

COMMERCE COMMISSION

TSB BANK LIMITED

SETTLEMENT AGREEMENT

DATE *11 December* 2017

THIS AGREEMENT is made on the ¹ 11th day of December 2017

Parties

COMMERCE COMMISSION, a statutory body established under section 8 of the Commerce Act 1986 (**Commission**).

TSB BANK LIMITED, a limited liability company registered in New Zealand (company number 405309) with a registered office at Level 5, 120 Devon Street East, New Plymouth, New Zealand (**TSB**).

1 Background

1.1 TSB is a creditor for the purposes of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA**). It is a Bank that provides a range of banking and other products, including providing home loan lending under consumer credit contracts.

1.2 In late 2015 TSB reviewed its calculation of the fee it charges for the early termination of fixed term lending agreements (**Break Fee**). As part of this review TSB identified three errors in its Break Fee calculation (the **Calculation Errors**), which led to some customers being overcharged and some customers being undercharged:

1.2.1 TSB was not applying a net present value discount when calculating Break Fees. Applying a net present value discount would have the effect of reducing the Break Fee paid by the Affected Customer;

1.2.2 TSB was applying carded interest rates (i.e. the "rack rate") as the comparator interest rate for the purpose of estimating TSB's loss arising from the prepayment. TSB considers that applying the special interest rate (which is lower than the carded rate) would be appropriate, provided that:

- (a) there were special interest rates available for the relevant type of loan; and
- (b) the customer met any special rate eligibility criteria applied by TSB.

Applying special interest rates would have the effect of increasing the Break Fee paid by the Affected Customer;

1.2.3 When calculating the Break Fee to be paid upon a partial prepayment, TSB applied a simplified formula which did not capture the difference in interest rates on the split future scheduled payments between principal and interest. TSB advised the Commission that this error could benefit some customers, have no impact for some customers and could be unfavourable for other customers. TSB has advised the Commission that this error was of much lesser magnitude than the net present value discount and special interest rate errors.

1.3 On 14 February 2016, TSB changed the manner in which it calculates Break Fees and considers that it has correctly calculated all Break Fees since that time.

- 1.4 In April 2016, TSB self-reported the Calculation Errors to the Commission.
- 1.5 Following TSB's self-report, the Commission began an investigation into whether the Calculation Errors breached the CCCFA and/or the Fair Trading Act 1986 (FTA).
- 1.6 TSB has fully co-operated with the Commission's investigation.
- 1.7 During its investigation, the Commission identified as an additional error that TSB's loan agreements and website represented that TSB's Break Fee was an "amount equal to any interest revenue loss to the bank as a result of the interest rate changes on amounts of principal so repaid from the repayment date to the end of the fixed rate terms".
- 1.8 The Commission considers that TSB's conduct has likely breached:
- 1.8.1 sections 41, 51 and 54(1) of the CCCFA by inadvertently charging Break Fees which:
- (a) exceeded a reasonable estimate of TSB's loss arising from the prepayment;
 - (b) were not calculated using an appropriate procedure; and
- 1.8.2 sections 13(g) and 13(i) of the FTA by making a false representation as to the Break Fee payable.
- 1.9 TSB does not accept it has breached the FTA.
- 1.10 This Settlement Agreement sets out the terms on which the parties have agreed to resolve the Commission's investigation.

2 Interpretation

Affected Loan means a consumer credit contract entered into between 1 April 2005 and 14 February 2016 where:

- (a) TSB is the creditor;
- (b) the whole or a portion of the loan is subject to a fixed interest rate; and
- (c) the borrower has paid a Break Fee.

Affected Customer means a borrower under an Affected Loan who has paid a Break Fee:

- (a) of any amount between 1 March 2013 and 14 February 2016; or
- (b) of \$400 or more between 1 October 2008 and 28 February 2013; or
- (c) of less than \$400 between 1 October 2008 and 28 February 2013, where that Affected Customer identifies themselves to TSB within 15 months of the date of this Agreement.

Agreement means this Settlement Agreement.

Best Endeavours means taking any steps that TSB would usually make to locate a non-paying debtor and includes using information currently known to TSB,

including email addresses, phone numbers and physical and/or postal addresses, to attempt to contact Affected Customers, as well as searches of White Pages and/or the electoral roll.

Break Fee means a fee paid by a borrower to TSB between 1 October 2008 and 14 February 2016 upon part or full prepayment of a consumer credit contract.

CCCFA means the Credit Contracts and Consumer Finance Act 2003.

FTA means the Fair Trading Act 1986.

Overcharge means the amount of the difference between a Break Fee paid by an Affected Customer to TSB and the Recalculated Break Fee, where:

- (a) the Recalculated Break Fee is less than the Break Fee paid on an Affected Loan; and
- (b) the difference between the Recalculated Break Fee and the Break Fee is \$5 or more.

Recalculated Break Fee means the Break Fee calculated pursuant to clause 4.2.1 of this Agreement.

Refund means the amount which TSB is required to refund to an Affected Customer under this Agreement which is the sum of the:

- (a) Overcharge; and
- (b) 5% per annum of the amount of the Overcharge (from the date the Break Fee was paid to the date of this Agreement) on a non-compounding basis to reflect the Affected Customer's lost opportunity to use the money.

3 Acknowledgment of breach

- 3.1 TSB acknowledges that from 2005 to 14 February 2016 it inadvertently charged unreasonable Break Fees in likely breach of sections 41, 51 and 54(1) of the CCCFA.
- 3.2 The Commission also considers that TSB is likely to have breached the FTA. TSB does not accept that it has breached the FTA.

4 Actions to be taken by TSB

4.1 Overview of action to be taken

4.1.1 To resolve the Commission's claim that TSB has likely breached the CCCFA and the FTA, TSB will in accordance with this Agreement:

- (a) calculate the Recalculated Break Fee for each Break Fee charged on Affected Loans to Affected Customers;
- (b) pay Refunds to Affected Customers;

- (c) write to Affected Customers advising them about the effect of this settlement on them;
- (d) publish the fact of this settlement and the availability of Refunds on its website; and
- (e) provide the Commission with an interim and a final report certifying that it has made Refunds.

4.2 Calculating the overcharge of the break fee

- 4.2.1 TSB will calculate the Recalculated Break Fee for each Break Fee charged on Affected Loans to Affected Customers using the formula set out in clause 11 of the Credit Contracts and Consumer Finance Regulations 2004.
- 4.2.2 For the avoidance of doubt, where the Recalculated Break Fee is in respect of a partial pre-payment, the calculation will take account of the difference in interest rates on the split of future scheduled payments between principal and interest calculated in accordance with the amortisation schedule.
- 4.2.3 If the Recalculated Break Fee is greater than the Break Fee, TSB undertakes not to seek to recover the difference between the Recalculated Break Fee and the Break Fee from the Affected Customer.

4.3 Paying the Refund

- 4.3.1 TSB must pay Refunds to Affected Customers within two months of the date of this Agreement or, if an Affected Customer is identified after the date of this Agreement, within one month of the date on which the Affected Customer identifies themselves as such to TSB, as follows:
 - (a) if the Affected Customer holds a transactional or savings account with TSB, TSB must credit the Refund to one of those accounts;
 - (b) if the Affected Customer does not hold a transactional or savings account with TSB, TSB must:
 - (i) use its Best Endeavours to contact the Affected Customer and provide them with the information set out in clause 4.4.1;
 - (ii) pay the Refund to the Affected Customer by bank cheque; and
 - (iii) if TSB is not able to contact the Affected Customer, comply with clause 4.5.3.

4.4 Contacting Affected Customers

4.4.1 TSB must within three weeks from the date of this Agreement use its Best Endeavours to send a letter to each Affected Customer who is entitled to receive a Refund at their last known postal address advising the Affected Customer:

- (a) that TSB has entered into this Agreement;
- (b) that TSB has inadvertently overcharged Break Fees on some Affected Loans;
- (c) the amount of the Refund payable to the Affected Customer;
- (d) in relation to payment of the Refund, either:
 - (i) that the Affected Customer's transaction or savings account with TSB will be credited where payment is required to be made under clause 4.3.1(a); or
 - (ii) that the Affected Customer will receive a bank cheque where payment is required to be made under clause 4.3.1(b)(ii); and
 - (iii) informing the Affected Customer what will happen to the Refund (in accordance with clause 4.5.3) in the event that TSB is unable to contact the Affected Customer.

4.4.2 Within 10 days from the date of this Agreement, TSB must provide a copy of a template letter to be sent to Affected Customers to the Commission for review and approval. TSB must amend the template letter on request by the Commission if the Commission reasonably considers amendment is required.

4.5 Locating Affected Customers

4.5.1 TSB must for 15 months from the date of this Agreement prominently publish information to the effect set out below on a website currently operated by TSB:

- (a) that TSB has entered into a settlement with the Commission;
- (b) that TSB has inadvertently overcharged Break Fees on some Affected Loans;
- (c) that TSB will pay the Refund to Affected Customers;
- (d) that any Affected Customer who is not a current customer of TSB and has not received a letter from TSB pursuant to clause 4.4.1 needs to contact TSB to provide updated contact details for their Refund;

- (e) TSB's relevant contact details; and
- (f) informing the Affected Customer what will happen to the Refund (in accordance with clause 4.5.3) in the event that the Affected Customer does not provide updated contact details to TSB.

4.5.2 TSB must update the details on the website within one week of any request by the Commission to do so if the Commission reasonably considers amendment is required.

4.5.3 If, after using its Best Endeavours, TSB is unable to contact an Affected Customer who is entitled to receive a Refund pursuant to clause 4.3.1(c) of this Agreement within three months from the date of this Agreement, TSB undertakes:

- (a) to hold the Refund on trust for the Affected Customer in an interest bearing account for one year from that date; and
- (b) if at the end of the one year period, the Affected Customer has not contacted TSB to arrange payment of the Refund, TSB must pay the Refund and associated interest within 7 days to the National Building Financial Capability Charitable Trust, or in the event that entity no longer exists to a similar entity to be agreed between TSB and the Commission. Any agreement as to the recipient organisation can be varied in accordance with clause 7.4 below.

4.6 Interim Report

4.6.1 TSB undertakes, at its own expense, to provide to the Commission within three months from the date of this Agreement an interim report recording the progress it has made with calculating Recalculated Break Fees, contacting Affected Customers and paying Refunds. This report must include the following information:

- (a) the loan account number of Affected Customers who are entitled to receive a Refund;
- (b) the total amount of Refunds Affected Customers are entitled to receive;
- (c) where Refunds have been paid to Affected Customers, the dates, methods and total amount of the payments;
- (d) where TSB has been unable to contact an Affected Customer who is entitled to receive a Refund under clause 4.3.1(c), the steps that TSB has taken to contact the Affected Customer, and what further work it intends to do to locate the Affected Customer; and
- (e) the total amount of Refunds yet to be paid.

4.6.2 The Commission requires that the interim report be provided in an Excel format.

4.7 Final Report

4.7.1 TSB undertakes, at its own expense, to provide a final report to the Commission six months from the date of this Agreement.

4.7.2 The final report must be prepared by an independent accountant approved by the Commission who has reviewed the steps taken by TSB. The reviewer must confirm that TSB has undertaken all steps it has agreed to take in this Agreement.

4.7.3 The final report must include:

- (a) the reviewer's opinion on whether TSB has undertaken the steps it has agreed to take in this Agreement;
- (b) details of any steps that have not yet been completed, including when they are likely to be completed by TSB;
- (c) the author's opinion as to the adequacy of any further steps that TSB ought reasonably to take to contact Affected Customers who have been unable to be contacted at the time of the final report;
- (d) a summary of the Refunds made; and
- (e) the following information:
 - (i) the loan account number of Affected Customers who are entitled to receive a Refund;
 - (ii) the total amount of Refunds Affected Customers are entitled to receive;
 - (iii) where Refunds have been paid to Affected Customers, the dates, methods and total amount of the payments;
 - (iv) where TSB has been unable to contact an Affected Customer who is entitled to receive a Refund under clause 4.3.1(c), the steps that TSB has taken to locate and contact the Affected Customer, and what further work it intends to do to locate and contact the Affected Customer; and
 - (v) the total amount of Refunds yet to be paid.

4.7.4 The Commission requires that the final report be provided in an Excel format.

5 No Further Action by Commission

5.1 The Commission will close its investigation into TSB upon the execution of this

Agreement.

- 5.2 The Commission will not issue or encourage any civil or criminal proceeding against TSB and/or its former or current Directors in relation to the conduct to which this Agreement applies other than any proceedings that may be brought as a consequence of TSB's failure to comply with this Agreement.

6 Effect and Implementation of this Agreement

- 6.1 TSB and the Commission will each take such steps as are necessary or desirable to give full effect to the terms of this Agreement.
- 6.2 If necessary to give effect to the Agreement, the terms of this Agreement may be amended by the written agreement of the parties.
- 6.3 Nothing in this Agreement will limit or affect the ability of:
- 6.3.1 the Commission to issue proceedings against TSB in respect of matters not related to this investigation, or in respect of conduct engaged in by TSB after the date of this Agreement or for breach of this Agreement;
 - 6.3.2 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 Calculation Errors.

7 Miscellaneous

- 7.1 This Agreement will be governed by, and interpreted in accordance with, the laws of New Zealand.
- 7.2 TSB and the Commission agree that:
- 7.2.1 neither the Agreement nor the fact that TSB has entered into the Agreement is confidential;
 - 7.2.2 the Agreement may be published on the Commission's website after it has been signed;
 - 7.2.3 the Commission may issue a media release about the Agreement, and will provide a copy of the media release to TSB at least 1 hour prior to its release;
 - 7.2.4 either TSB or the Commission may make public statements (either separately or jointly) in relation to the Agreement after it has been signed; and
 - 7.2.5 any media release and/or public statement must be consistent with the matters set out in the Agreement.
- 7.3 TSB agrees that it will not make any public comment in relation to the Agreement until after the Commission has issued any media release notifying the public of it. This media release will be published on the day the Commission posts its notice of this Agreement on the Commission's website.

7.4 This Agreement is not intended to be enforceable by National Building Financial Capability Charitable Trust or any other registered charity or financial literacy organisation that may benefit from clause 4.5.3(b) and the parties to this Agreement may agree to vary the recipient of Refunds in accordance with section 15 of the Contract and Commercial Law Act 2017.

7.5 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:

7.5.1 If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
44 The Terrace
Wellington

Attention: Dot Benson & James McIvor

Email: [REDACTED]

7.5.2 If addressed to TSB, by hand delivery or email to the following address:

TSB Bank Limited
Level 5, 120 Devon Street East
New Plymouth

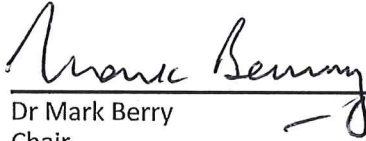
Attention: Roddy Bennett
General Manager Finance

Email: [REDACTED]

EXECUTION

SIGNED for and on behalf of

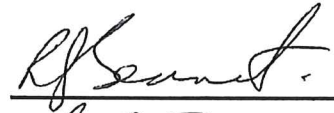
COMMERCE COMMISSION



Dr Mark Berry
Chair

SIGNED for and on behalf of

TSB BANK LIMITED



R. A. Bennett
GM - Finance