

COMMERCE COMMISSION

BAYCORP (NZ) LIMITED

SETTLEMENT AGREEMENT

DATE *6 November* 2013

THIS AGREEMENT is made on the 6 day of November 2013

Parties

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

BAYCORP (NZ) LIMITED, a limited liability company registered in New Zealand (company number 1821297) with a registered office at Level 2, 15 Hopetoun Street, Ponsonby, Auckland 1011, New Zealand ("**Baycorp**")

Purpose of the Agreement

1. The Commission has conducted an investigation into allegations that Baycorp contravened the Fair Trading Act 1986 (**FTA**).
2. The Commission considers that Baycorp is likely to have breached s 13(i) of the FTA. Baycorp does not admit that its conduct has contravened s 13(i) of the FTA.
3. This Settlement Agreement (**Agreement**) sets out the terms on which the parties have agreed to resolve the Commission's investigation.

Background

4. The Credit (Repossession) Act 1997 (**CRA**) governs the taking of possession of consumer goods by a creditor under a security agreement. Once sale of repossessed goods securing a consumer debt has occurred (**Repossession and Sale Action**), s 35¹ of the CRA prohibits a creditor from recovering more than the debt balance outstanding after deducting the net proceeds from the sale of a repossessed security item.
5. Baycorp is in business as a provider of debt recovery and credit management services. Baycorp's business includes providing debt collection services to its clients. Generally, Baycorp does not undertake Repossession and Sale Action on behalf of clients. Baycorp's clients refer debts owed to them by consumer customers to Baycorp for collection as a third party service provider on their behalf (**Customer Accounts**) only after Repossession and Sale Action has been completed.
6. 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.

¹ **Section 35 - Limit on 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 after deducting those proceeds from that amount (whether under a judgment or otherwise).

7. In April 2012, the Commission began an investigation into allegations that Baycorp may have breached s 13(i) of the FTA by representing that it had a right on behalf of its clients to add collection costs, certain legal costs (if incurred) and, in instances where a judgment has been obtained, court awarded costs and interest (**Debt Collection Fees**) to some Customer Accounts after Repossession and Sale Action.
8. Section 35 of the CRA prohibits a creditor from recovering more than the debt balance outstanding after Repossession and Sale Action has been completed.
9. The Commission's investigation has established that Baycorp has, on at least 2,449 occasions since 8 January 2009, added Debt Collection Fees to Customer Accounts after Repossession and Sale Action.
10. In the Commission's opinion, a representation that a creditor can recover fees or interest when s 35 CRA applies is misleading or false because the creditor has no such right.
11. Baycorp and the Commission consider that this issue has arisen because of a lack of awareness by credit providers, including certain of Baycorp's clients, that the CRA applies to them.
12. Baycorp has cooperated fully with the Commission at all times during the investigation and has voluntarily reversed fees and charges to affected Customer Accounts at its own expense, and made changes to its processes.
13. Baycorp advised the Commission that:
 - 13.1 It does not undertake Repossession and Sale Action on the Customer Accounts that it collects on behalf of its clients. Its clients will have completed that activity (if they wish to do so) prior to engaging Baycorp to act for them on the collection of the Customer Account.
 - 13.2 Baycorp's contract with its clients requires the client to provide full and accurate information to Baycorp, including identifying any impediments to Baycorp loading the Debt Collection Fees to the Customer Account. If a Customer Account was not identified to Baycorp by its client as prohibiting the collection of Debt Collection Fees then Baycorp would not mark the Customer Account in its computer system as not to have Debt Collection Fees added and Debt Collection Fees would be added to the Customer Account.
 - 13.3 It relies on its clients to advise it of factual impediments, whether contractual or legislative, to the collection of Debt Collection Fees from customers.
 - 13.4 Any representations made by Baycorp as to the recovery of collection costs from Customer Accounts were made by Baycorp as a third party outsourced service provider for its client and in reliance on the information provided by the client.

The Commission's View

14. The Commission considers that:
- 14.1 Baycorp is likely to have breached s 13(i) of the FTA by representing that it had a right on behalf of its clients to add Debt Collection Fees on Customer Accounts after Repossession and Sale Action when s 35 of the CRA prevented recovery of those sums.
- 14.2 Baycorp is likely to be in breach of the FTA despite not undertaking the Repossession and Sale Action itself, acting on instruction from its clients and relying on information provided by its clients. The Commission considers that Baycorp would be unable to rely on a reasonable reliance defence.

Baycorp's Response

15. Baycorp has co-operated fully with the Commission throughout the investigation.
16. In relation to paragraph 14 above, Baycorp acknowledges the Commission's view but makes no admission of liability in relation to a breach of s 13(i) of the FTA. Baycorp also says that it relied on information provided by its clients and believes it would have a defence under s 44 of the FTA to any breach of the FTA.
17. In response to the Commission's investigation, Baycorp:
- 17.1 reversed all relevant Debt Collection Fees charged to Customer Accounts after Repossession Action and, where the balance on Customer Accounts has gone into credit, has refunded those credit amounts itself, to affected Customers (an **Affected Customer**); and
- 17.2 has altered its debt load processes, information requirements and practices to reasonably ensure that it can identify Customer Accounts that cannot have Debt Collection Fees added because Repossession and Sale Action had taken place before the Customer Account was referred to Baycorp.

Refunds to Affected Customers

18. To the extent that it has not done so already, Baycorp agrees that it will, before 31 October 2013, reverse all Debt Collection Fees charged to Customer Accounts after Repossession and Sale Action using the following process:
- 18.1 Baycorp will confirm with its clients which Customer Accounts have been subject to Repossession and Sale Action since 8 January 2009 (each an **Affected Customer Account**).
- 18.2 Following reversal of all relevant Debt Collection Fees, Baycorp will determine if there is a credit balance on the Customer Account and:
- 18.2.1 where there is a credit balance remaining on the Affected Customer Account after crediting any Debt Collection Fees to the Affected

Customer Account, and Baycorp has been engaged to collect other debts that the Affected Customer has (**Other Debts**), then Baycorp will apply that credit balance to the Other Debts, or

18.2.2 where there is a credit balance remaining on the Affected Customer Account after crediting any Debt Collection Fees to the Affected Customer Account or to Other Debts, Baycorp will issue a cheque for the amount of the credit balance remaining to the Affected Customer at their last known address.

19. If Baycorp cannot locate any Affected Customer who is eligible for a refund under clause 18, Baycorp agrees to treat any payment due to the Affected Customer as if that payment was unclaimed money under the Unclaimed Money Act 1971.

Other Remedial Steps

20. To the extent that it has not already done so, Baycorp also agrees to amend its debt lodgement forms and website client portal by requiring clients to confirm whether the account is a consumer account and whether Repossession and Sale Action has occurred and the balance outstanding on the Customer Account following sale of the repossessed goods and prior to referral of the Customer Account to Baycorp.

Report Requirement

21. Baycorp will at its cost retain an independent accounting firm to provide the Commission with a report by 30 November 2013 verifying completion of the refund process outlined at clause 18. This report must include the following details:
- 21.1 The total value of all credits and refunds made to Affected Customers.
- 21.2 The number of Affected Customers (if any) who have not received a refund, together with the identifying details of each such Affected Customer, the amount outstanding to each Affected Customer, the reasons for the failure to make the payment and the steps taken to attempt to refund them.
- 21.3 An opinion as to whether the refund process including, the calculation of the amount to be credited and where applicable, refunded to each Affected Customer is accurate.

Payment of Costs

22. Baycorp will, within 20 days of the date of this Agreement, and following submission of a tax invoice by the Commission, pay the Commission's actual and estimated further costs in relation to the investigation (including completion of this Agreement) in the amount of \$11,651.00.

No Further Action by Commission

23. The Commission will close its investigation once the parties have signed this Agreement and Baycorp has paid the Commission's costs as provided for in clause 22.
24. The Commission will not issue, encourage or support any civil or criminal legal proceeding against Baycorp in relation to any representation made by Baycorp about its ability to add Debt Collection Fees to the balance outstanding on the Customer Accounts after Repossession and Sale Action.

Unaffected Rights

25. Nothing in this Agreement:
 - 25.1 Constitutes an admission of legal liability by Baycorp
 - 25.2 Will limit or affect the ability of the Commission to issue proceedings against Baycorp in respect of matters not related to this Agreement, or in respect of conduct engaged in by Baycorp after the date of this Agreement
 - 25.3 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.
26. If there is any material breach by Baycorp in fulfilment of this Agreement (such breach to be determined solely by the Commission), the Commission may in its complete discretion bring proceedings against Baycorp for breach of the terms of this Agreement.
27. If the Commission commences any proceedings pursuant to clause 26 above, Baycorp waives any limitation defence that arises solely because of the time that elapsed between the date of this Agreement and the alleged material breach.

Miscellaneous

28. Baycorp and the Commission will each take such steps as are necessary or desirable to give full effect to the terms of this Agreement.
29. Either Baycorp or the Commission may release or publish this Agreement, including to the public at large, after it has been signed. The Commission acknowledges that some of the information provided by Baycorp to the Commission may be confidential and/or commercially sensitive. If the Commission receives a request pursuant to the Official Information Act 1982 (**OIA**) which covers or might cover and/or record or reveal all or some of the Baycorp information (**Information Request**), it will promptly consult with Baycorp as to whether there are grounds for the requested material to be withheld under Part 1 of the OIA. The Commission acknowledges that this confidential information may include personal information relating to Affected Customers and therefore may be subject to constraint under the Privacy Act 1993.

The Commission will also take full and proper account of the confidential and/or commercially sensitive nature of the Baycorp's information and of any views expressed by Baycorp, in accordance with the provisions of the OIA, when considering any Information Request.

30. The parties may make public statements (either separately or jointly) in relation to the settlement. Any public statement must be consistent with the matters set out in the Agreement and in particular that this reflects an industry issue that has arisen through lack of awareness by credit providers that the CRA can apply to them.
31. Baycorp agrees that it will not make any public comment in relation to this Agreement until after the Commission has issued any media release notifying the public of this Agreement.
32. This Agreement will be governed and interpreted in accordance with the laws of New Zealand.
33. 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:

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

Commerce Commission
Level 19, 135 Albert Street
Auckland 1143

Attention: James McIvor
Competition Branch, Commerce Commission

Email: james.mcivor@comcom.govt.nz

33.2 if addressed to Baycorp, by hand delivery or email to the following address:

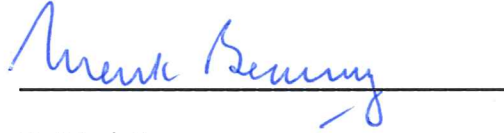
Baycorp (NZ) Limited
c/o The Company Secretary
Baycorp Holdings Pty Limited Level 6, 1 Wentworth Street
Parramatta, NSW 2150

Attention: Mike Morris

Email: mike.morris@baycorp.com.au

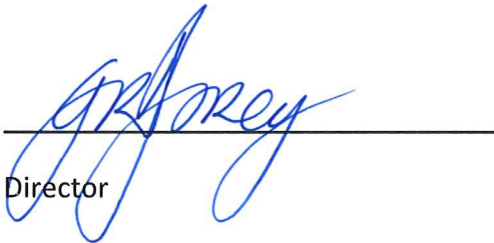
EXECUTION

SIGNED for and on behalf of THE COMMERCE COMMISSION



Dr Mark Berry
Chairman

SIGNED for and on behalf of BAYCORP (NZ) LIMITED



Director



CFO/Company Secretary