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30 August 2017

Kiwi Personal Finance Limited
24 Delta Avenue
New Lynn
Auckland 0600

via email: kiwimoney@vodafone.co.nz

Attention: [REDACTED]

Dear Mr [REDACTED]

Credit Contracts and Consumer Finance Act 2003 & Fair Trading Act 1986: Warning and Compliance Advice

1. The Commerce Commission (Commission) has been investigating the conduct of Kiwi Personal Finance Limited (KPFL) under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and the Fair Trading Act 1986 (FTA).¹ We have now completed our investigation and are writing to you to alert you to our concerns.

Conduct of concern

2. The Commission considers that KPFL is likely to have breached the FTA and the CCCFA because it misrepresented that it had rights that it did not have. In particular, KPFL's standard form consumer credit contract and repossession warning notices represented that it was able to repossess property under a clause that took security in the borrower's "all present and after acquired property" (APAAP). This representation is misleading because the CCCFA requires consumer goods to be specifically identified in the credit contract before a lender can repossess them.
3. The Commission also considers that KPFL is likely to have breached the CCCFA because KPFL's repossession warning notice missed some of the information that must be legally included.

Compliance advice

4. In addition, KPFL may have potentially misled borrowers about the extent of its security or potentially breached the CCCFA by taking a security in APAAP if a

¹ The CCCFA and the FTA can be viewed on line at <http://www.legislation.govt.nz/>.

borrower's property included goods listed in section 83ZN of the CCCFA (**prohibited goods**).²

5. Also, by taking a security interest in a "bedroom suite" in its contract with [REDACTED] KPFL may have breached the CCCFA if, in doing so, KPFL took a security interest in beds and bedding because these are prohibited goods.
6. After weighing up the factors set out in our Enforcement Response Guidelines, we have decided to conclude this investigation by issuing this warning letter and compliance advice.³

The investigation

7. The Commission opened an investigation into KPFL in late 2016 after it received a copy of KPFL's consumer credit contract and repossession warning notice as part of a complaint that the documents did not comply with the CCCFA. During the investigation, the Commission reviewed these documents, together with a further seven contracts and six repossession warning notices provided voluntarily by KPFL.
8. The information we gathered has established to our satisfaction that:
 - 8.1 All eight contracts reviewed by the Commission were entered into after 6 June 2015.
 - 8.2 All of the eight contracts reviewed took security over specified household goods and/or a motor vehicle. One contract purported to take security over a bedroom suite.
 - 8.3 Seven of the eight contracts also purported to take security over APAAP.⁴
 - 8.4 All contracts reviewed by the Commission included a statement to the effect that, if a debtor failed to comply with their commitments under the contract, the lender may be entitled to repossess and sell the secured property listed in the contract.
 - 8.5 Once made aware of the Commission's view, KPFL ceased taking security over APAAP with effect from March 2017.

² Prohibited goods are beds and bedding, cooking equipment including stoves, medical equipment, portable heaters, washing machines, refrigerators, travel documents, identification documents and bank cards.

³ The Enforcement Response Guidelines are available at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

⁴ KPFL also advised that in April 2017 its loan ledger comprised approximately [REDACTED] loans, most of which had been advanced after 6 June 2015, however we do not know how many of the loan agreements purported to take security over APAAP.

- ██████████ KPFL could not confirm the number of repossession warning notices it had issued since 6 June 2015 but estimated that it had issued about ██████████ ██████████
- 8.7 All of the repossession warning notices reviewed by the Commission during this investigation were in the format prescribed by the previous legislation, the Credit (Repossession) Act 1997 (**CRA**).
- 8.8 One of the repossession warning notices also referred to the CRA instead of the CCCFA. That same repossession warning notice also did not specify any particular goods to be repossessed and simply stated that KPFL “INTENDS TO TAKE POSSESSION of the All Present & After Acquired Property”.⁵
- 8.9 Another repossession warning notice stated that if the default was not remedied, KPFL would repossess a bedroom suite (amongst other specified household goods).⁶
- 8.10 KPFL advised Commission staff that it had repossessed goods on only two occasions since June 2015 and that neither repossession had been in reliance on an APAAP clause.⁷

The Commission’s view

9. In this case, the Commission’s view is that:
- 9.1 KPFL’s representations in its contracts and repossession warning notices about its ability to repossess under APAAP clauses were likely to be in breach of section 13(i) of the FTA.
- 9.2 KPFL’s repossession warning notices were likely to breach section 83G and schedule 3A of the CCCFA.
- 9.3 KPFL may have possibly breached section 13(i) of the FTA and/or section 83ZN of the CCCFA where the loan was secured over APAAP and where the borrower owned prohibited goods.
10. Our reasons for this view are set out below.

Breaches of the FTA

11. Section 13(i) of the FTA prohibits businesses from making false or misleading representations about the existence of a right. The Commission’s view is that some

⁵ Notice issued to Mr and Mrs ██████████ dated 28 July 2016.

⁶ Notice issued to Mr and Mrs ██████████ dated 26 January 2017.

⁷ One repossession had been a motor vehicle in 2016 with the consent of the debtor and the other repossession was in early 2017 when KPFL repossessed a television which had been specifically identified as security in the relevant consumer credit contract.

of KPFL's consumer credit contracts and repossession warning notices were likely to breach section 13(i) of the FTA because they misled debtors as to the extent of the company's right to repossess APAAP.

12. Under the CCCFA, consumer goods can only be repossessed if they are specifically identified in the contract (in accordance with section 83F). Therefore, a lender cannot repossess consumer goods under an APAAP unless the goods are identified in the contract, in the case of present goods, or unless the borrower later agrees to specifically appropriate goods in the case of after-acquired goods.
13. KPFL's contracts said that KPFL had the ability to repossess property secured by the agreement. Where the security was APAAP, KPFL could not repossess without taking other steps. Therefore, in the Commission's view, KPFL's consumer credit contract was likely to mislead borrowers about extent of KPFL's repossession rights and was likely to breach section 13(i) FTA.
14. Similarly, those KPFL repossession warning notices which represented that KPFL "INTENDS TO TAKE POSSESSION of the All Present & After Acquired Property" were also misleading because they represented that KPFL had a right to repossess all of the borrower's property, when in fact no such right existed.

Breaches of the CCCFA

15. Section 83G(3)(b) requires a repossession notice to "contain as much of the key information set out in Schedule 3A as is applicable to the credit contract". The Commission considers that KPFL's Notice was likely to be in breach of section 83G(3)(b) because it was missing some of the applicable, key information, including:
 - 15.1 a checklist of the conditions that must be met before a creditor had the right to repossess goods, including that the contract entered into by the debtor gave KPFL the right to repossess (clause (i));
 - 15.2 information that the person carrying out the repossession was licensed to do so and, if that person were an agent, that he/she had KPFL's authority to repossess goods on its behalf (clause (i)(ii)(A)); and
 - 15.3 an expiry date for the Notice and a statement that it was of no effect after that date (clause (j)).
16. The Commission also considers that KPFL was at risk of breaching section 83G where its repossession warning notice did not contain sufficient information to enable identification of the goods to be repossessed, as required by clause (g) of Schedule 3A.⁸

⁸ One of the Notices reviewed referred to repossession of APAAP and no other specifically identified property.

Other issues – compliance advice

17. KPFL also risks misleading borrowers about the extent of its security where it takes security over APAAP and the borrower owns, or acquires, prohibited goods. On its face, the APAAP security would include the prohibited goods and KPFL's contract could breach section 83ZN. In these circumstances, a repossession warning notice that referred to an APAAP could mislead the borrower that KPFL was able to repossess prohibited goods when that was not the case.
18. Also, in the Commission's view, Mr and Mrs ██████ contract could potentially breach section 83ZN and/or section 13(i) of the FTA by taking a security interest over a "bedroom suite". It is not clear from this description whether the security captured Mr and Mrs ██████ beds and bedding which are prohibited items under section 83ZN of the CCCFA. Therefore, the inclusion of that term in a Notice, without further explanatory information, also put KPFL at risk of breaching section 13(i) of the FTA.
19. In our view lenders should clearly describe any security interest that they take for a loan, using plain English and with sufficient particularity so that the borrower understands what is at risk. General categories of security or broad descriptions risk misleading or confusing consumers about the nature, extent and consequence of the lender's security interest and breaching clause (q) of Schedule 1 of the CCCFA which requires "a clear explanation of ... (ii) the property that is, or is proposed to be, subject to the security interest".;

Warning

20. We have decided to conclude our investigation by issuing this warning letter, together with compliance advice to assist KPFL's compliance with its statutory obligations. In coming to a decision about the appropriate enforcement outcome for this investigation, we have noted the following points made by KPFL:
 - 20.1 KPFL sought legal advice about its obligations under the CCCFA in advance of the credit law changes that came into effect in June 2015.
 - 20.2 The decision to include the APAAP clause in KPFL's consumer credit contract was based on the legal advice it obtained.
 - 20.3 In KPFL's view, the term "bedroom suite" includes items of furniture such as dressers and side tables but not mattresses and bases although KPFL has now acknowledged that the term "bedroom suite" may lead people to understand that a bed is included in a security.
21. While we will not be taking further action at this time, we will take this warning into account if such conduct were to continue or if KPFL or any person or entity associated with KPFL were to engage in similar conduct in the future.

22. This letter is public information and will be published on our website. We may also make public comment about our investigations and conclusions, including issuing a media release or making comment to media.

The Commission's role

23. The Commission is responsible for enforcing and promoting compliance with a number of laws, including the CCCFA and the FTA. The CCCFA helps protect consumers when they are borrowing money or making purchases on credit. The FTA prohibits false and misleading consumer information.

Penalties for breaching the CCCFA and the FTA

24. Only a Court can decide if there has actually been a breach of the CCCFA and/or the FTA and it can impose significant penalties where it finds the law has been broken.
25. Lenders who breach the CCCFA may:
- 25.1 be unable to enforce the contract or any right to recover property or any security interest;
 - 25.2 have to refund money or pay compensation;
 - 25.3 have to pay statutory damages;
 - 25.4 be convicted of a criminal offence and fined up to \$600,000 per offence for companies and \$200,000 for individuals; and
 - 25.5 be issued with an infringement notice with a fine of \$1,000 for each infringement offence;
 - 25.6 have contracts changed by the court if the contracts are oppressive; and
 - 25.7 be banned from operating within the finance industry.
26. A company that breaches the FTA can be fined up to \$600,000 and an individual up to \$200,000 per offence.
27. You should be aware that the decisions outlined in this letter do not prevent any other person or entity from taking private action through the courts.

Further information

28. We have published a series of fact sheets and other resources to help businesses comply with the CCCFA and FTA. These are available on our website at www.comcom.govt.nz. We encourage you to visit our website to better understand your obligations and the Commission's role in enforcing the CCCFA and FTA.

29. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely



James McIvor
Acting Team Leader – Credit
Competition Branch
Auckland