

Settlement Agreement

Commerce Commission

Kiwibank Limited

Agreement dated

27 August

2020

Parties

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

Kiwibank Limited an incorporated company under the Companies Act 1993 (**Kiwibank**)

(collectively the **Parties**)

Introduction

- A Prior to April 2019, Kiwibank did not have in place robust home loan agreed variation disclosure policies, processes and systems for certain types of changes requested by borrowers to their home loans in particular circumstances. As a result, between 6 June 2015 and 31 March 2019 inclusive (**Relevant Period**), Kiwibank 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**).
- B This Agreement records the terms on which Kiwibank and the Commission have agreed to resolve Kiwibank's breach of section 9C(2)(a)(iii) of the CCCFA.
- C This Agreement will be made public by the Commission (including on the Commission's website).

1 Interpretation

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

Affected Customers means

- (a) the 13,375 customers (including joint borrowers where applicable) identified by Kiwibank and notified to the Commission as entering into home loan contracts with Kiwibank or its Relevant Subsidiaries before 6 June 2015, where those customers had a Relevant Variation on at least one occasion after 1 July 2017 but before 1 April 2019 (**Customer Cohort A**); and
- (b) the 35,088 customers (including joint borrowers where applicable) identified by Kiwibank as entering into home loan contracts with Kiwibank or its Relevant Subsidiaries on or after 6 June 2015, where those customers had a Relevant Variation on at least one occasion before 1 April 2019 (**Customer Cohort B**).

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

Investigation means the Commission's investigation into Kiwibank's and its Relevant Subsidiaries' home loan variation policies, processes and systems and those entities' related compliance with the CCCFA in respect of home loan variations in the Relevant Period.

Kiwibank Information means all information provided by or on behalf of Kiwibank and the Relevant Subsidiaries to the Commission (whether voluntarily or under compulsion) relating to Kiwibank's voluntary disclosure or the Investigation.

Related Parties of Kiwibank include:

- (a) its past and present directors, officers, employees and agents; and
- (b) its related companies (including the Relevant Subsidiaries), and each related company's past and present directors, officers, employees and agents, where "related company" has the same meaning as in the Companies Act 1993.

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 payments are or were to be deducted, (b) a home loan account, (c) a transactional account, (d) a credit card account, or (e) an account for a similar banking product.

Relevant Subsidiaries means any of Kiwibank's subsidiaries that issue home loans.

Relevant Variation means a simple home loan variation requested by a customer which was of a particular type and in circumstances (including due to the channel used or the combination of variations requested at the same time) for which Kiwibank did not have robust home loan agreed variation policies, procedures and systems.

2 Background: Breach of the CCCFA

- 2.1 In August 2019, Kiwibank reported an issue to the Commission relating to the agreed variation disclosure it was required to provide to the Affected Customers.
- 2.2 Kiwibank advised the Commission that the issue related to the robustness of its home loan variation policies, processes and systems in the Relevant Period where, in certain circumstances, some Affected Customers requested simple changes to their home loan contracts, such as re-fixing their interest rates or changing their repayment amounts.
- 2.3 Kiwibank advised the Commission of the potential issue in clause 2.2 on behalf of Kiwibank and its Relevant Subsidiaries in circumstances where Kiwibank, under contractual arrangements with the Relevant Subsidiaries, is responsible for administering the Relevant Subsidiaries' home loan contracts.
- 2.4 Kiwibank has advised the Commission that:
 - (a) it amended and improved its home loan variation policies, processes and systems from 1 April 2019; and
 - (b) it has undertaken, and is in the process of finalising, a confirming disclosure exercise in respect of the Affected Customers.
- 2.5 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) Kiwibank admits the breach identified by the Commission;

- (b) Kiwibank agrees to pay the Settlement Amount to Affected Customers as per clause 3.3 below; and
- (c) the rights of Affected Customers (if any) are not compromised by this Agreement, as set out in clause 4.4 below.

3 Terms of settlement

Admissions

- 3.1 Kiwibank admits that, in breach of section 9C(2)(a)(iii) of the CCCFA, it failed to have in place robust home loan variation disclosure policies, procedures and systems for certain types of home loan variations in the Relevant Period.
- 3.2 The admissions in this Agreement are limited to those admissions expressly made. Nothing in this Agreement constitutes any wider admission of liability by Kiwibank or its Related Parties or any admission that any Affected Customers have suffered loss, harm or prejudice.

Settlement Amount and calculation of distribution between Affected Customers

- 3.3 Kiwibank agrees to pay NZ\$5,228,625 (**Settlement Amount**) to the Affected Customers in accordance with the calculation and distribution methodologies set out at clauses 3.4 to 3.16 below.

Calculation Methodology

- 3.4 The payment of the Settlement Amount is to occur by Kiwibank paying an amount in respect of each Affected Customer (**Compensation Amount**) to be calculated pursuant to clause 3.5 below.
- 3.5 Kiwibank is to calculate the Compensation Amount for Affected Customers as set out below:
 - (a) For Customer Cohort A, a payment of \$63 is to be made; and
 - (b) For Customer Cohort B, a payment of \$125 is to be made.

Distribution methodology

Affected Customers with Relevant Accounts

- 3.6 Within three months of the date of this Agreement, for any Affected Customers who have a Relevant Account with Kiwibank or the Relevant Subsidiaries (**Kiwibank Account**), Kiwibank shall pay the Compensation Amount by direct crediting a Kiwibank 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 Kiwibank or the Relevant Subsidiaries.
- 3.7 Within the timeframe set out at clause 3.6 of this Agreement, Kiwibank will write to each Affected Customer to whom a payment has been made under that clause, in a form or forms agreed by the Commission and Kiwibank.

Affected Customers without Relevant Accounts

- 3.8 Within six months of the date of this Agreement, for any Affected Customers who do not presently have a Kiwibank Account (**Affected Customers without Kiwibank Accounts**):
- (a) Kiwibank 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 Kiwibank Accounts by SMS message, email, post or telephone.)
 - (b) If, Kiwibank contacts and obtains instructions from any Affected Customers without Kiwibank Accounts as to a nominated Relevant Account into which the Compensation Amount can be paid, Kiwibank shall pay the Compensation Amount by direct crediting the nominated Relevant Account.
- 3.9 Within the timeframe set out at clause 3.8 of this Agreement, Kiwibank will write, at least once, to all Affected Customers without Kiwibank Accounts in a form or forms agreed by the Commission and Kiwibank.
- 3.10 To the extent that Kiwibank is not successful in contacting any Affected Customers without Kiwibank Accounts within six months of the date of this Agreement, Kiwibank shall use reasonable endeavours to locate those customers through engaging the assistance of a credit reporter to help trace customers.
- 3.11 If, nine months after the date of this Agreement and after using reasonable endeavours as required under clauses 3.8 and 3.10 above, there are any Affected Customers without Kiwibank Accounts who Kiwibank cannot locate the parties will proceed as per clauses 3.15 and 3.16 below.

Bankrupt Customers

- 3.12 Notwithstanding clauses 3.6 to 3.11 above, if Kiwibank is aware any Affected Customers who are entitled to be paid a Compensation Amount under clause 3.4 above are bankrupt, the relevant Compensation Amount shall be paid to the Official Assignee, unless otherwise agreed with the Official Assignee.

Deceased Estates

- 3.13 If any Affected Customers who are entitled to be paid a Compensation Amount under clause 3.4 above are deceased, Kiwibank shall, if possible, apply the Compensation Amount as in clause 3.6 above, otherwise, Kiwibank shall:
- (a) for Affected Customers within Customer Cohort A, proceed as set out at clauses 3.15 and 3.16 below; and
 - (b) for Affected Customers within Customer Cohort B, within the timeframe set out in clause 3.8 above,
 - (i) 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

- (ii) pay the Compensation Amount to a bank account nominated by the representative(s) of the deceased customer; or
 - (iii) if the representative(s) of the deceased customer has not contacted Kiwibank within 3 months of Kiwibank's last attempt to contact them, proceed as set out at clauses 3.15 and 3.16 below.
- 3.14 Seven months after the date of this Agreement, Kiwibank 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 Kiwibank Accounts.
- 3.15 Ten months after the date of this Agreement, Kiwibank 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 Kiwibank Accounts (the **Payment Update**).
- 3.16 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.
- 3.17 Other than the Settlement Amount, in no circumstances are Kiwibank or the Relevant Subsidiaries required to pay any further amounts to the Commission or Affected Customers under this Agreement.

4 Closure of the Commission's Investigation

- 4.1 The Commission will close its Investigation upon the execution of this Agreement.
- 4.2 The Commission undertakes not to issue, encourage or support any civil or criminal legal proceedings against Kiwibank and/or the Relevant Subsidiaries and/or any of the Related Parties in respect of matters related to the Investigation or this Agreement.
- 4.3 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.
- 4.4 Nothing in this Agreement will limit or affect the ability of:
 - (a) the Commission to issue proceedings against Kiwibank in respect of matters not related to the Investigation, or in respect of conduct Kiwibank engages in after the date of this Agreement or for breach of this Agreement; and
 - (b) any person, other than the Relevant Subsidiaries, 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.

5 Public statements

- 5.1 Subject to clauses 5.2 and 5.4 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.
- 5.2 Kiwibank understands that this Agreement does not prevent the Commission from making any public statement regarding its views of whether Kiwibank's conduct may amount to a breach of any other legal obligation.
- 5.3 Except as required by law, Kiwibank 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.
- 5.4 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.


6 Miscellaneous

- 6.1 While the Relevant Subsidiaries are not parties to this Agreement, the parties acknowledge that the Relevant Subsidiaries are relying upon, and may enforce the Commission's obligations in this Agreement, including in clauses 4.1 and 4.2.
- 6.2 The Commission acknowledges that some of the Kiwibank 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 Kiwibank Information (**Information Request**), it will notify Kiwibank of that request and will consult with Kiwibank as to whether there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982. The Commission will notify Kiwibank 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.
- 6.3 Each party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 6.4 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.
- 6.5 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.
- 6.6 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.
- 6.7 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.

- 6.8 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.
- 6.9 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.
- 6.10 No amendment to this Agreement will be effective unless it is in writing and signed by both of the Parties.
- 6.11 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.
- 6.12 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.
- 6.13 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.
- 6.14 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 Kiwibank, by hand delivery or email to the following address:
- Kiwibank Limited
Level 9, 20 Customhouse Quay, Wellington 6011
- Attention: [REDACTED]
- Email: [REDACTED]

Execution

Signed by and on behalf of **New Zealand
Commerce Commission**



Signature of Chair


Anna Rawlings

Name of Chair

Signed by and on behalf of **Kiwibank
Limited**



Signature of Director/authorised signatory



Name of Director/authorised signatory