

Interest Rate Swaps investigation: Commerce Commission settlement with Westpac

Questions and Answers as at 17 February 2015

1. What is the settlement for?

The Commission investigated ANZ's, Westpac's and ASB's (**the three banks**) marketing and sale of interest rate swaps (**swaps**) to rural customers. The Commission investigated Westpac for the period between 2005 and 2012. The investigation was conducted under the Fair Trading Act (the **Act**). The Act prohibits misleading and deceptive conduct in trade, including making false or misleading representations.

We commenced our investigation in August 2012 following media articles alleging that some New Zealand banks had mis-sold swaps to rural customers. We primarily considered whether swaps were marketed during this time in ways that may have misled customers as to their true risk, nature, and/or suitability.

2. What are swaps?

A swap is a financial derivative product that allows a borrower to manage the interest rate exposure on their borrowing. It allows a borrower to exchange with another party (for example, a bank) an obligation to pay a floating reference interest rate for an obligation to pay a fixed base interest rate or vice versa.

3. What was the outcome of the Commission's investigation?

On 17 December 2013 we announced that we had completed our investigation into the marketing and sale of swaps by the three banks. We advised the three banks that in our view, we had sufficient foundation for commencing proceedings against the banks in relation to the alleged conduct. We intended to place the matter before the Court for determination, as only the Court can decide if the Act has been breached, and planned to file proceedings in March 2014.

While preparing proceedings, we had discussions with the three banks about our concerns. The discussions with the banks have been continuing since then.

On 3 December, 2014 we reached a settlement with ANZ. The Financial Markets Authority (**FMA**) also reached a settlement with ANZ on 3 December 2014. On 23 December 2014, we reached a settlement with ASB. On 30 January 2015 we reached a settlement with Westpac conditional on Westpac also reaching a settlement with the FMA. Westpac reached a settlement with the FMA on **16 February 2015**.

4. How and why have we settled?

We believe that the agreed settlement with Westpac is in the public interest and in the interests of our group of eligible complainants (referred to as **named customers** in the Settlement Agreement).

The settlement with Westpac resolves the Commission's concerns regarding Westpac's alleged conduct in three ways:

- Westpac has admitted out of court (in the Settlement Agreement) that, in marketing and selling swaps to the named customers between October 2005 and August 2008, it breached section 9 of the Act in that it engaged in certain conduct that was likely to mislead or deceive those customers by representing that their swaps fixed the all up cost of their borrowing, when in fact the margins on the loans underpinning their swaps could increase.
- Westpac will make available for payment an amount expected to be \$2.47 million. From that amount, as a result of certain allowed deductions and/or set-offs, Westpac will pay a sum expected to be \$1.88 million to be distributed between named customers.
- Westpac will pay the sum of \$250,000 to Rural Support Trusts.

Westpac will also pay the Commission \$250,000 towards its investigation costs.

We believe that this settlement is a very good outcome, as contested court proceedings would have meant uncertainty and lengthy delays in achieving any possible payments to eligible customers. This settlement delivers payments to eligible customers much more quickly than might be achievable through the courts. The payments to be made under the settlement are, in our view, a reasonable approximation of the potential losses that the Commission could have recovered on their behalf, if we had been successful at trial.

The full terms of the settlement are set out in the Settlement Agreement, which you can find at www.comcom.govt.nz/irs-westpac-settlement. The details of named customers are confidential and are not contained in the publicly available version of the Settlement Agreement.

5. Why is Westpac paying less than ANZ did in its settlement?

The settlement amount is lower compared to the recent ANZ settlement primarily because:

- Despite facing increased funding costs after the global financial crisis, Westpac chose not to increase farmers' loan margins for the original terms of the swaps.
- Westpac did however increase margins for some customers upon restructuring of a swap.
- Westpac's method of calculating break fees under swaps was roughly comparable to its method for calculating swaps under an equivalent fixed rate term loan.

- We received a much smaller volume of complaints about Westpac's swaps as compared to ANZ.

6. Which Westpac customers are eligible for a payment offer?

Each eligible customer will receive a letter from Westpac setting out the named customer's entitlement under the Settlement Agreement (**payment offer**). Payment offers are being made to the named customers only. The named customers are the 38 current or former Westpac rural customers who agreed to participate in the Commission's investigation and whose details were provided to Westpac before 31 July 2014.

The details of all customers who complained to the Commission will remain confidential.

7. Which Westpac customers are not eligible for a payment offer?

- Non-rural (eg, commercial) Westpac customers or former non-rural Westpac customers.
- Westpac rural customers or former Westpac rural customers who did not complain to the Commission.
- Westpac rural customers or former Westpac rural customers who complained to the Commission but later withdrew the complaint or declined to permit the Commission to disclose their identity to the bank.
- Westpac customers or former customers who bought swaps outside the October 2005 to August 2008 period.

8. I have not been in contact with the Commission before but I bought a rural swap from Westpac. I want to be included in the settlement.

Unfortunately you will not be able to participate in the settlement we have reached with Westpac.

On 9 May 2014 we called through the media for any other rural customers who had concerns about the way in which they were sold swaps to contact us by 30 May 2014. We advised that for any rural customers who contacted us after that date, we would do all that we could to include those complaints in our proposed proceedings and ongoing discussions with the banks, but that for those complainants we could not be as confident of obtaining redress.

During the course of our settlement discussions we were required to close off our list of complainants who were able to participate in the Westpac settlement. We closed the list of 'Westpac' complainants on 31 July 2014.

If you still have concerns about your dealings with Westpac over the sale of swaps, you may wish to take legal advice.

9. How do I know if I am eligible?

You will be eligible if you (or a family member, trustee, or someone associated with your business) complained to the Commission before 31 July 2014 about your experience with swaps and consented to us disclosing your identity to the bank.

You will receive a letter from us shortly asking you to confirm your contact details by returning a form to us. This is so that Westpac can contact you directly with any payment offer.

By sending back your form to the Commission you are simply updating the Commission with your current contact details and consenting for the Commission to send your contact details to Westpac so that it can forward any payment offer to you. Sending this form back to the Commission does not commit you to accepting any offer that may be made to you.

10. What payments will be made by Westpac?

Payment offers will be made to the named customers. These offers will be calculated according to a payment methodology which has been set out by the Commission and based on confidential conditions contained in the Settlement Agreement.

Westpac may deduct from the amount to be paid to a named customer the value of any already written off debt. If the written off debt exceeds the amount that the named customer would otherwise be entitled to under the settlement, the named customer may receive no payment. Where this occurs, Westpac will explain to those customers the reason for the deduction.

Westpac is not required to make any payment to named customers who have previously received a payment, financial benefit, or reduced obligation from Westpac and settled with Westpac in relation to the matters that are the subject of the investigation. Westpac will explain to those customers the reason why they will not receive a payment.

11. Will anyone who hasn't registered a complaint get any money?

The agreement allows the Commission to direct Westpac to pay \$250,000 to Rural Support Trusts for the assistance of the wider rural community.

The Commission will provide Westpac with the details of which Rural Support Trusts are to receive payments and the amount of each distribution.

12. What is the process for paying me if I am eligible?

Please read the timeline that we have prepared www.comcom.govt.nz/irs-westpac-settlement.

Named customers will receive a letter from Westpac setting out any payment offer.

Named customers will have 70 working days from the date of Westpac's letter in which to decide whether to accept the payment, and details of how to do that will be in the payment offer.

13. How much are the payments?

This information is confidential to each customer, Westpac, and the Commission.

Payment offers will differ for each named customer as they will be based on individual circumstances.

Payment offers will be calculated based on the methodology prescribed by the Commission. It is not a precise calculation of any loss a named customer may have suffered, but rather what we think is a good estimate of losses that may have been recoverable if the matter had gone to court.

14. If I accept a payment offer, how long will it be before I get paid?

Payment to named customers who accept payment offers must be made by Westpac within 15 working days of acceptance.

15. I previously signed a settlement with Westpac over my swaps. Does this mean that I cannot receive another payment?

Yes. If you previously signed a settlement with Westpac and received a payment, financial benefit, or reduced obligation from Westpac in connection with that settlement, then you will not receive any further payment under our settlement.

16. What are the implications if I accept a payment?

Named customers who wish to accept a payment offer will be required to sign a Customer Release before any money can be paid. This Customer Release waives any legal rights you have against Westpac with respect to your purchase of swaps between October 2005 and August 2008. It states that the payment to you is in full and final settlement of any claims you have against Westpac in relation to the marketing and sale of interest rate swaps to you during that time.

Named customers should take legal and financial advice as to whether they wish to sign the Customer Release and accept any payment. We cannot give you advice on this.

17. What happens if I don't accept my payment offer?

If you decline the payment offer, the money will be retained by Westpac.

Any payment offer not accepted by the deadline will be deemed to be declined unless you have queried the offer, in which case you will have an additional 20 days after Westpac and the Commission (if necessary) have responded to that query in which to accept or reject the payment offer.

18. Will the offer include interest on my losses?

No. Payment offers will not include interest.

19. Will I have to pay tax on the payment I receive?

That may depend on your individual circumstances. You will need to take your own specialist tax advice on the implications of accepting the payment offer.

20. What is happening with the other banks the Commission has investigated?

The Commission settled with ANZ on 3 December 2014. The Commission settled with ASB on 23 December 2014.

21. What action is the Financial Markets Authority taking?

Westpac has reached a separate settlement with the Financial Markets Authority (**FMA**). As a result, the FMA has closed its investigation. For more information see www.fma.govt.nz.