

WESTPAC NEW ZEALAND LIMITED
THE COMMERCE COMMISSION
THE FINANCIAL MARKETS AUTHORITY

SETTLEMENT AGREEMENT REGARDING EXCHANGE RATE APPLIED TO TRANSACTIONS BY
WESTPAC CUSTOMERS UTILISING WESTPAC BANKING CORPORATION ATMS IN AUSTRALIA

DATE 12 February 2015 *Man RK*

THIS AGREEMENT IS made on 12 February 2015

PARTIES:

This agreement is entered into:

- BETWEEN** Westpac New Zealand Limited (**WNZL**)
- AND** The Commerce Commission, an independent Crown entity established under section 8 of the Commerce Act 1986 (**Commission**)
- AND** The Financial Markets Authority, an independent Crown entity established under section 6 of the Financial Markets Authority Act 2011 (**FMA**)

1. RECITALS

- 1.1. The Commission and the FMA have regulatory oversight in relation to the Fair Trading Act 1986 and the fair dealing provisions of the Financial Markets Conduct Act 2013 respectively (together Acts).
- 1.2. In September 2014, WNZL approached the Commission and the FMA to notify them of conduct that may have breached the Acts.
- 1.3. The potential breaches of the Acts relate to representations made by WNZL about foreign exchange charges imposed on WNZL customers who used a WNZL debit card or a VISA DebitPLUS card (**Debit Card**) to withdraw cash from Westpac Banking Corporation (**WBC**) ATMs in Australia between 8 February 2010 and 26 August 2014 (**Relevant Period**).
- 1.4. The Debit Card terms stated that Australian WBC ATM transactions would be processed and converted into New Zealand dollars using a rate of exchange fixed by the credit card schemes (i.e. Visa and Mastercard).

Trans-Tasman Link

- 1.5. In February 2010, WNZL introduced a proprietary scheme called Trans-Tasman Link (TTL) for processing Australian currency withdrawals from WBC ATMs by WNZL Debit Card customers. TTL is an internal settlement process that replaced the card schemes for these transactions.

Representations to customers about currency conversion charges

- 1.6. Throughout the Relevant Period, the terms and conditions for relevant debit cards stated that foreign currency transactions would be processed and converted into New Zealand dollars using a rate of exchange fixed by the card schemes.

- 1.7. While WNZL intended the introduction of TTL to be neutral from a WNZL Debit Card customer's perspective, during the Relevant Period, the rate of exchange used by TTL did not maintain parity with the card schemes' rates of exchange. As a result some customers paid more for that currency than the Debit Card conditions of use contemplated.
- 1.8. Upon becoming aware of issue, WNZL notified the FMA and the Commission. Since that notification, WNZL has worked with the Commission and the FMA. This included the provision of a detailed report on the internal investigation WNZL undertook (**Investigation**), confirmation of the remedial steps WNZL has already undertaken, and the refund process referred to in this Agreement. The refund process will result in WNZL refunding some \$3.9 million, together with interest, to affected customers.
- 1.9. The Commission and the FMA have considered whether WNZL's conduct may have contravened the Acts.

2. INTERPRETATION

- 2.1. In this Agreement, the following expressions have the following meanings, unless the context dictates otherwise:
 - (a) The headings are for ease of reference only and shall not affect the interpretation of this Agreement;
 - (b) Words denoting the singular include the plural and vice versa;
 - (c) Words denoting persons include bodies corporate and unincorporated associations and vice versa;
 - (d) Where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
 - (e) "Including" and similar words do not imply limitation;
 - (f) Reference to a party includes its respective permitted assignees, successors, executors and administrators; and
 - (g) Monetary amounts are in New Zealand Dollars.
- 2.2. In this Agreement, unless otherwise specified or the context otherwise requires, a reference to:
 - (a) a party is a reference to a party to this Agreement; and
 - (b) a clause is to a clause in this Agreement.

2.3. In this Agreement:

- (a) **Affected Customer** means a WNZL customer who utilised a Debit Card to withdraw Australian currency from a WBC ATM during the Relevant Period;
- (b) **Charity** means the Mangere Budgeting Services Trust;
- (c) **Debit Card** has the meaning ascribed to it by clause 1.3. of this Agreement;
- (d) **Exchange Rate Differential** means
 - (i) the difference between the TTL charge paid by an Affected Customer and the amount that would have been charged by the relevant card scheme; and
 - (ii) the currency conversion fee (2.5%) charged on that amount calculated in para (i) above.
- (e) **Interest** means simple interest at 5% per annum;
- (f) **Investigation** has the meaning ascribed to it by clause 1.8 of this Agreement;
- (g) **Refund**, for each customer, means the total of the Exchange Rate Differential and the Interest;
- (h) **Related Parties** of WNZL includes a "related company" as defined in the Companies Act 1993, and past and present directors, officers, employees and agents of WNZL and its related companies; and
- (i) **Relevant Period** has the meaning ascribed to it at clause 1.3. of this Agreement.
- (j) **Settlement** means the refund process described in clause 4 of this Agreement;
- (k) **TTL Charge** means any rate of exchange charged to Affected Customers by WNZL for Australian currency withdrawals from WBC ATMs during the Relevant Period.

3. **AGREEMENT**

- 3.1. The Commission considers that WNZL has engaged in conduct that is likely to have breached the Fair Trading Act 1986.
- 3.2. The FMA considers that WNZL has engaged in conduct that is likely to have breached the Financial Markets Conduct Act 2013.
- 3.3. WNZL acknowledges that the conduct that is the subject of this Agreement may have contravened the Acts.

- 3.4. The Parties agree that this Agreement sets out the basis upon which the Commerce Commission and the FMA concerns arising from this matter are to be resolved.

4. SETTLEMENT

The Refund

- 4.1. WNZL will calculate the Exchange Rate Differential for each Affected Customer.
- 4.2. WNZL will then pay the Refund to each eligible Affected Customer in accordance with the refund process set out at clause 4.3.

Refund Process

- 4.3. WNZL agrees to use best endeavours to identify all Affected Customers and:

Current customers

- (a) for those Affected Customers who are WNZL customers at the date of this Agreement and are entitled to a Refund of \$5.00 or more:
- (i) to write to those customers informing them of their entitlement to the Refund within twenty-one (21) days of this Agreement being executed; and
 - (ii) pay the Refund to the customer's account within five days of issuing the letter described in clause 4.2.(a)(i).

Former customers

- (b) for those Affected Customers who are not WNZL customers at the date of this Agreement and are entitled to a Refund of \$5.00 or more:
- (i) to use all reasonable endeavours to obtain the mailing addresses for the former customers and write to those customers informing them of their entitlement to the Refund; or
 - (ii) if no mailing address is available, to use all reasonable endeavours to bring their entitlement to the Refund to the notice of the former customers; and
 - (iii) pay the Refund at the direction of the former customer; or
 - (iv) if the former customer has not contacted WNZL within 60 days of WNZL's last attempt to contact them, to pay the Refund to the Charity.

Deceased Estates

- (c) for any deceased Affected Customer entitled to a Refund of \$100.00 or more:

- (i) to make reasonable endeavours to obtain the mailing addresses for the representative(s) of the deceased customer and write to the representative(s) of the deceased customer informing them of the entitlement to the Refund; or
 - (ii) if no mailing address is available, to make reasonable endeavours to bring their entitlement to the Refund to the notice of the representative(s) of the deceased customer; and
 - (iii) pay the Refund at the direction (if any) of the deceased customer's representative(s); or
 - (iv) if the representative(s) of the deceased customer has not contacted WNZL within 60 days of WNZL's last attempt to contact them, to pay the Refund to the Charity.
- (d) for any deceased Affected Customer entitled to a Refund less than \$100.00, to pay the Refund to the Charity.

Inquiries

- 4.4. WNZL will provide easily accessible points of contact for Affected Customers (including a 0800 number and an email address).

Report

- 4.5. On 1 March 2016 and on the first business day of each month thereafter, WNZL will provide the Commission and the FMA with a status report containing the following information:
- (a) Each Refund payment made in accordance with clause 4.3, including the date of payment, amount paid and who received the payment (for example, an Affected Customer, the Charity, Affected Customer's estate or representative); and
 - (b) a status update regarding the steps taken by WNZL in accordance with clause 4.3 in respect of Affected Customers who had not received a Refund payment as at the date of the relevant report.
- 4.6. WNZL shall continue to provide the status report in accordance with clause 4.5 until it has met all its obligations under clause 4.3. For the avoidance of doubt, no personal information (as defined in the Privacy Act 1993) is to be disclosed in the status report.

5. NO FURTHER ACTION BY THE COMMISSION OR THE FMA

- 5.1. The Commission and the FMA each undertake not to issue, encourage or support any legal proceedings against WNZL and/or each of its Related Parties in respect of matters that are the subject of this Agreement, other than as required by law.

5.2. The parties agree that this Agreement is in full and final settlement of all claims and proceedings that the Commission and/or the FMA has, or may have, whether in its own right or on behalf of any other person, in respect of the matters that are the subject of this Agreement.

6. SEVERANCE

6.1. Each of the provisions of this Agreement is distinct and severable from the others and if at any time one or more of such provisions is or becomes invalid, unlawful or unenforceable (whether wholly or to any extent), the validity, lawfulness and enforceability of the remaining provisions (or the same provision to any other extent) shall not in any way be affected or impaired and shall remain in full force and effect.

7. VARIATION

7.1. No amendment or other variation to this Agreement shall be effective unless it is in writing, is dated and signed by or on behalf of each of the parties.

8. SUCCESSORS IN TITLE

8.1. This Agreement shall be binding upon and endure for the benefit of the lawful successors in title and permitted assignees of each party.

9. ENTIRE AGREEMENT

9.1. This Agreement constitutes the entire and only agreement between the parties in relation to the matters contemplated by this Agreement and supersedes all prior written or oral agreements and understandings between the parties in relation to such matters.

10. GENERAL

10.1. 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.

10.2. A party may execute this Agreement by signing any counterpart. All counterparts constitute one document when taken together.

10.3. No party may assign or transfer any of its rights and/or obligations under this Agreement.

10.4. Each party must pay its own costs in relation to preparing, negotiating and executing this Agreement and any document related to this Agreement.

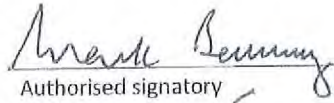
11. PUBLIC STATEMENTS

- 11.1. 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 will be consistent with the spirit and intent of this Agreement.
- 11.2. Except as required by law, WNZL agrees that it will not make any public comment in relation to this Agreement or the Investigation until after the Commission and the FMA have issued a media release notifying the public of the Settlement.

12. MISCELLANEOUS

- 12.1. The Commission and the FMA acknowledge that some of the information provided by WNZL to the Commission and the FMA during the course of the Investigation may be confidential and/or commercially sensitive and/or subject to privilege (the **WNZL information**). The Commission and the FMA respectively agree 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 WNZL information (an **Information Request**) it will notify:
- (a) WNZL of that request and will consult with WNZL as to whether there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982; and
 - (b) the Commission or the FMA (as applicable) of the notification given pursuant to (a) above and WNZL consents to that notification.
- 12.2. Where relevant, the Commission or the FMA (as applicable) will:
- (a) take full and proper account of the confidential and/or commercially sensitive and/or privileged nature of the WNZL Information, and of any views expressed by WNZL, in accordance with the provisions of the Official Information Act 1982 when considering any Information Request;
 - (b) notify WNZL at least 5 days prior to 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; and
 - (c) notify the Commission or the FMA (as applicable) of the notification given pursuant to (b) above and WNZL consents to that notification.
- 12.3. The parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Agreement.
- 12.4. If necessary or desirable, the processes required to give full effect to the terms of this Agreement may be amended by the agreement of the parties in writing.
- 12.5. This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 12.6. 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.

Signed by and on behalf of the Commerce
Commission


Authorised signatory

MARK NEWMAN BERRY
Name


In the presence of:

Witness Name: G B Williams

Witness Address: Wellington

Witness Occupation: Manager

Signed by and on behalf of the Financial Markets
Authority


Authorised signatory

ROB EVERETT
Name

In the presence of:

Witness Name: CAROLINE CAMPBELL

Witness Address: AUCKLAND

Witness Occupation: EXECUTIVE ASSISTANT

Signed by and on behalf of WESTPAC NEW ZEALAND
LIMITED by its attorney


Attorney

MICHAEL HENDRIKSEN

Name

In the presence of:

Witness Name:

Susan Ivory

Witness Address:

Wellington

Witness Occupation:

Solicitor

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 Westpac on Takutai Square, 16 Takutai Square, 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 Wellington

On this 12th day of February 2016



Michael John Hendriksen