

19 March 2018

Dealer Finance Limited  
4/213 Blenheim Rd  
Riccarton  
Christchurch 8041  
New Zealand  
By email: [manager@dfi.co.nz](mailto:manager@dfi.co.nz)

Dear Mr [ ]

### **Credit Contracts and Consumer Finance Act 2003: Warning**

1. The Commerce Commission (the **Commission**) has been investigating Dealer Finance Limited (**DFL**) under the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**). We have now completed our investigation and are writing to inform you of our concerns.
2. The Commission considers that between September and December 2015, DFL through its agent Nigel Thompson Motor Company Limited (**NTMC**)<sup>1</sup> did not make reasonable inquiries before entering into agreements with borrowers, so as to be satisfied that it was likely that the borrowers would make payments under the agreements without suffering substantial hardship.
3. As a consequence, DFL is likely to have breached section 9C of the CCCFA by failing to comply with the lender responsibility principles.
4. After weighing up the factors set out in our [Enforcement Response Guidelines](#)<sup>2</sup>, we have decided to conclude this investigation by issuing this warning.

#### **The law**

5. Lenders under consumer credit contracts entered into after 6 June 2015 are required to comply with the Lender responsibility principles set out in section 9C (see Annex A).

---

<sup>1</sup> NTMC was placed in liquidation on 23 March 2017 and is now registered in the Companies Register as 3224647 Limited.

<sup>2</sup> <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>

6. Relevant to this investigation is Principle 3(a)(ii) which states:

*“The lender responsibilities are that a lender must, in relation to an agreement with a borrower,—*

*(a) make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that—*

*(i) the credit or finance provided under the agreement will meet the borrower’s requirements and objectives; and*

*(ii) the borrower will make the payments under the agreement without suffering substantial hardship”*

### **The investigation**

7. The Commission received three complaints from borrowers who alleged that they had suffered substantial hardship as a result of making payments under loans granted by DFL and that DFL (via NTMC) had not made reasonable inquiries into their ability to repay the loans at the time of entering into the agreement.

8. As a result of the Commission’s investigation, it was established that:

8.1 DFL provides vehicle finance through 20 motor vehicle dealerships (dealers) in Christchurch. Each dealer holds 5% of the issued shares in DFL;

8.2 DFL provides documentation to its dealers in order for them to enter into consumer credit contracts with prospective car purchasers as agents on behalf of DFL. One such dealer was NTMC;

8.3 Each of the three borrowers who complained to the Commission entered into finance agreements with DFL, through NTMC, when purchasing a motor vehicle from NTMC;

8.4 The relevant facts regarding the three borrowers are as follows:

#### *Borrower One*

8.4.1 In September 2015 Borrower One entered into a loan contract with DFL through NTMC. Borrower One was a beneficiary who had obtained a pre-approved loan from a third party to pay a deposit on a new car. During the process of applying for the loan from DFL the borrower told NTMC that she had personal debts of over \$30,000. Despite this information, NTMC did not take any steps to verify the information about the Borrower’s income or expenditure before entering into the loan with her. The Borrower purchased a motor vehicle valued at \$8,999 on finance through DFL and within a short time suffered substantial hardship in making repayments.

- 8.4.2 The borrower alleges that in prioritising car repayments, she fell into arrears with Housing New Zealand, and regularly had to apply for food grants.
- 8.4.3 The Commission's view is that before entering into the loan, DFL, through its agent NTMC, did not make reasonable inquiries so as to be satisfied that it was likely that borrower would be able to make payments under the agreement without suffering substantial hardship.

*Borrower Two*

- 8.4.4 In September 2015 Borrower Two entered into a loan contract with DFL through NTMC. Borrower Two was a beneficiary who, after viewing a motor vehicle at NTMC was advised by a salesperson that she had approved finance to buy a \$6,000 motor vehicle. She was asked by NTMC to bring in her driver's licence and a copy of her current bank statement. The Borrower alleges that within a month she was struggling to make the loan repayments.
- 8.4.5 The Commission has reviewed the bank statement supplied to NTMC which showed the borrower had only \$1.65 in her bank account at the time of entering the agreement. A review of the statement disclosed financial commitments including other loan repayments and costs involved in providing for basic family needs.
- 8.4.6 Had NTMC reviewed the statement at the time it was provided, it would have revealed that the borrower was likely to suffer substantial hardship in making the repayments to DFL.
- 8.4.7 The Commission's view is that on receiving and assessing the statement, neither DFL nor its agent NTMC could have been satisfied that it was likely that borrower would be able to make payments under the agreement without suffering substantial hardship.

*Borrower Three*

- 8.4.8 Borrower Three entered into a loan agreement with DFL in December 2015. She was a sickness beneficiary who had recently returned from Australia. In discussions with a salesperson at NTMC she advised that she had \$2500 (from the sale of her effects before leaving Australia) for a deposit on a motor vehicle valued at \$10,999. NTMC staff enquired as to her income and loan history, but she was not asked to provide any documentation except for her driver's licence and passport.
- 8.4.9 NTMC approved the loan as she was an acceptable risk due to a clean credit check, her age demographic and the deposit she could pay. The borrower used \$2,000 as a deposit and the remaining \$500

supplemented the initial payments. Once the \$500 was exhausted, the borrower quickly fell into arrears.

8.4.10 The Commission's investigation has found that DFL through its agent, NTMC did not make reasonable inquiries about the borrower's income or expenditure before entering into the loan with her so as to be satisfied that it was likely that she would be able to make payments under the agreement without suffering substantial hardship.

8.5 In the three cases, we are concerned that either:

8.5.1 DFL obtained insufficient financial information, particularly income and expenses information about the borrower, or

8.5.2 DFL did not sufficiently take into account other relevant information when considering whether the borrower would be able to make payments under the agreement without suffering substantial hardship.

8.6 DFL advised the Commission that it has since implemented procedures with its dealers to ensure that a compulsory checklist list of 'reasonable inquiries' is to be satisfied before finance is approved.

8.7 DFL also reserves the right to undo the agreement made by its dealer when it reviews the contract documentation and check list on receipt from the dealer.

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

9. DFL is named as the creditor under all three loan agreements although, in each case it was NTMC that was the point of contact with the borrower. The Commission considers that NTMC was acting as an agent of DFL when it entered into the transactions and the ultimate responsibility for complying with the responsible lending principles rests with DFL as the creditor.
10. In each case we consider DFL's conduct is likely to have breached section 9C(1) of the CCCFA by not complying with the obligation set out in sections 9C(2)(b) and (3)(a)(ii) of the CCCFA.
11. In our view, DFL should have had procedures in place to ensure its dealer comply with the lender responsibility principles.
12. We acknowledge that DFL was developing procedures to ensure compliance with the lender responsibility principles throughout 2015 and that this process had begun before the Commission's investigation.
13. We also acknowledge that DFL has settled the debt with two of the borrowers.



### **Next steps**

14. We recommend that DFL seeks legal advice and takes all steps necessary to ensure that its dealers comply with DFL's obligations as a responsible lender.
15. While we will not be taking any further action against DFL at this time, we will take this warning into account if this conduct continues or if DFL engages in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against DFL.
16. This warning letter is public information. We may make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

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

17. The Commission is responsible for enforcing and promoting compliance with a number of laws in New Zealand, including the CCCFA. The CCCFA protects the interests of consumers in connection with credit contracts and other consumer finance.

### **Penalties for breaching the CCCFA**

18. Only the courts can decide if there has actually been a breach of the CCCFA. A lender which breaches s9C of the CCCFA may:
  - 18.1 have a declaration concerning that breach made against it by the court;
  - 18.2 be subject to injunctive relief requiring the lender to comply with the lender responsibility provisions;
  - 18.3 be ordered to pay the losses or damages of a borrower;
  - 18.4 be ordered to pay exemplary damages to a borrower;
  - 18.5 have a credit contract re-opened.
19. Where a lender fails more than once to comply with any of the provisions of the CCCFA the court may make an order prohibiting or restricting any person (including a director or a principal officer of a lender) from:
  - 19.1 providing credit under a consumer credit contract;
  - 19.2 acting as a director or taking part directly or indirectly in the management or control of any company or business that provides credit under a consumer credit contract; or
  - 19.3 being in the employ or acting as an agent of a credit in any capacity that allows the person to take any part in the negotiation of a consumer credit contract involving the provision of credit by the creditor.

20. DFL should be aware that the decisions outlined in this letter do not prevent any other person or entity from taking private action through the courts.

**Further information**

21. We have published a series of fact sheets and other resources including a responsible lenders guide to help businesses comply with the CCCFA and the other legislation we enforce. These are available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz). We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the CCCFA.
22. You can also view the CCCFA and other legislation at [www.legislation.co.nz](http://www.legislation.co.nz).
23. Thank you for your assistance with this investigation. Please contact Merv Theobald on 04 924 3767 or by email at [mervyn.theobald@comcom.govt.nz](mailto:mervyn.theobald@comcom.govt.nz) if you have any questions about this letter.

Yours sincerely



Kirsten Mannix  
Consumer Manager Wellington

Copy to: Nigel Thompson  
[nigeltwthompson@gmail.com](mailto:nigeltwthompson@gmail.com)

**Annex A****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; and
    - (ii) before entering into an agreement to provide credit or finance and before taking a relevant guarantee; and
    - (iii) in all subsequent dealings with a borrower in relation to an agreement or a guarantor in relation to a relevant guarantee; and
  - (b) comply with all the lender responsibilities specified in subsections (3), (4), and (5).
- (3) The lender responsibilities are that a lender must, in relation to an agreement with a borrower,—
  - (a) make reasonable inquiries, before entering into the agreement, so as to be satisfied that it is likely that—
    - (i) the credit or finance provided under the agreement will meet the borrower's requirements and objectives; and
    - (ii) the borrower will make the payments under the agreement without suffering substantial hardship; and
  - (b) assist the borrower to reach an informed decision as to whether or not to enter into the agreement and to be reasonably aware of the full implications of entering into the agreement, including by ensuring that—
    - (i) any advertising is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and
    - (ii) the terms of the agreement are expressed in plain language in a clear, concise, and intelligible manner; and
    - (iii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and
  - (c) assist the borrower to reach informed decisions in all subsequent dealings in relation to the agreement, including by ensuring that—

- (i) any variation to the agreement is expressed in plain language in a clear, concise, and intelligible manner; and
  - (ii) any information provided by the lender to the borrower after the agreement has been entered into is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing; and
- (d) treat the borrower and their property (or property in their possession) reasonably and in an ethical manner, including—
- (i) when breaches of the agreement have occurred or may occur or when other problems arise:
  - (ii) when a debtor under a consumer credit contract suffers unforeseen hardship (*see* section 55):
  - (iii) during a repossession process (including by taking all reasonable steps to ensure that goods and property are not damaged during the process, that repossessed goods are adequately stored and protected, and that the right to enter premises is not exercised in an unreasonable manner); and
- (e) ensure, in the case of an agreement to which Part 5 applies, that—
- (i) the agreement is not oppressive:
  - (ii) the lender does not exercise a right or power conferred by the agreement in an oppressive manner:
  - (iii) the lender does not induce the borrower to enter into the agreement by oppressive means; and
- (f) meet all the lender's legal obligations to the borrower, including under this Act, the Fair Trading Act 1986, the Consumer Guarantees Act 1993, the Financial Service Providers (Registration and Dispute Resolution) Act 2008, and the Financial Advisers Act 2008, which include—
- (i) obligations in relation to disclosure, credit fees, unforeseen hardship applications, and credit repossession under this Act; and
  - (ii) prohibitions on false or misleading representations and unfair contract terms under the Fair Trading Act 1986; and
  - (iii) the guarantee that the service of providing credit and any other services will be carried out with reasonable care and skill under the Consumer Guarantees Act 1993.
- (4) The lender responsibilities are also that a lender must, in relation to a relevant guarantee that is taken by the lender,—



- (a) make reasonable inquiries, before the guarantee is given, so as to be satisfied that it is likely that the guarantor will be able to comply with the guarantee without suffering substantial hardship; and
  - (b) assist the guarantor to reach an informed decision as to whether or not to give the guarantee and to be reasonably aware of the full implications of giving the guarantee, including by ensuring that—
    - (i) the terms of the guarantee are expressed in plain language in a clear, concise, and intelligible manner; and
    - (ii) any information provided by the lender to the guarantor is not presented in a manner that is or is likely to be misleading, deceptive, or confusing; and
  - (c) treat the guarantor reasonably and in an ethical manner, including when breaches of a credit contract to which the guarantee applies have occurred or may occur or when other problems arise; and
  - (d) ensure, in the case of a guarantee that is to be treated as forming part of a credit contract for the purposes of Part 5 under section 119, that—
    - (i) the guarantee is not oppressive:
    - (ii) the lender does not exercise a right or power conferred by the guarantee in an oppressive manner:
    - (iii) the lender does not induce the guarantor to give the guarantee by oppressive means; and
  - (e) meet all the lender's legal obligations to the guarantor, including under the Acts specified in subsection (3)(f).
- (5) The lender responsibilities are also that a lender must, in relation to a relevant insurance contract,—
- (a) make reasonable inquiries, before the contract is entered into, so as to be satisfied that it is likely that—
    - (i) the insurance provided under the contract will meet the borrower's requirements and objectives; and
    - (ii) the borrower will make the payments under the contract without suffering substantial hardship; and
  - (b) assist the borrower to reach an informed decision as to whether or not to enter into the contract and to be reasonably aware of the full implications of entering into the contract, including by ensuring that—

- (i) any advertising distributed by the lender is not, or is not likely to be, misleading, deceptive, or confusing to borrowers; and
- (ii) any information provided by the lender to the borrower is not presented in a manner that is, or is likely to be, misleading, deceptive, or confusing.

(6) Subsections (3)(b)(iii) and (c)(ii), (4)(b)(ii), and (5)(b)(ii) do not apply to information that is subject to section 32(1).

(7) For the purposes of the inquiries required under subsections (3)(a), (4)(a), and (5)(a), the lender may rely on information provided by the borrower or guarantor unless the lender has reasonable grounds to believe the information is not reliable.

- Section 9C: inserted, on 6 June 2015, by section 9 of the Credit Contracts and Consumer Finance Amendment Act 2014 (2014 No 33).