

VARIATION OF ENFORCEABLE UNDERTAKING

National Consumer Credit Protection Act 2009

Section 322

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

Franchelen Pty Ltd (Franchelen)
ACN 144 757 755
SE 11, 5 Innovation Parkway
Birtinya Qld 4575

1. Definitions

- 1.1. Defined terms used in this variation of the Enforceable Undertaking accepted by ASIC from Franchelen on 18 March 2014 (**Enforceable Undertaking**) have the same meaning as in the Enforceable Undertaking. A copy of the Enforceable Undertaking is attached as an Annexure to this document.

2. Background

- 2.1. On 18 March 2014, ASIC accepted the Enforceable Undertaking, which had been offered to it by Franchelen.
- 2.2. Under paragraph 3.7 of the Enforceable Undertaking, Franchelen undertook to require the Consultant to undertake a review of Franchelen's continuing compliance with the general conduct obligations in section 47 of the National Credit Act and each Existing Loan for which a Borrower has submitted a hardship notice. The Consultant was to provide every six months, until all of the Existing Loans had been finalised, a report with its views on Franchelen's compliance with those obligations and any recommendations in relation to those matters.
- 2.3. The purpose of the Consultant's six-monthly review was to ensure that Franchelen complied with the relevant provisions of the National Credit Act as it engaged in credit activities relating to collection on the Existing Loans until those loans were finalised. The compliance reports provided by the Consultant, the last being dated 15 December 2021, have not identified any compliance issues since March 2014.
- 2.4. There are four (4) Existing Loans remaining which have the following status:
 - 2.4.1 One loan is the subject of a Determination made by AFCA which will see the property associated with the loan sold, or otherwise forfeited to the first mortgagee for sale, after which the loan will be finalised. It is expected that the property will be sold by the end of May 2022 or within a short period thereafter;
 - 2.4.2 One loan is the subject of a complaint with AFCA and a recent Determination has been made, open for acceptance until 17 June 2022. If accepted the property associated with the loan will be sold by mid-December 2022, or otherwise forfeited to the first mortgagee for sale, after which the loan will be finalised; and
 - 2.4.3 The borrowers under two loans are making both principal and interest payments with a view to having the loans repaid by 31 December 2022.
- 2.5. Franchelen has offered this variation of the Enforceable Undertaking to not require the Consultant to continue to conduct and report on the six-monthly compliance reviews and in the alternative require Franchelen to provide to ASIC reports on the outstanding loans on a six-monthly basis until all outstanding loans have been finalised.
- 2.6. ASIC has accepted this variation of the Enforceable Undertaking on the basis that there have been no compliance issues identified by the Consultant to date, the low remaining number of Existing Loans and the obligation for Franchelen to continue to report to ASIC until all Existing Loans have been finalised.

3. Variation of undertakings

3.7. Effective from the date of acceptance of this variation by ASIC, paragraphs 3.7.1, 3.7.2, 3.7.3 and 3.7.4 of the Enforceable Undertaking are deleted and substituted with the following paragraphs:

3.7.1 From the date of this variation until the Existing Loans are finalised, Franchelen undertakes to provide ASIC with a report every 6 months which provides a description of the status of each Existing Loan (including details of active/finalised loans, extensions, complaints, status of litigation, status of recovery from bankrupt estates) and the steps that Franchelen has taken to finalise its credit activities in relation to collection of amounts owing on each of the Existing Loans.

3.7.2 Upon request from ASIC, Franchelen undertakes to provide ASIC any further information reasonably required by ASIC to enable ASIC to assess Franchelen's compliance with the Enforceable Undertaking.

4. No other terms of the Enforceable Undertaking are varied.

5. Acknowledgements

5.8. Franchelen acknowledges that ASIC:

6.1.1. may issue a media release on execution of this variation referring to its terms and to the reasons for its execution.

6.1.2. may from time to time publicly refer to this variation and to Franchelen's compliance or non-compliance with the Enforceable Undertaking as varied; and

6.1.3. will make this variation available for public inspection.

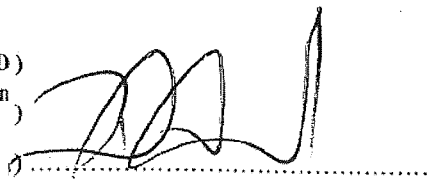
5.9. Franchelen acknowledges that this variation does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this variation or the Enforceable Undertaking or arising from future conduct.

5.10. Franchelen acknowledges that this variation in no way derogates from the rights and remedies available to any other person or entity arising from any conduct described in this variation or the Enforceable Undertaking.

5.11. Franchelen acknowledges that the entry into this variation modifies the Enforceable Undertaking but does not affect the validity of the Enforceable Undertaking and does not prejudice ASIC's ability to take any action in relation to the Enforceable Undertaking.


5.12. Franchelen acknowledges that this variation has no operative force until accepted by ASIC.

Executed by **FRANCHELEN PTY LTD**
ACN 144 757 755 in accordance with section
127(1) of the *Corporations Act 2001* (Cth)



Sole Director and Company Secretary

In the presence of:


Robert Ian Ormsby
Solicitor

2.6.22

.....
Name:

Date:

Accepted by the Australian Securities and Investments Commission under section 322 of
the National Consumer Credit Protection Act:



David McGuinness

Senior Executive Leader, Financial Services Enforcement

Delegate of the Australian Securities and Investments Commission

Date:

2 June, 2022

Annexure

Copy of the Enforceable Undertaking offered by Franchelen to ASIC and dated
18 March 2014

ENFORCEABLE UNDERTAKING

National Consumer Credit Protection Act 2009

Section 233

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

Franchelen Pty Ltd
ACN 144 757 755
Unit 3, 10 Lake Kawana Boulevard
BIRTINYA QLD 4575

1. DEFINITIONS

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

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

ACL means an Australian credit licence as defined in s35 of the National Credit Act

COSL means Credit Ombudsman Service Limited

Credit Activity has the meaning given to it by s6 of the National Credit Act

Credit Legislation has the meaning given to it by section 5 of the National Credit Act

Franchelen means Franchelen Pty Ltd ACN 144 757 755

Kawana Island Properties means Kawana Island Properties Pty Ltd ACN 112 991 278

Mr Gowland means Robert Gowland

Mr Grabbe means Ronald Grabbe

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

National Credit Code means Schedule 1 of the National Credit Act

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

Relevant Period means the period from 22 June 2010 to the date of this Enforceable Undertaking

RGD Constructions means RGD Constructions Pty Ltd ACN 100 177 928

Undertakings means the undertakings contained in part 3 of this Enforceable Undertaking

2. BACKGROUND

2.1 ASIC's role

- 2.1.1 Pursuant to s1 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 Details of Conduct

- 2.2.1 RGD Constructions developed Ocean Reach, a complex of 100 residential units on the Sunshine Coast. Mr Grabbe has been the director of RGD Constructions since 10 April 2002.
- 2.2.2 Kawana Island Properties owns Ocean Reach. Mr Gowland has been a director of Kawana Island Properties since 17 February 2005. Mr Grabbe was a director of Kawana Island Properties from 17 February 2005 to 13 August 2012.
- 2.2.3 Off the plan sales in Ocean Reach commenced in around May 2008. Construction at Ocean Reach took place between mid-2009 until about 16 June 2010.
- 2.2.4 When completion of the contracts for purchase of residential units at Ocean Reach fell due, some of the purchasers requested Kawana Island Properties provide financing for a portion of the purchase price (**the Borrowers**).
- 2.2.5 On or about 22 June 2010 Mr Grabbe and Mr Gowland created Franchelen for the sole purpose of providing finance to the Borrowers. Mr Grabbe and Mr Gowland incorporated Franchelen appointing themselves as directors of Franchelen. Franchelen provided finance to the Borrowers for the difference between the purchase price and the loan that each of the Borrowers was able to obtain from a commercial lender. This allowed the Borrowers to complete the contracts for the purchase of the units.
- 2.2.6 During the Relevant Period, Franchelen entered into, and acted as the credit provider for, at least 49 loan contracts in which it provided loans to some of the Borrowers (**Existing Loans**). A number of the loans were refinanced one or more times.
- 2.2.7 Throughout the Relevant Period, Franchelen did not hold the relevant authority authorising it to engage in credit activities. .

2.3 ASIC's investigation

- 2.3.1 ASIC commenced an investigation on 30 April 2013 into the activities of Franchelen. ASIC was concerned that, due to the conduct described

in paragraph 2.2, Franchelen was engaging in credit activities while unlicensed.

- 2.3.2 In January 2013, upon being notified of the concerns of ASIC regarding the lack of an ACL, Franchelen suspended the collection of payments from the Borrowers on the Existing Loans
- 2.3.3 At all material times which the loans were entered into, Franchelen was legally represented. Franchelen obtained independent legal advice that it was not required to hold an ACL to conduct its activities.
- 2.3.4 The directors of Franchelen now accept that legal advice was not correct.
- 2.3.5 On 11 August 2012, Franchelen lodged an application for an ACL with ASIC.
- 2.3.6 On the basis of the information obtained in the course of its investigation, ASIC accepts that it is the position of the directors of Franchelen that they genuinely misunderstood the effect of the entering into the Existing Loans and the consequent obligations under the National Credit (Consequential Provisions) Act and the National Credit Act.

2.4 ASIC's concerns

- 2.4.1 ASIC is concerned that, during the Relevant Period, Franchelen has engaged in credit activities while not being authorised to engage in those credit activities in contravention of:
 - (a) items 4 and 6 of Sch 2 the National Credit (Consequential Provisions) Act; and
 - (b) section 29 of the National Credit Act.

2.5 Acknowledgement of concerns

- 2.5.1 Franchelen acknowledges:
 - (a) ASIC's concerns and that those concerns are reasonably held; and
 - (b) that it must comply with the requirements of this Enforceable Undertaking in order to address ASIC's concerns and to ensure compliance with the Credit Legislation.
- 2.5.2 ASIC acknowledges that Franchelen has worked constructively with ASIC to address ASIC's concerns.

3. UNDERTAKINGS

- 3.1 Under section 322 of the National Credit Act, Franchelen has offered, and ASIC has agreed to accept as an alternative to commencing civil

proceedings or pursuing administrative action in relation to a contraventions of items 4 and 6 of Sch 2 the National Credit (Consequential Provisions) Act and section 29 of the National Credit Act the following undertakings.

3.2 Existing Loans

3.2.1 On being issued with an ACL by ASIC, Franchelen must limit its engagement in credit activity to the management and finalisation of the Existing Loans according to the terms of the loan agreements as amended by this Enforceable Undertaking.

3.2.2 Franchelen will cease engaging in credit activities when all of the Existing Loans have been finalised.

3.2.3 Franchelen will, in good faith, seek to finalise the Existing Loans, having regard to the individual Borrower's personal circumstances and ability to repay the loans. Franchelen will engage in dialogue and correspondence with the Borrowers about the repayment terms of the Existing Loans.

3.3 Membership of COSL

3.3.1 Franchelen must maintain its membership of COSL (member number M0018596) until such time as all loan funds relating to the Existing Loans have been repaid to Franchelen.

3.4 Correspondence with Borrowers

3.4.1 Upon the issue of an ACL by ASIC and within 7 days of acceptance of this Enforceable Undertaking, Franchelen must write a letter to all of the borrowers of the Existing Loans (**the Letter**) informing them:

- (a) of Franchelen's membership of COSL;
- (b) of the issuing of an ACL to Franchelen by ASIC;
- (c) of the extension of the term of the Existing Loans to 31 August 2014 (**Initial Extended Term**) and with the ability to further extend the term beyond the Initial Extended Term for hardship reasons in accordance with paragraphs 3.4.5 to 3.4.7 of this Enforceable Undertaking and the hardship provisions of Division 3 of Part 4 of the National Credit Code;
- (d) that the interest rate payable by the borrowers of the Existing Loans is capped at the rate at which it was last negotiated with each individual borrower (ranging from 9 per cent to 11 per cent), notwithstanding that the loan agreements entitle Franchelen to charge interest at 15 per cent;
- (e) of their position and the accrued interest balance on the Existing Loans;

- (f) that Franchelen has not charged compound interest since January 2013 resulting in borrowers not being penalised for suspending their interest payments on the Existing Loans;
- (g) that they will be allowed 6 months from the date of this Enforceable Undertaking to pay any accrued interest on the Existing Loans;
- (h) that any accrued interest not paid during the 6 month period from the date of this Enforceable Undertaking, referred to in paragraph (g) will be capitalised on the Existing Loans;
- (i) that repayments of principal and payments of interest under the Existing Loans are to commence with 14 days of the date of the Letter in accordance with the loan terms as amended by the terms of this Enforceable Undertaking;
- (j) of Franchelen's willingness to manage the Existing Loans having regard to the individual Borrower's personal circumstances and ability repay the loans within the Initial Extended Term and of Franchelen's willingness to engage in dialogue and correspondence with the Borrowers about the repayment terms of the Existing Loans;
- (k) of the individual Borrowers ability to commence the process of engaging with Franchelen regarding their personal circumstances and ability to repay the loans within the Initial Extended Term by signing and returning the form that will accompany the Letter (**the Loan Discussion Form**);
- (l) of Franchelen's internal complaint resolution policy and how it can be accessed;
- (m) of the role of COSL as a forum if any complaint is not resolved by Franchelen's internal complaint resolution policy to the borrower's satisfaction; and
- (n) to the extent COSL will allow, that Franchelen is willing to also utilise COSL as a forum to discuss loan repayments generally with the borrowers.

3.4.2 Notwithstanding Franchelen's undertaking to cap the interest payable on the Existing Loans at the rate last negotiated with the individual borrower (as indicated in paragraph 3.4.1(d)), for any borrower who was in default on their loans as at January 2013, Franchelen retains the right to charge interest on their loans at 15 per cent should, after 28 days of having been informed of the terms of the Enforceable Undertaking by Franchelen, the borrower fail to communicate with Franchelen. Franchelen must obtain proof of delivery of the Letter at either the address for service of the borrower in the loan documentation or at the address for the property to which the loan relates before charging interest at 15 per cent.

- 3.4.3 Within 7 days of receiving completed Loan Discussion Forms from borrowers, Franchelen must send letters to those borrowers acknowledging receipt of the Discussion Loan Form (**Acknowledgements of Receipt**).
- 3.4.4 Within 14 days of sending the Acknowledgements of Receipt, Franchelen must meet or contact by telephone those borrowers who have returned completed Loan Discussion Forms to discuss their loans and repayment terms and the ability of the borrowers to repay their loans within the Initial Extended Term. Within 14 days of this contact Franchelen must make a determination of any request in the Loan Discussion Form and communicate this determination to the borrower.
- 3.4.5 Franchelen must include a copy of its hardship policy (**the Policy**) with the Letter. If a borrower is unable to meet his or her obligations under the loan agreement pertaining to one of the Existing Loans (as amended by this Enforceable Undertaking) and claims hardship under the Policy, Franchelen must promptly assess that claim in accordance with the Policy. Without limiting the relief that Franchelen can provide a borrower under the Policy, if hardship is shown, Franchelen will extend the borrower's loan term until 31 December 2014 or such earlier date agreed to by the borrower (**Second Extended Term**).
- 3.4.6 No later than 90 days before the end of the Second Extended Term, Franchelen must contact each borrower who has previously claimed hardship in accordance with the Policy to engage in further dialogue and correspondence with those borrowers about their loans and repayment terms, including their ability to repay the loans by the end of the Second Extended Term. If a borrower wishes to make a further claim of hardship under the Policy, Franchelen will promptly assess that claim in accordance with the Policy. Without limiting the relief that Franchelen can provide a borrower under the Policy, if hardship is shown, Franchelen will extend the borrower's loan term until 31 December 2015 or such earlier date agreed to by the borrower (**Third Extended Term**).
- 3.4.7 No later than 90 days before the end of the Third Extended Term, Franchelen must contact each borrower who has previously claimed hardship in accordance with the Policy to engage in further dialogue and correspondence with those borrowers about their loans and repayment terms, including their ability to repay the loan by the end of the Second Extended Term. If a borrower wishes to make a further claim of hardship under the Policy, Franchelen will promptly assess that claim in accordance with the Policy. If after the Third Extended Term (or any subsequent term) a Borrower is still in hardship, Franchelen will continue to engage with the Borrower in good faith. Nothing in this EU limits the Borrower's ability to be granted further extensions.
- 3.4.8 If Franchelen grants any extension to the term of the Borrower's loan pursuant to this EU or the hardship provisions of Division 3 of Part 4 of the National Credit Code Franchelen then, unless clause 3.4.2 above applies, will only charge the interest rate that had been in place for the each of the Borrowers at the time of this undertaking as referred to in paragraph 3.4.1. (d).

3.4.9 Franchelen must act reasonably in its dealings with borrowers and the negotiation of any amendments to the terms and conditions of the borrowers' loan agreements.

3.5 Engagement of Consultant

3.5.1 Within 30 days of the issue of an ACL to Franchelen by ASIC, Franchelen must engage an independent external compliance consultant (the Consultant), whose appointment and terms of engagement are to be approved by ASIC in writing prior to such appointment (such approval not to be reasonably withheld).

3.5.2 Franchelen must not vary the terms of engagement for the Consultant without the advance written approval of ASIC.

3.5.3 Franchelen must 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 those costs to the Borrowers.

3.6 Preliminary Compliance Review

3.6.1 Within 30 days of appointment, or such time as extended by ASIC, Franchelen must require the Consultant to undertake a review (**the Preliminary Review**) of:

- (a) Franchelen's compliance with the NCCP, including the policies, procedures and systems Franchelen has in place in relation to the Existing Loans with particular reference to:
 - i. the general conduct obligations in section 47 of the National Credit Act;
 - ii. the hardship provisions of Division 3 of Part 4 of the National Credit Code.

3.6.2 Franchelen must require the Consultant to give a written report (**the Preliminary Report**) to Franchelen and to ASIC that sets out:

- (a) a description of the methodology and parameters/limitations used in the Review undertaken by the Consultant;
- (b) the Consultant's assessment of Franchelen's policies, procedure and systems during the Relevant Period and its compliance with the Credit Legislation including but not limited to those specified in paragraph 3.6.1 of this Enforceable Undertaking;
- (c) recommendations to remedy any deficiencies identified by the Consultant; and
- (d) the timeframe in which the Consultant estimates it will take to remedy the deficiencies.

3.6.3 Franchelen shall, within 30 days after the due date of the Preliminary Report, lodge with ASIC a written statement:

- (a) identifying which of the recommendations made in the Consultant's report have been implemented; and
- (b) providing a proposed timetable for the implementation of any recommendations in the Consultant's reports which had, at the date of the written statement, not been implemented (**Outstanding Recommendations**).
- (c) ASIC's and Franchelen will seek to reach agreement to the proposed timetable. If ASIC and Franchelen are unable to reach agreement, the Consultants timeframe will be used starting on the date that Franchelen lodges the written statement with ASIC.

3.6.4 If paragraph 3.6.3(b) applies, within 7 days of the implementation of all Outstanding Recommendations, Franchelen will lodge with ASIC a written statement certifying that all of the Outstanding Recommendations have been implemented.

3.7 Ongoing Compliance Reviews

3.7.1 At the end of each 6 month period from the date of the Preliminary Report until the Existing Loans are finalised Franchelen must require the Consultant to undertake a review of:

- (a) Franchelen's continuing compliance with the general conduct obligations in section 47 of the National Credit Act; and
- (b) Each Existing Loan for which a Borrower has submitted a hardship notice with particular reference to:
 - i. the hardship provisions of Division 3 of Part 4 of the National Credit Code; and
 - ii. Franchelen's compliance with its hardship policy.

3.7.2 At the end of each Ongoing Compliance Review Franchelen must require the Consultant to give a written report in relation to each loan for which a Borrower has submitted a hardship notice (**the Hardship Reports**) to Franchelen and to ASIC that sets out:

- (a) the Consultant's assessment of Franchelen's compliance with the hardship provisions of Division 3 of Part 4 of the National Credit Code and its hardship policy; and
- (b) recommendations to remedy any deficiencies identified by the Consultant.

3.7.3 Within 30 days of receiving the Hardship Report Franchelen will lodge with ASIC a written statement which certifies that the Consultant's recommendations in the Hardship Report has been implemented.

3.7.4 ASIC may direct Franchelen to provide a copy of the relevant Hardship Report to the borrower to which the Hardship Report relates. Franchelen must comply with this direction.

3.8 Assistance to the Consultant

3.8.1 Franchelen must, for the purposes of the Review:

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

(b) permit the Consultant, subject to any claim of legal professional privilege, to:

i. have access to their books, including client files;

ii. interview employees, contractors and representatives; and

iii. contact borrowers.

3.8.2 Franchelen must permit the Consultant to liaise with ASIC about the Review and the Consultant's reports as set out in paragraphs 3.6.1 to 3.6.7, including the selection of contracts and files for the purposes of the Review.

3.9 Imposition of Condition on ACL

3.9.1 Franchelen accepts that conditions will be inserted into any ACL issued to it by ASIC setting out the Undertakings.

3.10 Costs

3.10.1 Franchelen will pay the costs of its compliance with this Enforceable Undertaking.

3.11 Provision of Documents and Information

3.11.1 Franchelen will provide all documents and information requested by ASIC from time to time for the purpose of assessing Franchelen's compliance with the terms of this Enforceable Undertaking.

4. ACKNOWLEDGEMENTS

4.1 Franchelen acknowledges that ASIC:

(a) will 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.

4.2 Further Franchelen acknowledges that:

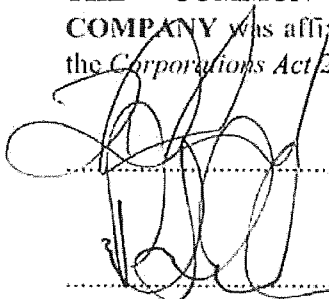
(a) ASIC's acceptance of this Enforceable Undertaking does not affect ASIC's power to investigate, conduct surveillance or pursue a criminal prosecution or its power to lay charges or seek a pecuniary civil order in relation to any contravention not the subject of ASIC's concerns in this Enforceable 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 arising from any conduct described in this Enforceable Undertaking or arising from future conduct.

4.3 Franchelen acknowledges that ASIC had reason to be concerned as to the alleged facts and has offered an Enforceable Undertaking in the terms of Part 3 above.

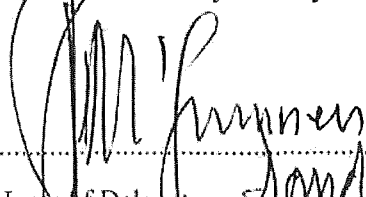
4.4 Franchelen acknowledges that this undertaking has no operative force until accepted by ASIC, and Franchelen and ASIC acknowledge that the date of the Enforceable Undertaking is the date on which it is accepted by ASIC.

THE COMMON SEAL of THE)
COMPANY 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 s93AA
of the ASIC Act by its duly authorised delegate:


Name of Delegate: David J McQuinn
Delegate of Australian Securities and Investments Commission
Date: 18 March 2014