

## ENFORCEABLE UNDERTAKING

*National Consumer Credit Protection Act 2009*

Subsection 322(1)

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

**NIMBLE AUSTRALIA PTY LTD ACN 135 501 807**

### 1. Definitions

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

*ASIC* means the Australia Securities and Investments Commission.

*ASIC Act* means the *Australian Securities and Investments Commission Act 2001*.

*commencement date* means the date this undertaking is accepted by ASIC.

*consumer* has the meaning given by subsection 5(1) of the Credit Act.

*Credit Act* means the *National Consumer Credit Protection Act 2009*.

*Credit Code* means the National Credit Code contained in Schedule 1 to the Credit Act.

*credit contract* has the meaning given by section 4 of the Credit Code.

*credit provider* has the meaning given by subsection 5(1) of the Credit Act.

*debtor* has the meaning given by subsection 204(1) of the Credit Code.

*final assessment* means an assessment made for the purpose of paragraph 128(c) of the Credit Act.

*negative funds position* means circumstances where consumer income less consumer expenses less amount payable under the credit contract equals less than zero.

*Nimble* means Nimble Australia Pty Ltd ACN 135 501 807

*permitted establishment fee* has the meaning given by subsection 31A(2) of the Credit Code.

*presumption of unsuitability* means each of the presumptions contained in subsection 131(3A) of the Credit Act.

**relevant consumer** means the 7,069 consumers who have been identified by Nimble as being eligible for a fee refund in respect of a loan based on the following eligibility criteria:

- (a) the consumer entered a small amount credit contract with Nimble during the relevant period; and
- (b) the consumer shows evidence of hardship after that loan was issued based on hardship indicators such as entering into a debt agreement under Part IX of the Bankruptcy Act 1966; and
- (c) a presumption of unsuitability of the credit contract applied at the time the consumer entered the credit contract with Nimble; and
- (d) the presumption of unsuitability may not have been rebutted; and
- (d) the consumer had a negative funds position at the time of entering into the small amount credit contract with Nimble.

**relevant period** means the period from 1 July 2013 to 22 July 2015 (inclusive).

**small amount credit contract** has the same meaning given by subsection 5(1) of the Credit Act.

**website** means the website at [www.nimble.com.au](http://www.nimble.com.au).

## **2. Background**

- 2.1 Under section 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.
- 2.2 ASIC has responsibility for, among other things, the administration and enforcement of the Credit Act which regulates consumer credit in Australia.
- 2.3 Nimble is a credit provider engaged in a business of providing small amount credit contracts to consumers across Australia via the website. Nimble holds an Australian credit licence that authorises it to engage in those credit activities.

### **ASIC's surveillance**

- 2.4 In 2013 and 2014 ASIC undertook an industry wide surveillance of organisations engaged in the business of small amount lending.
- 2.5 As part of that industry wide surveillance, ASIC identified a number of concerns with Nimble's responsible lending practices. In October 2014 ASIC wrote to Nimble listing the following concerns:
- (a) that Nimble was not making reasonable inquiries into the consumer's requirements and objectives and financial situation in all instances; and
  - (b) that Nimble had entered into unsuitable credit contracts because the assessment processes being used by Nimble did not identify that the presumption of unsuitability was rebutted.
- 2.6 Further examination of Nimble's practices and processes completed by ASIC during 2015 revealed the following concerns about Nimble's responsible lending practices:
- (a) to purport to meet the obligation to make reasonable inquiries into the consumer's requirements and objectives, Nimble relied on a drop down menu which contained four broadly worded options only, one of which was "temporary cash shortfall";
  - (b) in some cases financial information contained in bank statements of consumers obtained for the purpose of subsection 130(1A) of the Credit Act was not thoroughly considered and accounted for in the final assessment; and
  - (c) where the presumption of unsuitability was triggered, there was no clear evidence from Nimble records to demonstrate that Nimble took steps to rebut the presumption of unsuitability of the credit contract in all instances.
- 2.7 Since ASIC commenced its surveillance Nimble has made substantial changes to its business practices and systems to improve compliance with its responsible lending obligations.

*ASIC's concerns*

- 2.8 As a result of the surveillance referred to in sections 2.4 to 2.6, ASIC is concerned that in respect of certain loans Nimble:
- (a) contravened paragraph 130(1)(a) of the Credit Act by entering into small amount credit contracts with consumers without making reasonable inquiries about the consumers' requirements and objectives in relation to the credit contract;
  - (b) contravened paragraphs 130(1)(b) and (c) of the Credit Act by entering into small amount credit contracts with consumers without making reasonable inquiries about the consumers' financial situation or taking reasonable steps to verify the consumers' financial situation; and

- (c) contravened subsection 131(1) of the Credit Act by entering into small amount credit contracts that were deemed unsuitable because the consumer had been a debtor under two or more other small amount credit contracts at the time of applying for the small amount credit contract with Nimble, and it could not be identified from Nimble records how the presumption of unsuitability was rebutted.

### **3. Undertakings**

- 3.1 Nimble has offered, and ASIC has agreed to accept as an alternative to commencing civil penalty proceedings, the undertakings set out in paragraphs 3.1.1 – 3.1.15.

#### ***Consumer refunds and voluntary contribution***

- 3.1.1 Within the period of six months commencing after the commencement date (the **refund period**), Nimble will use its best endeavours to refund \$1,590,390 to the 7,069 relevant consumers made up of the following fees and charges that were incurred under credit contracts with Nimble:
  - (a) the permitted establishment fee;
  - (b) any fee or charge payable in default of a payment under the contract;
  - (c) any collection or enforcement fees; and
  - (d) any fee or charge that is payable on a monthly basis after the original term of the credit contract had ended.
- 3.1.2 If a loan that is eligible for a fee refund was not fully repaid by the consumer, the refund amount for that loan will be reduced to take account of the outstanding balance.
- 3.1.3 By no later than 14 days after the expiration of the refund period, Nimble will pay the following amounts to Financial Counselling Australia for the purposes of funding financial literacy programs and research in Australia:
  - (a) \$50,000; and
  - (b) any amount that was required to be refunded under paragraph 3.1.1 but which had not been refunded or disbursed by the timeframes specified in those paragraphs.

***Independent overview of consumer refunds***

3.1.4 Nimble has engaged Deloitte to:

- (a) monitor the completion of refunds and disbursements in accordance with paragraphs 3.1.1 to 3.1.3; and
- (b) submit the following written reports to ASIC:
  - (i) within 14 days after the end of each month within the refund period, a report (**monthly Deloitte report**) that sets out the following information:
    - (A) the steps Nimble took to contact relevant consumers during the month and how many relevant consumers responded; and
    - (B) the total number of relevant consumers to whom refunds were made during the month; and
    - (C) the total dollar value of refunds made during the month;
  - (ii) within 30 days after the end of the refund period, a report (**final Deloitte report**) covering the refund period that sets out:
    - (A) the total number of relevant consumers to whom refunds were made;
    - (B) the total dollar amount of refunds made;
    - (C) the total number of relevant consumers contacted who responded; and
    - (E) the total amount of monies paid to Financial Counselling Australia.

3.1.5 Nimble will transfer \$250,000 to a trust account held by their legal advisors on the commencement date and maintain that amount in such account until ASIC approves the release of the funds or 7 days after ASIC receives the final Deloitte report (whichever is earlier).

***Consumer communication***

- 3.1.6 Nimble will, as soon as practicable during the refund period, send a letter or email approved by ASIC to each relevant consumer that sets out how a relevant consumer can access the refund amount and:
- (a) the concerns referred to in paragraph 2.8; and
  - (b) the steps that Nimble is required to take in accordance with this undertaking.

***External compliance consultant***

- 3.1.7 Within 30 days of the commencement date, or such further time as agreed to by ASIC in writing, Nimble will engage an external compliance consultant (**Consultant**) whose appointment and terms of engagement are to be approved by ASIC in writing.
- 3.1.8 Nimble will, under the terms of engagement, require the Consultant to, in respect of the period from the commencement date to 6 months thereafter (the compliance review period):
- (a) review and assess the arrangements (**compliance arrangements**), including but not limited to the policies, procedures, and resources that Nimble has in place to ensure compliance with:
    - (i) the general conduct obligations under section 47 of the Credit Act;
    - (ii) the responsible lending obligations under Chapter 3 of the Credit Act;
    - (iii) provisions in the Credit Act and Credit Code that apply to small amount credit contracts;
    - (iv) the advertising provisions in section 33 of the Credit Act; and
    - (v) Division 2 of Part 2 of the ASIC Act;
  - (b) as part of the review of matters referred to in paragraph (a), review consumer files, internal documents, interview relevant staff and review the website;
  - (c) if appropriate, make recommendations to Nimble for changes to the compliance arrangements; and
  - (d) within 30 days after the expiration of the compliance review period (or other time agreed to by ASIC in writing) provide a report (compliance report) in writing to both Nimble and ASIC, that sets out:
    - (i) a description of the method used in the review undertaken by the Consultant;

- (ii) the dates the Consultant carried out the review;
- (iii) the Consultant's assessment of the compliance arrangements including a conclusion as to whether the compliance arrangements are adequate in respect to each of the matters referred to in paragraph (a); and
- (iv) any recommendations to Nimble for changes to the compliance arrangements;

3.1.9 Nimble will do all things reasonably necessary to enable the Consultant to conduct the review and prepare the compliance report.

3.1.10 Nimble will not vary the terms of engagement of the Consultant without the prior written approval of ASIC. In the event the Consultant is no longer able to act or meet the requirements agreed on in this undertaking, Nimble may engage an alternative external compliance consultant whose appointment and terms of engagement are to be approved by ASIC in writing.

3.1.11 Within 21 days after receiving the compliance report, Nimble will provide a report (certification report) to ASIC that:

- (a) certifies which of the recommendations made by the Consultant have been implemented; and
- (b) provides a timetable for the implementation of any recommendations in the compliance report which, have not been implemented.

3.1.12 The compliance report and the certification report will be provided to ASIC at the following address:

Senior Specialist  
Deposit Takers, Credit and Insurers  
Australian Securities and Investments Commission  
Level 5, 100 Market Street  
Sydney NSW 2000

### ***General***

3.1.13 Nimble undertakes that it will pay the costs of its compliance with this undertaking including all remuneration and costs associated with the engagement of Deloitte and the Consultant.

3.1.14 Nimble will provide all documents and information requested by ASIC from time to time for the purpose of assessing compliance with the terms of this undertaking.

## **4. Acknowledgements**

4.1 Nimble acknowledges ASIC's concerns as set out in paragraph 2.8 of this undertaking and that those concerns are reasonably held. ASIC acknowledges that Nimble has worked constructively with ASIC to resolve ASIC's concerns and has implemented substantial changes to its processes and systems.

4.2 Nimble acknowledges that ASIC:

- (a) may issue a media release on execution of this 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 undertaking;
- (c) may from time to time publicly report about the compliance with this undertaking; and
- (d) will make this undertaking available for public inspection.

4.3 Nimble acknowledges that in relation to the compliance report, certification report and final Deloitte report, ASIC may:

- (a) issue a media release referring to the contents of the reports;
- (b) from time to time publicly refer to the reports or their contents.

4.4 ASIC acknowledges that in relation to paragraph 4.2 and 4.3 it will not refer to:

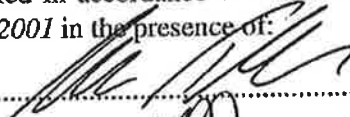
- (a) any information that would or could reasonably be expected to unreasonably affect the business, commercial or financial affairs of Nimble otherwise than is contemplated by this undertaking;
- (b) information that otherwise should not be disclosed because it would be against the public interest to do so;
- (c) personal information of an individual.



4.5 Nimble acknowledges that:


- (a) ASIC's acceptance of this 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 ASIC's concerns in this undertaking or arising from future conduct;
- (b) this undertaking in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this undertaking or arising from future conduct.

THE COMMON SEAL of )  
NIMBLE AUSTRALIA PTY LTD was )  
affixed in accordance with the *Corporations* )  
*Act 2001* in the presence of:

  
..... Director

  
..... Director/Company Secretary

Accepted by the Australian Securities and Investments Commission under subsection 322(1) of the *National Consumer Credit Protection Act 2009* by its duly authorised delegate:

  
.....  
<<INSERT Name of Delegate>> MICHAEL SAADAT

Delegate of Australian Securities and Investments Commission  
<<INSERT Date>> 18 MARCH 2016