

COMMERCE COMMISSION

AND

(1) PACIFIC LOANS LIMITED

(2) [REDACTED]

SETTLEMENT AGREEMENT

DATE 6 December 2018

THIS AGREEMENT is made on the 6th day of December 2018

Parties

COMMERCE COMMISSION, a statutory body established under s 8 of the Commerce Act 1986 ("**Commission**")

and

(1) **PACIFIC LOANS LIMITED** (Company Number 258156), a limited liability company whose registered office is situated at Gilligan Rowe & Associates LP, Level 6, 135 Broadway, Newmarket, Auckland 1023 ("**Pacific Loans**"); and

(2)

Interpretation

In this Agreement and its attached Undertakings:

Affected Customer means the holder of an Affected Loan Account.

Affected Loan Accounts means those loan accounts in respect of which Pacific Loans and/or B&D charged, represented the right to recover, or sought to recover, Interest and Fees after Repossession and Sale Action contrary to s 35 of the CRA and/or s 83ZM of the CCCFA. This includes loan accounts that are both open and closed.

Agreement means this Settlement Agreement including the attached Undertakings.

B&D means B&D Holdings Limited (In Liquidation) (Company No 577013), a limited liability company whose registered office is situated at 7th Floor, Norris Ward McKinnon House, 711 Victoria Street, Hamilton, 3204. B&D entered liquidation on 9 May 2016 after a Special Resolution of Shareholders was approved under s 241(2)(a) of the Companies Act 1993.

CCCFA means the Credit Contracts and Consumer Finance Act 2003.

CRA means the Credit (Repossession) Act 1997.

FTA means the Fair Trading Act 1986.

Interest and Fees means any interest, default interest, fee, cost, expense, commission, charge and disbursement, including Court filing and solicitors' fees.

Refund Owning means the amount of Interest and Fees payable and/or due by Pacific Loans to an Affected Customer as specified in Schedule 2 and Schedule 3.

Repossession and Sale Action means the repossession and sale of consumer goods pursuant to a loan or security agreement.

Responsible Lending Code means the Responsible Lending Code, as it may be amended from time to time.

Undertakings means the Enforceable Undertakings contained in Schedule 1 of this Agreement.

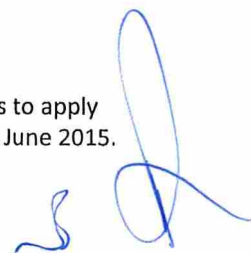
Purpose of the Agreement

1. Pacific Loans is a lender that provides personal loans to consumers. In the course of its lending it may take security over consumer goods and/or motor vehicles belonging to borrowers.
2. B&D is a company that undertook debt collection activities before entering liquidation on 9 May 2016.
3. Prior to B&D's liquidation, Pacific Loans assigned distressed loans which it had difficulty recovering to B&D, under various assignment agreements.
4. The Commission has conducted an investigation into whether Pacific Loans and B&D breached s 13(i) of the FTA by representing that they had the right to add Interest and Fees to some customer accounts after Repossession and Sale Action, which is contrary to s 35 of the CRA.
5. The Commission's investigation has concluded that Pacific Loans and B&D charged Interest and Fees to at least 58 Affected Customers contrary to s 35 of the CRA, and that this conduct breached s 13(i) of the FTA.
6. This Agreement sets out the terms on which the Commission, Pacific Loans and [REDACTED] have agreed to resolve and settle the Commission's investigation into Pacific Loans by the provision of Undertakings.

Summary of issues

7. The CRA governed the repossession and sale of consumer goods by a creditor under a security agreement, until amendments to the CCCFA were introduced on 6 June 2015. Before this date, a creditor who repossessed and sold consumer goods pursuant to a security agreement had to comply with s 35 of the CRA.
8. Section 35 of the CRA prohibited a creditor from recovering more than the balance outstanding after deducting the net proceeds from the sale of those assets from the amount owing by the debtor. The debtor's obligation was frozen at this shortfall on sale, so that the creditor was not entitled to add ongoing Interest and Fees. This prohibition was reaffirmed by s 83ZM of the CCCFA, which took effect from 6 June 2015.¹

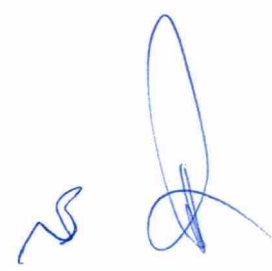
¹ Transitional provisions contained in Schedule 1AA of the CCCFA provide that the CRA continues to apply to existing credit agreements. Section 83ZM applies to new credit agreements entered after 6 June 2015.



9. The FTA prohibits false and misleading conduct in trade. It is an offence under s 13(i) of the FTA to make a misleading representation as to the existence, exclusion or effect of any right, including a statutory right.
10. 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 s 35 of the CRA (and now s 83ZM of the CCCFA), the creditor has no such right.
11. Pacific Loans and B&D represented that they had the right to recover Interest and Fees after Repossession and Sale Action, when they had no such right.
12. Accordingly, Pacific Loans and B&D made misrepresentations that were likely to mislead borrowers, in breach of s 13(i) of the FTA.
13. Between 2002 and 2014, Pacific Loans assigned 167 loans to B&D which were the subject of Repossession and Sale Action. B&D and/or Pacific Loans collected debtor payments totalling \$227,221.66 in Interest and Fees after Repossession and Sale Action on 58 of these loans.
14. In addition, following an internal review of all its loans entered into between 2002 and 2014 (other than those assigned to B&D), Pacific Loans has identified that it incorrectly collected Interest and Fees on an additional 24 loans.
15. The Commission acknowledges that it investigated Pacific Loans in 2007 and 2008. Pacific Loans believes that it may have a limitation defence in relation to the conduct that is subject to this Agreement. The Commission does not accept that such a limitation defence arises.
16. Pacific Loans and B&D made a joint offer in April 2016 to repay a total of \$234,739.74 (including interest) to Affected Customers in respect of the original 167 Affected Loan Accounts but this offer was withdrawn after B&D was placed in liquidation in May 2016.
17. Given B&D's liquidation, B&D has insufficient assets to repay Affected Customers all of the sums that are due. The liquidator of B&D confirmed to the Commission that the company refunded \$28,832.60 to 36 Affected Customers on 3 August 2017.

Enforceable Undertakings by Pacific Loans

18. To resolve the Commission's claim that Pacific Loans' practice of charging Interest and Fees after Repossession and Sale Action breaches the FTA, Pacific Loans has offered, and the Commission has agreed to accept, pursuant to s 46A of the FTA, the Undertakings contained in Schedule 1 of this Agreement.



Pacific Loans' Agreement

19. Pacific Loans agrees that before **28 February 2019** it:
- 19.1 will refund 58 Affected Customers who were overcharged Interest and Fees by B&D in the sum of \$79,601.36 (approximately one third of the total amount overcharged), in accordance with the amounts listed in Schedule 2;² and
 - 19.2 will refund 24 Affected Customers that Pacific Loans identified, during an internal review of all loans it entered into from 2002 to 2014, as having been overcharged (by Pacific Loans) Interest and Fees in the sum of \$55,177.87, in accordance with the amounts listed in Schedule 3.
20. Pacific Loans acknowledges and admits:
- 20.1 the facts set out in clauses 7-17 above;
 - 20.2 that it and/or B&D added Interest and Fees to Affected Loan Accounts after Repossession and Sale Action contrary to s 35 CRA, and engaged in conduct and made representations that breached s 13(i) FTA, as noted above.
21. Pacific Loans agrees and warrants that it has:
- 21.1 ceased charging Interest and Fees on all loans owned by Pacific Loans where Repossession and Sale Action has been taken; and
 - 21.2 altered its processes and practices, and has put in place controls, checks and systems to ensure that, in future, Interest and Fees will not be charged on loans after Repossession and Sale Action has been taken.

No Further Action by Commission

22. Upon signing of this Agreement by Pacific Loans, the Commission will close its investigation into Pacific Loans. The Commission will send a warning letter to Pacific Loans outlining its concerns about Pacific Loans' conduct.
23. This Agreement applies only to Pacific Loans and [REDACTED] who are signatories to this Agreement. This Agreement does not prevent the Commission from taking action against any other person relating to the conduct described in this Agreement.
24. Subject to clause 28, below, and to compliance with this Agreement, the Commission will not issue any civil or criminal proceeding against Pacific Loans and/or [REDACTED] [REDACTED] in relation to the conduct covered by this Agreement other than

² This will partially compensate 58 Affected Customers for the amounts they were overcharged. The figure includes \$7,621.24 being the sole amount that Pacific Loans received from B&D after repossession and sale plus a further \$71,980.14 of the sum which it accepts was overcharged by B&D and not paid to Pacific Loans.

proceedings that may be brought as a consequence of Pacific Loans' and/or [REDACTED]'s breach of this Agreement.

Effect and Implementation of this Settlement Agreement

25. Pacific Loans and [REDACTED] will take all steps necessary to give effect to the terms of this Agreement.
26. [REDACTED] agrees to procure Pacific Loans' compliance with this Agreement.
27. In the event that Pacific Loans breaches this Agreement or enters liquidation, voluntary administration, receivership or reaches a voluntary arrangement with creditors, [REDACTED] agrees to guarantee, and to accept joint and several liability for, Pacific Loans' obligations under this Agreement.

Breach or non-disclosure

28. If there is any breach of Pacific Loans' and/or [REDACTED]'s obligations under this Agreement, or they fail to comply with the Undertakings, the Commission may, in its complete discretion, take any action it deems appropriate including cancelling or rescinding this Agreement, suing for breach, enforcing the guarantee, and/or commencing civil or criminal proceedings *inter alia* under the FTA. For the avoidance of doubt, the Commission may bring civil or criminal proceedings against Pacific Loans and/or [REDACTED] for the conduct referred to in this Agreement, as if this Agreement had not been entered into.
29. If the Commission considers that Pacific Loans and/or [REDACTED] has breached the Undertakings, the Commission may, in the alternative, apply to the Court under s 46B of the FTA for an order:
 - 29.1 directing Pacific Loans and/or [REDACTED] to comply with the term;
 - 29.2 directing Pacific Loans and/or [REDACTED] to pay to the Crown an amount not exceeding the amount of any financial benefit that Pacific Loans and/or [REDACTED] has obtained directly or indirectly and that is reasonably attributable to the breach;
 - 29.3 directing Pacific Loans and/or [REDACTED] to compensate any other person who has suffered loss or damage as a result of the breach; and/or
 - 29.4 for any other consequential relief the Court thinks appropriate
30. Nothing in this Agreement:
 - 30.1 will limit or affect the ability of the Commission to issue proceedings against Pacific Loans and/or [REDACTED] in respect of matters not referred to in this Agreement, or in respect of conduct engaged in by Pacific Loans and/or [REDACTED] after the date of this Agreement;

- 30.2 will limit or affect the ability of the Commission to cancel or rescind this Agreement and/or to issue proceedings against Pacific Loans and/or [REDACTED] in the event of breach;
- 30.3 will limit or affect the ability of any person who has not consented to be bound by the terms of this Agreement from pursuing any rights available to him, her or it under the FTA or under any other law.
31. If the Commission commences any Court proceedings pursuant to clause 28 above, Pacific Loans and/or [REDACTED] waives any limitation defence that may be available to it/[REDACTED] in respect of those proceedings to the extent that such limitation defence arose solely as a result of the settlement recorded in this Agreement.

Miscellaneous

32. This Agreement will be governed and interpreted in accordance with the laws of New Zealand, and will be subject to the exclusive jurisdiction of the New Zealand Courts.
33. Pacific Loans, [REDACTED] and the Commission agree that:
- 33.1 neither the Agreement, nor the fact that Pacific Loans and [REDACTED] have entered into the Agreement and given the Undertakings is confidential, save the names and identity of the borrowers as listed in Schedule 2 and Schedule 3;
- 33.2 the Agreement may be published on the Commission's website after it has been signed, and after redactions have been made to remove borrowers' names, as listed in Schedule 2 and Schedule 3;
- 33.3 the Commission may issue a media release about the Agreement;
- 33.4 either Pacific Loans or the Commission may make public statements (either separately or jointly) in relation to the Agreement after it has been signed, save that the parties shall not reveal the names and identity of any Affected Customers;
- 33.5 any public statement must be consistent with the matters set out in the Agreement.
34. Pacific Loans and [REDACTED] agree that they will not make any public comment in relation to the Agreement until after the Commission has issued any media release notifying the public of it.



35. 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:

35.1 if addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
Level 13, 55 Shortland Street
Auckland 1143

Attention: [REDACTED]

Email: [REDACTED]

35.2 if addressed to Pacific Loans or [REDACTED] by hand delivery or email to the following address:

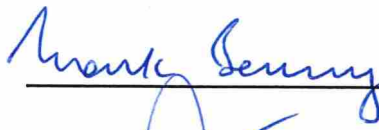
Pacific Loans Limited
Gilligan Rowe & Associates LP,
Level 6, 135 Broadway,
Newmarket,
Auckland 1023

Attention: [REDACTED]

Email: [REDACTED]

EXECUTION

**SIGNED for and on behalf of
THE COMMERCE COMMISSION**



Dr Mark Berry
Chair

**SIGNED for and on behalf of
PACIFIC LOANS LIMITED**

SIGNED by

[REDACTED]

[REDACTED]

SCHEDULE 1 – ENFORCEABLE UNDERTAKINGS

Introduction

These Undertakings are offered by Pacific Loans for acceptance by the Commerce Commission, pursuant to s 46A of the Fair Trading Act 1986.

These Undertakings form part of and are attached to the Agreement between Pacific Loans, [REDACTED] and the Commerce Commission.

These Undertakings are to be read consistently with the terms of the Agreement and the terms used in the Agreement also apply to these Undertakings.

Enforceable Undertakings by Pacific Loans

Adjustments to Affected Loan Accounts and Payments to be made to Affected Customers

1. Pacific Loans undertakes that, before **28 February 2019**, it will credit the Refund Owing to each Affected Loan Account. If an Affected Loan Account is closed, it will be reopened prior to crediting the Refund Owing.
2. Pacific Loans undertakes that if an Affected Customer is owed money after crediting the Refund Owing in accordance with Clause 1 of this Undertaking, Pacific Loans will:
 - 2.1 notify the Affected Customer in accordance with Clauses 3 and 4 of this Undertaking; and
 - 2.2 pay the sum due to the Affected Customer, in accordance with the Affected Customer's instructions.

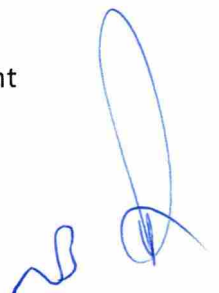
Notice requirements

3. Pacific Loans will, by **25 January 2019**, send a letter to each of the Affected Customers at their last known address.
4. That letter will be in a form approved by the Commission and will:
 - 4.1 advise the Affected Customer that Pacific Loans has entered into a settlement with the Commission and has given enforceable undertakings pursuant to s 46A of the FTA;
 - 4.2 advise the Affected Customer of the amount of the Refund Owing;
 - 4.3 where the Affected Customer has an existing loan account, advise the Affected Customer of any amount credited to their Affected Loan Account and the balance of that account as at the date of the letter;
 - 4.4 where the Affected Customer is entitled to a payment in accordance with clause 2.2 of this Undertaking;

- 4.4.1 advise the Affected Customer of the amount of that payment; and
 - 4.4.2 advise that the Affected Customer should contact Pacific Loans to arrange for that payment to be made to them.
- 5. If, after using its best endeavours, Pacific Loans is unable to locate an Affected Customer who is eligible for a payment pursuant to clause 2.2 of this Undertaking, Pacific Loans undertakes to treat the payment as if it were unclaimed money under the Unclaimed Money Act 1971, unless the parties agree otherwise. "Best endeavours" includes using information currently known to Pacific Loans, as well as searches of Google, Facebook, White Pages and/or the electoral roll, and any other efforts that Pacific Loans would usually make to locate a non-paying debtor. It also includes appointing a tracing agent to locate an Affected Customer.

Confirmation of adjustments to Affected Loan Accounts and payments to Affected Customers

- 6. Pacific Loans undertakes to provide to the Commission by **26 July 2019**, and at its own cost, an independent audit report prepared by an accounting firm, confirming that Pacific Loans has credited and paid, where applicable, the Refund Owing and any interest in accordance with this Agreement and the Undertakings. Pacific Loans will submit to the Commission, the name of the accounting firm prior to their engagement by Pacific Loans. The firm of accountants appointed to fulfil this function should be independent and have no existing audit or commercial relationship with Pacific Loans.
- 7. The report must include the following details:
 - 7.1 the total value of all Refunds Owing;
 - 7.2 the number of Affected Loan Accounts to which credits have been made;
 - 7.3 the total value of the payments made to Affected Customers in accordance with Clause 2.2 of this Undertaking;
 - 7.4 the name and address of each person credited or refunded, with the amount of credit or refund;
 - 7.5 the number of Affected Customers (if any) who have not received a payment to which they are entitled, together with the name, date of birth and last known address of each such Affected Customer, the amount due to each Affected Customer, the reasons for the failure to make the payment and the steps taken to attempt to locate the Affected Customer;
 - 7.6 an opinion as to whether Pacific Loans has made payments in accordance with the Agreement and the Undertakings; and
 - 7.7 an opinion as to whether the calculation of the payments made or amount credited to Affected Customers under this Agreement is accurate.



Loan account practices, systems and processes

8. Pacific Loans also undertakes that it:
- 8.1 will not, in future, charge Interest and Fees on consumer loans after it takes Repossession and Sale Action unless the law changes or the parties agree that this conduct will not breach the FTA;
 - 8.2 will establish contractual and procedural controls in relation to the sale, assignment or novation of loans to ensure that any purchaser complies with the law;
 - 8.3 will conduct detailed due diligence in the event that it acquires new loans from third parties to ensure that repossession debts are properly identified and that future breaches of the CRA and CCCFA do not occur;
 - 8.4 will establish within 3 months of the date of this Agreement a compliance programme, as defined by s 84 of the CCCFA, and will comply with the principles of the Responsible Lending Code; and
 - 8.5 will provide to the Commission, by **26 July 2019** and at its own expense, confirmation from the independent accounting firm appointed that its compliance programme and its systems and processes have been modified to ensure that in future Pacific Loans will not charge Interest and Fees on consumer loans after it takes Repossession and Sale Action.

Miscellaneous

9. Pacific Loans further undertakes that it will:
- 9.1 request credit reference agencies to update their records to reflect customers' revised account balances where a default is still recorded against an Affected Customer at the date of this Agreement;
 - 9.2 confirm to the Commission by **28 February 2019** that it has requested credit reference agencies to update their records; and
 - 9.3 provide any documents and information requested by the Commission from time to time for the purpose of assessing Pacific Loans' compliance with the terms of this Undertaking and the Agreement.

SCHEDULE 2 – AFFECTED CUSTOMERS WITH LOANS ASSIGNED TO B&D

	DEBTOR	TOTAL REPAYMENT
1		958.04
2		1083.88
3		285.80
4		506.63
5		904.52
6		2635.04
7		1634.13
8		572.46
9		2920.99
10		1559.86
11		2287.53
12		1437.50
13		1251.31
14		1048.86
15		941.33
16		1295.16
17		756.53
18		271.24
19		1292.93
20		411.74
21		326.35
22		362.91
23		637.09
24		1339.85
25		1033.04
26		201.99
27		1301.91
28		5894.62
29		3108.94
30		404.64
31		543.46
32		249.48
33		1542.64
34		551.31
35		24.15
36		1880.69
37		3153.85
38		829.16

39		1440.11
40		1880.63
41		821.09
42		2819.69
43		559.08
44		1370.46
45		1896.06
46		1512.47
47		1679.36
48		2477.13
49		2042.85
50		2418.34
51		1448.19
52		2696.11
53		3637.81
54		1644.53
55		472.40
56		371.05
57		526.49
58		445.95
TOTAL		79601.36

SCHEDULE 3 – AFFECTED CUSTOMERS WITH LOANS NOT ASSIGNED TO B&D

	LOAN NUMBER	DEBTOR	TOTAL REPAYMENT DUE
1			132.16
2			325.86
3			597.66
4			347.39
5			317.77
6			850.22
7			116.13
8			107.07
9			155.48
10			204.27
11			847.70
12			2790.82
13			1630.30
14			261.28
15			5402.40
16			23627.06
17			292.39
18			105.70
19			3344.44
20			361.47
21			11382.20
22			138.83
23			1027.73
24			811.54
TOTAL			55177.87