

**Enforceable Undertakings to the Financial Markets
Authority and the Commerce Commission**

Pursuant to s46 of the Financial Markets Authority Act 2011 and s46A of the
Fair Trading Act 1986

Westpac New Zealand Limited

Date:

~~July~~ 2019

1 August 2019

1. Parties

- 1.1 Westpac New Zealand Limited (**WNZL**) a company incorporated in New Zealand having its registered address at Westpac on Takutai Square, 16 Takutai Square, Auckland.
- 1.2 The Financial Markets Authority, an independent Crown entity established under section 6 of the Financial Markets Authority Act 2011 (**FMA**).
- 1.3 The Commerce Commission, an independent Crown entity established under section 8 of the Commerce Act 1986 (**Commission**).

2. Background

- 2.1 The FMA and the Commission have regulatory oversight in relation to the Financial Markets Conduct Act 2013 and the Fair Trading Act 1986 respectively.
- 2.2 WNZL offers a series of banking package arrangements (**Banking Package Arrangements**) to a range of different customer groups. In addition to other benefits, Banking Package Arrangements typically include an agreement that WNZL will provide a fee waiver and/or other discounts in respect of certain financial products or services if a customer meets required eligibility conditions (**Specified Fees & Charges Benefits**).
- 2.3 As a consequence of a self-initiated review of Banking Package Arrangements, WNZL identified that some eligible customers did not receive the Specified Fees & Charges Benefits agreed under the terms of their relevant Banking Package Arrangements (such customers being **Impacted Customers**). In respect of the Banking Package Arrangements that are the subject of the undertakings in this document, this issue stemmed from the manual nature of WNZL processes for implementing Specified Fees & Charges Benefits on Banking Package Arrangements. WNZL staff were required to manually complete and then submit a form. Some forms were not submitted correctly which resulted in a failure to initiate Specified Fees & Charges Benefits.
- 2.4 WNZL notified the FMA and the Commission of the above issue and of its plan to refund all fees incorrectly charged to Impacted Customers with appropriate compensation added. When the issue first arose, WNZL also notified the FMA and the Commission that it was: (i) improving its systems and controls in relation to the ongoing implementation and monitoring of Banking Package Arrangements; and (ii) commencing a wider review of its material Banking Package Arrangements to ensure that all eligible customers were receiving their agreed Specified Fees & Charges Benefits.

- 2.5 The undertakings in this document are given to the FMA and the Commission in respect of Impacted Customers within the customer populations of the following Banking Package Arrangements offered to recent school leavers: (i) Tertiary Pac; (ii) Career Starter Pac; (iii) Graduate Pac; and (iv) International Student Pac, (together the **Affected Banking Packages**).
- 2.6 WNZL acknowledges that its conduct in respect of the Impacted Customers may have contravened Part 2 of the Financial Markets Conduct Act 2013 and/or Part 1 of the Fair Trading Act 1986 and has, accordingly, offered the undertakings set out in paragraph 4.1 below to the FMA and the Commission (**Undertakings**).
- 2.7 To the extent that there are any other issues concerning WNZL's Banking Package Arrangements that are identified which are of a similar nature as described at paragraph 2.3 above, the Commission has agreed that the FMA shall be the lead regulator in respect of such issues and WNZL's primary point of contact. In that regard, WNZL has offered separate but related undertakings to the FMA recorded in a stand-alone document. For clarity as to the Commission's involvement in the undertakings set out in this document, it is noted that:
- 2.7.1 Under the Memorandum of Understanding between the FMA and the Commission dated 31 March 2014, the Commission retains primary regulatory and enforcement responsibility for fair trading in respect of consumer credit contracts and has primary jurisdiction for historical (pre-2014) conduct of the same nature; and
- 2.7.2 In respect of the Affected Banking Packages, approximately 20% of the Specified Fees & Charges Benefits which have been incorrectly applied relate to consumer credit contracts; the remaining issues typically relate to transactional accounts.
- 3. Purpose and Effect of the Undertakings**
- 3.1 The Undertakings are offered to the FMA and the Commission in relation to the remediation of the potential contravention referred to in paragraph 2.6 above and provide the FMA and the Commission with a means to enforce that remediation.
- 3.2 The Undertakings:
- 3.2.1 are accepted by the FMA and the Commission as court enforceable undertakings in terms of sections 46 and 47 of the Financial Markets Authority Act 2011, and 46A of the Fair Trading Act 1986 respectively; and
- 3.2.2 come into effect when executed by WNZL and signed as accepted by the FMA and the Commission.
- 4. Undertakings**
- 4.1 WNZL undertakes:

4.1.1 to provide a written confirmation to the FMA and the Commission that it has completed a review of the Affected Banking Packages and taken all reasonable steps to identify all Impacted Customers;

4.1.2 to, as soon as reasonably practicable, to the extent that this has not already occurred,

4.1.2.1 refund all fees and charges that have been incorrectly charged to all such Impacted Customers (**Incorrect Charges**), together with a compensation amount, in accordance with the refund methodology set out in paragraphs 4.4 to 4.9 below; and

4.1.2.2 provide an explanation to each Impacted Customer of the reason for the refund, namely that they were incorrectly charged the Incorrect Charges in respect of a/ an Affected Banking Package/s; and

4.1.3 to, within 6 weeks from the date on which the Undertakings come into effect under 3.2.2, provide a written report to the FMA and the Commission confirming when it has satisfied 4.1.2, including details of the total number and amount of refunds made.

4.2 In relation to the requirements in the undertaking in paragraph 4.1.1 for WNZL to take all reasonable steps to identify all Impacted Customers, this is to be limited to identifying Impacted Customers who entered into any Affected Banking Packages after 1 November 2008.

Publication of refunds

4.3 Within 5 working days of the undertakings in this document coming into effect, WNZL shall publish a notification in a prominent position on its website that: (i) explains that refunds are being given to Impacted Customers in respect of the Affected Banking Packages and the reason for the refunds, namely that they were incorrectly charged the Incorrect Charges; and (ii) provides a WNZL contact email address for any current or former customers who have any queries or who consider that they should have been contacted about a refund but have not been. The notification on the website shall appear for at least four weeks from the date of posting or throughout the period of time that WNZL is undertaking the activities contemplated by paragraph 4.7.1, whichever is the longer.

Refund methodology

4.4 For the avoidance of doubt, in determining the amount to be refunded to each of the Impacted Customers under 4.1.2.1 (**Refund Amount**), WNZL shall:

- 4.4.1 include in the calculation of the Incorrect Charges, all incorrectly charged fees and charges over the period in which the customer was part of the relevant Banking Package Arrangement and was eligible for the relevant agreed Specified Fees & Charges Benefits, except for any incorrectly charged fees and charges applied prior to 1 November 2008; and
 - 4.4.2 calculate a compensation amount on the Incorrect Charges using WNZL's highest on call savings deposit rate, accrued daily and compounded monthly, over the period since the error occurred.
- 4.5 Subject to paragraph 4.9 below, if any Refund Amount is calculated to be an amount of \$20.00 or less,
- 4.5.1 For any relevant Impacted Customer who is: (i) a current WNZL customer (**Current Customer**); and (ii) holds a transactional account or has a similar banking product with WNZL into which funds can readily be transferred (**Relevant Account**), that Refund Amount shall be paid to that Impacted Customer; but
 - 4.5.2 For any relevant Impacted Customer who does not have a Relevant Account (whether or not a Current Customer), that amount may be paid to the designated charity set out in paragraph 5 below (**Designated Charity**), rather than to the Impacted Customer.

Current Customers

- 4.6 Subject to paragraph 4.5 above, WNZL shall refund all Impacted Customers who are Current Customers and have a Relevant Account by directly crediting their accounts. For the avoidance of doubt, this may include crediting a customer's Refund Amount against any outstanding balance the customer may have on a credit contract with WNZL.

Impacted Customers without Relevant Accounts

- 4.7 Subject to paragraph 4.5 above, for all Impacted Customers who do not presently have a Relevant Account with WNZL (**Impacted Customers without Relevant Accounts**),
- 4.7.1 WNZL shall take reasonable steps using the information that it holds on such Impacted Customers to identify a current postal address for each customer. (For example, this may include contacting Impacted Customers by SMS Message or email to confirm postal address details.)
 - 4.7.2 For those Impacted Customers without Relevant Accounts for whom WNZL can identify a current postal address, WNZL shall provide the Refund Amount by sending a cheque to the customer at that postal address.

4.7.3 To the extent that WNZL cannot identify a current postal address for any Impacted Customers without Relevant Accounts or Impacted Customers do not present cheques received within 6 months of the date they were posted, WNZL shall notify the FMA of the number of such customers and seek any further guidance from the FMA as to the further steps required, including whether any further address searches or public advertising should be undertaken.

4.7.4 If, following any further steps undertaken by WNZL pursuant to guidance given under paragraph 4.7.3, a current postal address for any Impacted Customer still cannot be found or if any Impacted Customer still does not present the cheque within any further advised period, WNZL shall pay the Refund Amount to the Designated Charity.

Bankrupt Customers

4.8 Notwithstanding paragraphs 4.6 and 4.7 above, if an Impacted Customer who is entitled to be paid a refund under paragraph 4.1 is bankrupt, the Refund Amount shall be paid to the Official Assignee, unless otherwise agreed with the Official Assignee.

Deceased Estates

4.9 Notwithstanding paragraphs 4.4 to 4.8 above, the following methodology shall apply if any Impacted Customer is deceased:

4.9.1 For any deceased Impacted Customers entitled to a Refund Amount of \$100.00 or more:

4.9.1.1 WNZL 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 Refund Amount; and

4.9.1.2 pay the Refund Amount at the direction (if any) of the deceased Impacted Customer's representative(s); or

4.9.1.3 if the representative(s) of the deceased Impacted Customer has not contacted WNZL within 60 days of WNZL's last attempt to contact them, to pay the Refund Amount to the Designated Charity.

4.9.2 For any deceased Impacted Customer entitled to a Refund Amount less than \$100.00, WNZL shall pay the Refund Amount to the Designated Charity.

5. Designated Charity


- 5.1 The designated charity for the purposes of the undertakings in this document is the National Building Financial Capability Charitable Trust, known as FinCap Trust.
- 5.2 Prior to making any payment to the Designated Charity, WNZL shall seek the FMA's consent.
- 5.3 For the avoidance of doubt, any payments that WNZL is required to make to the Designated Charity pursuant to paragraphs 4.5.2; 4.7.4; 4.9.1.3; and 4.9.2 shall be subject to WNZL complying with any unclaimed monies obligations.

6. Miscellaneous

- 6.1 No amendment to the Undertakings will be effective unless in writing, executed by WNZL and signed as accepted by the FMA and the Commission.
- 6.2 These undertakings are properly executed if WNZL signs the same copy, or identical copy of the execution page as the FMA and/or the Commission. Where there are separate copies, signed on behalf of WNZL, the FMA, and the Commission, the signed copy can be the original document or an emailed copy.
- 6.3 WNZL acknowledges that:
- 6.3.1 the FMA and/or the Commission may make the Undertakings and this document publicly available through publishing it on the FMA and the Commission's websites;
 - 6.3.2 the FMA and/or the Commission may make public reference to the Undertakings including in media statements or other publications;
 - 6.3.3 in accepting the Undertakings, the FMA and the Commission are not prevented from exercising their rights and powers under the relevant legislation to any contravention of the Undertakings or in relation to any other matter not the subject of these Undertakings; and
 - 6.3.4 the Undertakings in no way limit the rights and remedies available to any other person or entity, including any Impacted Customer, arising from any conduct described in the Undertakings or arising from future conduct.

Execution

Signed by and on behalf of Westpac New Zealand Limited



Attorney's signature

MARK BROUGHTON WEENINK
Name of Attorney

In the presence of:



Signature

Witness name:

Witness address:


Witness occupation:

Date:

**Daniel Robinson
Solicitor
AUCKLAND**

19 July 2019

Accepted by the Commerce Commission
by:



Authorised signatory

ANNA RAWLINGS
Name

In the presence of:



Signature

Witness name: Sarah Gifford

Witness address: Auckland

Witness occupation: Investigator

Date: 30/7/2019

Accepted by the Financial Markets
Authority by:



Authorised signatory



Name

In the presence of:



Signature

Witness name:



Witness address:



Witness occupation:



Date:



CERTIFICATE OF NON-REVOCATION OF POWER OF ATTORNEY

I, Mark Broughton Weenink of Auckland in New Zealand, Bank Officer

HEREBY CERTIFY -

1. **THAT** by Deed dated 6 September 2006 and there numbered PA 7032934.1 **WESTPAC NEW ZEALAND LIMITED** (Company Number 1763882), incorporated in New Zealand under the Companies Act 1993 and having its principal place of business in New Zealand at Westpac on Takutai Square, 16 Takutai Square, Auckland ("**Westpac**") appointed me its attorney on the terms and subject to the conditions set out in that Deed and the attached document is executed by me under the powers conferred by that Deed.
2. **THAT**, at the date of this certificate, I am a Tier One Attorney for Westpac.
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 or otherwise.

SIGNED at Auckland on the ^{9th} day of July 2019


Mark Broughton Weenink