

# Settlement Agreement

Commerce Commission

Westpac New Zealand Limited

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Agreement dated

31 January

2020

## Parties

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

**Westpac New Zealand Limited** an incorporated company under the Companies Act 1993  
(Westpac)

(collectively the Parties)

## 1 Introduction

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- 1.1 Between 16 May 2017 and 2 March 2018 inclusive (**Relevant Period**), Westpac failed to provide Initial Disclosure before entering into 19,365 personal credit card contracts, in breach of s 17 of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**).
- 1.2 This Agreement records the terms on which Westpac and the Commission have agreed to resolve Westpac's breach of s 17 of the CCCFA.
- 1.3 This Agreement will be made public by the Commission (including on the Commission's website).

## 2 Interpretation

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

**Costs of Borrowing** means any credit fee, or default fee, charged by Westpac, plus any interest charged by Westpac, to the Affected Customer for their credit card contract until the date the Affected Customer was provided corrective Initial Disclosure as set out at clause 3.5 below.

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

**Initial Disclosure** means the information that Westpac is required to provide Affected Customers under s 17 of the CCCFA.

**Investigation** means the Commission's investigation into Westpac's failure to provide Initial Disclosure before entering into personal credit card contracts in the Relevant Period.

**Related Parties** of Westpac include:

- (a) its past and present directors, officers, employees and agents; and
- (b) its related companies 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.

**Westpac Information** means all information provided by or on behalf of Westpac to the Commission (whether voluntarily or under compulsion) relating to Westpac's voluntary disclosure, the Investigation or the Proceedings.

### **3 Breach of the CCCFA**

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#### **Initial Disclosure**

- 3.1 In March 2018, Westpac reported to the Commission that it had failed to provide Initial Disclosure to some credit card customers who entered into credit card contracts with Westpac in the Relevant Period (the customers being the **Affected Customers** and the relevant credit card contracts being the **Affected Contracts**). The circumstances of Westpac's report to the Commission is explained at clause 3.4 below.
- 3.2 Westpac's failure to provide Initial Disclosure to the Affected Customers, included failing, before entering into the Affected Contracts, to provide initial disclosure of:
- (a) the customer's personal credit limit, annual account fee, annual interest rate, initial unpaid balance, and the date the first statement would be sent;
  - (b) the name of the creditor, fees, cancellation rights, hardship rights, complaints procedures, information on continuing disclosure, and FSPR number; and
  - (c) Westpac's standard terms and conditions for credit cards.
- 3.3 Westpac advised the Commission that the failure to provide Initial Disclosure arose when part of its IT system was upgraded, which meant Westpac's credit card management system did not receive instructions to send an Initial Disclosure letter to the Affected Customers. Westpac did not have a control in place to alert it to this problem.
- 3.4 Westpac self-identified the error in March 2018 and advised the Commission of the error at that point. From 3 March 2018 Westpac provided Initial Disclosure to customers who made new credit card applications and whose applications in that respect were approved. Westpac also advised the Commission that it had:
- (a) provided corrective Initial Disclosure to the Affected Customers in March and April 2018; and
  - (b) put in place additional controls and made system changes in order to stop the issue arising again.
- 3.5 Westpac has waived or refunded the fees and interest for 229 Affected Customers. Those Affected Customers' accounts had been referred to Westpac's collections team and their accounts were either past or very near three months in default prior to receipt of the corrective disclosure.

#### **Breach is admitted**

- 3.6 Following review and analysis of Westpac's information in the course of the Investigation, on 11 July 2019 the Commission commenced High Court civil proceedings against Westpac, in the form set out at Schedule One, for failing to provide the Affected Customers with Initial Disclosure in breach of s 17 of the CCCFA (CIV-2019-404-1392) (**Proceedings**).



- 3.7 In the Proceedings, the Commission claims that Westpac breached s 17 of the CCCFA by failing to provide Initial Disclosure in that Westpac did not:
- (a) give the disclosure statement to the Affected Customers;
  - (b) send the disclosure statement by post to the Affected Customers' last known places of residence or an address specified by each Affected Customer; or
  - (c) in the case of electronic communication, send the disclosure statement to the information system specified by each of the Affected Customers.
- 3.8 Following discussions between the Parties, the Commission has concluded, based on the Solicitor-General's Prosecution Guidelines and its Enforcement Criteria, that it would be in the public interest for it to resolve the Proceedings on the basis that:
- (a) Westpac agrees to admit the breach of s 17 of the CCCFA pleaded by the Commission as the first cause of action in the Proceedings, by failing to ensure that it provided Initial Disclosure.
  - (b) The Commission agrees to discontinue the second cause of action in the Proceedings, being an alleged breach of s 9 of the Fair Trading Act 1986.
  - (c) Westpac agrees to pay the Settlement Amount to Affected Customers as per clause 3.23 below.
  - (d) Westpac agrees to make the Costs Payment to the Commission as set out in clause 3.22 below.
  - (e) The rights of Affected Customers are not compromised by this Agreement, as set out in clause 4.3 below.
- 3.9 For its part, Westpac has decided to resolve the Proceedings in order to bring a prompt end to this matter.
- 3.10 The Parties have agreed to resolve the issues arising out of the Proceedings on the terms set out below.

#### **Admissions**

- 3.11 Westpac admits that, in failing to provide Initial Disclosure, Westpac breached s 17 of the CCCFA.
- 3.12 The admissions in this Agreement are limited to those admissions expressly made. Nothing in this Agreement constitutes:
- (a) any wider admission of liability by Westpac or its Related Parties;
  - (b) any admission or agreement as to the correct interpretation or application of the CCCFA so far as it relates to the consequences of a failure to provide initial disclosure;
  - (c) any admission that any Affected Customers have suffered loss or harm or have been prejudiced as a result of Westpac's failure to provide Initial Disclosure; or



- (d) any admission that it would be liable for any fines, penalties, refunds or damages at law, whether under the CCCFA or Fair Trading Act 1986 or any other legislation, regulation or rule of law.

**Court procedure for declaratory order**

- 3.13 By 31 January 2020, Westpac will file and serve a statement of defence in the form attached at **Schedule Two**.
- 3.14 Within 14 Days of Westpac serving its Statement of Defence in accordance with clause 3.13 above the Commission will file a notice of discontinuance in the High Court discontinuing the second cause of action in the Proceedings in the form set out at **Schedule Three**.
- 3.15 Within 14 Days of Westpac filing and serving its statement of defence in accordance with clause 3.13 above, the Commission will file an interlocutory application seeking a declaratory order on admission of facts, along with an affidavit in support. This application will seek an order declaring that the conduct as pleaded in paragraphs 3.1 to 3.6 and 4.1 of the statement of claim, to the extent admitted in paragraphs 3.1 to 3.6 and 4.1 of the statement of defence, breached s 17 of the CCCFA. The parties will file a joint memorandum of counsel in the form attached at **Schedule Four**, seeking that the declaratory order is made without a hearing.
- 3.16 Westpac will consent to the Court making the declaration sought by the Commission in accordance with clause 3.15 above.
- 3.17 The Parties agree to provide to each other, before filing, any Court documents that either intends to file, and to provide a reasonable opportunity for the recipient to comment on the contents.
- 3.18 The Commission agrees that it will not seek any relief in the Proceedings other than the declaration sought in accordance with clause 3.15 above.
- 3.19 If the Court requires a hearing, the Parties will cooperate to arrange for the Commission's application to be heard by the Court as soon as reasonably possible.
- 3.20 The other provisions of this Agreement remain in force irrespective of the outcome of the Commission's application under clause 3.15 above.
- 3.21 The Parties agree to take whatever steps are required to bring the Proceedings to a conclusion after there is a judgment on the Commission's interlocutory application under clause 3.15 above.

**Payment of costs**

- 3.22 Within 15 Days of the execution of this Agreement, Westpac will pay the Commission NZ\$50,000 (including GST, if any) towards the Commission's costs in relation to the Investigation and Proceedings (**Costs Payment**).

**Settlement Amount and calculation of distribution between Affected Customers**

- 3.23 Westpac agrees to pay not less than NZ\$3,700,000 (**Settlement Amount**) to Affected Customers in accordance with the calculation and distribution methodologies set out at clauses 3.24 to 3.25 below.



### Calculation Methodology

- 3.24 The payment of the Settlement Amount is to occur by Westpac paying an amount in respect of each Affected Contract (**Compensation Amount**). That Compensation Amount is an amount to be paid to consumers in compensation for Westpac's failure to provide Initial Disclosure, and is to be the higher of:
- (a) the Cost of Borrowing under the Affected Contract; or
  - (b) the Minimum Payment amount as defined at clause 3.25 below.
- 3.25 Westpac is to calculate a minimum payment (**Minimum Payment**) at an amount that ensures the total payments made in respect of all Affected Contracts, including the payment of Costs of Borrowing to Affected Customers where applicable, and the waiver or refund of the fees and interest for the 229 Affected Customers as set out in clause 3.5 above, is not less than the Settlement Amount.
- 3.26 Within 20 Days of the execution of this Agreement Westpac will provide the amount of the Minimum Payment to the Commission.
- 3.27 For the avoidance of doubt, the 229 Affected Customers described in clause 3.5 above will not receive any further Cost of Borrowing amounts (these amounts having already been refunded) but those customers may receive a further payment, if required, to ensure that those customers receive, at least, the Minimum Payment amount.

### Distribution methodology

#### *Affected Customers with Relevant Accounts*

- 3.28 Within four months of the date of this Agreement, for any Affected Customers who are current Westpac customers and hold a credit card account, transactional account or similar banking product into which funds can be readily transferred (**Relevant Account**), Westpac shall pay the Compensation Amount by direct crediting a Relevant Account. For the avoidance of doubt, this may include crediting a customer's Compensation Amount against any outstanding balance the customer may have on a credit contract with Westpac.

#### *Affected Customers without Relevant Accounts*

- 3.29 Within six months of the date of this Agreement, for any Affected Customers who do not presently have a Relevant Account with Westpac (**Affected Customers without Relevant Accounts**):
- (a) Westpac shall take reasonable steps using the information that it holds on such Affected Customers without Relevant Accounts to identify a current postal address for each customer. (For example, this may include contacting Affected Customers without Relevant Accounts by SMS message, email, post or telephone.)
  - (b) If, in the course of taking the reasonable steps in clause (a) above, Westpac obtains instructions from any Affected Customers as to a nominated bank account into which the Compensation Amount can be paid, Westpac shall pay the Compensation Amount by direct crediting the relevant nominated account.

- (c) If Westpac can identify a current postal address for any Affected Customers without Relevant Accounts but has not obtained instructions as to a nominated bank account for those customers, Westpac shall provide the Compensation Amount by sending a cheque to those customers at the relevant postal addresses.
- 3.30 To the extent that Westpac cannot identify a current postal address for any Affected Customers without Relevant Accounts or if any Affected Customers without Relevant Accounts do not present cheques received within 6 months of the date they were posted, Westpac shall use reasonable endeavours to locate those customers using external credit reporting searches.
- 3.31 Shortly before or on the date on which Westpac commences direct crediting Compensation Amounts to Customers with Relevant Accounts pursuant to clause 3.28 above, Westpac shall in the REDNews section of its website (with a link displayed on its home page), or in a place of equivalent prominence on its website, publish a notification that: (i) explains that payments are being made under this Agreement to Affected Customers and the reasons for those payments, namely the failure to make Initial Disclosure; and (ii) provides a Westpac contact email address for any current or former customers who have any queries. This notification shall appear for at least four weeks or throughout the period of time that Westpac is undertaking the activities in clause 3.29 above, whichever is the longer.
- 3.32 If, twelve months after the date of this Agreement and after using reasonable endeavours as required under clause 3.30 above, there are any Affected Customers without Relevant Accounts who Westpac cannot locate, or who do not cash the cheques sent to them by Westpac, the parties will proceed as per clauses 3.36 and 3.37 below.

*Bankrupt Customers*

- 3.33 Notwithstanding clauses 3.28 to 3.29 above, if any Affected Customers who are entitled to be paid a Compensation Amount under clause 3.24 above are bankrupt, the relevant Compensation Amount shall be paid to the Official Assignee, unless otherwise agreed with the Official Assignee.

*Deceased Estates*

- 3.34 Notwithstanding clauses 3.28 to 3.29 above, if any Affected Customers who are entitled to be paid a Compensation Amount under clause 3.24 above are deceased:
- (a) Westpac shall 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 at the direction (if any) of the representative(s) of the deceased customer; or
  - (c) if the representative(s) of the deceased customer has not contacted Westpac within 12 months of Westpac's last attempt to contact them, the parties will proceed as set out at paragraph 3.37 below.
- 3.35 Nine months after the date of this Agreement, Westpac 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 Relevant Accounts.

- 3.36 Twelve months after the date of this Agreement, Westpac 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 Relevant Accounts (**Payment Update**).
- 3.37 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.
- 3.38 Other than the Settlement Amount and Costs Payment, in no circumstances is Westpac required to pay any further amounts to the Commission or Affected Customers under this Agreement.

#### **Communications with the Affected Customers**

- 3.39 As part of communications with the Affected Customers, for those customers for whom Westpac can locate a current postal or current email address, Westpac will write to customers advising:
- (a) that Westpac failed to provide Initial Disclosure in respect of the Affected Contract;
  - (b) that Westpac has entered into this Agreement with the Commission;
  - (c) the amount of the Compensation Amount owed to the Affected Customer; and
  - (d) details of how the Compensation Amount has or can be paid.

## **4 Other Proceedings**

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- 4.1 The Commission undertakes not to issue, encourage or support any civil or criminal legal proceedings against Westpac and/or each of its Related Parties in respect of matters that are the subject of the Proceedings.
- 4.2 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.
- 4.3 Nothing in this Agreement will limit or affect the ability of:
- (a) the Commission to issue proceedings against Westpac in respect of matters not related to the Proceedings, or in respect of conduct Westpac 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.

## 5 Public statements

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- 5.1 Subject to clauses 5.2 and 5.3 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 Proceedings will be made in good faith and be consistent with the spirit and intent of this Agreement.
- 5.2 Westpac understands that this Agreement does not prevent the Commission from making any public statement regarding its views of whether Westpac's conduct in failing to provide Initial Disclosure may, in the Commission's view, amount to a breach of any other section of the CCCFA, or any other statute.
- 5.3 Except as required by law, Westpac agrees that it will not make any public comment in relation to this Agreement or the Proceedings 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 hour 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

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- 6.1 The Commission acknowledges that some of the Westpac 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 Westpac Information (**Information Request**), it will notify Westpac of that request and will consult with Westpac as to whether there are grounds of the requested material to be withheld under Part 1 of the Official Information Act 1982.
- 6.2 Each party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 6.3 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.
- 6.4 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.
- 6.5 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.
- 6.6 Where Westpac or the Commission take any step in the payment process of this Agreement late, all dependent dates shall be extended by the same period.



- 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 Proceedings. 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: Mary-Anne Borrowdale, General Counsel, Competition and Consumer, Commerce Commission
- Email: mary-anne.borrowdale@comcom.govt.nz
- (b) If addressed to Westpac, by hand delivery or email to the following address:
- Westpac New Zealand Limited  
Level 4SS, Westpac on Takutai Square, Auckland 1140
- Attention: [REDACTED] General Manager Regulatory Affairs, Corporate Legal Services and General Counsel NZ
- Email: [REDACTED]



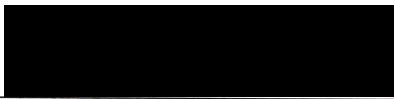
**Execution**

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

  
\_\_\_\_\_  
Chair

*ANNA RAWLINGS*  
\_\_\_\_\_  
New Zealand Commerce Commission

**Signed by and on behalf of Westpac New  
Zealand Limited**

  
\_\_\_\_\_  
Attorney's signatory

  
\_\_\_\_\_  
Name of Attorney