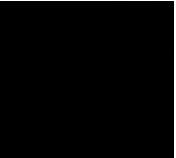


23 February

Settlement Agreement

Commerce Commission

ASB Bank Limited



4

Agreement dated

23 February

2021

Parties

Commerce Commission a statutory body established under s 8 of the Commerce Act 1986
(Commission)

ASB Bank Limited an incorporated company under the Companies Act 1993 (ASB)

(collectively, the Parties)

1 Introduction

- 1.1 Prior to June 2019, ASB's standard operating procedure for providing variation disclosure was not consistently followed where customers requested certain changes in branch or by telephone to home loan and personal loan terms. This meant that some customers were not given variation disclosure where it was required to be given. To that extent, between 6 June 2015 and 18 June 2019 inclusive (**Relevant Period**), ASB did not exercise the care of a responsible lender. This was a breach of section 9C(2)(a)(iii) of the lender responsibility principles of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).
- 1.2 This Agreement records the terms on which ASB and the Commission have agreed to resolve ASB's breach of section 9C(2)(a)(iii) of the CCCFA.
- 1.3 This Agreement will be made public by the Commission (including on the Commission's website).

2 Interpretation

- 2.1 For the purposes of this Agreement, in addition to those terms defined in the body of this Agreement:

Affected Customers means

- (a) the 26,088 customers (including joint borrowers where applicable) identified by ASB and notified to the Commission as entering into all home loan contracts with ASB before 6 June 2015, where those customers had a Relevant Variation on at least one occasion after 6 June 2015 (**Customer Cohort A**); and
- (b) the 47,032 customers (including joint borrowers where applicable) identified by ASB and notified to the Commission as entering into any home loan contracts with ASB on or after 6 June 2015, where those customers had at least one Relevant Variation (**Customer Cohort B**).

Agreement means this Settlement Agreement.

Days means working days as defined in High Court rule 1.3.

Investigation means the Commission's investigation into the issue reported by ASB regarding ASB's home loan and personal loan variation policies, processes and systems and ASB's compliance with the CCCFA in respect of the Relevant Variations in the Relevant Period.

ASB Information means all information provided by ASB to the Commission (whether voluntarily or under compulsion) relating to ASB's voluntary disclosure or the Investigation.

Relevant Account means a bank account into which funds can be readily transferred, including (a) the payment account from which the relevant Affected Customers' nominated home loan or personal loan payments are or were to be deducted, (b) a home loan account, (c) a transactional account, (d) a personal loan account, or (e) an account for a similar banking product.

Relevant Variation means a home loan or personal loan variation made, during the Relevant Period, as a result of a request by a customer to change their repayment date, amount or frequency made in person at a branch or by phone.

3 Breach of CCCFA

Investigation

- 3.1 In September 2019, ASB reported an issue to the Commission relating to the agreed variation disclosure it was required to provide to the Affected Customers.
- 3.2 ASB advised the Commission that on 6 June 2015, it implemented a new standard operating procedure, which allowed staff in a branch and in their call centre to make changes to the relevant repayment date, amount and frequency of personal loans and home loans upon request by the customer. According to the standard operating procedure, upon actioning such a request frontline staff were required to prepare and issue the customer with the relevant variation disclosure as required under the CCCFA. Upon review, ASB identified that it could not confirm that the process was followed consistently and that some customers were not given the required disclosure.
- 3.3 ASB has advised the Commission that it has updated its policies, process and procedures to ensure that all customers who requests a change in their repayment date, amount or frequency receive the required variation disclosure.
- 3.4 Following discussions between the Parties, the Commission has concluded, based on its Enforcement Criteria, that it would be in the public interest for it to resolve this matter on the basis that:
 - (a) ASB admits the breach identified by the Commission;
 - (b) ASB agrees to pay the Settlement Amount to Affected Customers as per clause 4.4 below; and
 - (c) the rights of Affected Customers (if any) are not compromised by this Agreement, as set out in clause 5.4 below.

4 Terms of settlement

- 4.1 The Parties have agreed to resolve all issues arising out of ASB's advice to the Commission (summarised in clause 3.2 above) and the Investigation on the terms set out below.

Admissions

- 4.2 ASB admits that, in breach of section 9C(2)(a)(iii) of the CCCFA, it failed to ensure that its systems and processes were sufficient to ensure that the required variation disclosure was given in all instances where it was required to be given during the Relevant Period. ASB also admits that during some of the Relevant Period it failed to have appropriate controls in place to promptly identify this failure and rectify it within a reasonable period.
- 4.3 The admissions in this Agreement are limited to the admissions expressly made. Nothing in this Agreement constitutes any wider admission of liability by ASB or any admission that any Affected Customers have suffered loss, harm or prejudice.

Settlement Amount and calculation of distribution between Affected Customers

- 4.4 ASB agrees to pay NZ\$8,123,304 (Settlement Amount) to the Affected Customers in accordance with the calculation and distribution methodologies set out at clauses 4.5 to 4.17 below.

Calculation methodology

- 4.5 The payment of the Settlement Amount is to occur by ASB paying an amount in respect of each Affected Customer (**Compensation Amount**) to be calculated pursuant to clause 4.6 below.
- 4.6 ASB is to calculate the Compensation Amount for Affected Customers as set out below:
- (a) For Customer Cohort A, a payment of \$68 per customer is to be made; and
 - (b) For Customer Cohort B, a payment of \$135 per customer is to be made.

Distribution methodology

Affected Customers with ASB Accounts

- 4.7 Within four months of the date of this Agreement, for any Affected Customers who have a Relevant Account with ASB, ASB shall pay the Compensation Amount by direct crediting the Relevant Account. For the avoidance of doubt, this may include crediting an Affected Customer's Compensation Amount against any outstanding balance the Affected Customer may have on a credit contract with ASB.
- 4.8 Within the timeframe set out at clause 4.7 of this Agreement, ASB will write to each Affected Customer to whom a payment has been made under that clause, in a form or forms agreed between the Commission and ASB, advising the Affected Customer of the payment to be made to them, including when the payment will be made, to which Relevant Account, and the reasons for making the payment.

Affected Customers without ASB Accounts

- 4.9 Within eight months of the date of this Agreement, for any Affected Customers who do not presently have a Relevant Account with ASB (**Affected Customers without ASB Accounts**):
- (a) ASB shall take reasonable steps using the information that it holds to obtain instructions as to a nominated Relevant Account into which the Compensation Amount can be paid. (For example, this may include contacting Affected Customers without ASB Accounts by SMS message, email, post or telephone.)
 - (b) If ASB contacts and obtains instructions from any Affected Customers without ASB Accounts as to a nominated Relevant Account into which the Compensation Amount can be paid, ASB shall pay the Compensation Amount by direct crediting the nominated Relevant Account.
- 4.10 Within the timeframe set out at clause 4.9 of this Agreement, ASB will write, at least once, to all Affected Customers without ASB Accounts in a form or forms agreed between the Commission and ASB.
- 4.11 To the extent that ASB is not successful in contacting any Affected Customers without ASB Accounts within eight months of the date of this Agreement, ASB shall use reasonable endeavours to locate those customers through engaging the assistance of a credit reporter to help trace customers.
- 4.12 If eleven months after the date of this Agreement and after using reasonable endeavours as required under clauses 4.9 and 4.11 above, there are any Affected Customers without ASB Accounts who ASB cannot locate the parties will proceed as per clauses 4.16 and 4.17 below.

Bankrupt Customers

- 4.13 Notwithstanding clauses 4.7 to 4.12 above, if ASB is aware any Affected Customers who are entitled to be paid a Compensation Amount under clause 4.5 above are bankrupt, the relevant Compensation Amount shall be paid to the Official Assignee, unless otherwise agreed with the Official Assignee.

Deceased Estates

- 4.14 If any Affected Customers who are entitled to be paid a Compensation Amount under clause 4.5 above are deceased, ASB shall, if possible, apply the Compensation Amount as in clause 4.6 above, otherwise, ASB shall, within the timeframe set out in clause 4.9 above:
- (a) use reasonable endeavours to contact the representative(s) of the deceased customer and write to the representative(s) of the deceased customer informing them of the entitlement to the Compensation Amount; and
 - (b) pay the Compensation Amount to a bank account nominated by the representative(s) of the deceased customer; or
 - (c) if the representative(s) of the deceased customer has not contacted ASB within 3 months of ASB's last attempt to contact them, proceed as set out at clauses 4.16 and 4.17 below.

- 4.15 Nine months after the date of this Agreement, ASB undertakes to provide a report to the Commission confirming the progress it has made in distributing the Settlement Amount, including a summary of payments made to the Affected Customers pursuant to this Agreement and an update on its progress locating Affected Customers without ASB Accounts.
- 4.16 Twelve months after the date of this Agreement, ASB undertakes to provide a final report to the Commission confirming the progress it has made in distributing the Settlement Amount, including a summary of the payments made to the Affected Customers pursuant to this Agreement, and an update on its progress locating Affected Customers without ASB Accounts (the **Payment Update**).
- 4.17 Within 30 days of receiving the Payment Update the parties will consider the amount of money which remains unpaid to Affected Customers, and will agree whether that remaining unpaid amount will be either:
- (a) Treated as unclaimed money under the Unclaimed Money Act 1971; or
 - (b) Paid to a charity to be nominated by the Commission.
- 4.18 Other than the Settlement Amount, in no circumstances is ASB required to pay any further amounts to the Commission or Affected Customers under this Agreement.

5 Closure of the Commission's Investigation

- 5.1 The Commission will close its Investigation upon the execution of this Agreement.
- 5.2 The Commission undertakes not to issue, encourage or support any civil or criminal legal proceedings against ASB in respect of matters related to the Investigation or this Agreement.
- 5.3 This Agreement is entered into without prejudice to the rights of Affected Customers in respect of the breach, which rights the Commission is not compromising on their behalf.
- 5.4 Nothing in this Agreement will limit or affect the ability of:
- (a) the Commission to issue proceedings against ASB in respect of matters not related to the Investigation, or in respect of conduct ASB engages in after the date of this Agreement or for breach of this Agreement; and
 - (b) any person, who has not consented to be bound by the terms of this Agreement from pursuing any rights that person considers would be available to them arising from matters contained in this Agreement.

6 Public statements

- 6.1 Subject to clauses 6.2 and 6.3 below, the Parties may make public statements in relation to the settlement after this Agreement has been executed. The Parties agree that any public statements relating to the Investigation and this Agreement will be made in good faith and be consistent with the spirit and intent of this Agreement.

- 6.2 Except as required by law, ASB agrees that it will not make any public comment in relation to this Agreement until after the Commission has issued any media comment notifying the public of this settlement.
- 6.3 The Parties agree to provide written copies of their initial press release to the other party at least one day in advance of their release to allow the other party the opportunity to comment. A party will not be obliged to accept the comments of the other party.

7 Miscellaneous

- 7.1 The Commission acknowledges that some of the ASB Information may be confidential and/or commercially sensitive and/or subject to privilege. The Commission agrees that, if it receives a request pursuant to the Official Information Act 1982 that covers or might cover and/or record or reveal all or some of the ASB Information (Information Request), it will notify ASB of that request and will consult with ASB as to whether there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982.
- 7.2 The Commission will notify ASB at least 5 days before complying with the request if, notwithstanding such consideration, it determines that no grounds exist on which it may refuse to comply with the Information Request.
- 7.3 Each party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 7.4 The Parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Agreement, and to demonstrate good faith in performing their obligations under this Agreement and in resolving any issues arising under this Agreement.
- 7.5 If necessary or desirable, the payment processes required to give full effect to the terms of this Agreement may be amended by agreement of the Parties.
- 7.6 The Parties by written agreement may vary any of the time periods stipulated in this Agreement, in which instance all other dependent time periods will be extended by the same amount of time.
- 7.7 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 7.8 The Parties agree that the New Zealand Courts will have exclusive jurisdiction to determine any proceedings arising out of or in connection with this Agreement and the matters to which it relates, including any proceedings brought by the Commission.
- 7.9 This Agreement constitutes the entire agreement between the Parties in relation to resolving the Investigation. It supersedes all prior communications, understandings or representations whether oral or written between the Parties.
- 7.10 No amendment to this Agreement will be effective unless it is in writing and signed by both of the Parties.
- 7.11 Any failure by any party to enforce any provision of this Agreement at any time will not operate as a waiver of that provision in respect of that act or omission or any other act or omission.

7.12 Any person signing this Agreement on behalf of one of the Parties warrants that by signing that they have all the necessary authority from that party to sign this Agreement on their behalf.

7.13 The Parties may enter into this Agreement by signing any number of counterparts, each of which will be treated as an original. All of the counterparts taken together will constitute a single document. A party may execute this Agreement by one signatory executing one counterpart and another signatory executing a different counterpart. A party's delivery of a signed pdf counterpart of this Agreement by email will have the same legal effect as that party's delivery of a signed original counterpart.

7.14 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:

(a) If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
Level 9
44 The Terrace
Wellington 6011

Attention: [REDACTED]

Email: [REDACTED]

(b) If addressed to ASB, by hand delivery or email to the following address:

ASB Bank Limited
Level 2
12 Jellicoe Street
North Wharf
Auckland

Attention: [REDACTED]

Email: [REDACTED]

Execution

Signed by and on behalf of the Commerce Commission





Chair

ANNA RAWLINGS

Commerce Commission

Signed by and on behalf of ASB Bank Limited



~~Director~~ authorised signatory


ASB Bank Limited



