

ENFORCEABLE UNDERTAKING
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (Cth)

Section 93AA

The commitments in this undertaking are offered to the Australian Securities and Investments Commission ("ASIC") by:

Automotive Financial Services Pty Ltd (A.C.N. 003 622 375)
5 Transvaal Avenue
DOUBLE BAY NSW 2028



1. Background

- 1.1 Automotive Financial Services Pty Ltd ("AFS") is a credit provider, specialising in the provision of finance to fund the purchase of motor vehicles from car dealers.
- 1.2 During the period from July 1997 to October 2001, AFS offered to consumers who entered into Loan Contracts with AFS ("borrowers") the option of purchasing a product known as the Credit Protection Waiver Program ("the Program"). AFS has ceased offering the Program and has no plans to reintroduce this product or any similar product in the future.
- 1.3 For the purpose of paragraph 1.2, the term "Loan Contracts" means:
- (a) A document described as "loan contract and mortgage" which, amongst other things, sets out the relevant terms of the particular transaction; and
 - (b) A document described as "terms and conditions" which is referred to in and incorporated by reference into the "loan contract and mortgage" and which, contains applicable terms.
- 1.4 Under the Program, borrowers who had purchased cars on finance with AFS could select to have loan repayments waived if specified events occurred ("the purchaser"). The specified events were:
- (a) the death of the purchaser;
 - (b) the disablement of the purchaser;
 - (c) the purchaser becoming unemployed;
 - (d) the total loss of a comprehensively insured vehicle; and
 - (e) loss of title of the motor vehicle.
- 1.5 Prior to marketing the Program, AFS received legal advice that the Program was not a contract of insurance and that AFS, in relation to the marketing of the Program and determining whether or not to accept applications for waiver of payment, did not need to comply with legislation regulating insurance contracts, particularly the *Insurance Contracts Act 1984* ("the Insurance Act").
- 1.6 ASIC has reviewed the Program and is of the opinion that this product is an insurance contract for the purposes of, amongst other things, the Insurance Act and as such AFS is required to comply with the requirements of the Insurance Act in relation to the Program. AFS does not agree with ASIC's opinion that the Program is an insurance contract and that it was obliged to comply with the Insurance Act.

- 1.7 ASIC's concerns that AFS was required to comply with the Insurance Act but did not are as follows:
- (a) AFS may have rejected applications for waiver of repayments in contravention of its obligations under the Insurance Act;
 - (b) AFS was not a member of an alternative dispute resolution scheme for companies offering life insurance or general insurance, and purchasers of the Program did not, therefore, have a right of independent review of any application for waiver that was rejected by AFS;
 - (c) AFS did not provide purchasers of the Program with notice of their entitlement to cancel the Program within 14 days of receiving such a notice (in breach of Section 64A of the Insurance Act);
 - (d) AFS may not have informed purchasers, in writing, of the general nature, effect and ramifications of the duty of disclosure within the meaning of the Insurance Act by consumers to AFS (in breach of Sections 22 and 28 of the Insurance Act).
- ASIC is also concerned that AFS may have sold the Program to purchasers where the benefits provided in relation to particular specified events were of limited value to them. AFS does not agree that the Program was of limited value to individual purchasers.
- 1.8 In the circumstances, ASIC is concerned that, as a result of the matters referred to in paragraph 1.7, purchasers may have suffered damages.
- 1.9 ASIC notes that AFS has fully co-operated with ASIC's enquiries, and provided information to ASIC which enabled it to review aspects of the operations of the Program relevant to its concerns.
- 1.10 In the course of its review referred to in paragraph 1.6 above, AFS has advised ASIC that:
- (a) 43 applications for waiver were rejected by AFS (from 1097 applications received) ("**the rejected applications**"); and
 - (b) 11 borrowers (as a result of continuing to make repayments under the Loan Contract in the period between making applications for waiver of repayments under the Program and the approval of those applications by AFS) have made a total amount of repayments that exceeds their respective liability. The total of these additional repayments is approximately \$6,500 ("**the overpayments**").
- 1.11 ASIC is responsible for monitoring and promoting consumer protection in relation to financial services, and ASIC may:
- (a) under section 12GD of the Australian Securities and Investments Commission Act 2001(Cth) ("**the ASIC Act**") seek inter alia, injunctions preventing a person from engaging in certain conduct, requiring that person to do any act or thing and/or placing corrective advertisements;
 - (b) under sections 12GM and 50 of the ASIC Act, commence proceedings for or on behalf of the consumers who have suffered damage by reason of any breach of the ASIC Act;
 - (c) under section 12GLA(2)(a) of the ASIC Act seek an order directing a person to perform a service for the benefit of the community or a section of the community.
- 1.12 ASIC is also responsible for the general administration of the Insurance Act, and, under section 55A of the Insurance Act, ASIC may commence proceedings where it is satisfied that the conduct of an insurer breaches the requirements of the Insurance Act.

1.13 AFS acknowledges ASIC's concerns and, although it does not agree the Program is an insurance contract and that it was obliged to comply with the Insurance Act, AFS has offered and ASIC has agreed to accept this Enforceable Undertaking to resolve all of ASIC's concerns in relation to the Program.

2. Undertakings

Pursuant to section 93AA of the ASIC Act, AFS offers the following undertakings to ASIC:

2.1 AFS will, within 20 business days of the date of execution of this Enforceable Undertaking, provide ASIC with details, which shall include a resume, of an external independent consultant with specialist knowledge of insurance law ("the insurance consultant") who AFS proposes to engage, and the proposed terms of that engagement.

2.2 The terms of engagement referred to in paragraph 2.1 above will contain, amongst other things, the following:

(a) The insurance consultant to review the rejected applications in accordance with the principles applying to the determination of claims for insurance contracts under the Insurance Act;

(b) If the insurance consultant determines that the rejected applications should have been approved by AFS, the insurance consultant will determine:

(i) whether or not the purchaser has suffered any damages;

(ii) whether or not interest is payable on the damages;

(iii) the quantum of the amounts referred to in paragraphs 2.2(b)(i) and 2.2(b)(ii).

(c) The insurance consultant to provide a written report to AFS:

(i) as to the steps he or she has taken in reviewing and determining the rejected applications referred to in paragraphs 2.2(a) and 2.2(b); and

(ii) providing recommendations as to the process and procedures when reviewing and determining all future applications for waiver.

2.3 AFS will provide ASIC with a copy of the report referred to in paragraph 2.2(c) within 2 business days of AFS receiving the report from the insurance consultant.

2.4 For the purpose of paragraph 2.2, AFS and the insurance consultant specifically acknowledge that where:

(i) an application for waiver under the Program was rejected because the borrower was not in permanent employment (as defined in Clause 14.1 of the loan contract between the borrower and AFS); and

(ii) the borrower was not in permanent employment when they purchased the Program,

AFS and the insurance consultant will not rely on the fact that the borrower was not in permanent employment at the time of making the application in determining whether or not the application for waiver should have been accepted by AFS.

2.5 Upon approval by ASIC in writing of the proposed insurance consultant and their terms of engagement, AFS will forthwith engage the insurance consultant on the terms so approved.

- 2.6 AFS will review all applications that it received after 1 November 2002 in accordance with the recommendations contained in the insurance consultant's report referred to in paragraph 2.2(c).
- 2.7 AFS will, within 20 business days of the date of execution of this Enforceable Undertaking, if it has not already done so, refund the overpayment to the applicable purchasers together with any applicable interest calculated in accordance with Section 57 of the Insurance Act.
- 2.8 On or by 30 November 2003, AFS will provide a report to ASIC signed by an officer of AFS with management capacity or above:
- (a) advising the outcome of the review by the insurance consultant of the rejected applications referred to in paragraph 2.2 (to the extent to which it has been completed); and
 - (b) confirming that the overpayments and interest referred to in paragraph 2.7 have been paid to the applicable purchasers.
- 2.9 On or by 30 November 2003, 30 November 2004 and 30 November 2005 AFS will provide reports to ASIC containing the following information (to the extent relevant) concerning the status of applications for waiver under the Program rejected by AFS:
- (a) the number of applications for waiver received:
 - (i) in the case of the report of 30 November 2003, since November 2002; and
 - (ii) in the case of the reports of 30 November 2004 and 30 November 2005, since the date of the previous report; and
 - (b) the number of applications for waiver that were rejected by AFS, and the reasons the application was rejected.
- 2.10 Upon receipt of a tax invoice, AFS will contribute \$20,000 to ASIC's costs of undertaking community service work or projects referred in paragraph 2.11 below.
- 2.11 For the purpose of paragraph 2.10, "community service work or projects" means researching, educating and promoting consumer awareness about their rights including any risks in purchasing financial products offered by or through car dealers.
- 2.12 AFS acknowledges that ASIC will not mention or identify that the funds originate from AFS when undertaking the work or projects referred to in paragraph 2.10.

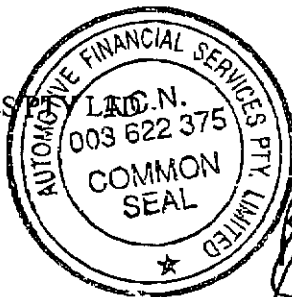
3. Acknowledgements

- 3.1 AFS acknowledges that ASIC:
- (a) may issue a media release on execution of this Enforceable Undertaking referring to the terms of the Enforceable Undertaking and the concerns of ASIC which led to its execution;
 - (b) may from time to time refer publicly to this Enforceable Undertaking; and
 - (c) will make a copy of the executed Enforceable Undertaking available on a Public Register.
- 3.2 Further, AFS acknowledges that:
- (a) this Enforceable Undertaking in no way derogates from the rights and remedies available to any other person arising from any conduct described in this Enforceable Undertaking;

- (b) ASIC's acceptance of this Enforceable Undertaking does not affect ASIC's powers to investigate a contravention arising from future conduct;
- (c) the Enforceable Undertaking has no operative force until accepted by ASIC.

EXECUTED BY

AUTOMOTIVE FINANCIAL SERVICES PTY LTD. N.
 ABN 77 003 622 375



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[Handwritten signature of Bradley James Dale]

Director

Director/Secretary

IAN WILLIAM DALE

BRADLEY JAMES DALE

Print Name

Print Name

ACCEPTED BY THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
 PURSUANT TO SECTION 93AA OF THE ASIC ACT BY ITS DULY AUTHORISED DELEGATE

[Handwritten signature of Jan Redfern]

Jan Redfern
 Deputy Executive Director,
 Enforcement

Dated: *25th* September 2003