

ENFORCEABLE UNDERTAKING

National Consumer Credit Protection Act 2009 (Cth)

Subsection 322(1)

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

BMW Australia Finance Limited

ACN 007 101 715

Australian Credit Licence 392387

1. **Definitions**

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

Affected Customer is a person who entered into a credit contract with BMWAF in the Relevant Period and:

- during the first 12 months of the term of the credit contract (i.e. from the date of the first draw-down of the credit contract), was in default of a scheduled repayment for 14 days or more; or
- after the first 12 months of the term of the credit contract (i.e. from the date of the first draw-down of the credit contract), first experiences default of a scheduled repayment for 31 days or more; or
- during the first 18 months of the term of the credit contract (i.e. from the date of the first draw-down of the credit contract) in respect of whom BMWAF received a hardship notice, pursuant to s 72 of the National Credit Code, in relation to the credit contract; or
- contacts BMWAF during the Refund Period and states that s/he is experiencing difficulty meeting her/his obligations under the credit contract.

Amended Licence Condition means the amended condition placed on BMWAF's Australian Credit Licence by ASIC on 7 October 2016.

Australian Credit Licence has the meaning given in s 35.¹

ASIC means the Australian Securities and Investments Commission.

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

BMWAF means BMW Australia Finance Limited (ACN 007 101 715).

Commencement Date means the date this enforceable undertaking is accepted by ASIC.

Consultant means the consultant engaged by BMWAF in accordance with the Licence Condition. The Consultant and the Independent Remediation Consultant may be the same person.

¹ In this enforceable undertaking references to sections are references to sections of the National Credit Act unless otherwise stated.

Credit contract has the meaning given in s 4 of the National Credit Code.

Licence Condition means the condition placed on BMWAF's Australian Credit Licence by ASIC on 27 January 2016.

Live Review means the Consultant's review of loan applications received by BMWAF, prior to the applications being approved by BMWAF. The Live Review process is detailed in the Amended Licence Condition.

Independent Remediation Consultant means Ernst & Young (EY), the independent external consultant proposed to be engaged by BMWAF in accordance with paragraph 3.19 of this enforceable undertaking.

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

National Credit Code means Schedule 1 to the National Credit Act.

Refund Period means the period from the Commencement Date until the completion date of the Remediation Program, estimated to be 31 March 2018.

Relevant Period means the period from 1 January 2011 to 31 August 2016.

Reports mean the Remediation Update Reports and the Final Remediation Report (as defined in paragraph 3.22(c) of this enforceable undertaking) collectively.

Remediation Program is defined in paragraph 3.8 and is the plan in accordance with which BMWAF will make remediation payments to Affected Customers.

RG 96 means *ASIC Regulatory Guide 96 Debt Collection Guideline: For collectors and creditors*.

Salvage Account means an account where the vehicle subject to the loan has been voluntarily surrendered, repossessed or sold privately with BMWAF's consent, and after the proceeds of sale have been applied to the loan, the whole or part of the short fall is written off by BMWAF.

Write off means that BMWAF has closed the loan account under the credit contract and no longer attempts to recover or accept monies that would otherwise be owed under the credit contract.

2. **Background**

ASIC's role

- 2.1 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.
- 2.2 From 1 July 2010, ASIC's responsibilities were expanded to include the administration and enforcement of the National Credit Act which regulates consumer credit in Australia.

Details of conduct

- 2.3 Since 7 March 2011, BMWAF has held an Australian Credit Licence, number 392387, which authorises it to engage in credit activities as a credit provider.
- 2.4 BMWAF's core business is providing loans for motor vehicles through its various business names, including Alphera Financial Services. All credit contracts entered into by BMWAF are secured loans.
- 2.5 The loans BMWAF provides include loans for the purchase of different makes of motor vehicles and is not limited to BMW vehicles. Applications for loans are also received and accepted from entities outside of the BMW dealership group.
- 2.6 Between 1 January 2011 and 31 August 2016, BMWAF entered into credit contracts for the purposes of the National Credit Act which are subject to the obligations under Part 3-2 of the National Credit Act and Part 5 of the National Credit Code.
- 2.7 On 28 October 2015, ASIC commenced an investigation into BMWAF pursuant to s 247. The investigation identified concerns regarding BMWAF's lending and debt collection practices.
- 2.8 On 27 January 2016, ASIC placed a Licence Condition on BMWAF's Australian Credit Licence which included a requirement that BMWAF appoint the Consultant to undertake four periodic reviews of BMWAF between 1 March 2016 and 28 February 2017 and to report to ASIC on those reviews.
- 2.9 The periodic reviews required by the Licence Condition were to include, among other things:
- (a) a review of BMWAF's policies and procedures to ensure compliance with the National Credit Act; and
 - (b) in each of the First and Second Review Periods a review of 100 loan contract files to assess BMWAF's compliance with its responsible lending and debt collection obligations. The loan files were to be selected at random from three categories:
 - (A) where the vehicle had been repossessed;
 - (B) where the customer was 25 years of age or younger at the time the credit contract was entered into; and
 - (C) where the customer had defaulted on at least three payments due under the credit contract.
- 2.10 On 30 June 2016 the Consultant provided ASIC with a report detailing its first review of BMWAF and found that:
- (a) BMWAF had not demonstrated a satisfactory level of organisational competency necessary to engage in credit activities efficiently, honestly and fairly;
 - (b) BMWAF did not have adequate resources to comply with its obligations under the National Credit Act;
 - (c) customer lending outcomes were unacceptable, with 98% of the 100 consumer files that were selected from the three categories referred to in paragraph 2.9(b) and tested (**Sample Customers**) failing to comply with its responsible lending obligations;

- (d) BMWAF had failed to demonstrate adequate verification of information obtained about the customer's financial situation;
- (e) BMWAF had failed to make an appropriate assessment that the proposed credit contract was 'not unsuitable' for the customer;
- (f) BMWAF did not have adequate processes and procedures in place to ensure consistent and appropriate communications with customers in respect of debt collections; and
- (g) BMWAF did not have adequate arrangements in place for managing its hardship obligations.

2.11 The Consultant also stated in its first report that BMWAF:

- (a) had failed to make adequate inquiries into the financial situation of the Sample Customers in that it:
 - (A) allocated unrealistically low amounts (between \$0 and \$200 per month) for Sample Customers' living and housing expenses; and
 - (B) used inappropriate benchmark figures for expenses without regard to the actual financial position of the Sample Customers;
- (b) failed to make inquiries about the requirements and objectives of the Sample Customers in circumstances where the loan provided for a significant balloon payment at the end of the contract term which was not factored into the ability of the Sample Customers to comply with the terms of the loan;
- (c) failed to take reasonable steps to verify the financial situation of the Sample Customers in that it:
 - (A) failed to verify income, particularly of self-employed or casual employees; and
 - (B) failed to demonstrate that reasonable steps were taken to resolve materially inconsistent information in its possession about the financial situation of the Sample Customers;
- (d) failed to assess contracts as unsuitable in circumstances where the financial situation of the Sample Customers indicated that they could only comply with their loan obligations with substantial hardship including in circumstances where:
 - (A) those customers had very low net disposable incomes;
 - (B) short term casual or self-employment income was not reasonably assessed; and
 - (C) there was evidence of recent small amount credit contract inquiries by those customers on their credit files;
- (e) failed to comply with its hardship obligations in that the Sample Customers were not considered for hardship arrangements despite raising legitimate grounds for hardship (for example, redundancy or family illness); and
- (f) failed to manage its debt collections arrangements satisfactorily in that the Sample Customers were unduly harassed (for example, by being contacted on more than three occasions in one day).

- 2.12 On 7 October 2016, as a result of the conduct outlined above, ASIC placed the Amended Licence Condition on BMWAF's Australian Credit Licence. The Amended Licence Condition, inter alia, expanded the period of oversight by the Consultant to include a further three periodic reviews between 1 March 2017 and 30 November 2017 and incorporated a requirement that the Consultant conduct Live Reviews.

ASIC's concerns regarding responsible lending

- 2.13 As a result of the matters set out in paragraphs 2.10(a)-(e) and 2.11(a)-(d), ASIC is concerned that BMWAF may have contravened provisions of the National Credit Act because during the Relevant Period BMWAF entered into credit contracts in circumstances where:

- (a) it failed to make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract in contravention of ss 128(d) and 130(1)(a);
- (b) it failed to make reasonable inquiries about, and to verify, the consumer's financial situation, in contravention of ss 128(d) and 130(1)(c) and (d);
- (c) it failed to assess credit contracts as unsuitable, in contravention of s 131(1); and/or
- (d) the credit contract was unsuitable for the consumer in contravention of s 133(1).

ASIC's concerns regarding hardship and collections practices

- 2.14 As a result of the matters set out in paragraphs 2.10(f)-(g) and 2.11(e)-(f), ASIC is concerned that BMWAF may have contravened provisions of the National Credit Code and the ASIC Act and failed to comply with RG 96 because during the Relevant Period BMWAF:

- (a) did not have adequate arrangements in place for identifying and managing its hardship obligations, which raises concerns about its compliance with Part 2, para 14 of RG 96, which raises concerns regarding its compliance with s 72 of the National Credit Code;
- (b) made an excessive number of contacts with customers raising concerns about its compliance with Part 2, para 5 of RG 96, which may constitute a contravention of s 12DJ of the ASIC Act; and
- (c) through its repossession agents, may have caused embarrassment or distress to customers by putting pressure on the customer by involving third parties, in contravention of Part 2, paras 8 and 18 of RG 96, which may constitute a contravention of s 12DJ of the ASIC Act.

- 2.15 Further, as a result of the matters identified by the Consultant, ASIC is concerned that BMWAF may have failed to comply with its statutory obligations to provide customers with information about their rights in relation to:

- (a) repossession of a vehicle the subject of a credit contract; or
- (b) voluntary return of a vehicle by a customer,

in contravention of ss 99 and 102, and s 85 of the National Credit Code, respectively.

Acknowledgment of ASIC's concerns

- 2.16 BMWAF:
- (a) admits for the purposes of this enforceable undertaking the findings referred to in paragraph 2.11 insofar as it concerns the Sample Customers;
 - (b) acknowledges that ASIC's concerns are reasonably held; and
 - (c) acknowledges that it must comply with all of the requirements of this enforceable undertaking in order to address ASIC's concerns.

3. **Undertakings**

- 3.1 Under s 322(1), BMWAF has offered, and ASIC has agreed to accept, the undertakings in paragraphs 3.2 to 3.28 below as an alternative to commencing civil penalty proceedings against BMWAF, its officers, employees, agents and related entities in respect of the matters set out in paragraphs 2.3 to 2.11 and 2.13 to 2.15.

Remediation of Affected Customers

- 3.2 BMWAF undertakes to remediate the Affected Customers (as identified) in accordance with the Remediation Program.

Remediation account

- 3.3 Within 15 days of the Commencement Date, BMWAF undertakes to create a separate and dedicated bank account (the **remediation account**) from which it will pay the remediation amounts determined in accordance with the Remediation Program.
- 3.4 BMWAF undertakes that the minimum amount to be deposited into the remediation account is \$14,611,931.
- 3.5 BMWAF undertakes to use the funds deposited into the remediation account for the sole purpose of paying the Affected Customers, or in disbursing any remaining funds as part of the community benefit payment process (as outlined in paragraph 3.28), in accordance with the terms of this enforceable undertaking.
- 3.6 If, as a result of the outcome of the processes set out in the Remediation Program, the number of Affected Customers is greater than the number specified in paragraph 3.12, BMWAF undertakes to deposit additional funds into the remediation account to remediate those additional Affected Customers. The additional funds are to be calculated in accordance with the methodology set out in the Remediation Program.
- 3.7 If, as a result of the outcome of the processes set out in the Remediation Program, the number of Salvage Accounts up to 31 August 2016 for Affected Customers is greater than the number specified in paragraph 3.12, BMWAF will write off any additional amounts of monies owed under the credit contracts.

Remediation Program

- 3.8 BMWAF undertakes to provide to ASIC, within 15 business days of the Commencement Date (or such longer period as may be agreed between ASIC and BMWAF), a Remediation Program

which will set out the methodology and processes to be used by BMWAF to make remediation payments to Affected Customers (**Remediation Program**).

- 3.9 BMWAF undertakes to request ASIC to approve the Remediation Program, within 15 business days of receiving the proposed Remediation Program (or such longer period as may be agreed between ASIC and BMWAF). ASIC's approval will not be unreasonably withheld.
- 3.10 BMWAF undertakes to make all reasonable modifications to the Remediation Program required by ASIC and/or the Independent Remediation Consultant within ten business days (or such longer period as agreed between ASIC and BMWAF) of being advised of the recommendation.
- 3.11 Subject to the terms of this enforceable undertaking, BMWAF undertakes to comply with the processes and procedures outlined in the Remediation Program.
- 3.12 As at 31 August 2016 the estimated number of Affected Customers is 15,531 and the estimated amount of remediation is \$14,611,931 in remediation payments to the Affected Customers and \$7,630,613 representing go-forward interest reductions on current credit contracts assuming Affected Customers make payments under their credit contracts as and when due. These figures may vary depending on the outcome of the processes set out in the Remediation Program.
- 3.13 The Affected Customers include those who have had the benefit of a write-off. These write-offs and associated costs total approximately \$50,233,295. This figure may vary depending on the outcome of the remediation process and because some write-offs may not be solely attributable to the conduct referred to in this enforceable undertaking.
- 3.14 BMWAF undertakes to use its best endeavours to remediate all Affected Customers by 31 March 2018.

Customer communication

- 3.15 As soon as is practicable, but no later than six weeks after the Commencement Date, BMWAF undertakes to commence contacting the Affected Customers to inform those customers about relevant details of the Remediation Program and their potential entitlements.
- 3.16 BMWAF undertakes that it will ensure that any communications to Affected Customers including templates of letters, emails and SMSs, and telephone call scripts, are approved by ASIC prior to being actioned. ASIC's approval will not be unreasonably withheld.
- 3.17 In accordance with paragraph 3.22(a) BMWAF undertakes to instruct the Independent Remediation Consultant to review the outcome of the communications sent during the Reporting Period and, if necessary, the Independent Remediation Consultant will provide recommendations as to any amendments to be made to the communications with customers.
- 3.18 BMWAF undertakes to adopt all reasonable amendments recommended by the Independent Remediation Consultant under paragraph 3.17 within ten business days of receiving the recommendations.

Independent overview of Remediation Program

Appointment of Independent Remediation Consultant

- 3.19 BMWAF proposes to engage EY to be the Independent Remediation Consultant.
- 3.20 BMWAF undertakes to request ASIC to approve, within 15 business days of the Commencement Date (or such longer period as may be agreed between ASIC and BMWAF), the terms of

engagement of EY in accordance with the requirements of this enforceable undertaking. ASIC's approval will not be unreasonably withheld.

Terms of engagement

3.21 BMWAF undertakes to ensure that the terms of the Independent Remediation Consultant's engagement provided to ASIC for approval under paragraph 3.20 include the following:

- (a) A statement that the work of the Independent Remediation Consultant is being carried out for BMWAF and ASIC.
- (b) A statement that upon ASIC's request, ASIC is to be copied into all or some communications between BMWAF and the Independent Remediation Consultant.
- (c) A requirement that the Independent Remediation Consultant notifies ASIC and BMWAF if a conflict of interests arises during the engagement or if the Independent Remediation Consultant becomes aware of information that adversely affects their ability to exercise objective and impartial judgment.
- (d) An acknowledgement that, in relation to the Reports, ASIC may from time to time publicly refer to the content of the Reports, and may make public a summary of the content of the Reports or a statement that refers to the content of the Reports.

3.22 BMWAF will engage the Independent Remediation Consultant to:

- (a) monitor, assess and, where necessary, make reasonable recommendations to amend and improve the effectiveness of the communications referred to in paragraphs 3.15 and 3.16;
- (b) monitor and assess whether the Affected Customers are being remediated in accordance with the Remediation Program, and where necessary, make reasonable recommendations to ensure compliance with the Remediation Program; and
- (c) submit the following written reports to ASIC:
 - (i) within 14 days after the end of each 60 day period (the **Reporting Period**) within the Refund Period, a report (**Remediation Update Report**) that sets out the following information in respect the relevant Reporting Period:
 - A. the steps BMWAF took to contact Affected Customers and how many Affected Customers responded to that contact;
 - B. the total number of Affected Customers to whom remediation amounts were paid (including crediting the amounts to current credit contracts);
 - C. the total dollar value of remediation payments made;
 - D. whether, in the opinion of the Independent Remediation Consultant, the Remediation Program requires any modification to address any concerns (including whether the Affected Customers are receiving consistent outcomes under the application of the Remediation Program) that may have arisen during the Reporting Period;

- E. whether, in the opinion of the Independent Remediation Consultant, BMWAF is complying with the Remediation Program; and
- (ii) within 30 days after the end of the Refund Period, a report (**Final Remediation Report**) covering the Refund Period that sets out:
 - A. the total number of Affected Customers to whom remediation amounts were paid (including crediting the amounts to current credit contracts);
 - B. the total dollar amount of remediation payments made;
 - C. the total number of Affected Customers attempted to be contacted and the number of Affected Customers who responded;
 - D. the total amount of monies paid, and the breakdown of the amounts paid to each organisation, under paragraph 3.28; and
 - E. whether, in the opinion of the Independent Remediation Consultant, BMWAF has complied with the Remediation Program; and
- (d) within 30 days of the Final Remediation Report, provide a statement as to whether all requirements and obligations set out in the Remediation Program have been completed.

3.23 The obligations of the Independent Remediation Consultant under this enforceable undertaking are separate and distinct from the obligations of the Consultant under the Licence Condition and the Amended Licence Condition.

Access to information

3.24 BMWAF undertakes to:

- (a) permit the Independent Remediation Consultant access to its books and to interview current employees to the extent that it is reasonable having regard to the requirements of this enforceable undertaking;
- (b) give the Independent Remediation Consultant any information or explanation reasonably requested of any matter connected with the Reports;
- (c) provide the Independent Remediation Consultant access to all customer data required to enable it to fulfil its obligations under this enforceable undertaking and the Remediation Program; and
- (d) otherwise give reasonable assistance to the Independent Remediation Consultant in carrying out the terms of their engagement and in producing the Reports.

Appointment of alternative Independent Remediation Consultant

3.25 BMWAF undertakes that if it becomes aware that the Independent Remediation Consultant is unable to continue its appointment, within 15 days of becoming aware it will seek ASIC's approval of:

- (a) the appointment of a new Independent Remediation Consultant; and

- (b) the proposed terms of engagement of the new Independent Remediation Consultant.
- 3.26 The new Independent Remediation Consultant nominated under paragraph 3.25:
- (a) must have the necessary expertise, experience and operational capacity to perform the role contemplated by this enforceable undertaking; and
- (b) unless otherwise agreed with ASIC, must be independent of BMWAF, its related bodies corporate and its officers at the time of the appointment.
- 3.27 If ASIC approves the new Independent Remediation Consultant and the terms of engagement following a request by BMWAF under paragraph 3.25, BMWAF undertakes to engage the approved new Independent Remediation Consultant on the approved terms within ten business days of receiving ASIC's approval (or within such longer period as may be agreed between ASIC and BMWAF).

Community benefit payment

- 3.28 For the purpose of funding consumer advocacy, financial literacy programs and research, financial literacy or financial counselling in Australia, BMWAF will pay the following amounts:
- (a) \$2,500,000 within three months of the Commencement Date;
- (b) \$2,500,000 within 21 months of the payment made under paragraph 3.28(a); and
- (c) any amount remaining in the remediation account which has not been paid for the purpose of complying with the undertaking in paragraph 3.2 by the end of the second anniversary of the Commencement Date.
- 3.29 The payments made under paragraph 3.28 are to be paid to organisations to be determined by ASIC and at the discretion of, and in the amounts directed by, ASIC.

Other matters

- 3.30 BMWAF undertakes to pay the costs of its compliance with this enforceable undertaking, including all costs associated with the engagement of the Independent Remediation Consultant.
- 3.31 BMWAF will, within a reasonable period of receiving a request from ASIC, provide all documents and information requested by ASIC from time to time for the purpose of assessing BMWAF's compliance with the terms of this enforceable undertaking.
- 3.32 In addition to any other reports or documents prepared under this enforceable undertaking, BMWAF undertakes to provide to ASIC within one month after the second anniversary of the Commencement Date, or such other period as agreed between ASIC and BMWAF, a statement as to whether the undertakings in paragraphs 3.2 to 3.28 have been complied with.
- 3.33 BMWAF will notify ASIC as soon as reasonably practicable, and in any event within ten business days of becoming aware, of any failure by BMWAF to comply with a term of this enforceable undertaking.

4. Acknowledgements

- 4.1 BMWAF 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 and comment on this enforceable undertaking;
- (c) may from time to time publicly report about BMWAF's compliance with this enforceable undertaking;
- (d) will make this enforceable undertaking available for public inspection;
- (e) may issue a media release referring to, or otherwise publicly refer to and comment on, the contents of the Reports; and
- (f) may make available for public inspection a summary of the contents of the Reports, or a statement that refers to the content of the Reports.

4.2 ASIC acknowledges that it will not refer to any information in the Reports that:

- (a) consists of personal information of an individual;
- (b) ASIC is satisfied would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of BMWAF or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the enforceable undertaking; or
- (c) ASIC is satisfied should not be released because it would not be in the public interest to do so.

4.3 Further, BMWAF 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 specifically the subject of ASIC's concerns as set out in this enforceable undertaking or arising from future conduct; and
- (b) this enforceable undertaking in no way derogates from the rights and remedies available to any other person or entity, including customers receiving the benefit of remediation paid in accordance with this enforceable undertaking, arising from any conduct described in this enforceable undertaking or arising from separate or future conduct.

4.4 BMWAF acknowledges that this enforceable undertaking has no operative force until accepted by ASIC, and BMWAF and ASIC acknowledge that the date of this enforceable undertaking is the date on which it is accepted by ASIC.

4.5 BMWAF acknowledges that this enforceable undertaking remains in force until all terms of the enforceable undertaking have been complied with and the Independent Remediation Consultant has provided to ASIC the determination required by paragraph 3.22(d).

5. **Notification**


5.1 The address for providing ASIC with any document or notification required by this enforceable undertaking is:

Level 7, 120 Collins Street, Melbourne, Victoria 3000

5.2 The address for providing BMWAF with any document or notification required by this enforceable undertaking is:


783 Springvale Road, Mulgrave, Victoria 3170

Executed by BMW Australia Finance Limited
in accordance with section 127 of the
Corporations Act 2001 (Cth):



Signature of director
ANAN CROOKES


Full name of director



Signature of company secretary/director
JAN-CHRISTIAN KLAGES

Full name of company secretary/director

**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:


.....
Name: STEPHEN CHRISTIAN GROVES
Delegate of Australian Securities and Investments Commission
Date: 2 DECEMBER 2016