for breach of this Agreement;
 - 6.3.2 any person who has not consented to be bound by the terms of this Agreement from pursuing any rights that person considers would be available to them.

7 Miscellaneous

- 7.1 This Agreement will be governed and interpreted in accordance with the laws of New Zealand.
- 7.2 Auto Finance Direct and the Commission agree that:
 - 7.2.1 in assessing the quantum of the reduced fees, the Commission has relied on information provided by Auto Finance Direct;
 - 7.2.2 neither the Agreement nor the fact that Auto Finance Direct has entered into the Agreement is confidential;
 - 7.2.3 the Agreement may be published on the Commission's website after it has been signed;
 - 7.2.4 the Commission may issue a media release about the Agreement;
 - 7.2.5 Auto Finance Direct will not make any public comment in relation to the Agreement, with the exception of the actions required under 4.5.2, until after the Commission has issued any media release notifying the public of it; and
 - 7.2.6 any media release and/or public statement must be consistent with the matters set out in the Agreement.
- 7.3 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:
 - 7.3.1 If addressed to the Commission, by both hand delivery and email to the following respective addresses:

Commerce Commission
44 The Terrace
Wellington Central
Wellington 6011

Attention: General Counsel, Competition and Consumer

Email: [REDACTED]

7.3.2 If addressed to Auto Finance Direct, by hand delivery or email to the following address:

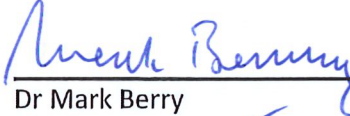
Auto Finance Direct
Limited
c/- Alliot NZ Limited
Level 2, 142 Broadway
Newmarket
Auckland 1023

Attention: Robert Young

Email: [REDACTED]

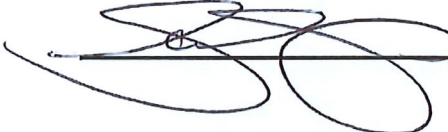
EXECUTION

SIGNED for and on behalf of
COMMERCE COMMISSION





Dr Mark Berry
Chair

SIGNED for and on behalf of
AUTO FINANCE DIRECT LIMITED



Robert Young.

Witnessed by:



Accountant
Auckland.