

20 December 2018

Pacific Loans Limited
Gilligan Rowe & Associates LP
Level 6, 135 Broadway
Newmarket
Auckland 1023

Attention:



ref: 12.1/16251

By email only to:

Fair Trading Act 1986: Warning

1. The Commerce Commission (**Commission**) has been investigating Pacific Loans Limited (**Pacific**) under the Fair Trading Act 1986 (**FTA**). As we have now completed the investigation, we write to alert you to the matters of concern identified during the investigation and documented in your settlement agreement with the Commission.
2. In summary, the Commission considers that Pacific is likely to have misled borrowers, in breach of section 13(i) of the FTA, about its right to continue charging interest and fees on particular loans after the repossession and sale of consumer goods, when it was not entitled to do so.
3. After weighing up the factors set out in our Enforcement Response Guidelines¹ we have decided to conclude this investigation by entering into a settlement agreement, which includes enforceable undertakings provided by Pacific, and issuing this warning.

The investigation

4. The Commission opened an investigation into Pacific after we became aware that it was adding fees and interest to loan balances following the repossession and sale of consumer goods pursuant to a security agreement.
5. Originally, the investigation was into Pacific and B&D Holdings Limited (In Liquidation) (**B&D**), a debt collection company to which Pacific assigned debts for collection. B&D went into liquidation in May 2016.

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

6. The investigation established that in the period 2002 to 2014 Pacific and/or B&D collected fees and interest totalling \$227,221.66 on 58 loans following repossession and sale action of consumer goods pursuant to a security agreement. Subsequently, Pacific identified an additional 24 loans on which a further \$55,177.88 in interest and fees had been incorrectly charged.
7. Pacific and B&D acknowledged adding such costs and made a joint offer to repay a total of \$234,739.74 (including interest) to debtors who had been incorrectly charged fees and interest on loans. This offer was withdrawn after B&D went into liquidation and the investigation into B&D was terminated. The liquidator of B&D subsequently confirmed to the Commission that the company had paid out a total of \$28,832.60 to 36 debtors who had been incorrectly charged fees and interest on loans.
8. The investigation into Pacific continued and the Commission has agreed to conclude it by entering into a settlement agreement with Pacific and issuing this warning.
9. Pursuant to the settlement agreement, Pacific has agreed to provide a series of enforceable undertakings and reimburse borrowers incorrectly charged interest and fees totalling \$134,779 to 82 loans.

The law

10. Until amendments to the Credit Contracts and Consumer Finance Act (**CCCFA**) came into effect in June 2015, creditors who repossessed and sold consumer goods pursuant to a security agreement had to comply with section 35 of the Credit (Repossession) Act 1997 (**CRA**).
11. Section 35 of the CRA prohibited a creditor from recovering more than the balance outstanding after deducting the net proceeds of the sale of those goods from the amount owed by the debtor. The debtor's obligation was frozen at that point and the creditor was not entitled to add ongoing interest and fees to any loan balance that remained after the sale proceeds had been deducted.²
12. Creditors who add interest and fees in such circumstances are representing that they have a right to do. A representation that a creditor has a right to recover interest and fees after repossession and sale action is misleading or false because, by virtue of section 35 of the CRA (and now section 83ZM of the CCCFA), the creditor has no such right.
13. The FTA prohibits false and misleading representations about goods and services by parties in trade. It is a breach of section 13(i) of the FTA to make a misleading representation as to the existence or effect or any legal right.

² This prohibition was reaffirmed by section 83ZM of the CCCFA which took effect on 6 June 2015. Transitional provisions contained in Schedule 1AA of the CCCFA provide that the CRA continues to apply to existing credit agreements. Section 83ZM applies to new agreements entered into from 6 June 2015.

The Commission's view

14. It is the Commission's view that Pacific is likely to have breached section 13(i) of the FTA. By continuing to charge fees and/or interest on loans which had been subject to repossession and sale action, Pacific falsely represented that it had a right to do so, when no such right existed because of the prohibition in section 35 of the CRA.

Concluding the investigation

15. The Commission has decided to conclude the investigation into Pacific by entering into a settlement agreement and issuing this warning. The Commission will not be taking any other action against Pacific at this time in relation to the conduct that has been the subject of this investigation.

Settlement agreement

16. Pursuant to the settlement agreement, Pacific will undertake remedial action, including:
 - 16.1 repaying debtors a portion of the total amount of fees and interest incorrectly charged by Pacific and/or B&D;
 - 16.2 amending its processes and practices; and
 - 16.3 putting controls and checks in place to ensure that in future, interest and fees will not be charged on loans where repossession and sale action has taken place pursuant to a security agreement.

Warning

17. The Commission will take this warning into account if the conduct, which has been the subject of this investigation, were to continue or if Pacific were to 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 Pacific.
18. This warning letter is public information and may 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

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

Penalties for breaching the FTA

21. Only the courts can decide if there has actually been a breach of the FTA and impose penalties where the law has been broken. A company that now breaches the FTA can be fined up to \$600,000 per breach and an individual up to \$200,000 per breach.³
22. You should be aware that our decision to issue this warning letter and conclude our investigation does not prevent any other person or entity from taking private action through a court.

Further information

23. The Commission has 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 Pacific to visit our website to better understand its obligations and the Commission's role in enforcing the FTA.
24. You can also view the FTA, the CCCFA and other legislation at www.legislation.co.nz.
25. 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 about this letter.

Yours sincerely

[REDACTED]

Consumer Manager

copied to:

[REDACTED]

³ Prior to the amendment of the FTA which took effect in June 2014, fines were \$60,000 for a person and \$200,000 for a body corporate.