

SETTLEMENT AGREEMENT

Between:

Commerce Commission

And

CallPlus Services Limited, Orcon Limited and Switch Utilities Limited

Settlement Agreement

Dated 30th August 2023

Parties

Commerce Commission, a body corporate established under section 8 of the Commerce Act 1986 (the **Commission**)

CallPlus Services Limited, a company having its registered office at Level 2, 136 Fanshawe Street Auckland (**CallPlus**)

Orcon Limited, a company having its registered office at Level 2, 136 Fanshawe Street Auckland (**Orcon**)

Switch Utilities Limited, a company having its registered office at Level 2, 136 Fanshawe Street Auckland (**Switch**)

(together, the **Parties**)

1 Introduction

- 1.1 Between 17 June 2014 and 20 June 2020 (**Relevant Period**) the defendants entered into Fixed Term Utilities Contracts for broadband and power services via uninvited direct telephone sales with consumers. The UDS Agreements provided to consumers after the telephone sale did not disclose the quantum of the early termination fees (**ETFs**) that consumers would be liable to pay if they cancelled their Fixed Term Utilities Contracts early.
- 1.2 The Commission commenced the Proceeding in the High Court (CIV-2021-404-2008) alleging that the defendants' disclosure breached s 36L(2)(b) of the Fair Trading Act 1986 (**FTA**), which requires UDS Agreements to disclose the "total price payable, and any other consideration to be given, under the agreement".
- 1.3 This Settlement Agreement records the terms on which the Parties have agreed to resolve the Proceeding.
- 1.4 This Agreement will be made public by the Commission (including on the Commission's website).

2 Interpretation

- 2.1 For the purposes of this Agreement:
 - (a) **Act** means the Fair Trading Act 1986 also referred to as the FTA;
 - (b) **Admission(s)** means the admission(s) described in clause 4.2;
 - (c) **Agreement** means this settlement agreement and any schedules attached to it;

- (d) **Charged Customers** means the 4,277 customers listed on Schedule 1, Schedule 2, Schedule 3 Table A, and Schedule 4 of the Commission's Statement of Claim whose accounts were charged an ETF under the defendants' Fixed Term Utilities Contracts.
- (e) **Defendants** means Callplus Services Limited, Orcon Limited and Switch Utilities Limited;
- (f) **Defendants' Information** means all information provided by the defendants to the Commission (voluntarily or under compulsion) in the course of this Investigation and/or Proceeding;
- (g) **Execution date** means the date on which this Agreement has been fully executed by all Parties to the Agreement.
- (h) **Fixed Term Utilities Contracts** means contracts for broadband and/or power services entered between the defendants and consumers in the Relevant Period for a fixed term of 12 or 24 months;
- (i) **Financially Impacted Customers** means the 2,636 customers listed on Schedule 1, Schedule 2, Schedule 3 Table A, and Schedule 4 of the Commission's Statement of Claim who paid an ETF (in full or part) under the defendants' Fixed Term Utilities Contracts.
- (j) **Investigation** means the Commission's investigation that commenced in or about May 2019 into the defendants' disclosure in UDS Agreements;
- (k) **Parties** means the Commerce Commission and the defendants;
- (l) **Proceeding** means the proceeding with the CIV number CIV-2021-404-2008 initiated by the statement of claim filed on 15 October 2021.
- (m) **Relevant Period** means the period between 17 June 2014 and 20 June 2020;
- (n) **Statement of Claim** means the Commission's Statement of Claim dated 15 October 2021;
- (o) **UDS Agreement** means an uninvited direct sales agreement as defined under s 36K of the Fair Trading Act 1986.

3 Breach of the Act

- 3.1 The defendants are three related companies in the Vocus Group. They supply telecommunication and energy services in New Zealand trading under the "Slingshot" and "Orcon" brands.
- 3.2 During the Relevant Period the defendants supplied broadband and/or power services to consumers in New Zealand under Fixed Term Utility Contracts as described at para [1.1] above. Contracts of this type that were entered into with consumers via uninvited telephone calls came within the definition of UDS Agreements under s 36K of the FTA.

FTA obligations

- 3.3 Section 36L of the FTA sets out the disclosure requirements for UDS Agreements. Relevant to this Agreement, s 36L(2)(b) says that a person supplying goods or services under a UDS Agreement must give the consumer a written copy of the UDS Agreement within five working days that, among other matters, discloses “the total price payable, and any other consideration to be given, under the agreement”. Section 36L(2)(b) does not explicitly refer to ETFs.

Early termination fees

- 3.4 The Fixed Term Utility Contracts contained a clause which provided that if the customer cancelled before the agreed fixed-term ended, the relevant defendant could charge the customer an ETF.
- 3.5 The ETFs comprised a flat fee that varied between \$130 - \$250 depending on the type of plan contracted for and the date on which the agreement was entered. The ETFs were set by the defendants in advance and were chargeable at whatever point the customer cancelled before the end of the agreed term. However, depending on a customer’s individual circumstances the defendants would on occasion waive all or part of the fee on a discretionary basis.

The defendants’ disclosure

- 3.6 The defendants sent customers who entered a UDS Agreement, an email (**Disclosure Email**) within five working days. Disclosure Emails generally included an electronic link to a webpage displaying the defendants’ terms and conditions for broadband services. The quantum of the ETF was not included in the Disclosure Email, or the terms and conditions which were provided to customers via email links.
- 3.7 In a preliminary question hearing the High Court determined that the ETFs in the defendants’ Fixed Term Utilities Contracts during the Relevant Period formed part of the “total price payable” and “part of the consideration to be given by consumers under the agreement”. The defendants were therefore required to disclose the amount of the fee payable if the consumer elected to terminate before the expiry of the nominated term.¹

Charged Customers and Financially Impacted Customers

- 3.8 During the Relevant Period, ETFs totalling approximately \$798,047 were applied to the accounts of 4,277 Charged Customers when they terminated agreements that had not disclosed the quantum of the ETF.
- 3.9 Of the Charged Customers, 2,636 Financially Impacted Customers paid the relevant ETF in full or in part. Sums ultimately paid by Financially Impacted Customers totalled approximately \$473,688.

¹ Commerce Commission v CallPlus Services Ltd & Ors [2022] NZHC 3156.

4 Terms of Settlement

- 4.1 The Parties have agreed to resolve the issues arising out of the Investigation and Proceeding on the terms set out below.

Admissions

- 4.2 In light of the Court's clarification of the law, the defendants admit that their failure to disclose the quantum of the ETF in writing in the Relevant Period breached the disclosure requirements under s 36L of the FTA.

Refunds to Financially Impacted Customers

- 4.3 The defendants will offer refunds of ETFs collected from Financially Impacted Customers as set out at 4.3 – 4.9 below and including:
- (a) \$251,182 to Financially Impacted Customers who are "New Customers" as identified at [4.24(a)] and listed in Schedule 1 of the Statement of Claim;
 - (b) \$143,555 to Financially Impacted Customers who are "Power Upsell Customers" as identified at [4.24(b)] and listed at Schedule 2 of the Statement of Claim;
 - (c) \$71,392 to Financially Impacted Customers who are "Fibre Upsell Customers" as identified at [4.24(c)] and listed at Schedule 3, Table A of the Statement of Claim;
 - (d) \$7,559 to Financially Impacted Customers who are "Amended Term Upsell Customers" as identified at [4.24(d)] and listed at Schedule 4 of the Statement of Claim.
- 4.4 Financially Impacted Customers who have currently active accounts with the defendants may, at the customer's election, receive the refund in the form of a credit applied to their (or their nominee's) account. Financially Impacted Customers may, at the customer's express election if offered by the defendants, request that an amount equal to their refund is instead donated to a registered charity identified by the defendants and agreed between the parties.

Bankrupt Customers

- 4.5 If the defendants are aware that any Financially Impacted Customer who is entitled to be paid a refund or credit under clause 4.3 is bankrupt the relevant refund amount shall be paid to the Official Assignee, unless otherwise agreed with the Official Assignee.

Deceased Estates

- 4.6 If the defendants are aware that any Financially Impacted Customer who is entitled to be paid a refund or credit under clause 4.3 is deceased, the defendants shall:
- (a) use reasonable endeavours to contact the representative(s) of the deceased customer and inform them of the entitlement;
 - (b) pay the refund or credit amount to a bank account nominated by the representative(s) of the deceased customer; or

- (c) if the representative(s) of the deceased customer have not contacted the defendant within 3 months of the defendants' last attempt to contact them, proceed as set out at clause 4.9 below.

Confirmation of waivers, refunds and unclaimed monies

- 4.7 The defendants will use all reasonable endeavours to complete the process of providing refunds or credits to Financially Impacted Customers within six months of the execution of this Agreement (**Refund Period**). The defendants will take all reasonable steps to locate and contact Financially Impacted Customers in order to provide those refunds.
- 4.8 At the conclusion of the Refund Period the defendants will provide the Commission with a full list of all Charged Customers setting out the quantum of the ETF that was waived, refunded or credited to each, and the date on which the waiver, refund or credit was applied as the case may be.
- 4.9 If any customers to whom the defendants are required to provide refunds under the Agreement cannot be located by the end of the Refund Period the defendants will provide the Commission with a list of those customers and the steps that have been taken to contact them. Any unclaimed refunds for those customers should be held for a period of 1 year from the date on which the defendants notify the Commission that they cannot be located (**Additional Period**). If the refund is not claimed in that time the sum held for those customers will be treated as follows:
 - (i) unclaimed refunds of more than \$100 to be treated as unclaimed money under the Unclaimed Money Act 1971 (**UMA**); and
 - (ii) unclaimed refunds of less than and equal to \$100 will then be donated to a charity to be agreed between the Parties.
- 4.10 At the conclusion of the Refund Period the defendants will provide a certificate, signed by a director or other person with appropriate authority (**First Certificate**), certifying that the defendants have complied with the agreed refunding process set out at paragraphs 4.3 to 4.8 of this Agreement. Within one month following the end of the Additional Period the defendants will provide a certificate signed by a director or person with appropriate authority (**Second Certificate**), certifying that the defendants have complied with the agreed refunding process set out at paragraph 4.9 of this agreement.
- 4.11 The defendants will meet all costs of making distribution, including reporting costs.

Discontinuance

- 4.12 The Commission will promptly take steps to discontinue the Proceeding following the execution of this Agreement.
- 4.13 The Commission undertakes not to issue, encourage or support any civil or criminal legal proceedings against the defendants in respect of the matters related to the Investigation, Proceeding or this Agreement.

Costs

4.14 The Parties agree that each will bear their own costs incurred in the Proceeding.

4.15

5 Rights of third parties not affected

5.1 For the avoidance of doubt, this Agreement is entered into without prejudice as to the rights of Charged Customers or Financially Impacted Customers in respect of the breach, which rights the Commission is not compromising on their behalf.

5.2 Nothing in this Agreement will limit or affect the ability of:

- (a) The Commission to issue proceedings against the defendants in respect of matters not related to the Investigation, or in respect of conduct the defendants engage in after the date of this Agreement or for breach of this Agreement; and
- (b) Any person, who has not consented to be bound by the terms of this Agreement from pursuing any rights that person considers would be available to them arising from matters contained in this Agreement.

6 Public statements

6.1 Subject to clause [4.15] above, the Parties may make public statements in relation to the settlement after this Agreement has been executed. The Parties agree that any public statements relating to the Investigation and this Agreement will be made in good faith and be consistent with the spirit and intent of this Agreement.

6.2 Except as required by law, the defendants agree that they will not make any public comment in relation to this Agreement until after the Commission has issued any media comment notifying the public of this settlement.

6.3 The parties agree to provide written copies of their initial press release to the other party at least one hour in advance of their release to allow the other party the opportunity to comment. A party will not be obliged to accept the comments of the other party.

7 Miscellaneous

7.1 The Commission acknowledges that some of the Defendants' Information may be confidential and/or commercially sensitive. The Commission agrees that, if it receives a request pursuant to the Official Information Act 1982 that covers or might cover and/or record or reveal all or some of the Defendants' Information (**Information Request**), it will notify the Defendants of that request and will consult with the

Defendants about whether there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982.

- 7.2 Each party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 7.3 The Parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Agreement, and to demonstrate good faith in performing their obligations under this Agreement and in resolving any issues under this Agreement.
- 7.4 If necessary or desirable, the payment processes required to give full effect to the terms of this Agreement may be varied by agreement of the Parties.
- 7.5 The Parties by written agreement may vary any of the time periods stipulated in this Agreement, in which instance all other dependent time periods will be extended by the same amount of time.
- 7.6 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 7.7 The Parties agree that the New Zealand Courts will have exclusive jurisdiction to determine any proceedings arising out of or in connection with this Agreement and the matters to which it relates.
- 7.8 This Agreement constitutes the entire agreement between the Parties in relation to resolving the Proceeding. It supersedes all prior communications, understandings or representations whether oral or written between the Parties.
- 7.9 No amendment to this Agreement will be effective unless it is in writing and signed by both Parties.
- 7.10 Any failure by any party to enforce any provision of this Agreement at any time will not operate as a waiver of that provision in respect of that act or omission or any other act or omission.
- 7.11 Any person signing this Agreement on behalf of one of the Parties warrants that by signing that they have all necessary authority from that party to sign this Agreement on their behalf.
- 7.12 The Parties may enter into this Agreement by signing any number of counterparts, each of which will be treated as an original. All of the counterparts taken together will constitute a single document. A party may execute this Agreement by one signatory executing one counterpart and another signatory executing a different counterpart. A party's delivery of a signed pdf counterpart of this Agreement by email will have the same legal effect as that party's delivery of a signed original counterpart.
- 7.13 Any notice or communication that is given or served under or in connection with this Agreement must be given in writing in the following manner:

- (a) If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
Level 9
44 The Terrace
Wellington 6011

Attention: [REDACTED]

Email: [REDACTED]

- (b) If addressed to the defendants, by hand delivery or email to the following address:

Vocus
Level 2
136 Fanshawe Street
Auckland

Attention: [REDACTED]

Email: [REDACTED]

Execution

Signed by and on behalf of the **Commerce Commission**

Date 30 August 2023


Commission Chair

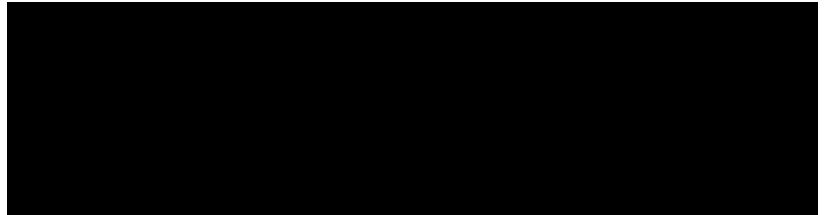
Dr John Small

In the presence of:

Witness Name:

Witness Address:

Witness Occupation:



Signed by and on behalf of **CallPlus Services Ltd**

Date 29-Aug-23 | 2:59 PM NZST


Director

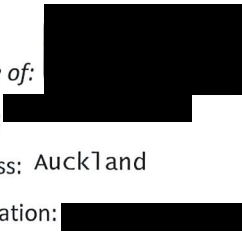
Mark Callander

In the presence of:

Witness Name:

Witness Address: Auckland

Witness Occupation:



Signed by and on behalf of **Orcon Limited**

Date 29-Aug-23 | 2:59 PM NZST


Director

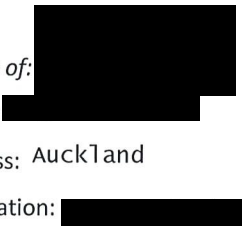
Mark Callander

In the presence of:

Witness Name:

Witness Address: Auckland

Witness Occupation:



Signed by and on behalf of **Switch Utilities Ltd**

[Redacted Signature]

Director

Date 29-Aug-23 | 2:59 PM NZST

Mark Callander

In the presence of:

[Redacted Name]

Witness Name:

[Redacted Name]

Witness Address: Auckland

Witness Occupation:

[Redacted Occupation]