

ENFORCEABLE UNDERTAKING

Australian Securities and Investments Commission Act 2001

Section 93AA

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

FAIR LOANS FOUNDATION PTY LTD

ACN 123 592 487

1. DEFINITIONS

In addition to terms defined elsewhere in this Enforceable Undertaking, the following definitions are used:

APR means annual percentage rate as defined in section 27 of the Code, or where applicable, section 25 of the UCCC;

ASIC means the Australian Securities and Investments Commission;

ASIC Act means the *Australian Securities and Investments Commission Act 2001* (Cth);

Code means the National Credit Code, which is Schedule 1 to the NCCP Act;

Credit Legislation has the meaning given in section 5 of the NCCP Act;

Daily Percentage Rate means the rate determined by dividing the APR by 365;

Fair Loans means Fair Loans Foundation Pty Ltd ACN 123 592 487;

NCCP Act means the *National Consumer Credit Protection Act 2009* (Cth);

Obligation means any obligation imposed on Fair Loans by this Enforceable Undertaking and includes an obligation arising from the requirement in paragraph 3.3.5 to comply with a Recommendation;

Overpaid Interest means the amount of interest Fair Loans' borrowers were charged over and above the maximum amount of interest payable calculated pursuant to section 28 of the Code (or, where applicable, section 26 of the UCCC) by applying the Daily Percentage Rate to the unpaid daily balances, calculated in accordance with the APR disclosed by Fair Loans;

Recommendation means a recommendation pursuant to paragraph 3.3.2(c); and
UCCC means the Uniform Consumer Credit Code.

2. BACKGROUND

2.1. ASIC's role

- 2.1.1. Under s 1 of the ASIC Act, ASIC is charged with a statutory responsibility to perform its functions and to exercise its powers so as to promote the confident and informed participation of investors and consumers in the financial system.
- 2.1.2. From 1 July 2010, ASIC's responsibilities were expanded to include the administration and enforcement of the NCCP Act, which regulates consumer credit in Australia.

2.2. Fair Loans

- 2.2.1. Fair Loans operates on a not-for-profit basis to provide credit to financially disadvantaged consumers as an alternative to high interest 'payday' loans.
- 2.2.2. Fair Loans has held an Australian Credit Licence, number 378968, since 25 October 2010.
- 2.2.3. Fair Loans was previously known as:
 - (a) Mobile Finance Pty Ltd during the period 23 January 2007 to 17 September 2009;
 - (b) Mobile Finance Ltd during the period 18 September 2009 to 1 September 2010;
 - (c) Fair Loans Financial Health Foundation Ltd during the period 2 September 2010 to 7 February 2011; and
 - (d) Fair Loans Foundation Ltd during the period 8 February 2011 to 10 July 2013.
- 2.2.4. During the period 3 April 2008 to 2 February 2011 Fair Loans traded as "Money Fast" and "Money Fast Australia".

2.3. The scope of this Enforceable Undertaking

- 2.3.1. This Enforceable Undertaking concerns two periods of conduct.
- 2.3.2. The first period relates to credit contracts entered into before 1 July 2010 prior to the commencement of the NCCP Act (**the UCCC contracts**), which were governed by the UCCC and the ASIC Act, and for those contracts in effect on or after 1 July 2010, the NCCP Act.

2.3.3. The second period relates to credit contracts entered into on or after 1 July 2010 after the commencement of the NCCP Act (**the NCCP Act contracts**), which were governed by the NCCP Act and the ASIC Act.

2.4. ASIC's concerns

2.4.1. ASIC's concerns relate to calculation errors by Fair Loans resulting in the incorrect APR being disclosed in relation to both UCCC contracts and NCCP Act contracts. There is also an additional concern in relation to NCCP Act contracts as set out in paragraph 2.5.3 below.

2.5. NCCP Act contracts

2.5.1. Following a review of pro-forma and sample NCCP Act contracts provided by Fair Loans, ASIC is concerned that the APR disclosed in Fair Loans' advertising and NCCP Act contracts was 19.95%, but when calculated in accordance with section 28 of the Code, the APR paid by borrowers is in fact 35%.

2.5.2. As a consequence, ASIC is concerned that Fair Loans' NCCP Act contracts breached section 23(1) of the Code, which prohibits the imposition of a monetary liability in respect of an interest charge under the contract exceeding the amount that may be charged consistently with the Code (Fair Loans' contracts purported to charge interest in excess of what could be charged pursuant to section 28 of the Code).

2.5.3. In addition, ASIC is concerned that Fair Loans' NCCP Act contracts breached section 17(5) of the Code, which requires the contract to disclose the method of calculation of interest and the frequency with which interest charges are debited (Fair Loans' contracts did not disclose this).

2.5.4. As a result of discussions between ASIC and Fair Loans, Fair Loans:

- (a) disclosed that approximately 414 NCCP Act contracts were affected by the disclosure and charging of the incorrect APR issues, resulting in the payment to Fair Loans by Fair Loans' borrowers of \$72,450.41 in Overpaid Interest;
- (b) voluntarily undertook to contact these borrowers and to credit or refund them the Overpaid Interest;
- (c) on 23 February 2012, advised ASIC that credits equal to the Overpaid Interest had been applied to the loan accounts of all current borrowers, and that the APR charged under these loans had been amended to 19.95%; and
- (d) on 23 March 2012, advised ASIC that it had also refunded to each non-current borrower the Overpaid Interest.

2.6. Infringement notices

- 2.6.1. On 26 November 2012, ASIC issued two infringement notices to Fair Loans pursuant to s331 of the NCCP Act and regulation 39 of the *National Consumer Credit Protection Regulations 2009*.
- 2.6.2. Fair Loans is in the process of paying the penalties set out in those notices pursuant to an instalment plan approved by ASIC.

2.7. UCCC contracts

- 2.7.1. Following ASIC's review of the pro-forma and sample NCCP Act contracts, ASIC conducted a review in relation to the UCCC contracts.
- 2.7.2. As a result of that review, ASIC is concerned that Fair Loans may have entered into contracts prior to 1 July 2010 which disclosed that the APR was:
- (a) 15.95% when it was in fact approximately 28.25%; or
 - (b) 19.95% when it was in fact 35%.

ASIC is concerned that these contracts may have been misleading in breach of s12DA and/or 12DB(1)(g) of the ASIC Act and, for those contracts in force as at 1 July 2010, section 17(5) of the Code as referred to in paragraph 2.5.3 above.

- 2.7.3. Fair Loans has advised ASIC that approximately 450 UCCC contracts were affected by the miscalculation of the APR, which resulted in the payment by Fair Loans' borrowers of approximately \$85,000 in Overpaid Interest, and put forward a proposal to refund the affected borrowers the Overpaid Interest.

2.8. Acknowledgements

- 2.8.1. Fair Loans acknowledges:
- (a) ASIC's concerns and that those concerns are reasonably held; and
 - (b) that the steps set out in this Enforceable Undertaking are necessary to address ASIC's concerns and to ensure compliance with the Credit Legislation.
- 2.8.2. ASIC acknowledges:
- (a) that Fair Loans has worked constructively with ASIC to resolve ASIC's concerns; and
 - (b) that Fair Loans has volunteered to refund or credit borrowers who have suffered detriment by reason of Overpaid Interest.

3. UNDERTAKINGS

3.1. Acceptance of Enforceable Undertaking

- 3.1.1. Under s 93AA of the ASIC Act, Fair Loans has offered the undertakings set out in paragraphs 3.2 to 3.8, and ASIC has agreed to accept those undertakings as an alternative to civil proceedings or pursuing administrative action.

3.2. Engagement of Consultant

- 3.2.1. Fair Loans must, by 12 August 2013, engage an independent external compliance consultant (**the Consultant**), whose appointment and terms of reference are to be approved by ASIC in writing (such approval not to be unreasonably withheld).
- 3.2.2. Fair Loans must not vary the terms of reference for the Consultant without advance written approval of ASIC.
- 3.2.3. Fair Loans will pay the costs of and in connection with the engagement of the Consultant and will not seek reimbursement of, contribution towards, or otherwise directly pass on these costs to its clients.

3.3. Compliance Review

- 3.3.1. Fair Loans must require the Consultant to undertake reviews of Fair Loans' compliance with the Credit Legislation, including but not limited to a review of:
- (a) compliance with section 47 of the NCCP Act;
 - (b) Fair Loans' pro-forma contract documents, credit guides, assessments, and pre-contractual statements; and
 - (c) a sample of Fair Loans' files relating to credit contracts (the size and selection of which is to be determined by the Consultant without influence from Fair Loans), entered into by Fair Loans as credit provider.
- 3.3.2. Fair Loans must require the Consultant to give written reports to Fair Loans and to ASIC that set out:
- (a) a description of the review undertaken by the Consultant as required for the purposes of paragraph 3.3.1;
 - (b) the Consultant's assessment of Fair Loans' compliance with the Credit Legislation, including but not limited to each of the items specified in paragraph 3.3.1;
 - (c) Recommendations for any changes to Fair Loans' practices and procedures that are necessary to ensure compliance with the Credit Legislation, and a time-frame for implementation of such changes; and

- (d) the Consultant's assessment as to whether any Recommendations made by the Consultant have been implemented effectively.
- 3.3.3. Fair Loans shall ensure that the Consultant carries out the reviews and prepares the written reports as required by paragraphs 3.3.1 and 3.3.2, for the following periods:
- (a) 1 July 2013 to 30 September 2013; and
 - (b) 1 December 2013 to 28 February 2014.
- 3.3.4. Fair Loans shall ensure that the Consultant submits the reports required by paragraph 3.3.2 to Fair Loans and ASIC within 30 days following the expiration of the periods specified in paragraph 3.3.3.
- 3.3.5. Fair Loans must comply with each of the consultant's Recommendations and the time-frame for implementation of each Recommendation unless otherwise agreed by ASIC.
- 3.3.6. Fair Loans shall, within 60 days after the due date of each report specified in paragraph 3.3.4, lodge a signed report with ASIC:
- (a) containing a declaration by an officer of Fair Loans, declaring which of the Recommendations made by the Consultant in any of the Consultant's reports have been implemented; and,
 - (b) providing a timetable for the implementation of any Recommendations in the Consultant's reports which had, at the date of the report, not been implemented.
- 3.4. APR Repayment Reviews and Repayment of Overpaid Interest**
- 3.4.1. Fair Loans must require the Consultant to:
- (a) review all consumer credit contracts under which Fair Loans is or was the credit provider, and were entered into at any time during the period 23 January 2007 and 30 June 2013 to determine:
 - (i) whether the APR and repayments under the contracts are calculated correctly; and
 - (ii) if the APR or repayments are not calculated correctly, whether:
 - A. Fair Loans has repaid any Overpaid Interest; and
 - B. any Overpaid Interest is owing to borrowers as at the date of the Consultant's review; and

- (b) give a report in writing to Fair Loans and ASIC by 31 October 2013 that sets out:
 - (i) a description of the review undertaken by the Consultant as required by paragraph 3.4.1(a);
 - (ii) the Consultant's findings in respect of the review, giving details of:
 - A. the Overpaid Interest repaid to borrowers as at the date of the review;
 - B. any Overpaid Interest which has not been repaid to borrowers and Fair Loans' attempts to contact such borrowers.

3.4.2. Fair Loans undertakes to:

- (a) use its best endeavours to repay the Overpaid Interest to borrowers by 31 March 2014, including but not limited to by:
 - (i) contacting borrowers by telephone, email or letter;
 - (ii) offering various methods of repayment, including cheque, cash, direct deposit and credit, and
- (b) by 1 April 2014, deposit all Overpaid Interest which was not refunded to borrowers by 31 March 2014, into a bank account held with an Australian Authorised Deposit Taking Institution, on trust for the borrowers, until otherwise directed by ASIC. Only Overpaid Interest is to be deposited into the account.

3.4.3. Fair Loans must require the Consultant to, in April 2014, review the files of consumer credit contracts under which any Overpaid Interest was owing to the borrower as described in paragraph 3.4.1(a)(ii)B, and, by 1 May 2014 give a report in writing to Fair Loans and ASIC which sets out:

- (a) a description of the review undertaken by the Consultant; and
- (b) the Consultant's findings in respect of the review, giving details of any Overpaid Interest which remains owing by Fair Loans to the borrowers as at the date of the review, and Fair Loans' attempts to contact such borrowers.

3.5. Assistance to the Consultant

3.5.1. Fair Loans must, for the purposes of the reviews specified in this Enforceable Undertaking:

- (a) give the Consultant any assistance, information and explanations that the Consultant reasonably requires for the purposes of conducting each review; and

- (b) permit the Consultant to:
 - (i) have access to their books, including client files;
 - (ii) interview employees, contractors and representatives; and
 - (iii) contact borrowers.
- 3.5.2. Fair Loans must permit the Consultant to consult with ASIC about the Consultant's reviews and reporting as set out in the terms of reference specified in paragraph 3.2.1 and 3.2.2, including the selection of contracts and files for the purposes of the reviews specified in 3.3.1.
- 3.6. Non-Compliance**
- 3.6.1. Fair Loans must notify ASIC within three business days of any failure by Fair Loans to comply with an Obligation.
- 3.6.2. If Fair Loans notifies ASIC pursuant to paragraph 3.6.1, or if ASIC notifies Fair Loans in writing that ASIC considers Fair Loans has failed to meet an Obligation, Fair Loans is deemed to be on notice that ASIC considers that Fair Loans has failed to meet an Obligation.
- 3.6.3. Should Fair Loans be on notice in respect of a failure to meet an Obligation, and where Fair Loans remains in default of the Obligation for a period of 15 consecutive business days, Fair Loans undertakes to cease engaging in credit activities while it remains in default of the Obligation (save for any time requirement of that Obligation).
- 3.6.4. Despite paragraph 3.6.3, Fair Loans may continue to engage in credit activities in respect of credit contracts for which it was acting as lender up to and including the day which is 14 business days after which it was put on notice.
- 3.6.5. Fair Loans may write to ASIC in relation to the reasons for it failing to comply with an Obligation imposed upon it by this Enforceable Undertaking. ASIC may, after considering any correspondence from Fair Loans and any other factors it considers appropriate, in its absolute discretion, waive its right to seek enforcement of paragraph 3.6.3, for a particular period or contingently.
- 3.6.6. ASIC will notify Fair Loans in writing of its decision in relation to correspondence received pursuant to paragraph 3.6.5 of this Enforceable Undertaking within seven days of receiving the correspondence.
- 3.6.7. If Fair Loans is in default of this Enforceable Undertaking and ASIC incurs legal costs in attempting to enforce this Enforceable Undertaking and Fair Loans ceases to be in default of this Enforceable Undertaking before ASIC obtains Court orders in relation to that default, Fair Loans undertakes to pay all of ASIC's legal costs on a solicitor/client basis.

3.6.8. This paragraph 3.6 does not affect any application to a Court for Orders which may be made by a Court pursuant to section 93AA of the ASIC Act.

3.7. Costs

3.7.1. Fair Loans will pay the costs of its compliance with this Enforceable Undertaking, including all remuneration and costs associated with the Consultant.

3.8. Provision of documents and information

3.8.1. Fair Loans will provide all relevant documents and information requested by ASIC from time to time for the purpose of assessing Fair Loans' compliance with the terms of this Enforceable Undertaking.

4. ACKNOWLEDGEMENTS AS TO OPERATION OF THE ENFORCEABLE UNDERTAKING

4.1.1. Nothing contained in this undertaking constitutes an admission by Fair Loans.

4.1.2. Fair Loans acknowledges that ASIC:


- (a) may issue a media release on execution of this Enforceable Undertaking referring to its terms and to the concerns of ASIC which led to its execution;
- (b) may from time to time publicly refer to this Enforceable Undertaking;
and
- (c) will make this Enforceable Undertaking available for public inspection.

4.1.3. Fair Loans further acknowledges that:

- (a) ASIC's acceptance of this Enforceable Undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of the background section of this Enforceable Undertaking or arising from future conduct;
- (b) this Enforceable Undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this Enforceable Undertaking or arising from future conduct; and
- (c) should ASIC form the view that Fair Loans has failed to comply with this Enforceable Undertaking, ASIC may take additional action including (without limitation) seeking court orders under s93AA of the ASIC Act requiring them to comply with the terms of this Enforceable Undertaking.

4.1.4. Fair Loans acknowledges that this Enforceable Undertaking has no operative force until accepted by ASIC, and Fair Loans and ASIC acknowledge that the date of this Enforceable Undertaking is the date on which it is accepted by ASIC.

EXECUTED BY FAIR LOANS)
FOUNDATION PTY LTD in)
accordance with section 127(1) of the)
Corporations Act 2001:)


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Signature of Director

ANTHONY NOVAK
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Print name of Director

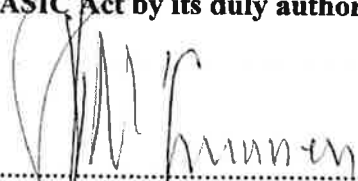

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Signature of Director

JUSTIN HARFIELD
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Print name of Director

Accepted by the Australian Securities and Investments Commission under s 93AA of the ASIC Act by its duly authorised delegate:


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David McGuinness

Senior Executive, Financial Services Enforcement

Date: 16 July 2013