

COMMERCE COMMISSION

AND

(1) RECEIVABLES MANAGEMENT (NZ) LIMITED

(2) SOUTHERN RECEIVABLES LIMITED

(3) ALLIED RECOVERIES LIMITED

(4) RJK RECEIVABLES LIMITED

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SETTLEMENT AGREEMENT WITH ENFORCEABLE UNDERTAKINGS

DATE 15<sup>th</sup> December 2017

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THIS AGREEMENT is made on the 15<sup>th</sup> day of December 2017

#### Parties

**COMMERCE COMMISSION**, a statutory body established under s8 of the Commerce Act 1986 ("Commission").

#### And

- (1) **RECEIVABLES MANAGEMENT (NZ) LIMITED** (Company Number 662530), a limited liability company whose registered office is situated at Level 2, 335 Lincoln Road, Addington, Christchurch 8024;
  - (2) **SOUTHERN RECEIVABLES LIMITED** (Company Number 1656047), a limited liability company whose registered office is situated at Level 2, 335 Lincoln Road, Addington, Christchurch 8024;
  - (3) **ALLIED RECOVERIES LIMITED** (Company Number 3312349), a limited liability company whose registered office is situated at Level 2, 335 Lincoln Road, Addington, Christchurch 8024; and
  - (4) **RJK RECEIVABLES LIMITED** (Company Number 2096402), a limited liability company whose registered office is situated at Level 2, 335 Lincoln Road, Addington, Christchurch 8024
- (together "Receivables Management").

#### Interpretation

In this Agreement and its attached Undertakings:

**Affected Debtor** means the holder of an Affected Loan Account.

**Affected Loan Accounts** means those loan accounts identified by Receivables Management during the investigation following the procedures agreed with the Commission, as set out in Schedule 2 to this Agreement.

**Agreement** means this Settlement Agreement including the attached Undertakings.

**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 Owing** means the amount of Interest and Fees charged to an Affected Loan Account after the date goods subject to Repossession and Sale Action were sold.

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

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

## Purpose of the Agreement

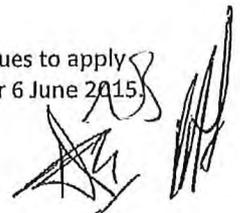
1. Receivables Management are associated companies within the Receivables Management group that acquire debt, loans and receivables, and handle debt collection. In addition to acting as creditors under consumer credit contracts, they also collect debts and monies on behalf of third party clients for whom they act. Some of these loans are secured by a security interest in consumer goods including motor vehicles, and can result in repossession in the event of default.
2. In March 2015, the Commission began investigating allegations that Receivables Management may have breached s13(i) of the FTA by representing that they or their clients had the right to add Interest and Fees to some debtor accounts after Repossession and Sale Action, which is contrary to s35 of the CRA.
3. Receivables Management acknowledges the Commission's view but makes no admission of liability in relation to a breach of s13(i) of the FTA. This Agreement sets out the terms on which the parties have agreed to resolve the Commission's investigation by the provision of Undertakings, and to refund Affected Debtors who have been overcharged.

## The Commission's Position

4. 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 s35 of the CRA.
5. 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 is frozen at this shortfall on sale, so that the creditor is 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.<sup>1</sup>
6. The FTA prohibits false and misleading conduct in trade. It is an offence under s13(i) of the FTA to make a misleading representation as to the existence, exclusion or effect of any right, including a statutory right.

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<sup>1</sup> 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.



7. 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 s35 of the CRA (and now s 83ZM of the CCCFA), the creditor has no such right.
8. Receivables Management represented that they had the right to Interest and Fees after Repossession and Sale Action when they had no such right.

### **Receivables Management's Response**

9. Receivables Management has cooperated fully with the Commission throughout the investigation.
10. The Commission's investigation prompted Receivables Management to undertake a review of their loan book, and the client debts they had sought to recover. The purpose of the review was to determine:
  - 10.1 the number of loans on which Interest and Fees were charged after Repossession and Sale Action had been taken; and
  - 10.2 the total amount charged to debtors in these circumstances.
11. Receivables Management's review identified that \$1,408,358.56 in Interest and Fees were added to 1,698 loans after Repossession and Sale Action had been taken.<sup>2</sup> These loans were split as follows:
  - 11.1 \$219,938.52 was charged to 103 debtors in respect of debt that Receivables Management had sought to recover on behalf of another creditor;
  - 11.2 \$1,188,420.04 was charged to 1,595 debtors in respect of debts that Receivables Management owned or had purchased.
12. Receivables Management makes no admission of liability in relation to a breach of s13(i) of the FTA. Receivables Management also says that they relied on information provided by their clients and debt sellers and believes they would have a defence under s44 of the FTA to any breach of the FTA.
13. Receivables Management agree that they:
  - 13.1 will refund all Affected Debtors in full who have been overcharged Interest and Fees contrary to s35 CRA and s 83ZM of the CCCFA;
  - 13.2 have ceased charging Interest and Fees in respect of loans where Repossession and Sale Action has been taken;

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<sup>2</sup> These figures may be subject to further adjustment, given the time that has elapsed since the original review was undertaken.



- 13.3 have altered their processes and practices, and have 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. This includes undertaking due diligence upon acquiring new loans to ensure that repossession debts are properly identified and that future breaches do not occur.

### **Enforceable Undertakings by Receivables Management**

14. To resolve the Commission's claim that Receivables Management's practice of charging Interest and Fees on the Affected Loan Accounts after Repossession and Sale Action breaches the FTA, Receivables Management has offered, and the Commission has agreed to accept, pursuant to section 46A of the FTA, the Undertakings contained in Schedule 1 of this Agreement.

### **No Further Action by Commission**

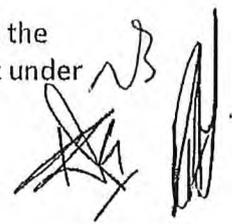
15. Upon signing of this Agreement by Receivables Management, the Commission will close its investigation in relation to Affected Loan Accounts and take no further action in respect of it, save to send a warning letter to Receivables Management outlining its concerns about Receivables Management's conduct.
16. Subject to clause 18 below and compliance with this Agreement, the Commission will not issue or encourage any civil or criminal proceeding against Receivables Management and/or their directors or employees in relation to the Affected Loan Accounts other than any proceedings that may be brought as a consequence of Receivables Management's failure to comply with this Agreement, or in the event that the Commission becomes aware of new material information relating to the conduct not known at the time of this Agreement.

### **Effect and Implementation of this Settlement Agreement**

17. Receivables Management will take such steps as are necessary or desirable to give full effect to the terms of this Agreement.

### **Breach or non-disclosure**

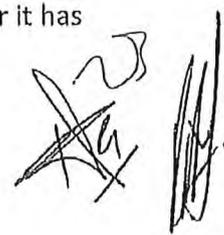
18. If there is any material breach of Receivables Managements' obligations under this Agreement, or failure by them to comply with the Undertakings, the Commission may in its complete discretion take any action it deems appropriate including cancelling or rescinding this Agreement, suing for breach, 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 Receivables Management for the conduct referred to in this Agreement, as if this Agreement had not been entered into.
19. If the Commission considers that Receivables Management has breached the Undertakings, the Commission may, in the alternative, apply to the Court under section 46B of the FTA for an order:



- 19.1 directing Receivables Management to comply with the term;
  - 19.2 directing Receivables Management to pay to the Crown an amount not exceeding the amount of any financial benefit that Receivables Management has obtained directly or indirectly and that is reasonably attributable to the breach;
  - 19.3 directing Receivables Management to compensate any other person who has suffered loss or damage as a result of the breach; and/or
  - 19.4 for any other consequential relief the Court thinks appropriate.
20. Nothing in this Agreement:
- 20.1 will limit or affect the ability of the Commission to issue proceedings against Receivables Management in respect of matters not referred to in this Agreement, or in respect of conduct engaged in by Receivables Management after the date of this Agreement;
  - 20.2 will limit or affect the ability of the Commission to cancel or rescind this Agreement and/or to issue proceedings against Receivables Management in the event of material breach;
  - 20.3 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.
21. If the Commission commences any Court proceedings pursuant to clause 18 above, Receivables Management waives any limitation defence that may be available to them 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

22. 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.
23. Receivables Management and the Commission agree that:
- 23.1 neither the Agreement nor the fact that Receivables Management has entered into the Agreement or given the Undertakings is confidential;
  - 23.2 the Agreement may be published on the Commission's website after it has been signed;
  - 23.3 the Commission may issue a media release about the Agreement;



- 23.4 either Receivables Management or the Commission may make public statements (either separately or jointly) in relation to the Agreement after it has been signed;
- 23.5 any public statement must be consistent with the matters set out in the Agreement.
24. The Commission acknowledges that some of the information provided by Receivables Management 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 Receivables Management information ("Information Request"), it will consult with Receivables Management 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 Debtors and therefore may be subject to constraint under the Privacy Act 1993. The Commission will take account of the confidential and/or commercially sensitive nature of Receivables Management's information and of any views expressed by Receivables Management, in accordance with the provisions of the OIA, when considering any Information Request.
25. Receivables Management agrees 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.
26. 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:

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

Commerce Commission  
Level 19, 135 Albert Street  
Auckland 1143

Attention [REDACTED]  
Email: [REDACTED]@comcom.govt.nz

- 26.2 if addressed to Receivables Management, by hand delivery or email to the following address:

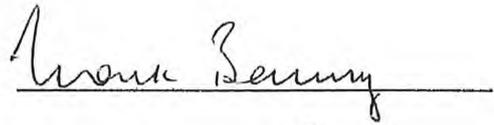
Receivables Management (NZ) Limited  
Level 2, 335 Lincoln Road,  
Addington,  
Christchurch 8024

Attention: [REDACTED]  
Email: [REDACTED] and [REDACTED]

26.3 Southern Receivables Limited, Allied Recoveries Limited and RJK Receivables Limited hereby agree to appoint Receivables Management (NZ) Limited to accept service on their behalf.

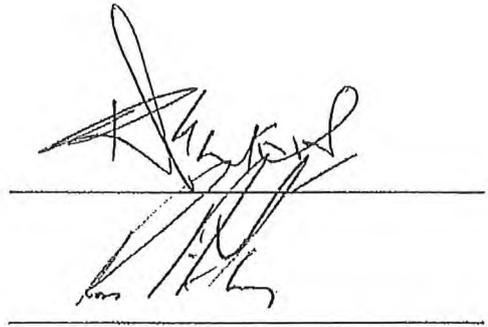
**EXECUTION**

SIGNED for and on behalf of  
THE COMMERCE COMMISSION



Dr Mark Berry  
Chair

SIGNED for and on behalf of  
RECEIVABLES MANAGEMENT (NZ) LIMITED



SIGNED for and on behalf of  
SOUTHERN RECEIVABLES LIMITED



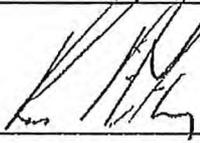
SIGNED for and on behalf of



ALLIED RECOVERIES LIMITED



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SIGNED for and on behalf of  
RJK RECEIVABLES LIMITED



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## SCHEDULE 1 – ENFORCEABLE UNDERTAKINGS

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### Introduction

These Undertakings are offered by Receivables Management for acceptance by the Commerce Commission, pursuant to section 46A of the Fair Trading Act 1986.

These Undertakings form part of and are attached to the Agreement between Receivables Management 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 Receivables Management

#### Adjustments to Affected Loan Accounts and Payments to be made to Affected Debtors

1. Receivables Management undertakes that, before 31 March 2018, they 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. Receivables Management undertakes that if an Affected Debtor is owed money after crediting the Refund Owing in accordance with Clause 1 of this Undertaking, Receivables Management will:
  - 2.1 notify the Affected Debtor in accordance with Clauses 3 and 4 of this Undertaking; and
  - 2.2 pay to the Affected Debtor in accordance with the Affected Debtor's instructions:
    - 2.2.1 the sum due; and
    - 2.2.2 an additional 5% per annum of the Refund Owing to compensate the Affected Debtor for not having had use of that money.

#### Notice requirements

3. Receivables Management will, by 31 March 2018, send a letter to each Affected Debtor at their last known address.
4. That letter will be in a form approved by the Commission and will:
  - 4.1 advise the Affected Debtor that Receivables Management has entered into a settlement with the Commission and has given enforceable undertakings pursuant to section 46A of the FTA;
  - 4.2 advise the Affected Debtor of the amount of the Refund Owing;



- 4.3 where the Affected Debtor has an existing loan account advise the Affected Debtor of any amount credited to their Affected Loan Account and the revised balance of that account as at the date of the letter;
- 4.4 where the Affected Debtor is entitled to a payment in accordance with clause 2.2 of this Undertaking:
  - 4.4.1 advise the Affected Debtor of the amount of that payment;
  - 4.4.2 advise that the Affected Debtor should contact Receivables Management to arrange for that payment to be made to them.
5. If, after using their best endeavours, Receivables Management is unable to locate an Affected Debtor who is eligible for a payment pursuant to clause 2.2 of this Undertaking, Receivables Management 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 Receivables Management, as well as searches of Google, Facebook, White Pages and/or the electoral roll, and any other efforts Receivables Management would usually make to locate a non-paying debtor. It also includes appointing a tracing agent to locate an Affected Debtor.

**Confirmation of adjustments to Affected Loan Accounts and payments to Affected Debtors**

6. Receivables Management undertakes to provide to the Commission by 30 April 2018, and at their own cost, an independent review report prepared by an independent accounting firm, confirming that Receivables Management has credited and paid, where applicable, the Refund Owing and any interest in accordance with this Agreement and the Undertakings. Any firm of accountants appointed to fulfil this function should be independent and have no existing audit or commercial relationship with Receivables Management.
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 Debtors in accordance with Clause 2.2.1 of this Undertaking;
  - 7.4 the total value of the payments made to Affected Debtors in accordance with Clause 2.2.2 of this Undertaking;
  - 7.5 list the loan account number of each person credited or refunded, with the amount of credit or refund;
  - 7.6 the number of Affected Debtors (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 Debtor, the amount due to each Affected Debtor, the reasons for the failure to make the payment and the steps taken to attempt to locate the Affected Debtor;

- 7.7 an opinion as to whether Receivables Management has made payments in accordance with the Agreement and the Undertakings; and
  - 7.8 an opinion as to whether the calculation of the payments made or amount credited to Affected Debtors under this Agreement is accurate.
8. The information in Clause 7.1 to 7.7 above should list the name of the corporate entity making the refund or credit, and whether it relates to debt owned by Receivables Management or third party clients.

#### **Loan account practices, systems and processes**

9. Receivables Management also undertake that:
- 9.1 they have ceased charging Interest and Fees on loans secured over consumer goods after they take Repossession and Sale Action;
  - 9.2 they will not, in future, charge Interest and Fees on loans secured over consumer goods after they take Repossession and Sale Action unless the law changes and the parties agree that this conduct will not breach the FTA;'
  - 9.3 they will provide to the Commission, by 30 April 2018 and at their own expense, confirmation from the independent accounting firm appointed that their compliance programme and their systems and processes have been modified to ensure that in future they will not charge Interest and Fees on loans secured over consumer goods after they take Repossession and Sale Action;
  - 9.4 if they become aware that they have charged Interest and Fees after Repossession and Sale on any loan other than the Affected Loan Accounts, they will refund or credit those borrowers in accordance with undertaking 2.2 within 60 days.

#### **Miscellaneous**

10. Receivables Management further undertake that they will:
- 10.1 request credit reference agencies to update their records to reflect Affected Debtors' revised account balances;
  - 10.2 confirm to the Commission by 31 March 2018 that they have requested credit reference agencies to update their records;
  - 10.3 provide any documents and information requested by the Commission from time to time for the purpose of assessing Receivables Management' compliance with the terms of this Undertaking and the Agreement; and

10.4 conduct detailed due diligence in future prior to acquiring or handling new debt, including where appropriate seeking vendor warranties, to ascertain and identify loans affected by Repossession and Sale Action, to prevent further recurrence.

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