

24 February 2017

[REDACTED]
Liquidator,
B&D Holdings Limited (in Liquidation)
PO Box 1027
HAMILTON

via email: [REDACTED]

Dear [REDACTED]

Fair Trading Act 1986: Warning

1. The Commerce Commission has been investigating the conduct of B&D Holdings Limited (in Liquidation) (**B&D**) under the Fair Trading Act 1986 (**FTA**). We have completed our investigation and write now to you to alert you to our concerns.
2. We request that you forward this letter to Mr and Mrs Wickins, directors of B&D at the relevant time, for their information.
3. In summary, the Commission considers that B&D's conduct in representing that it was entitled to add interest, fees and commission to debtors' loans after Pacific Loans Limited (PLL) had repossessed and sold relevant loan securities, is likely to breach sections 9 and 13(i) of the Fair Trading Act (**FTA**).

The investigation

4. The investigation has been concerned only with those consumer loans which involved the repossession and sale of the loan security, commonly a motor vehicle.
5. The focus of the investigation has been B&D's practice of adding additional sums such as fees, court costs and commission to consumer debts assigned to it for collection by PLL.
6. The investigation established that in the period 2002-2014, PLL assigned approximately 167 loans to B&D that had been subject to repossession and sale of the loan security prior to assignment.
7. PLL added fees and charges to those loans prior to assigning them to B&D. Post assignment, B&D added fees and charges and court costs to the loan balances.
8. Payments collected by B&D were split between B&D and PLL.

9. On 58 of the assigned loans, B&D collected more than the balance remaining after the net proceeds of the sale of the secured asset had been deducted from the loan balance.
10. In total, B&D collected \$227,221.66¹. It received \$139,011.77 of these payments and PLL received \$88,209.89.

The Commission's view

11. Section 35 of the Credit (Repossession) Act 1997 (CRA)² provides that a creditor is not entitled to recover any more than the balance of a loan left after the net proceeds of the sale of a secured asset have been deducted. It states:

35 Limits on a creditor's right to recover from debtor

If the net proceeds of sale are less than the amount required to settle the agreement under section 31 as at the date of the sale, the creditor is not entitled to recover more than the balance left owing after deducting those proceeds from that amount (whether under a judgement or otherwise).

12. In the Commission's view, a creditor who, in breach of section 35 of the CRA, represents that it has a right to charge additional fees, interest, commission etc is also likely to be in breach of the FTA.
13. In our view B&D's conduct in representing that it was entitled to charge interest and/or fees on loans after repossession and sale of the loan security has occurred, is likely to mislead or deceive debtors about the amounts owing under their loan agreements and about B&D's right to charge those sums. We therefore consider that B&D is likely to have breached sections 9 and 13(i) of the FTA.³
14. B&D has now ceased this practice. We acknowledge that it believed it was complying with the law, that it has co-operated with our investigation and that it was willing to repay sums incorrectly charged to debtors' loans.
15. We also note that B&D is in liquidation and is unable to repay debtors the full amount it originally offered.

Available enforcement responses

16. The Commission has a range of enforcement responses available to it for responding to likely breaches of the legislation it enforces. They range from relatively low level responses such as compliance advice, or a warning, through to taking legal proceedings.

¹ This is the amount shown in the data provided to the Commission by B&D and PLL showing the position as at 31 July 2016.

² The CRA was repealed in 2015 and the law relating to the repossession of consumer goods under a credit contract is now found in Part 3A of the Credit Contracts and Consumer Finance Act 2003 (CCCFA). Section 83ZM of the CCCFA contains the provisions previously found in section 35 of the CRA. The law applicable to this investigation is section 35 of the CRA.

³ Sections 9 and 13 of the FTA are set out in Attachment 1 at the end of this letter.

17. Information about the Commission's approach to enforcing the legislation it is charged with enforcing is contained in our Enforcement Response Guidelines at <http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/>
18. The Commission has identified a number of special focus areas for the 2016-2017 year. One of those areas is the practices associated with consumer debt collection, including the information that is provided to debtors, the fees that are charged and the repossession of loan securities. We are looking to increase the level of compliance amongst creditors with regard to these and other related issues.

Warning

19. The Commission has given careful consideration to the appropriate enforcement response in B&D's case. We have weighed up all the relevant factors including the fact that B&D is now in liquidation.
20. We have determined that, in the particular circumstances of this case, a warning is the appropriate enforcement response.
21. We will not be taking any further action against B&D at this time in relation to this issue but we will take this warning into account if this conduct were to resume, or if B&D engages in similar conduct in the future.
22. We may also draw this warning to the attention of a court in any subsequent proceedings brought by the Commission against B&D.
23. This warning 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.
24. We encourage creditors to regularly review their legal compliance procedures and policies and we recommend that you seek legal advice about your compliance with the CCCF Act and/or other applicable legislation, if you intend to resume collection of assignment debts.

The Commission's role

25. The Commission is responsible for enforcing and promoting compliance with a number of laws that promote competition in New Zealand, including the FTA. The Act prohibits false and misleading behaviour by businesses in the promotion and sale of goods and services.

Penalties for breaching the CCCF Act

26. Only the courts can decide if there has actually been a breach of the FTA. The court can impose penalties where it finds the law has been broken. A company that breaches the FTA can be fined up to \$600,000 and an individual up to \$200,000.

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 FTA 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 FTA
29. You can also view the FTA 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 at [REDACTED]@comcom.govt.nz if you have any questions in relation to this letter.

Yours sincerely

[REDACTED]

PP

[REDACTED]
Consumer Manager
Competition Branch