

20 December 2017

Greenfield Global Limited t/a KiwiOwn
Unit 1
43 High Street
Auckland 1010

By post and email: [REDACTED] [@kiwiown.co.nz](mailto:[REDACTED]@kiwiown.co.nz)

Attention: [REDACTED]

Dear [REDACTED]

Credit Contracts and Consumer Finance Act 2003 - Fair Trading Act 1986: Warning

1. The Commerce Commission has been investigating Greenfield Global Limited trading as KiwiOwn (KiwiOwn) under the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and the Fair Trading Act 1986 (FTA). We have now completed our investigation and are writing to you to alert you to our concerns.
2. In summary, the Commission considers that KiwiOwn is likely to have breached:
 - section 17 of the CCCFA, by failing to disclose to customers key information applicable to consumer credit contracts as set out in Schedule 1 of the CCCFA; and
 - section 13(i) of the FTA, by making representations that mislead consumers about their rights under the Consumer Guarantees Act 1993 (CGA).
3. After weighing up the factors set out in our Enforcement Response Guidelines¹, we have decided to conclude this investigation by issuing this warning letter.

The investigation

4. The Commission opened an investigation into KiwiOwn in March 2016 as part of a wider investigation into the mobile trader industry reviewing compliance by traders with their disclosure and other obligations under the CCCFA and the FTA (the Acts).
5. During the investigation KiwiOwn voluntarily provided the Commission with a number of completed customer contracts which we reviewed for compliance with

¹ The Enforcement Response Guidelines are available at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>.

initial disclosure obligations under the CCCFA and for representations that may mislead customers about their CGA rights in breach of the FTA.

6. The information that we gathered established to our satisfaction that:
 - 6.1 KiwiOwn is a mobile trader selling consumer goods to customers utilising a catalogue;
 - 6.2 KiwiOwn has used two similar versions of customer contract (together, the customer contracts) over the period under review:
 - 6.2.1 between 6 June 2015 and approximately January 2016, KiwiOwn used a “Revolving Credit” contract which consisted of an application form together with a separate terms and conditions document (revolving credit contract); and
 - 6.2.2 between approximately February 2016 and April 2016, KiwiOwn used a “Fixed Instalment” contract which consisted of a document containing variable terms together with a separate terms and conditions document (fixed instalment contract);
 - 6.3 the customer contracts are consumer credit contracts under the CCCFA:
 - 6.3.1 customers pay for goods by instalment, receiving goods part way through the contract after making the minimum required payments; and
 - 6.3.2 charges under the contract include an establishment fee, a delivery fee and a monthly administration fee;
 - 6.4 between 6 June 2015 and 6 April 2016 KiwiOwn entered into [REDACTED] customer contracts having a total value of [REDACTED] and
 - 6.5 the disclosure provided to customers when entering into the consumer contracts did not include all of the key information applicable to the contracts, as set out in Schedule 1 of the CCCFA.
7. Once made aware of the Commission’s views, KiwiOwn:
 - 7.1 updated its standard form disclosure documentation, revising its customer contract in April and June 2016 and again in about September 2016;
 - 7.2 provided up-dated disclosure in September 2016 to affected customers with outstanding balances; and

7.3 refunded a total of \$109,749 to customers in September 2016, being credit and default fees charged to customers on contracts entered into between 6 June 2015 and 6 June 2016.²

7.3.1 KiwiOwn credited the accounts of customers with outstanding balances; and

7.3.2 where customers had fully repaid their customer account, KiwiOwn credited customer bank accounts.

8. As set out above, our document review has focussed on disclosure obligations under the CCCFA and we make no comment about KiwiOwn's compliance with any other disclosure obligations that it may have in addition to those under the CCCFA, including the disclosure requirements for uninvited direct sale agreements and layby sale agreements under the FTA.

The Law

CCCFA disclosure

9. Section 17 of the CCCFA requires creditors under a consumer credit contract to disclose to the debtor, before the contract is entered into, all of the information required by Schedule 1 to the CCCFA as applies to the contract.

10. Under section 99(1A) of the CCCFA, a debtor is not liable for the costs of borrowing in relation to any period during which the creditor has failed to comply with section 17 of the CCCFA. 'Costs of borrowing' is defined to include both credit fees and default fees.

Misleading representations

11. Section 13(i) of the FTA prohibits persons, in trade, in connection with the supply of goods or services, from making a false or misleading representation concerning the existence, exclusion, or effect of any guarantee, right or remedy available under the CGA.

12. The CGA gives consumers guarantees where goods and services are supplied to them.

12.1 Section 5A of the CGA provides a guarantee to consumers that goods will be delivered at a time, or within a period, agreed between the supplier and the consumer, or, if no time or period has been agreed, within a reasonable time. Where the supplier fails to comply with the guarantee the consumer can, if the failure is of a substantial character, reject the goods and obtain damages, including for consequential losses.

² \$60 establishment fee, \$5 monthly account fee and \$15 dishonour fee.

- 12.2 Section 18(4) of the CGA provides that the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure.

The Commission's view

CCCFA disclosure

13. In this case, the Commission's view is that KiwiOwn is likely to have breached section 17 of the CCCFA by failing to disclose to debtors, before the contract is entered into, all of the key information required by Schedule 1 to the CCCFA as applies to their contract.
14. In the Commission's view, KiwiOwn's customer contracts either fail to disclose or inaccurately disclose:
- the total amount of payments (Schedule 1, paragraph (o)(iii));³
 - the number of payments (Schedule 1, paragraph (o)(ii));⁴
 - the amount of the last payment (Schedule 1, paragraph (o)(i));⁵
 - a statement of the debtor's right to cancel under s27 (Schedule 1, paragraph (s));⁶
 - a statement of the debtor's right to apply for relief for hardship (Schedule 1, paragraph (sa));⁷ and
 - the name under which the creditor is registered on the financial service providers register (Schedule 1, paragraph (uc)).⁸

Misleading representation about liability for delay in delivery

15. The Commission's view is that KiwiOwn's conduct is likely to have breached s13(i) of the FTA. We have reached this view because we believe that the customer contracts mislead customers about KiwiOwn's liability under the CGA for delay in delivery of goods and about the customer's right to cancel for delay.

³ The Total Unpaid Balance/Total Purchase Price did not include the \$5 monthly account fee on contracts reviewed.

⁴ Additional payments to the number of payments stated on contracts reviewed were required to pay fees (\$60 establishment fee, \$40 delivery fee and \$5 monthly account fee).

⁵ On most contracts reviewed the final payment differed from the regular payment stated on the contract because the regular payment had been calculated to repay the purchase price of the goods excluding fees (establishment, delivery and monthly account).

⁶ The customer contracts state that "the [CCCFA] gives 5 days to cancel" whereas the correct period is "5 working days" (although "5 working days" is stated elsewhere in the customer contracts).

⁷ The statement contained in the customer contracts is incomplete.

⁸ The customer contracts incorrectly stated the name under which KiwiOwn was registered on the financial service providers register. The documents stated that KiwiOwn was registered under the name "KiwiOwn Limited" whereas KiwiOwn was in fact registered under the name "Greenfield Global Limited".

16. KiwiOwn represents in clause 12.1 of the customer contracts that it is not liable for delay in delivery and that the customer cannot cancel as a result of delay. However, consumers have a guarantee under section 5A of the CGA that goods will be delivered within the agreed time (or if there is no agreed time, within a reasonable time). Where the supplier fails to comply with the guarantee, consumers can, if the failure is of substantial character, reject goods and obtain damages.⁹
17. On reading clause 12.1 we consider that consumers are likely to form the impression that their rights differ from those set out in section 5A of the CGA, when this is not the case.

Misleading representation about liability for damages

18. The Commission is also of the view that KiwiOwn is likely to have breached section 13(i) of the FTA on the basis that we believe that the fixed instalment contract misleads customers about KiwiOwn's liability under the CGA for direct, indirect and other damages resulting from the customers' use of the goods.
19. KiwiOwn represents in clause 10.1 of the fixed instalment contract that it is not liable for damages arising from the use of goods.
20. Section 18(4) of the CGA provides that the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure (other than loss or damage through reduction in value of the goods) which was reasonably foreseeable as liable to result from the failure. Therefore, the representation made by KiwiOwn, about not being liable for damages, is likely to mislead consumers as to their rights under the CGA.

Warning

21. While we will not be taking any further action against KiwiOwn at this time, we will take this warning into account if this conduct continues or if you engage in similar conduct in the future. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against KiwiOwn.
22. This warning letter is public information. We may 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 that promote competition in New Zealand, including the Acts. The CCCFA is designed to protect consumers when they are borrowing money and enable them to make informed choices about using credit. The FTA prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

⁹ Section 5A(2) of the CGA.

Penalties for breaching the Acts

24. Only the courts can decide if there has actually been a breach of the Acts. The court can impose penalties where it finds the law has been broken.
25. Creditors who breach the CCCFA may:
- be unable to enforce the contract or any right to recover property or any security interest;
 - have to refund money or pay compensation;
 - have to pay statutory damages;
 - be convicted of a criminal offence and fined up to \$600,000 per offence for companies and \$200,000 for individuals;
 - be issued with an infringement notices with a fine of \$1,000 for each infringement offence;
 - have contracts changed by the court if the contracts are oppressive; and
 - 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 our decision to issue this warning letter does 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 Acts and the other legislation we enforce. 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 Acts.
29. You can also view the Acts and other legislation at www.legislation.co.nz.
30. Thank you for your assistance with this investigation. Please contact [REDACTED] on [REDACTED] or by email [REDACTED]@comcom.govt.nz if you have any questions about this letter.

Yours sincerely



Stuart Wallace
Head of Consumer