

COURT 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 (**ASIC**) by:

Elevare Pay Easy Pty Ltd trading as Elepay
ACN 634 728 591
Level 1/1925 Logan Road
Upper Mount Gravatt QLD 4122
(Elepay)

1 Definitions

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

Acceptance Date means the date this undertaking was accepted by ASIC.

Australian credit licence means a licence issued by ASIC that authorises the licensee to engage in particular credit activities.

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

Corporations Act means the *Corporations Act 2001* (Cth).

DDO means the design and distribution obligations relating to financial products that are contained in Part 7.8A of the Corporations Act.

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

Relevant Period means the period 5 October 2021 to 15 March 2023.

2 Background**2.1 ASIC's role**

2.1.1 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 Elepay

2.2.1 Elepay is a business that offers seven products which provide funding to property owners for expenses related to the preparation for sale of a property (such as home

improvements, marketing and interior design) or for home renovation.

- 2.2.2 Elepay has not until 23 January 2024 held an Australian credit licence.
- 2.2.3 Elepay offers the following three products where it does not charge the consumer for providing credit, but a merchant fee is payable to Elepay by the third-party supplier of home improvement/renovation goods and services (the **Partner**):
- i. '120 RLC Product' – the consumer repays Elepay within 120 days;
 - ii. '180 Product' – the consumer repays Elepay within 180 days by way of five equal instalments;
 - iii. '12-Months Product' – the consumer repays Elepay within 12 months. A 'processing fee' of \$125 which does not exceed the amount permitted by the National Credit Act is charged to the consumer.
- 2.2.4 Elepay offers the following four products where the consumer is charged a fee and/or interest and the individual loan periods do not exceed 62 days (three products include the option to enter into a second contract after expiration of the first loan period):
- i. '60-Days Product' – which involves the consumer entering into a loan agreement with the amount to be repaid within 60 days, either by a single repayment or by four equal instalments. A fee is paid by the consumer to Elepay which during the Relevant Period was between 2.45% and 4.35%;
 - ii. '90- and 120- Days Product' – which involves an initial loan agreement of either 28 days (for the 90 Day Product) or 58 days (for the 120 Day Product). At the expiration of these loan terms, Elepay enters into an option agreement with the consumer which grants the consumer an option to enter into a second contract; the latter is to be repaid by a single payment or by four equal instalments. Fixed fees are applied, depending on whether the option is exercised or not, and which during the Relevant Period were between 3.35% and 6.95%;
 - iii. '107 Product' - which involves an initial loan of 45 days between Elepay and a Partner who is charged a fee. Upon expiration of this loan, Elepay enters into a loan with a consumer for up to 62 days. Elepay treats the entry into the latter loan with the consumer as having extinguished the Partner's liability for Elepay's loan to the Partner. A fee is

paid by the consumer to Elepay which during the Relevant Period was between 5% and 5.9%.

- 2.2.5 Elepay offers its products online through its website. Consumers may also be referred to Elepay by its approved Partners.
- 2.2.6 On 18 October 2023, Elepay submitted an application to ASIC to obtain an Australian credit licence.
- 2.2.7 On 23 January 2024, ASIC granted an Australian credit licence to Elepay with number 552946.

2.3 Details of conduct and ASIC's concerns

- 2.3.1 The DDO commenced on 5 October 2021. They require issuers and distributors to take a consumer-centric approach by placing consumer outcomes front and centre at the product design, product distribution, and monitoring and review stages of the product life cycle. The DDO require issuers of financial products to make a target market determination (**TMD**) before they distribute a financial product (see s 994B(2)).
- 2.3.2 Section 994AA(1)(b) extends the definition of 'financial product' for the purposes of Part 7.8A of the Corporations Act to include a 'financial product' within the meaning of the ASIC Act.
- 2.3.3 Section 12BAA(7)(k) of the ASIC Act defines specific things as a 'financial product', one of those being a 'credit facility' within the meaning of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
- 2.3.4 Each of the seven products offered by Elepay is a 'credit facility' and Part 7.8A applies to each of Elepay's products.
- 2.3.5 Accordingly, from 5 October 2021, Elepay was required by section 994B(2) to make a TMD for each of its products prior to distributing them to retail clients.
- 2.3.6 During the Relevant Period, Elepay did not have TMDs for its products.
- 2.3.7 Elepay did not have compliance measures, systems and controls that identified the requirement to make TMDs for its products.
- 2.3.8 On 15 March 2023, Elepay made TMDs in respect of each of its seven products.
- 2.3.9 During the Relevant Period, Elepay lent \$13.748 million to 1,658 retail clients.
- 2.3.10 ASIC is concerned that Elepay's failure to make TMDs exposed consumers who were issued its products to the risk that they

obtained a financial product that was not appropriate to their needs and objectives.

2.4 Admissions

- 2.4.1 Elepay admits that during the Relevant Period it failed to make TMDs for each of its seven products prior to engaging in retail product distribution in contravention of section 994B(2) of the Corporations Act. Elepay acknowledges ASIC's concerns in relation to this failure and to address those concerns has offered a court enforceable undertaking in the terms of paragraphs 3.2 to 3.12 below.

3 Undertakings

- 3.1 Under s93AA of the ASIC Act, Elepay has offered, and ASIC has agreed to accept, the undertakings in paragraphs 3.2 to 3.12 below.

Independent Expert

- 3.2 Elepay undertakes to engage an Independent Expert in accordance with paragraphs 3.3 to 3.9 below to report on:
- 3.2.1 whether each of Elepay's clients who had entered into a contract with it at any time during the period from 5 October 2021 to the Acceptance Date fell within the class of retail clients that Elepay has identified as the target market for each of its products in their respective TMDs;
- 3.2.2 the fees and charges that have been paid to Elepay by those clients who fall outside of the respective target markets;
- 3.2.3 whether each of Elepay's TMDs comply with the requirements of the DDO and if not, set out recommendations for amendments that, in the opinion of the Independent Expert, would be necessary for Elepay to make in order to rectify deficiencies identified in the report.
- 3.3 Elepay undertakes to request ASIC to approve, within 15 business days of the Acceptance Date or within such longer period as may be agreed by ASIC and Elepay:
- 3.3.1 the appointment of an Independent Expert that meets the criteria in paragraph 3.5 below, and
- 3.3.2 draft terms of engagement for that expert that meet the requirements of this undertaking.
- 3.4 If ASIC approves the draft terms of engagement for the Independent Expert following a request by Elepay under paragraph 3.3, Elepay undertakes to appoint the approved Independent Expert on the terms approved by ASIC, within 10 business days of receiving ASIC's

approval, or within such longer period as may be agreed by ASIC and Elepay.

- 3.5 Elepay undertakes to nominate, under paragraph 3.3.1 above, an Independent Expert who, in Elepay's opinion:
 - 3.5.1 has the necessary expertise, experience and operational capacity to perform the role contemplated by this court enforceable undertaking; and
 - 3.5.2 is independent of Elepay, its related bodies corporate and its officers at the time of the appointment, and who will at all material times be capable of exercising objective and impartial judgement.
- 3.6 Elepay undertakes to ensure the terms of the Independent Expert's engagement provided to ASIC for approval under paragraph 3.3.2:
 - 3.6.1 require the Independent Expert to, within 3 months of engagement, or within such longer period as may be agreed by ASIC and Elepay, provide a report to Elepay and ASIC on the matters referred to at paragraph 3.2;
 - 3.6.2 include a statement to the effect that the work of the Independent Expert is being carried out for Elepay and ASIC, and acknowledging that ASIC is relying on the work of the Independent Expert;
 - 3.6.3 include a statement that upon request by ASIC, ASIC is to be copied into all or some communications between Elepay and the Independent Expert;
 - 3.6.4 require the Independent Expert to notify ASIC where a conflict of interest arises during the engagement or when the Independent Expert becomes aware of information that adversely affects its ability to exercise objective and impartial judgement; and
 - 3.6.5 include acknowledgement that in relation to the written reports to be provided to ASIC and Elepay, ASIC may from time to time publicly refer to the content of the reports, and may make a summary of the content of the reports or a statement that refers to the content of the reports public.
- 3.7 Elepay undertakes to:
 - 3.7.1 permit the Independent Expert, to the extent that it is reasonable having regard to the requirements of this court enforceable undertaking, to have access to its books and to interview current employees;
 - 3.7.2 give the Independent Expert any information or explanation reasonably requested by the Independent Expert of any

matter in any way connected with the report required to be prepared by the Independent Expert under this court enforceable undertaking; and

- 3.7.3 otherwise reasonably assist the Independent Expert in carrying out the terms of its engagement and producing the reports required to be prepared by the Independent Expert under this court enforceable undertaking.
- 3.8 Elepay undertakes to seek approval under paragraph 3.3 for the appointment of a new Independent Expert, within 15 business days of becoming aware the appointed Independent Expert is unable to continue its appointment.
- 3.9 Within 10 business days (or such later date as agreed between ASIC and Elepay) of receipt of the Independent Expert's report, Elepay undertakes to notify each of those clients identified in the report as falling outside of the target market in the respective TMDs made by Elepay that:
 - 3.9.1 when they acquired the product, Elepay was required to make a TMD in respect of the product and had failed to do so;
 - 3.9.2 a copy of the TMD in respect of the product they acquired can be located at www.elepay.com.au/tmd-home;
 - 3.9.3 it will not charge the client any future fees and charges in respect of the remainder of the contract; and
 - 3.9.4 in light of Elepay's failure to make a TMD, there are potential remedies available to the client pursuant to sections 994M and 994N of the Corporations Act; and
 - 3.9.5 it will refund the client any fees and charges that they have paid Elepay to date.
- 3.10 Within 15 business days of receiving the Independent Expert's report, Elepay undertakes to provide a statement to ASIC that it has:
 - 3.10.1 notified affected clients of the matters in paragraphs 3.9.1 to 3.9.4 above;
 - 3.10.2 refunded affected clients in accordance with paragraph 3.9.5 above;
 - 3.10.3 addressed each of the Independent Expert's recommendations in respect of identified deficiencies in its TMDs.

3.11 Elepay undertakes that it will pay the costs of its compliance with this court enforceable undertaking.

3.12 Elepay will provide all documents and information requested by ASIC from time to time for the purpose of assessing its compliance with the terms of this court enforceable undertaking.

4 Acknowledgements

4.1 Elepay acknowledges that ASIC:

4.1.1 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;

4.1.2 may from time to time publicly refer to this undertaking;

4.1.3 will make this undertaking available for public inspection.

4.1.4 may issue a media release referring to the content of the Independent Expert's reports;

4.1.5 may from time to time publicly refer to the content of the Independent Expert's reports; and

4.1.6 will make available for public inspection a summary of the content of the Independent Expert's reports, or a statement that refers to the content of those reports.

4.2 ASIC acknowledges that it will not refer to any information from an expert report that:

4.2.1 consists of personal information of an identified natural person whose acts or omissions are not the subject of, or a concern mentioned in, the court enforceable undertaking;

4.2.2 ASIC is satisfied would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of Elepay or a third party otherwise than in a way that arises from the execution, implementation and reporting of the outcomes of the court enforceable undertaking;

4.2.3 ASIC is satisfied should not be released because it would be against the public interest to do so; or

4.2.4 Elepay has asked not to be released if ASIC is satisfied:

- i. it would be unreasonable to release because the release of the information would unreasonably affect the business, commercial or financial affairs of Elepay otherwise than in a way that arises from the execution, implementation and

reporting of the outcomes of the court enforceable undertaking; or

- ii. it should not be released because it would be against the public interest to do so.

4.3 Further Elepay acknowledges that:

4.3.1 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;

4.3.2 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.

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

Executed by Elevare Pay Easy Pty Ltd ACN)
634 728 591 in accordance with section)
127 of the *Corporations Act 2001*:

..... Director

..... *Sole* Director/Company Secretary

Accepted by the Australian Securities and Investments Commission under s93AA of the ASIC Act by its duly authorised delegate:

.....

Chris Rowe

Delegate of Australian Securities and Investments Commission

1 February 2024