

WESTPAC NEW ZEALAND LIMITED
COMMERCE COMMISSION

**SETTLEMENT AGREEMENT REGARDING VARIATION DISCLOSURE OF AGREED CHANGES
TO CERTAIN CONSUMER CREDIT CONTRACTS**

DATE *26th* OCTOBER 2018

This AGREEMENT is made on 26th 18th OCTOBER 2018



PARTIES

COMMERCE COMMISSION, a Crown Entity established under s 8 of the Commerce Act 1986 ("Commission")

WESTPAC NEW ZEALAND LIMITED, a company incorporated under the Companies Act 1993 and having its registered office at Westpac On Takutai Square, 16 Takutai Square, Auckland, New Zealand ("WNZL")

(collectively referred to as the "parties")

1. BACKGROUND TO AGREEMENT

- 1.1 The Commission has regulatory oversight in relation to the Credit Contracts and Consumer Finance Act 2003 ("CCCFA").
- 1.2 The Commission has investigated WNZL's compliance with s 22 of the CCCFA in respect of agreed changes to consumer credit contracts over the period 7 June 2012 to the end of April 2017 ("Investigation").

Difference in view as to proper interpretation of s 22(1)(a)

- 1.3 Section 22(1) of the CCCFA provides that, where parties to a consumer credit contract agree to change the contract, the lender must ensure that disclosure of the following information is made to every borrower under the contract:
 - (a) "full particulars of the change"; and
 - (b) "any other information prescribed by regulations".
- 1.4 Currently, there are no regulations that prescribe that any other information must be provided under s 22(1). Therefore, a lender will comply with s 22(1) if it discloses "full particulars of the change" pursuant to s 22(1)(a).
- 1.5 The Commission considers that the words "full particulars of the change" in s 22(1)(a) require lenders to provide borrowers with full particulars of any agreed change that would alter the key information required in initial disclosure under s 17 of the CCCFA, being that information set out in Schedule 1 of the CCCFA ("Schedule 1 Information").
- 1.6 WNZL disagrees with the Commission's interpretation of s 22(1)(a). WNZL's view is that the natural and ordinary meaning of "full particulars of the change" in the context of s 22(1)(a) is that only changes to the contractual terms of the consumer credit contract must be disclosed. The absence of a reference to Schedule 1 or s 17 in s 22 means that "full particulars of the change" does not require lenders to make reference to Schedule 1 Information when providing variation disclosure.
- 1.7 The practical implication of the difference in views between the parties is that if the Commission were right, for the personal loan variation disclosure which was the focus of the



Investigation, WNZL should have disclosed agreed changes to the applicable Schedule 1 Information which included (i) the total amount of payments; (ii) the total amount of interest payable; and (iii) the total number of payments.

WNZL's adjustment of its practices

- 1.8 In the course of the Investigation, WNZL provided examples to the Commission of personal loan variation disclosure used across the bank during the period covered by the investigation. During that process, WNZL identified that a small group of borrowers had received personal loan variation documentation that was different from WNZL's standard personal loan variation documentation (the former being the "bespoke documentation") and which did not disclose the total number of payments due. WNZL acknowledges that this omission occurred in circumstances where information as to the total number of payments was potentially an existing term of borrowers' consumer credit contracts.
- 1.9 When WNZL identified the potential issue with the bespoke documentation it stopped the use of that documentation and implemented variation disclosure documentation that includes disclosure of the total number of payments.
- 1.10 In respect of WNZL's standard personal loan variation documentation, WNZL acknowledges that, notwithstanding its view on the proper interpretation of s 22(1)(a), customers would benefit from receiving further information in relation to agreed changes to their consumer credit contracts, and intends as below to make disclosure adjustments to meet the Commission's expectations.

The Commission's regulatory response

- 1.11 The Commission recognises that:
- (a) there is ambiguity in the meaning and application of s 22;
 - (b) there is no applicable legal precedent on s 22;
 - (c) there is as yet no published Commission guidance on s 22(1)(a);
 - (d) there have been no clarifying regulations made under the authority of s 22(1)(b).
- 1.12 Taking these factors into account, and noting the adjustments to its disclosure practices that WNZL has made and commits to making in this Agreement, the Commission's compliance concerns have been resolved to its satisfaction and the Commission has resolved to close the Investigation.

2. AGREEMENT

Review and remediation

- 2.1 While WNZL does not accept that it has breached s 22 of the CCCFA, in order to bring an end to the Investigation, WNZL agrees that:
- (a) in giving variation disclosure of agreed changes, it will include updates of any applicable key information in the Schedule 1 Information that was provided to customers as initial disclosure under s 17 of the CCCFA that changed as a result of the agreed personal loan variation;

- (b) it will undertake a review and remediation exercise, on the terms set out in paragraphs 2.4 and 2.7 below (the "**Review and Remediation Terms**"), in relation to customers (i) who received the bespoke documentation in respect of personal loan agreements entered into on or after 6 June 2015; and (ii) for whom the relevant variation would have changed the number of payments due by those customers under their consumer credit contracts.
- 2.2 WNZL agrees that it will comply with paragraph 2.1(a) above within 3 months of the date of this Agreement.
- 2.3 WNZL agrees that it will share the review findings with the Commission within three months of this Agreement being signed. WNZL also agrees that, within 3 months of sharing the review findings with the Commission, it will provide a written assurance to the Commission that it has fully complied with the remediation steps as agreed in the Review and Remediation Terms.
- 2.4 The parties agree that the agreement in paragraph 2.1(a) will lapse if:
- (a) there is any amendment or repeal of the relevant provisions in the CCCFA relating to agreed variation disclosure under s 22(1); or
- (b) the agreement is rendered unnecessary or inconsistent with any regulations issued under s 22(1)(b) of the CCCFA.
- 2.5 WNZL and the Commission agree that the terms of reference for the review are to be as follows:
- (a) WNZL will take reasonable steps to identify the customers who received the bespoke documentation in relation to personal loan agreements entered into on or after 6 June 2015 and for whom the relevant variation may have changed the number of payments due under their consumer credit contracts (being the "**Affected Customers**");
- (b) For each of the Affected Customers, WNZL will identify:
- (i) the relevant time period in which there was potentially a continuing breach of s22(1)(a) of the CCCFA; and
- (ii) whether WNZL, during the period in which there was potentially a continuing breach of s22(1)(a) of the CCCFA, either (aa) referred the relevant consumer credit contract to a collection agency; or (bb) sold the relevant consumer credit contract.
- 2.6 WNZL and the Commission agree that following completion of the above review, WNZL will promptly undertake remediation on the following terms:
- (a) provide corrective disclosure which cures the potential s22(1)(a) breach to all Affected Customers: (i) whose consumer credit contracts remain in force and which continue to accrue costs of borrowing amounts; and (ii) who have not yet received effective corrective disclosure; and
- (b) repay the costs of borrowing paid by any of the Affected Customers who WNZL, during the period in which there was potentially a continuing breach of s22(1)(a) of

the CCCFA, either (i) referred the relevant consumer credit contract to a collection agency; or (ii) sold the relevant consumer credit contract.

- 2.7 In respect of the repayments at paragraph 2.6(b) above,
- (a) the cost of borrowing is to be calculated from the date at which the relevant variation took effect up to the date of repayment and to include all credit fees, default fees and interest charges;
 - (b) WNZL shall instruct an independent expert to check and report on the methodology used to calculate the repayments due; and
 - (c) WNZL may make the repayment by crediting that amount against any outstanding balance the Affected Customers remain liable for under their relevant consumer credit contract.
- 2.8 WNZL agrees that for the sub-set of Affected Customers identified in 2.6(b) above, it will not charge any further costs of borrowing amounts under the relevant consumer credit contract, unless that contract is later varied by agreement and effective disclosure provided.

3. NO FURTHER ACTION BY COMMISSION

- 3.1 The Commission will close its Investigation into WNZL upon the execution of the Agreement, on the basis that its compliance concerns have been resolved and subject to WNZL's performance of this Agreement.
- 3.2 Nothing in this Agreement will limit or affect the ability of:
- (a) the Commission to issue proceedings against WNZL in respect of matters not related to this investigation, or in respect of conduct engaged in by WNZL after the date of this Agreement or for breach of this Agreement;
 - (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 the matters contained in this Agreement.

4. PUBLICITY

- 4.1 The parties agree that:
- (a) this Agreement may be published on the Commission's website once it has been executed;
 - (b) subject to paragraph 4.2 below, the parties may make public statements in relation this Agreement once it has been executed. The parties agree that any public statements relating to the Investigation will be consistent with the spirit and intent of this Agreement.
- 4.2 Except as required by law, WNZL agrees that it will not make any public comment in relation to this Agreement until one hour after the Commission has issued a media release notifying the public of the Agreement. The Commission agrees to give WNZL at least 1 working day's notice of when it intends to issue the Commission's media release.

4.3 The parties agree to provide draft media releases to each other prior to those media releases being issued.

5. GENERAL

5.1 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.

5.2 This Agreement constitutes the entire agreement between the Commission and WNZL in relation to resolving the Investigation. It supersedes all prior communications, understandings or representations whether oral or written between the Commission and WNZL.

5.3 No amendment to this Agreement will be effective unless it is in writing and signed by both of the parties.

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

5.5 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.

SIGNATURES

Signed by and on behalf of
COMMERCE COMMISSION by:




Dr Mark Berry
Chair

26/10/18

Date

SIGNED for and on behalf of **WESTPAC NEW ZEALAND LIMITED** by:



Signature of witness

DANIEL ROBINSON

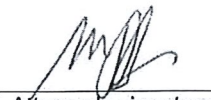
Name of witness

SOLICITOR

Occupation

AUCKLAND

City/town of residence



Attorney's signature

Michael John Hendriksen
Legal Counsel
Auckland

Name of Attorney

CERTIFICATE OF NON-REVOCATION OF POWER OF ATTORNEY

I, **MICHAEL JOHN HENDRIKSEN**, of Auckland in New Zealand, Bank Officer

HEREBY CERTIFY -

1. **THAT** by Deed dated 6 September 2006, a copy of which is deposited with Land Information New Zealand and numbered 7032934.1, **WESTPAC NEW ZEALAND LIMITED**, incorporated in New Zealand and having its principal place of business at 188 Quay Street, Auckland appointed me its attorney on the terms and subject to the conditions set out in that Deed.
2. **THAT** at the date of this certificate I am a Tier One Attorney for Westpac New Zealand Limited.
3. **THAT** at the date of this certificate I have not received any notice or information of the revocation of that appointment by the winding up or dissolution of **Westpac New Zealand Limited** or otherwise.

SIGNED at Auckland

On this 18th day of October 2018



Michael Hendriksen