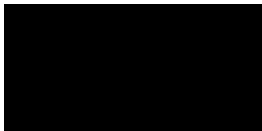


2 August 2019



By email only: 

Dear 

**Official Information Act request #19.005 – Interest Rate Swaps**

1. We refer to your Official Information Act 1982 (OIA) request received on 5 July 2019 for information about the Commerce Commission's (Commission) 2012/2013 investigation into bank's marketing, promoting and selling interest rate swaps to rural customers during the time period from 2005 to 2009. In particular:
  - 1.1 details of correspondence with banks and the Financial Markets Authority (FMA) during and after this time about the interest swap deals and the resolution of losses to customers;
  - 1.2 details of the complaints made to the Commission by bank customers about the interest rate swaps;
  - 1.3 information about whether the Commission came up with an estimated value for the money lost by bank customers as a result of the interest rate swaps; and
  - 1.4 any documents about how the Commission came up with the final settlement number with the banks.
2. On 18 July 2019, during our phone conversation, you clarified the scope of your request to:
  - 2.1 copies of the complaints received by the Commission about the interest rate swaps;
  - 2.2 information about how the Commission quantified the loss to customers, including whether the Commission came up with any estimates and if so, how that number (or numbers) was established; and

- 2.3 a copy of the report prepared by the Commission on this matter.

### **Our response**

#### *Copies of the complaints received by the Commission about the interest rate swaps*

3. The Commission received 256 complaints<sup>1</sup> about the interest rate swaps:
- 3.1 178 complaints about ANZ National Bank (ANZ);
  - 3.2 40 complaints about ASB Bank Limited (ASB); and
  - 3.3 38 complaints about Westpac New Zealand Limited (Westpac).
4. We have decided, pursuant to section 16(e) of the OIA, to provide a summary of the complaints. This is to protect the privacy of natural persons under section 9(2)(a) of the OIA.
5. For all three banks, the complaints are primarily about one or more of the following issues:
- 5.1 **Break costs:** customers believed that the break costs would be the same or materially similar to the cost of terminating a fixed rate loan because they were advised swaps were like a fixed rate loan.
  - 5.2 **Margin:** customers believed that margins would not change for the duration of the original swaps because they were advised swaps were like a fixed rate loan.
  - 5.3 **Monitoring:** customers were advised the Bank would monitor and/or manage the swaps to ensure customers were able to take best advantage of them.
  - 5.4 **Suitability:** customers were advised the swaps were a suitable alternative or substitute for a fixed rate loan.

#### *Information about how the Commission quantified the loss to customers*

6. The method by which the Commission quantified the loss to affected customers for each Bank is contained in each of the Settlement Agreements, **attached**.
7. The Commission's conclusion was that some of the farmers suffered financial harm as a result of entering into the swaps. Most of these losses arose because, without the bank's conduct in offering to sell them complex swaps, these farmers may have entered into more advantageous or less costly borrowing arrangements.

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<sup>1</sup> The Commission has received 412 complaints about interest rates swaps generally in the period between January 2009 and March 2019.

8. The size of actual customer losses depended on the specific arrangements individual farmers would have likely otherwise entered into. This uncertainty made the losses difficult to quantify.
9. As a result, our calculations on the loss primarily considered:
  - 9.1 the increased margins and funding premiums imposed;
  - 9.2 the increased repayments required because break fees were added to principal upon restructure;
  - 9.3 the higher break fees; and
  - 9.4 the opportunity cost arising from being fixed at a higher interest rate for a longer period than they otherwise would have.
10. Commission staff undertook consumer-specific assessments of likely losses. We are withholding those assessments under section 9(2)(a) of the OIA to protect the privacy of those consumers.
11. The Commission settled with the Banks for \$25.17 million, including admissions in the High Court for ANZ and out of court admissions for ASB and Westpac.
12. We understand that the total rural swaps market was more than \$8 billion but consider this number is not directly relevant to the settlement figure. The compensation for those affected was based on the losses suffered, not the total value of the swaps.
13. In addition, in settlement or in court we could only get compensation for the complainant farmers that we knew about, and who had provided us with information about their situation. This might mean that some loss-sufferers are not compensated, but without them coming forward we could not assist them. It is reasonable to expect that other swaps customers who did not complain to the Commission will have approached the Banks directly for compensation, after the Commission announced the settlement.

*Copy of the report prepared by the Commission on this matter*

14. The Commission produced four enforcement reports during its investigation; an overarching report and one for each of the three Banks. The purpose of an enforcement report is to provide an assessment of whether the Commission has sufficient evidence to establish a breach of the legislation we enforce.
15. The Commission produced three investigation termination reports at the completion of its investigation; one for each Bank. The purpose of a termination report is to ensure there is a full record of the information and evidence gathered by the Commission during the course of its investigation, to provide a summary and explanation of the conclusions reached by the Commission and the enforcement decisions it made.

16. The Commission will be extending the deadline to decide this part of your request to **30 August 2019**.
17. The reason for the Commission's extension of time is that consultations are necessary to make a decision on your request, such that a proper response cannot reasonably be made within the original time limit (section 15A(1)(b) of the OIA).

*Further information*

18. There is considerable information about the Commission's interest rates swaps investigation and settlements, including media releases and Q&As, here:  
<https://web.archive.org/web/20170405233901/http://comcom.govt.nz/fair-trading/interest-rate-swaps-2/>
- 18.1 ANZ:  
<https://web.archive.org/web/20170405233227/http://comcom.govt.nz/fair-trading/interest-rate-swaps-2/irs-anz-settlement/>
- 18.2 ASB:  
<https://web.archive.org/web/20170405233232/http://comcom.govt.nz/fair-trading/interest-rate-swaps-2/irs-asb-settlement/>
- 18.3 Westpac:  
<https://web.archive.org/web/20170405233236/http://comcom.govt.nz/fair-trading/interest-rate-swaps-2/irs-westpac-settlement/>
19. If you are not satisfied with the Commission's response to your OIA request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and review this response. However, we would welcome the opportunity to discuss any concerns with you first.
20. The Commission will be publishing this response to your request on its website. Your personal details will be redacted from the published response.
21. Please do not hesitate to contact us at [oia@comcom.govt.nz](mailto:oia@comcom.govt.nz) if you have any questions about this request.

Yours sincerely,

*Mary Sheppard*  
OIA Coordinator



Public version

# Settlement Agreement

regarding the Commerce Commission investigation into interest rate swaps transactions with rural customers between 2005 and 2012

New Zealand Commerce Commission

Westpac New Zealand Limited

Westpac Banking Corporation

Dated 30 January 2015

Released under Official Information Act 1982

**Agreement** dated 30 January 2015

## Parties

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

**Westpac Banking Corporation** an incorporated company in New South Wales, Australia – together referred to as "**Westpac**" in this Agreement; and

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

## 1 Introduction

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- 1.1 The Commission has investigated alleged contraventions of the Fair Trading Act 1986 (the **Act**) by Westpac in relation to its marketing, promotion and sale of interest rate swap products to rural customers from 2005 to 2012 (the **Investigation**).
- 1.2 This Agreement records the background to the Investigation, the conclusions reached by the Commission, and the means by which the Investigation is to be resolved.
- 1.3 This Agreement will be made public by the Commission (including on the Commission's website), save for any material identified in this Agreement as confidential.

### Interpretation

- 1.4 For the purposes of this Agreement:

**Customer Release** means the document as set out in **Schedule Two**.

**Days** means working days, save that time does not run between 24 December 2014 and 12 January 2015, inclusive.

**Break Cost** means the amount that is the cost (or in some cases a benefit) to a party to terminate a Swap prior to its maturity date.

**Effective Date** means the date the terms of this Agreement come into effect, as set out at clause 2.13.

**Global Liquidity Cost (GLC)** means the additional charge that Westpac introduced after August 2008 to reflect the higher cost of borrowing experienced as a result of the global financial crisis and charged by Westpac to some of the Named Customers in addition to the floating base rate and Margin charged on the Loan, typically following the restructure of the Interest Rate Swap.

**Independent Review** means the review conducted by Professor Jerry Bowman, Emeritus Professor of Finance, University of Auckland, as set out at clause 3.6.

**Interest Rate Swaps (Swaps)** comprise, in the case of Interest Rate Swaps sold to rural customers, contracts under which one party agrees to make payments based on a

fixed interest rate on a notional principal amount, in exchange for receiving payments from the other party based on a floating interest rate on the notional principal amount. The principal amount is not exchanged.

**Loan** means the wholesale term loan(s) made by Westpac to the Named Customer – usually at a floating interest rate – that corresponds to the Interest Rate Swap(s).

**Margin** means the margin charged by Westpac to the Named Customer in addition to the floating rate interest rate charged as part of the Loan interest rate.

**Named Customer** means those persons listed in **Schedule One**, including their executors, administrators, successors and assigns and, in the case of a trustee, includes any substituted or additional trustee (if any). Named Customers comprise that group of customers whose details were provided by the Commission to Westpac as the Commission's complainants of record as at 31 July 2014. **Schedule One** is confidential to the parties, but the Named Customers will be advised of the availability of a Payment Offer as per clauses 3.16 to 3.18 below.

**Offer Amount** means the amount to be offered to a Named Customer.

**Payment Methodology** means the methodology determined by the Commission referred to in clause 3.8 and applied to the Named Customers in **Schedule One**.

**Payment Offer** means the offer letter containing the Offer Amount that Westpac has agreed to make to each Named Customer under this Agreement.

**Related Parties** of Westpac include:

- (a) their past and present directors, officers, employees and agents; and
- (b) their past and present 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.

**Restructured Swap/Restructure** means an extension of the Swap, being the termination of an existing Swap and the taking of a new Swap, with the Break Costs charged to the Named Customer by Westpac being embedded into the Restructured Swap, a process also known as a 'blend and extend'.

**Rural Support Trusts** are charitable trusts that assist farmers during and after extreme weather or environmental events and for general hardship, and for the purposes of this Agreement are limited to those listed at [www.rural-support.org.nz](http://www.rural-support.org.nz).

**Westpac Information** means all information provided by Westpac to the Commission, whether voluntarily or under compulsion, in respect of the Investigation.

## 2 Background

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### Interest Rate Swaps

- 2.1 In 2005, Westpac began marketing Swaps to current and potential rural customers, primarily through private meetings arranged by Westpac Agribusiness relationship managers and conducted with those customers by a Westpac Financial Markets Specialist (**Sales Presentations**). This marketing included Powerpoint presentations,

and, in some cases, other marketing documents which were provided to the customers (**Marketing Documents**).

### **Commission Investigation**

- 2.2 During 2012, media reports indicated that certain rural customers were dissatisfied with Interest Rate Swaps.
- 2.3 At around the same time, the Commission received complaints about the manner in which Westpac staff marketed Swaps to rural customers.
- 2.4 In August 2012, the Commission commenced the Investigation.
- 2.5 Westpac and the Financial Markets Authority (**FMA**) are entering into a separate agreement in relation to the FMA's own enquiries into Interest Rate Swaps (**FMA Settlement**).

### **Commission Decision**

- 2.6 The Commission has completed the Investigation into Westpac's conduct and concluded that, in its view, there is a sufficient foundation for it to commence proceedings against Westpac alleging breaches of the Act. In particular, the Commission considers that between 2005 and 2008 Westpac engaged in conduct that conveyed the impression to existing and potential customers, including the Named Customers, that:
- (a) Margins on the Loan would not change for the term of the original Swap and for any Restructure, extension, or shortening of the term of the Swap;
  - (b) there would be no, or only a nominal, Break Cost to terminate a Swap;
  - (c) there was no additional cost for the Named Customer to Restructure a Swap; and/or
  - (d) Swaps were a suitable alternative and good substitute for a fixed rate term loan for the circumstances of the customer or potential customer,
- (the **Conduct**).
- 2.7 The Commission concluded that the Conduct was, or was likely to be, misleading because:
- (a) with respect to Margins, under the contractual terms Westpac could (and, in some instances, did), increase Margins;
  - (b) with respect to termination, the Break Cost could be significantly higher than was anticipated, such as to make it uneconomic to terminate the Swap;
  - (c) with respect to a Restructure of a Swap, Westpac could (and, in some instances, did):
    - (i) charge a Break Cost upon a Restructure; and/or
    - (ii) charge a GLC upon a Restructure;

- (d) with respect to suitability, Named Customers could not take advantage of the flexibility of the swaps because:
- (i) doing so attracted a cost (as referred to at clause (c)(i)-(c)(ii) above) that was not foreseen by the Named Customers, which undermined the flexibility of the swap and dissuaded some Named Customers from exercising that option;
  - (ii) the Named Customers were not technically equipped to monitor and adjust the swaps.
- 2.8 The Commission considers that it is likely that some Westpac rural customers, including the Named Customers, suffered loss as a result of the Conduct.

**Westpac's position**

2.9 Westpac does not accept the Commission's conclusions referred to at clauses 2.6, 2.7 and 2.8 above.

2.10 In particular, Westpac says:

- (a) It provided comprehensive information to customers regarding Swaps, which clearly explained their effect and the risks associated with the product.
- (b) It did not sell Swaps unless they were fully explained to customers in one on one meetings with a Westpac Financial Markets Specialist. Westpac was satisfied the customer understood the product, and it was suitable for their circumstances.
- (c) Westpac recommended that the customer take independent advice before entering into the Swap.
- (d) Westpac's customers were, or ought to have been, aware that the Swap was a separate agreement that did not impact on Westpac's ability to increase the Margin on the underlying Loan agreement.
- (e) It is common knowledge that any fixed interest rate product (which includes a Swap) will incur Break Costs if terminated early and that the amount of a Break Cost cannot be estimated in advance. Westpac's Break Costs under a Swap were calculated in a materially similar way to the Break Costs that would have applied had the customer entered into a fixed rate term loan.
- (f) It was explained to the relevant customers that there is a Break Cost when a Swap is terminated early or Restructured and no representations were made as to the likely amount of those Break Costs.
- (g) Only customers who signed an express variation to their Loans agreeing to pay a GLC were charged a GLC.
- (h) Customers were provided with an appropriate level of support by Westpac to enable them to monitor and adjust their Swaps.
- (i) Customers would be time-barred from pursuing Westpac for compensation under the Act.

## Settlement

- 2.11 Notwithstanding the parties' differing views on Westpac's conduct, following discussions between the Commission and Westpac, the Commission has concluded, based upon the Solicitor General's Prosecution Guidelines and its Enforcement Criteria, that it would be in the public interest for it to resolve the issues arising in the Investigation, on the terms set out below.
- 2.12 In reaching the terms of this settlement, the parties have considered:
- (a) The complex nature of the factual issues involved in the case, including in particular, the difficulties involved in establishing what losses may have been suffered.
  - (b) The legal issues arising from possible legal defences that Westpac would have, including as to limitation.
  - (c) The length of time that it would take before any proceedings would be resolved, and the likely delays that would cause in providing any compensation to Named Customers.
  - (d) The stress on Named Customers, and the distraction for them from their businesses, of having to come to court to give evidence about events that occurred some years ago.
  - (e) The sums involved in the settlement.
- 2.13 This Agreement is conditional upon Westpac and the FMA entering into and executing the FMA Settlement. Notwithstanding execution, the terms of this Agreement will only come into effect as at:
- (a) the date of Westpac and the FMA entering into and executing the FMA Settlement, being no later than 27 February 2015; or
  - (b) such earlier date at Westpac's election,
- (Effective Date).**
- 2.14 Westpac is to immediately advise the Commission of the Effective Date.
- 2.15 For the avoidance of doubt, this Agreement is deemed to be terminated in the event that:
- (a) Westpac and the FMA have not entered into the FMA Settlement by 5pm on 27 February 2015; and
  - (b) Westpac has not elected to bring the terms of this Agreement into effect by 5pm on 27 February 2015.
- 2.16 Clauses 2.13 and 2.15 are inserted for the sole benefit of Westpac and may be waived by Westpac.

### 3 Terms of Settlement

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3.1 The Commission and Westpac have agreed to resolve the issues between them arising from the Investigation on the following terms:

- (a) Westpac admits breaching section 9 of the Act, as set out at clause 3.2 below.
- (b) Westpac will make available a maximum amount of \$2,473,303 for Named Customers, subject to clause 3.12. From that amount, Westpac will offer to pay a sum expected to be \$1,878,899 to Named Customers, as set out at clause 3.21 below, and subject to clause 3.30 below. The remainder relates to potential compensation for Named Customers that fall within clause 3.12(a) in the circumstances to be noted in the confidential letter received by those Named Customers in accordance with clause 3.14.
- (c) Westpac will also pay:
  - (i) \$250,000 to Rural Support Trusts, as set out at clause 3.35 below.
  - (ii) \$250,000 to the Commission as a contribution to its costs of the Investigation, as set out at clause 3.36 below.

#### Admissions

- 3.2 Westpac admits that 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 some of the customers listed in Schedule One, by representing that their Swap arrangements fixed the all up cost of their borrowing, when in fact the Margins on the Loans underpinning their Swaps could increase.
- 3.3 Westpac does not, however, admit that any customers suffered, or are likely to have suffered, any loss or damage from this conduct. Further, Westpac does not admit any misleading conduct with respect to Break Costs, flexibility or suitability in relation to Swaps.
- 3.4 The admissions in this Agreement are limited to those admissions expressly made. Nothing in this Agreement constitutes any wider admission of liability by Westpac or its Related Parties.

#### Independent Review

- 3.5 In the course of negotiations between the parties, Westpac has compiled and provided to the Commission certain details of the Interest Rate Swaps and related Loans transacted by the Named Customers, together with some calculations agreed between the parties (**Transactional Information**). The parties have used this information in setting the total amounts to be paid to individual Named Customers.
- 3.6 Westpac has at its own cost retained Professor Jerry Bowman, Emeritus Professor of Finance, University of Auckland, to conduct an independent review of the Transactional Information, to confirm its accuracy (**Independent Review**).
- 3.7 The Commission has reviewed the Independent Review, and accepts its conclusions.

### Payment Methodology

- 3.8 The Commission has provided Westpac with a methodology by which it has calculated the amount to be offered to each Named Customer (**Payment Methodology**) and a schedule of those Offer Amounts.
- 3.9 The Payment Methodology, and the amounts to be paid to each Named Customer (subject to clause 3.30 below), is set out at **Schedule One**, which is confidential.
- 3.10 The Commission considers that the factors taken into account in deriving the Payment Methodology and the Payment Methodology itself provide a reasonable proxy of the potential harm and recoverable losses (as applicable to their circumstances) that Named Customers may have suffered.
- 3.11 Westpac maintains that the payments do not represent:
- (a) any form of loss to the Named Customer, or represent any recoverable loss or damage suffered by a customer; or
  - (b) that any particular Named Customer has suffered loss, or that, other than as a result of Westpac entering into this Agreement, the payment is legally required.

### Special Payment Provisions for certain customers

- 3.12 Westpac shall make all payments to Named Customers in cleared funds, save that:
- (a) Westpac is not required to make any payment to those Named Customers listed in Part 2 of **Schedule One** (being those Named Customers for whom Westpac has already written off debts that exceed the amounts that they would otherwise be entitled to under this Settlement), and subject to clause 3.14 below.
  - (b) Westpac is not required to make any payment to those Named Customers listed in Part 3 of **Schedule One** (being those 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), and subject to clause 3.14 below.
- 3.13 Westpac is to pay discounted amounts to the Named Customers listed in Parts 4 and 5 of **Schedule One**, as set out in that Schedule.
- 3.14 For the avoidance of doubt, Westpac is to advise the Named Customers listed in Parts 2-5 of **Schedule One** as to the basis for non-payment or reduced payment, as set out in **Schedule Four**.

### Offer process

- 3.15 The Commission will:
- (a) within 5 Days of the Effective Date, send the communication in **Schedule Three** to the Named Customers advising of the settlement and the forthcoming Payment Offer; and



- (b) save where a Named Customer objects to the provision of their contact details to Westpac, within 15 Days of the Effective Date (or as soon as practicable thereafter), provide Westpac with the Named Customer's contact details currently held by the Commission.
- 3.16 Subject to 3.17, within 5 Days of receipt of the Named Customer's contact details from the Commission, Westpac will send the Named Customers referred to in **Schedule One**, via mail and email to the last known address of the customer, the following documents:
- (a) the letter set out in **Schedule Four** (which is confidential) specifying the Payment Offer to the Named Customer;
- (b) the Customer Election form, as set out in **Schedule Five**; and
- (c) the Customer Release as set out in **Schedule Two**.
- 3.17 Westpac is not required to send the documents referred to at clauses 3.16(b) and 3.16(c) to any Named Customer listed in Part 2 or Part 3 of **Schedule One**.
- 3.18 The parties agree that Named Customers will have 70 Days from the date of posting of the Payment Offer to make the Customer Election to accept or reject the Payment Offer (**Response Date**).

*Acceptance of Payment Offer*

- 3.19 In order to accept a Payment Offer, a Named Customer must complete, sign and return:
- (a) the Customer Election form, ticking the box marked for acceptance; and
- (b) the Customer Release.
- 3.20 The date of such acceptance is deemed to be the date the Named Customer posts or emails both of those forms to Westpac, properly executed by all required parties.
- 3.21 Within 15 Days of receipt of those documents, properly executed, Westpac will pay that Named Customer in accordance with the Payment Offer. Payments will be made by electronic transfer to a bank account nominated by the Named Customer. Where the Named Customer omits to nominate a bank account the payment shall be made to the Named Customer by bank cheque.

*Rejection of the Payment Offer*

- 3.22 A Named Customer can refuse the Payment Offer by returning the Customer Election form marked to indicate rejection of the Payment Offer.
- 3.23 Any Payment Offer not accepted by the Response Date is deemed to be declined, unless the customer has queried the Payment Offer, in which case the parties will provide that Named Customer with an additional period of 20 Days in which to accept or reject the Payment Offer after they have responded to that query.

*Defects in documentation*

- 3.24 Where there is an error or omission by a Named Customer in the Customer Election or Customer Release forms in response to a Payment Offer, Westpac will promptly

engage with the Named Customer to ask them to remedy the defect. The Response Date will be extended by a maximum of 20 Days for that Named Customer while the error or omission is being corrected.

#### **Ensuring Named Customers are made aware of the Offer**

- 3.25 If a Named Customer has not responded to the Payment Offer within 20 Days of the date it was sent then, if the Named Customer is a current Westpac customer, Westpac will use its best endeavours to advise the Named Customer of the Payment Offer by other means, including having the Named Customer's Westpac Agribusiness relationship manager try to make contact with the Named Customer by telephone.
- 3.26 In addition, in its monthly reports as set out at clause 3.31 below, Westpac will advise the Commission of all Named Customers who have not returned to Westpac a Customer Election form.
- 3.27 The Commission may at any time take its own steps to contact and encourage any Named Customer to respond to the Payment Offer.

#### **Queries regarding Payment Offers**

- 3.28 Westpac agrees that it will:
- (a) provide easily accessible points of contact for Named Customers with questions about the payment process;
  - (b) review and respond to any Named Customer's queries about the payment process or the information relied upon to calculate the Payment Offer in a timely manner and in good faith;
  - (c) to the extent required by law, upon request provide Named Customers with access to their customer file; and
  - (d) not disadvantage a Named Customer merely as a result of the Named Customer considering, accepting or declining the Payment Offer.
- 3.29 The parties agree that they will each provide any assistance reasonably requested by the other party to assist in resolving any Named Customer's queries.
- 3.30 The parties agree that any miscalculation made in any Payment Offer will be remedied by the parties, in good faith, adjusting the Payment Offer. For the avoidance of doubt:
- (a) The Payment Offer may be adjusted by increasing, or decreasing, the Payment Offer in accordance with the Commission's Payment Methodology.
  - (b) In the event a Payment Offer is adjusted, the time in which the Named Customer has to accept that Payment Offer is extended for a further 70 Days from the date of posting the adjusted Payment Offer.

#### **Verification and reporting**

- 3.31 By the 28<sup>th</sup> of each month from the Effective Date of this Agreement, Westpac will provide a report to the Commission on the progress of the payment process, including:
- (a) the details of all Payment Offers made;

- (b) the total value of all payments made;
  - (c) details of all Named Customers who received a payment and the amount of each payment;
  - (d) confirmation that the payments made to Named Customers were made in accordance with the amounts specified in **Schedule One**;
  - (e) the details of Named Customers (if any) who have declined to accept the Payment Offer; and
  - (f) the details of Named Customers (if any) who have not responded to the Payment Offer, and the steps taken to trace and make the Payment Offer to them.
- 3.32 Within 20 Days of the final payments, Westpac will provide the Commission with a report (**Final Report**), which will include the detail listed in clause 3.31 as well as including the details of the payment to the Rural Support Trust(s).
- 3.33 Westpac will meet the cost of administering all payments under this Agreement, including the costs of preparing the monthly reports and the Final Report.
- 3.34 The parties agree to work in good faith to ensure that the payment process is completed as soon as is reasonably practicable.

#### **Rural Support Trusts**

- 3.35 Westpac agrees to pay the sum of \$250,000 (including GST, if any) to Rural Support Trusts, as follows:
- (a) Within 10 Days of the Effective Date, the Commission will provide Westpac with the details of which Rural Support Trusts are to receive payments and the amount of each distribution.
  - (b) Within 5 Days of such notification from the Commission, Westpac will pay the Rural Support Trusts in accordance with the Commission's direction.

#### **Payment of Costs**

- 3.36 Westpac agrees to pay to the Commission within 10 Days of the Effective Date \$250,000 (including GST, if any) towards the Commission's actual and estimated further costs in relation to the Investigation.

## **4 Closure of the Commission's Investigation and Releases**

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- 4.1 The parties agree that this Agreement is in full and final settlement of all claims and proceedings that the Commission has, or may have, whether in its own right or on behalf of any other person in respect of the Investigation.
- 4.2 Upon the Effective Date:
- (a) the Commission will close the Investigation; and

- (b) any outstanding notices issued to Westpac under the Investigation requiring it to provide documents or information will be deemed to be withdrawn.
- 4.3 The Commission undertakes not to issue, encourage or support any civil or criminal legal proceeding against Westpac and/or each of its Related Parties in respect of the matters that are the subject of the Investigation, except that the Commission may provide assistance to the FMA if asked to do so.
- 4.4 For the avoidance of doubt, this Agreement does not give rise to any legal entitlement or actionable right (whether under the Contracts Privity Act 1982 or otherwise) by any:
  - (a) Named Customer against Westpac, its Related Parties, or the Commission; and
  - (b) Rural Support Trust against Westpac, its Related Parties, or the Commission.

## 5 Undertakings and Specific Performance

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- 5.1 Westpac provides to the Commission court-enforceable undertakings under section 46A of the Act to:
  - (a) make the Payment Offers to Named Customers in accordance with the Payment Methodology; and
  - (b) upon receipt of each duly completed Customer Election Form and Customer Release pay the Named Customer in accordance with the terms of this Agreement.
- 5.2 The Commission can enforce clause 5.1, notwithstanding clauses 4.1 and 4.3.
- 5.3 Notwithstanding clause 5.1 above, either party has the right to sue for specific performance for breach of this Agreement.
- 5.4 In the event of action being taken against Westpac by the Commission to enforce the undertakings given under clause 5.1 above (**Enforcement Action**), the other provisions of this Agreement continue in full force and effect notwithstanding the Enforcement Action.

## 6 Public Statements

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- 6.1 Subject to clauses 6.4 and 6.5, the parties may make public statements in relation to the content of the settlement on or after the Effective Date. The parties agree that any public statements relating to the Investigation will be made in good faith and be consistent with the spirit and intent of this Agreement and, in particular, may include:
  - (a) The Commission stating that the Payment Methodology takes into account all Margin increases and, where applicable, all other relevant costs associated with the Swap and will return to most Named Customers a reasonable approximation of all of the potential losses that the Commission considers it could have recovered on behalf of Named Customers after trial in respect of Interest Rate Swaps.
  - (b) The Commission also saying that:

- (i) There are Westpac rural swap customers who are outside of the Settlement.
    - (ii) There is no money available to those customers under this Settlement.
    - (iii) Instead, the Commission has determined that a payment be made to Rural Support Trusts, to support the rural community as a whole.
  - (c) Westpac stating its view that no losses would be recoverable following trial.
  - (d) Either party may acknowledge that Westpac calculated the Break Cost on Swaps and fixed rate term loans using a materially similar methodology.
- 6.2 In accordance with its obligations under section 6 of the Act the Commission may at its own election publish on its website an Investigation Closure Report summarising the Investigation and the conclusions reached.
- 6.3 The Commission agrees that it will provide Westpac with a draft of any Investigation Closure Report before its intended release and afford Westpac a reasonable opportunity to comment on that report. Westpac's response, if any, shall be posted directly underneath the Investigation Closure Report on the relevant Commission website page.
- 6.4 Except as required by law, Westpac agrees that it will not make any public comment in relation to this Agreement or the Investigation until after the Commission has issued a media release notifying the public of this settlement.
- 6.5 The parties agree to provide written copies of their initial written media statements to the other party at least 24 hours 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.

## **7 Miscellaneous**

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- 7.1 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 (an **Information Request**), it will notify Westpac of that Information Request and will consult with Westpac as to whether there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982. The Commission will:
- (a) take full and proper account of the confidential and/or commercially sensitive and/or privileged nature of the Westpac Information, and of any views expressed by Westpac, in accordance with the provisions of the Official Information Act 1982 when considering any Information Request; and
  - (b) notify Westpac at least 5 days prior to complying with the Information Request if, notwithstanding such consideration, it determines that no grounds exist on which it may refuse to comply with the Information Request.
- 7.2 Each party will meet its own expenses incurred in the course of performing its obligations under this Agreement.

- 7.3 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 resolving any issues arising under this Agreement.
- 7.4 If necessary or desirable, the payment processes required to give full effect to the terms of this Agreement may be amended by the agreement of the parties.
- 7.5 The parties by mutual written agreement may vary any of the time periods stipulated in this Agreement, in which instance all other time periods will be extended by the same amount of time.
- 7.6 Where Westpac or the Commission take any step in the payment process of this Agreement later than the period prescribed by this Agreement, all dependent dates shall extend by the same period.
- 7.7 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 7.8 Westpac and the Commission 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.
- 7.9 This Agreement constitutes the entire agreement between the Commission and Westpac in relation to the Investigation and it supersedes all prior communications, understandings or representations whether oral or written between the Commission and Westpac.
- 7.10 No amendment to this Agreement will be effective unless it is in writing and signed by both of the parties.
- 7.11 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.
- 7.12 This Agreement may be executed in any number of counterparts. Once the parties have executed the counterparts, and each party has received a copy of each signed counterpart which that party did not execute, each counterpart will be deemed to be as valid and binding on the party executing it as if it had been executed by all the parties.
- 7.13 With the exception of Enforcement Action under section 5 of this Agreement, any question, difference or dispute between the parties concerning the implementation of this Agreement which the parties are unable to resolve themselves shall be referred to expert determination by a suitably qualified expert upon whom the parties can agree. If the parties are unable to agree on an expert within 10 Days of the date that they commence exchanging proposed names, then either party may ask the president for the time being of the New Zealand Institute of Chartered Accountants to appoint said expert.
- 7.14 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 19  
135 Albert Street  
Auckland 1143

Attention: Mary-Anne Borrowdale  
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  
Westpac On Takutai Square  
53 Galway Street  
Auckland 1010

Attention: Mike Hendriksen  
Legal Counsel  
Westpac New Zealand Limited

Email: michael\_hendriksen@westpac.co.nz

Released under Official Information Act 1982

**Execution**

Signed for and on behalf of Westpac New Zealand Limited by:

  
\_\_\_\_\_  
Attorney

If not signed by two directors then witnessed by:

  
\_\_\_\_\_  
Signature of witness

MARIETTE VAN RYN  
\_\_\_\_\_  
Name of Attorney

Michael Hendriksen  
\_\_\_\_\_  
Name of witness

Lawyer  
\_\_\_\_\_  
Occupation

Auckland  
\_\_\_\_\_  
City/town of residence

Signed for and on behalf of Westpac Banking Corporation by:

  
\_\_\_\_\_  
Attorney

  
\_\_\_\_\_  
Signature of witness

MARIETTE VAN RYN  
\_\_\_\_\_  
Name of Attorney

Michael Hendriksen  
\_\_\_\_\_  
Name of witness

Lawyer  
\_\_\_\_\_  
Occupation

Auckland  
\_\_\_\_\_  
City/town of residence



Signed for and on behalf of the Commerce Commission by:

Andrew Bennett  
Chair

If not signed by two Commissioners then witnessed by:

\_\_\_\_\_  
Commissioner/authorised signatory

Bj Walker  
Signature of witness

OLLEEN WALKER  
Name of witness

OFFICE SUPPORT COORDINATOR  
Occupation

AUCKLAND  
City/town of residence

Released under Official Information Act 1982

**Schedule One (Confidential)**

List of Named Customers with payment Schedule

**Confidential**

Released under Official Information Act 1982

SETTLEMENT AGREEMENT  
Interest Rate Swaps Investigation

Confidential

Released under Official Information Act 1982

Confidential

Released under Official Information Act 1982

## Schedule Two

### Form of wording for Customer Release

This agreement is entered into:

**Between** Westpac New Zealand Limited and Westpac Banking Corporation (together, **Westpac**)

**And** [Name] (the **Customer**)  
(together, the **parties**)

### **1 Background to agreement**

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- 1.1 The Commerce Commission (**Commission**) has investigated alleged contraventions of the Fair Trading Act 1986 (the **Act**) by Westpac in relation to the marketing of interest rate swap transactions (**interest rate swaps**) to rural customers from 2005 to 2012 (the **Investigation**).
- 1.2 Westpac and the Commission have entered into a settlement agreement (the **Settlement**) in relation to the Investigation.
- 1.3 Under the terms of the Settlement, Westpac has agreed to pay certain rural swaps customers on the Commission's direction.
- 1.4 Westpac has agreed to offer to make a payment to the Customer.
- 1.5 This agreement records the terms and conditions on which the payment is made to the Customer.
- 1.6 In this agreement a reference to Related Parties means Westpac's past or present related companies (as defined in the Companies Act 1993) and Westpac's and its related companies' directors, officers, employees or agents.

### **2 Settlement payment**

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- 2.1 The Commission has directed Westpac to make a payment of [●] to the Customer (the **payment**).
- 2.2 Westpac agrees to effect the payment to the Customer within 15 days of Westpac's receipt of an executed copy of this agreement.

### **3 Settlement and release**

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- 3.1 The parties agree that the payment is in full and final settlement of any and all claims or losses the Customer may have against Westpac or its Related Parties (whether or not the claims are known to, or capable of being known by, either party) in relation to the marketing and sale of the interest rate swaps in Schedule A (and the underlying Loans) that the Customer entered into with Westpac that were the subject of the Investigation.

- 3.2 The Customer agrees not to issue, encourage or support any legal proceedings in relation to the interest rate swaps that were the subject of the Investigation against Westpac and/or any of its Related Parties.
- 3.3 The Customer agrees that upon entry into this agreement it will keep the terms of this agreement and the payment (including the methodology making up the payment) strictly confidential.

#### **4 No admission**

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- 4.1 Nothing in this agreement constitutes an admission of legal liability by Westpac or its Related Parties.

#### **5 Entire agreement**

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- 5.1 Westpac and the Customer acknowledge and agree that this agreement contains all of the terms, representations and warranties made between the parties with respect to its subject matter and supersedes any and all prior representations, discussions and agreements relating thereto.

#### **6 Independent advice**

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- 6.1 The Customer acknowledges that it has agreed to enter into this agreement in reliance on such independent advice (including tax, legal and financial advice) as the Customer considers necessary and not on any representation or other conduct of Westpac or the Commerce Commission prior to this agreement being entered into, or at any subsequent time.

#### **7 Costs**

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- 7.1 Westpac and the Customer each agree to bear their own costs for entering into this agreement.

**Executed as an agreement on 30 January 2015 by:**

**Signed** for and on behalf of [Customer Name] by:

\_\_\_\_\_  
Director

If not signed by two directors then witnessed by:

\_\_\_\_\_  
Director/authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

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

\_\_\_\_\_  
Attorney

If not signed by two directors then witnessed by:

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

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

Signed for and on behalf of Westpac  
Banking Corporation by:

\_\_\_\_\_  
Attorney

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

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

**Schedule A – Customer Swaps**

Swap Counterparty:	
Date of the swap:	
Term of the swap:	
Notional value of the swap:	



## Schedule Three

### Commission Communication with Westpac complainants announcing settlement

[Insert Date]

[Recipient Name]

[Recipient Address] / Email Address

Dear [Recipient]

### Interest Rate Swaps Investigation – Fair Trading Act 1986 – Westpac – Notice of settlement

As you are aware, the Commerce Commission has been investigating the way in which Westpac Banking Corporation and Westpac New Zealand Limited (**Westpac**) marketed and sold interest rate swaps (**Swaps**) to farmers.

The Commission has now reached a settlement with Westpac that resolves the Commission's concerns arising from this investigation. This letter summarises the reasons why the Commission has elected to settle this matter and the process that you will need to follow to obtain any payment or credit to which you are entitled under the settlement.

The Commission asks that you read this letter, and return the enclosed form to the address provided within 5 working days of receiving this letter. It is important that you do so, to ensure you are able to participate in the offer to be made to you.

#### Background

In December 2013, the Commission announced that it considered that there was sufficient foundation for it to commence legal proceedings against Westpac for alleged breaches of the Fair Trading Act 1986 (the **Act**). Since that announcement, however, the Commission has been in discussions with Westpac in an attempt to resolve the Commission's concerns and in order to obtain a settlement payment for the Westpac rural customers who complained to the Commission.

#### Settlement

As a result of those discussions, the Commission has now reached a settlement with Westpac. The Commission is of the view that this settlement is in the public interest and in the interests of the large majority of complainants (referred to as **Named Customers** in the Settlement Agreement between the Commission and Westpac).

The basis of the settlement is as follows:

- Westpac admits that it breached section 9 of the Act – which prohibits engaging in conduct that is misleading or deceptive or likely to mislead or deceive;
- Westpac will make available for payment an amount expected to be \$2,473,303 and, from that amount, will pay a sum expected to be \$1,878,899, to be distributed between Named Customers, on the basis agreed between the parties;
- Westpac will make a donation of \$250,000 to Rural Support Trusts; and
- Westpac will pay \$250,000 to the Commission as a contribution to its costs of the investigation.

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](http://www.comcom.govt.nz/irs-westpac-settlement)]. Note that the compensation payable to

each individual farmer is confidential and is not contained in the publicly available version of the agreement.

### **Reasons for settlement**

The Commission considers that this settlement is a very satisfactory outcome to the investigation. In reaching this conclusion, the Commission has considered:

- The complex nature of the factual issues involved in the case, including in particular the difficulties involved in establishing what loss any individual farmer may have suffered.
- The legal issues arising from possible legal defences that Westpac would have, including as to limitation.
- The length of time that it would take before any proceedings would be resolved, and the likely delays that would cause in providing any compensation to farmers.
- The stress on farmers, and the distraction for them from their businesses, of having to come to court to give evidence about events that occurred some years ago.
- The sums involved in the settlement and the breadth of payments to the Westpac rural customers who contacted the Commission.

### **Payment methodology**

In the coming weeks, you will receive a letter from Westpac setting out your entitlement under the Settlement Agreement. For most customers, that will involve a payment to you. For some customers, however, particularly those who have previously settled with the bank relating to Swaps or for whom the bank has written off sums of money, there will be no payment. Nevertheless customers who will not receive a payment for those reasons will be advised by Westpac of the reason why a payment offer will not be paid to them.

Westpac's letter will also explain the process by which you can accept any offer of payment from Westpac.

Westpac and the Commission have calculated each customer's entitlement on the basis of a methodology agreed between Westpac and the Commission. Although this is not a precise calculation of any loss you may have suffered, the Commission considers that it is a reasonable approximation.

As you would expect, the payments will differ for each Named Customer as they will be based on individual circumstances.

### **Distribution Process**

The Westpac letter you receive will include a Customer Release that you will need to sign before any payment can be made.

This Customer Release will confirm that any payment to you is in full and final settlement of any and all claims you may have against Westpac in connection with Westpac's marketing, promotion and sale of the rural swaps listed in the release to you.

You should take your own legal and financial advice as to whether you wish to sign the Customer Release and accept any payment.

You do not have to accept any payment that is offered to you by Westpac. But if you do wish to accept the payment, it is important that you return the completed Customer Release to Westpac. You will not receive any payment or credit until you return the Customer Release to Westpac. Accordingly we urge you to respond promptly to Westpac's letter.

I can advise you that Westpac has undertaken to treat all customers fairly and it will not take any adverse action against any customer who chooses to accept or decline the offer.

**Requirement to confirm contact details for receipt of settlement correspondence**

The Commission has agreed to provide Westpac with your most recent contact details, to ensure that the settlement can be completed promptly. The Commission seeks your consent to do so. Those details will be provided to Westpac strictly on the basis they are for the purposes of effecting this settlement only.

Accordingly please complete and return the attached form by email to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz) confirming where Westpac should send its letter regarding the offer of any payment. This is especially important if you are no longer a customer of Westpac. Please return this by no later than [insert date]

**Questions and Answers (Q&A) about the settlement process**

The Commission is updating its website to include further information about the settlement. There you will find a copy of the Commission's media release about the settlement and a Q&A [[www.comcom.govt.nz/irs-westpac-settlement](http://www.comcom.govt.nz/irs-westpac-settlement)].

Westpac will be providing a contact point for affected Named Customers to contact if they have any questions. This will be set out in the correspondence you will receive from Westpac.

If you have any queries about this settlement you should contact the Westpac contact point when Westpac writes to you. In the interim you may call our contact centre on 0800 943 600 or send an email to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz) if you have any queries or concerns about the provision of your contact details to Westpac.

Yours sincerely

Mary-Anne Borrowdale  
General Counsel  
Competition

Encl.

<b>Westpac Interest Rate Swaps Settlement Confirmation of contact details</b>	
<b>Name: (Personal and Business entity)</b>	
<b>Current postal address:</b>	
<b>Current email address:</b>	
<b>Confirmation that I consent to my current contact details as provided to the Commission to be provided to Westpac for the purposes of the Commission's settlement with Westpac</b>	Yes / No (please circle)
<b>Signed:</b>	
<b>Date:</b>	

Please return this to the Commission by no later than [insert date] by scanning and emailing to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz) or by sending by post to:

"Westpac Interest Rate Swaps Settlement"  
 Commerce Commission  
 PO Box 2351  
 Wellington 6140

**Schedule Four (Confidential)**

Westpac letter to customers

**Confidential**

Released under Official Information Act 1982

Confidential

Released under Official Information Act 1982

Confidential

Released under Official Information Act 1982

**Schedule Five**

**Customer Election Form**

**Confidential**

Released under Official Information Act 1982



Confidential

Released under Official Information Act 1982

**CERTIFICATE OF NON-REVOCATION OF POWER OF ATTORNEY**

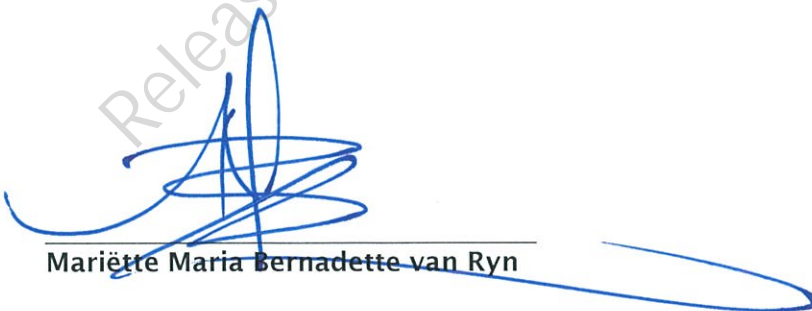
I, **MARIËTTE MARIA BERNADETTE VAN RYN**, of Auckland in New Zealand, Bank Officer

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 Auckland**

On this 30<sup>th</sup> day of January 2015



**Mariëtte Maria Bernadette van Ryn**

# CERTIFICATE OF NON-REVOCATION OF POWER OF ATTORNEY

I, **MARIËTTE MARIA BERNADETTE VAN RYN** of Auckland in New Zealand, Bank Officer

HEREBY CERTIFY -

1. **THAT** by Deed dated 20 October 2003 a copy of which is deposited in the Land Registry Office at Christchurch and there numbered PA 5941731.1 **WESTPAC BANKING CORPORATION** ABN 33 007 457 141, incorporated in Australia (and registered in New South Wales) under the Corporations Act 2001 of Australia 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 this 30<sup>th</sup> day of January 2015



Mariëtte Maria Bernadette van Ryn

# Settlement Agreement

regarding the Commerce Commission investigation into interest rate swaps transactions with rural customers between 2005 and 2009

**New Zealand Commerce Commission**

**ANZ Bank New Zealand Limited**

Dated: 3 December 2014

Released under Official Information Act 1982

**Agreement** dated 3 December 2014

## Parties

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

**Commerce Commission** a statutory body established under s8 of the Commerce Act 1986 (the Commission)

### 1 Introduction

- 1.1 The Commission has investigated alleged contraventions of the Fair Trading Act 1986 (the Act) by ANZ in relation to its marketing, promotion and offer of interest rate swap transactions to rural customers from 2005 to 2009 (the Investigation).
- 1.2 This Agreement records the background to the Investigation, the conclusions reached by the Commission, and the means by which the Investigation is to be resolved.
- 1.3 This Agreement will be made public by the Commission (including on the Commission's website), save for any material identified in this Agreement as confidential.

### Interpretation

- 1.4 For the purposes of this Agreement:

**ANZ Information** means all information provided by or on behalf of ANZ to the Commission, whether voluntarily or under compulsion, in respect of the Investigation.

**Customer Release** means the document as set out in **Schedule Two**;

**Customer Election** means the Named Customer's election to accept or decline the Payment Offer as per clause 3.26(b) and in the form set out in **Schedule Seven**.

**Days** means working days, save that time does not run between 24 December 2014 and 12 January 2015, inclusive.

**ETA** means the Early Termination Amount which is the cost (or in some cases a benefit) to a party to terminate a Rural Swap prior to its maturity date.

**Independent Review** means the review to be conducted by Northington Partners, as set out at clause 3.16.

**Insolvency Event** means any of the following:

- (a) a Named Customer has been declared at risk pursuant to the Corporations (Investigation and Management) Act 1989;
- (b) legal procedures have been taken in relation to:
  - (i) the suspension of payments, a moratorium of any indebtedness, winding-up, dissolution, administration or reorganisation (by way of

- voluntary arrangement, scheme of arrangement or otherwise) of a Named Customer;
- (ii) a composition, assignment or arrangement with any creditor of a Named Customer;
  - (iii) the appointment of a liquidator, receiver, administrator, administrative receiver, statutory manager or other similar officer in respect of a Named Customer or any of its assets; or
  - (iv) enforcement of any security over any assets of a Named Customer;
- (c) a Named Customer is adjudicated bankrupt; or
- (d) any similar or equivalent event in relation to paragraphs (a) to (c) that occurs under the laws of any other jurisdiction.

**Interest Rate Swaps (Rural Swaps, or Swaps)** comprise, in the case of Interest Rate Swaps sold to rural customers, contracts under which one party agrees to make payments based on a fixed interest rate on a notional principal amount, in exchange for receiving payments from the other party based on a floating interest rate on the notional principal amount. The principal amount is not exchanged.

**Loan** means the loan made by ANZ to the Named Customer – usually at a floating interest rate – that corresponds to the Interest Rate Swap.

**Margin** means the amount charged by ANZ to the Named Customer in addition to the bank bill bid-market settlement (**BKBM**) rate charged as part of the Loan interest rate.

**Named Customer** means those persons listed in **Schedule One**, including their executors, administrators, successors and assigns and, in the case of a trustee, includes any substituted or additional trustee (if any). It also includes other entities in the Risk Group, as the parties agree is appropriate following the Independent Review. Named Customers comprise that group of customers whose details were provided by the Commission to ANZ before 12 August 2014 as the Commission's complainants of record. Schedule One is confidential to the parties, but the Named Customers will be advised of the availability of a Payment Offer as per clauses 3.26 to 3.27 below.

**Payment Fund** means the fund defined at clause 3.11.

**Payment Methodology** means the methodology defined at clauses 3.20 and 3.21.

**Payment Offer** means the amount offered to any Named Customer in the offer letter set out at Schedule Seven (which is confidential) or in any adjusted offer made using the same or similar form made in accordance with clause 3.40. It is comprised of the amount determined to be payable to the Named Customer under the Payment Methodology, less any deductions and set offs under this Agreement.

**Related Parties** of ANZ 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; and

- (c) Australia and New Zealand Banking Group Limited (**ANZBGL**) and its past and present directors, officers, employees and agents; and
- (d) ANZBGL's past and present 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.

**Restructured Swap/Restructure** means in effect amending the terms of the Swap by terminating an existing Swap and entering into a new (restructured) swap on new terms, which may include a new fixed or floating interest rate, new maturity date or new notional principal amount.

**Rural Support Trusts** are charitable trusts that assist farmers during and after extreme weather or environmental events and for general hardship, and for the purposes of this Agreement are limited to those listed at [www.rural-support.org.nz](http://www.rural-support.org.nz). It is anticipated that there will be a payment to one or more Rural Support Trusts as part of this settlement. If that is not able to occur, then the payment intended for the Rural Support Trusts is to be paid to another suitable organisation at the Commission's election for the purpose of assisting the rural sector.

#### **Use of an Agent**

- 1.5 The parties agree that ANZ may retain at its own cost a suitably qualified third party, to be approved by the Commission, to undertake some of the payment process set out in this Agreement on ANZ's behalf, but that ANZ's duties and obligations under this Agreement remain with ANZ.

## **2 Background**

### **Interest Rate Swaps**

- 2.1 Between mid-2005 and approximately 2009, ANZ marketed Interest Rate Swaps to existing and potential rural customers, primarily through private meetings conducted with those customers by ANZ managers (**Sales Presentations**). This marketing often included documents and PowerPoint presentations provided to the customers (**Marketing Documents**).

### **Commission and FMA Investigations**

- 2.2 During 2012, media reports indicated that certain rural customers were dissatisfied with Interest Rate Swaps.
- 2.3 At around the same time, the Commission received complaints about the manner in which ANZ staff marketed Interest Rate Swaps to rural customers.
- 2.4 In August 2012 the Commission commenced the Investigation.
- 2.5 In early 2014, the Financial Markets Authority (**FMA**) commenced its own investigation in relation to Interest Rate Swaps. ANZ and the FMA are entering into a separate agreement in relation to the FMA investigation.

### Commission Decision

2.6 The Commission has completed the Investigation into ANZ's conduct and concluded that, in its view, there is a sufficient foundation for it to commence proceedings against ANZ alleging breaches of the Act. In particular, the Commission considers that ANZ engaged in conduct that conveyed the impression to existing and potential customers, including the Named Customers, that:

- (a) Margins on the Loan would not change for the term of the original Swap and for any Restructure, extension, or shortening of the term of the Swap; and/or
- (b) The ETA would be the same or materially similar to the cost of terminating a fixed rate term loan of equivalent amount, interest rate, and duration; and/or
- (c) Swaps were a suitable alternative and good substitute for a fixed rate term loan for the circumstances of the customer or potential customer,

(the **Conduct**).

2.7 The Commission concluded that the Conduct was, or was likely to be, misleading because:

- (a) with respect to Margins, under the contractual terms ANZ could (and, in some instances, did), increase Margins;
- (b) with respect to termination, the ETA could be significantly higher than the amount payable to terminate an equivalent fixed rate term loan;
- (c) with respect to suitability, Named Customers could not always take advantage of the flexibility of the Swaps because:
  - (i) doing so attracted a cost that was not foreseen by the Named Customers, which undermined the flexibility of the Swap and dissuaded some Named Customers from exercising that option;
  - (ii) the Named Customers were not technically equipped to monitor and adjust the Swaps.

2.8 The Commission considers that it is likely that some ANZ rural customers may have suffered loss as a result of the Conduct.

### ANZ's position

2.9 ANZ disagrees with the matters set out in clause 2.6 and the Commission's conclusions referred to at clauses 2.7 and 2.8 above.

2.10 In particular, ANZ says:

- (a) The Commission's conclusions have not been tested in Court.
- (b) The loan agreements plainly provided for margin changes and that it did not give assurances that margins would not change.
- (c) The contract documents entered in respect of the swap transactions were comprehensive, identified the risks, and included confirmations from the Named Customers and in many cases their solicitors as to the Named Customers' understanding of the transaction.



- (d) It was a reasonable opinion that ETAs would be similar to the cost of breaking a fixed term loan, based on the experience of ANZ at the dates that the Named Customers entered Swaps. The fact some (but not all) ETAs differed from fixed term loan break costs was attributable to the unique and extraordinary effect of the Global Financial Crisis.
- (e) Many of the Named Customers were sophisticated business people running commercial operations (the average asset value of the Named Customers was at least \$15.7m as at 30 September 2008). They were experienced in managing cash flows (including interest rate fluctuations) and were capable of understanding the nature of the transactions.
- (f) Named Customers had access to, and often took, legal and other professional advice before entering Swaps.
- (g) It would not be liable for any fines, penalties, refunds or damages at law, whether under the Act or any other legislation, regulation or rule of law.

### **Settlement**

- 2.11 Notwithstanding the parties' differing views on ANZ's conduct, following discussions between the Commission and ANZ, the Commission has concluded, based upon the Solicitor-General's Prosecution Guidelines and its Enforcement Criteria, that it would be in the public interest for it to resolve the issues arising in the Investigation, on the terms set out below.
- 2.12 In reaching the terms of this settlement, the parties have considered:
- (a) The complex nature of the factual issues involved in the case, including in particular the difficulties involved in establishing what losses may have been suffered.
  - (b) The legal issues arising from possible legal defences that ANZ would have, including as to limitation.
  - (c) The length of time that it would take before any proceedings would be resolved, and the likely delays that would cause in providing any compensation to Named Customers.
  - (d) The stress on Named Customers, and the distraction for them from their businesses, of having to come to court to give evidence about events that occurred some years ago.
  - (e) The sums involved in the settlement.
- 2.13 This Agreement is conditional upon ANZ entering into and executing a settlement with the FMA pursuant to the FMA Investigation.

### **3 Terms of settlement**

- 3.1 The Commission and ANZ have agreed to resolve the issues between them arising from the Investigation on the terms set out below.

### **Admissions**

- 3.2 ANZ makes the admissions in **Schedule Five** to this Agreement, including that it engaged in certain conduct that was misleading in relation to some Named Customers.
- 3.3 The admissions in this Agreement are limited to those admissions expressly made. Nothing in this Agreement constitutes any wider admission of liability by ANZ or its Related Parties.

### **Statement of claim and statement of defence**

- 3.4 Within 10 Days of execution of this Agreement, the Commission will file in the High Court at Auckland a Statement of Claim in the form attached at **Schedule Four**.
- 3.5 Within 5 Days of service of the Statement of Claim, ANZ will file a Statement of Defence in the form attached at **Schedule Five**.
- 3.6 The Commission will only apply for a Court order declaring that the conduct as pleaded in paragraphs 32 to 34 of the Statement of Claim and admitted in paragraphs 32 to 34 of the Statement of Defence breached section 9 of the Act.
- 3.7 ANZ will not oppose the Court making the declaration sought by the Commission.
- 3.8 The parties agree to provide to each other, before filing, any Court documents that either intends to file, and to provide a reasonable opportunity to the recipient to comment on the contents. The parties will cooperate to arrange for the Commission's application to be heard by the Court as soon as reasonably possible.
- 3.9 Irrespective of the outcome of the Commission's application under clause 3.6 above, the other provisions of this Agreement remain in force.

### **Payment of Costs**

- 3.10 ANZ agrees to pay to the Commission within 15 Days of signing this agreement NZ\$500,000 (including GST, if any) towards the Commission's actual and estimated further costs in relation to the Investigation.

### **Payment Fund**

- 3.11 ANZ will, within 5 Days of the date of this Agreement, deposit the sum of \$18.5 million into an interest bearing account (**Payment Fund**). Interest is to accrue at ANZ's usual published commercial rates (the **Interest**).
- 3.12 The Interest will form part of the Payment Fund.
- 3.13 Other than the amounts set out in clause 3.11, in no circumstances is ANZ under any obligation to pay any further amounts into the Payment Fund under this Agreement. Any payment under this Agreement (other than the costs payable by ANZ under clause 3.10 and to administer the payment process) can only be paid out of the Payment Fund.
- 3.14 ANZ agrees that it will pay out monies from the Payment Fund in accordance with the terms set out below.

### Independent Review

- 3.15 In the course of negotiations between the parties, ANZ has compiled and provided to the Commission details of the Interest Rate Swaps and related Loans transacted by the Named Customers, together with certain calculations agreed between the parties (**Transactional Information**). The parties have used this information in setting the amount of the Payment Fund.
- 3.16 Promptly upon execution of this Agreement, ANZ will at its own cost retain Northington Partners (**Northington**) to conduct an independent review of the Transactional Information, to confirm its accuracy (**Independent Review**). The scope of the Independent Review will be agreed between ANZ, the Commission and Northington.
- 3.17 The parties anticipate that the Independent Review will take no more than 60 Days.
- 3.18 Promptly upon completion of the Independent Review, Northington is to provide a report to ANZ and the Commission setting out the results of the review, including detailing any adjustments to be made to the Transactional Information and the basis for them.
- 3.19 If either party disagrees with the suggested adjustments, or the amounts to be set-off or deducted as permitted by this Agreement, the parties will engage in good faith with each other and Northington to resolve the dispute.

### Payment Methodology

- 3.20 Subject to resolving any dispute arising under clause 3.19, within 10 Days of receipt of the Independent Review, the Commission will provide ANZ with a methodology by which it has calculated the amount to be offered to each Named Customer (**Payment Methodology**) and a schedule of those offer amounts.
- 3.21 The Payment Methodology will take into account:
- (a) Margins paid by Named Customers;
  - (b) ETAs paid by Named Customers on termination or restructure of a Swap;
  - (c) Costs incurred by Named Customers who did not terminate or restructure their Swaps; and
  - (d) Potential difficulties in establishing specific customer losses, particularly with respect to the larger, more financially experienced and better-resourced Named Customers.
- 3.22 The parameters within which the Commission will set the Payment Methodology are set out at **Schedule Three**, which is confidential.

### **Differing positions regarding Payment Methodology**

- 3.23 The Commission considers that the factors taken into account in deriving the Payment Methodology will provide a reasonable proxy of the potential harm and recoverable losses (as applicable to their circumstances) that Named Customers may have suffered.
- 3.24 ANZ's position is that the payments do not represent:
- (a) that ANZ is liable in any particular case;
  - (b) any form of loss to the Named Customer, or represent any recoverable loss or damage suffered by a customer; or
  - (c) that any particular Named Customer has suffered loss, or that the payment is legally required.

### **Offer process**

- 3.25 The Commission will:
- (a) within 5 Days of execution of this Agreement, send the communication in **Schedule Six** to the Named Customers advising of the settlement and the forthcoming Payment Offer; and
  - (b) save where a Named Customer objects to the provision of their contact details to ANZ, within 15 Days of execution of this Agreement (or as soon as practicable thereafter but no later than 10 Days before the Payment Offers are due to be sent in accordance with this Agreement), provide ANZ with the Named Customer contact details currently held by the Commission.
- 3.26 Within 10 Days of receipt of the Payment Methodology from the Commission, ANZ will send Named Customers (including any Named Customer referred to at clauses 3.41 and 3.42 below), via mail and email to the last known address of the customer, the following documents:
- (a) the letter set out in **Schedule Seven** (which is confidential) specifying the Payment Offer to the Named Customer;
  - (b) the Customer Election form, as set out in **Schedule Seven**; and
  - (c) the Customer Release as set out in **Schedule Two** to the Named Customers,
- 3.27 The parties agree that Named Customers will have 70 Days from the date of posting of the Payment Offer to make the Customer Election to accept or reject the offer (**Response Date**).

#### *Acceptance of Payment Offer*

- 3.28 In order to accept a Payment Offer, a Named Customer must complete, sign and return:
- (a) The Customer Election form, ticking the box marked for acceptance; and
  - (b) The Customer Release.

- 3.29 The date of such acceptance is deemed to be the date the Named Customer posts or emails both of those forms to ANZ, properly executed by all parties.
- 3.30 Within 15 Days of receipt of those documents, properly executed, ANZ will pay that Named Customer in accordance with the Payment Offer. Payments will be made from the Payment Fund by electronic transfer to a bank account nominated by the Named Customer. Where the Named Customer omits to nominate a bank account the payment shall be made to the Named Customer by bank cheque.

*Rejection of the Payment Offer*

- 3.31 A Named Customer can refuse the Payment Offer by returning the Customer Election form marked to indicate rejection of the offer.
- 3.32 Any Payment Offer not accepted by the Response Date is deemed to be declined, unless the customer has queried the offer, in which case the parties will provide that Named Customer with an additional period of 20 Days in which to accept or reject the Payment Offer after they have responded to that query.
- 3.33 All amounts representing Payment Offers (less any set offs and deductions referred to at clauses 3.41 and 3.42 below) that are rejected or not accepted by the Response Date will be retained in the Payment Fund for distribution in accordance with clauses 3.46 and 3.47 below.

*Defects in documentation*

- 3.34 Where there is an error or omission by a Named Customer in the Customer Election or Customer Release forms in response to a Payment Offer, ANZ will promptly engage with the Named Customer to ask them to remedy the defect. The Response Date will be extended by a maximum of 20 Days for that Named Customer while an error or omission is being corrected. No payment may be made from the Payment Fund to the Rural Support Trusts until all identified errors or omissions have been remedied.

**Ensuring Named Customers are made aware of the Offer**

- 3.35 If a Named Customer has not responded to the Payment Offer within 30 Days of the date it was sent then, if the Named Customer is a current ANZ customer, ANZ will use its best endeavours to advise the Named Customer of the offer by other means, including having the Named Customer's ANZ Rural Manager try to make contact with the Named Customer by telephone.
- 3.36 In addition, in its monthly reports as set out at clause 3.49 below, ANZ will advise the Commission of all Named Customers who have not returned to ANZ a Customer Election form.
- 3.37 The Commission may at any time take its own steps to contact and encourage any Named Customer to respond to the Payment Offer.

**Queries regarding Payment Offers**

- 3.38 ANZ agrees that it will:
- (a) provide easily accessible points of contact for Named Customers with questions about the payment process;

- (b) review and respond to any Named Customer's queries about Payment Offers or the payment process in a timely manner and in good faith;
  - (c) to the extent required by law, upon request provide Named Customers with access to their customer file; and
  - (d) not disadvantage any Named Customer merely as a result of that Named Customer considering, accepting or declining the Payment Offer.
- 3.39 The parties agree that they will each provide any assistance reasonably requested by the other to assist in resolving any Named Customer's queries.
- 3.40 The Commission has a right and discretion to direct that ANZ adjust any Named Customer's Payment Offer or extend the time in which the Named Customer has to accept that Payment Offer, following review of a customer query, provided that it does so within 20 Days of the Response Date, subject in all circumstances to clause 3.13 and so long as any adjustment is consistent with the Payment Methodology. The Commission's right and discretion under this clause expires as soon as any payment is made from the Payment Fund to the Rural Support Trusts.

#### **Special Payment Provisions for certain customers**

- 3.41 ANZ shall pay all Named Customers from the Payment Fund in cash, save that ANZ may, at its sole discretion:
- (a) pay any of the Named Customers under credit management by ANZ as at the date of this Agreement by crediting their account with the amount offered, rather than making a cash payment;
  - (b) set off any amount payable to a Named Customer against any amount payable or otherwise owed to ANZ by a Named Customer which is subject to an Insolvency Event; and/or
  - (c) set off any amount payable to a Named Customer against any amount written off by ANZ outside of an Insolvency Event by crediting their account with the amount payable, rather than making a cash payment.
- 3.42 ANZ shall be entitled to deduct from the amount to be paid to a Named Customer the value of any payment, financial benefit or reduced obligation previously provided by ANZ to that Named Customer in relation to the matters that are the subject of the Investigation (**Prior Accommodation**). (For the avoidance of doubt, where a Payment Offer before any deduction is less than the Prior Accommodation, the Named Customer shall not be required to refund to ANZ any of the Prior Accommodation). All deducted amounts will be paid from the Payment Fund to ANZ as set out below.
- 3.43 For the avoidance of doubt, any deduction and set off under clause 3.41 or 3.42 is:
- (a) to be particularised in the Payment Offer; and
  - (b) able to be deducted from a Named Customer's Payment Offer where any deduction and set off allowed under this Agreement relates to any customer within that Named Customer's risk group (as the parties agree is appropriate in the relevant circumstances following the Independent Review).

- 3.44 ANZ may make and pay ANZ the set offs and deductions referred to at clauses 3.41 and 3.42 above no earlier than the date on which:
- (a) the Named Customer accepts the Payment Offer;
  - (b) the Named Customer rejects the Payment Offer; or
  - (c) the Payment Offer is deemed to be declined.

#### **Final Payments**

- 3.45 Within 5 Days of completing all payments to Named Customers and making all set offs and deductions as permitted by this Agreement, ANZ will notify the Commission of the balance remaining in the Payment Fund, including interest.
- 3.46 Within 10 Days of ANZ's notification to the Commission under clause 3.45 above, the Commission will direct ANZ to distribute the balance of the Payment Fund to any or all of the Rural Support Trusts and the amount of each distribution (**Final Payments**).
- 3.47 ANZ is to make the Final Payments to the Rural Support Trusts in accordance with clause 3.46 within 5 Days of the Commission's direction.
- 3.48 The parties agree to work in good faith to ensure that the payment process is completed as soon as is reasonably practicable and if possible by 30 September 2015.

#### **Verification and reporting**

- 3.49 By the 28<sup>th</sup> of each month from signing from the date that Payment Offers are sent until completion of the payment process, ANZ will provide a report to the Commission on the progress of the payment process, including:
- (a) the details of all Payment Offers made;
  - (b) the total value of all payments made;
  - (c) details of all Named Customers who received a payment and the amount of each payment;
  - (d) confirmation that the payments made to Named Customers were made in accordance with the amounts required by the Payment Methodology;
  - (e) the details of Named Customers (if any) who have declined to accept the Payment Offer;
  - (f) the details of Named Customers (if any) who have not responded to the Payment Offer, and the steps taken to trace and make the offer to them.
- 3.50 Within 20 Days of the Final Payment, ANZ will provide the Commission with a report (the **Final Report**) verifying completion of the payment process, which will include the detail listed in clause 3.49 as well as including the details of the payment to Rural Support Trust(s).
- 3.51 ANZ will meet the cost of preparing the monthly reports and the Final Report.

#### **4 Closure of Commission's Investigation And Releases**

- 4.1 The parties agree that this Agreement is in full and final settlement of all claims and proceedings that the Commission has, or may have, whether in its own right or on behalf of any other person, in respect of the matters the subject of the Investigation.
- 4.2 Upon execution of this Agreement, the Commission will suspend the Investigation.
- 4.3 While the Investigation is suspended:
- (a) The terms of the Agreement to Suspend Operation of Limitation Period dated 31 March 2014 (as extended from time to time by the parties) (**Standstill Agreement**) remain in force and are extended accordingly;
  - (b) Time does not run against ANZ's obligations to comply with any outstanding notices issued to it by the Commission to provide documents or information under the Investigation.
- 4.4 Upon the completion of the hearing on the Commission's application referred to at clause 3.6 above:
- (a) The Commission will close the Investigation;
  - (b) The extension of the Standstill Agreement under this Agreement will expire;
  - (c) Any outstanding notices issued to ANZ under the Investigation requiring it to provide documents or information will be deemed to be withdrawn.
- 4.5 The Commission undertakes not to issue, encourage or support any civil or criminal legal proceeding against ANZ and/or each of its Related Parties in respect of the matters that are the subject of the Investigation.
- 4.6 For the avoidance of doubt, this Agreement does not give rise to any legal entitlement or actionable right by any:
- (a) Named Customer against ANZ, its Related Parties, or the Commission; and
  - (b) Rural Support Trust against ANZ, its Related Parties, or the Commission.

#### **5 Undertakings and specific performance**

- 5.1 ANZ provides to the Commission court-enforceable undertakings under section 46A of the Act to:
- (a) make the Payment Offers to Named Customers in accordance with the Payment Methodology; and
  - (b) upon receipt of duly completed Customer Election Forms and Customer Releases pay the Named Customer the Payment Amount, in accordance with the terms of this Agreement.
- 5.2 The Commission can enforce clause 5.1, notwithstanding clauses 4.1 and 4.5.
- 5.3 Notwithstanding clause 5.1 above, either party has the right to sue for specific performance for breach of this Agreement.



5.4 In the event of action being taken against ANZ by the Commission to enforce the undertakings given under clause 5.1 above (**Enforcement Action**), the other provisions of this Agreement continue in full force and effect notwithstanding the Enforcement Action.

## 6 Public Statements

6.1 Subject to clauses 6.4 and 6.5, 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 made in good faith and be consistent with the spirit and intent of this Agreement and, in particular, may include:

- (a) The Commission stating that it expects that the Payment Methodology will return to most Named Customers:
  - (i) a reasonable approximation of all of the potential losses that the Commission considers it could have recovered on behalf of Named Customers after trial in respect of any extra margins that they paid; and
  - (ii) a reasonable approximation of all of the potential losses it could have recovered for Named Customers after trial for additional Early Termination Amounts that Named Customers incurred; or
  - (iii) For those who did not pay an Early Termination Amount, a reasonable portion of the extra costs that they may have incurred.
- (b) The Commission also saying that:
  - (i) There are ANZ rural swap customers who are outside of the Settlement.
  - (ii) There is no money available to those customers under this Settlement.
  - (iii) Instead, the Commission has determined that payments be made to Rural Support Trusts, to support the rural community as a whole.
- (c) ANZ stating its view that no losses would be recoverable following trial, and that the Commission will determine the allocation of all payments out of the Payment Fund, not ANZ.

6.2 In accordance with its obligations under section 6 of the Act the Commission may at its own election publish on its website an Investigation Closure Report summarising the Investigation and the conclusions reached.

6.3 The Commission agrees that it will provide ANZ with a draft of the Investigation Closure Report before its intended release and afford ANZ a reasonable opportunity to comment on that report. ANZ's response, if any, shall be posted directly underneath the Investigation Closure Report on the relevant Commission web-site page.

6.4 Except as required by law, ANZ agrees that it will not make any public comment in relation to this Agreement or the Investigation until after the Commission has issued any media comment notifying the public of this settlement.

6.5 The parties agree to provide written copies of their initial written media statements to the other party at least 24 hours 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.

## 7 Miscellaneous

- 7.1 The Commission acknowledges that some of the information provided by ANZ to the Commission during the course of the Investigation is confidential and/or commercially sensitive and/or subject to privilege (the ANZ information). 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 ANZ information (an **Information Request**), it will notify ANZ of that request and will consult with ANZ as to whether there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982. The Commission will:
- (a) take full and proper account of the confidential and/or commercially sensitive and/or privileged nature of the ANZ information, and of any views expressed by ANZ, in accordance with the provisions of the Official Information Act 1982 when considering any Information Request; and
  - (b) notify ANZ 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.
- 7.2 Each party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 7.3 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.
- 7.4 If necessary or desirable, the payment processes required to give full effect to the terms of this Agreement may be amended by the agreement of the parties.
- 7.5 The parties by written agreement may vary any of the time periods stipulated in this Agreement, in which instance all other time periods will be extended by the same amount of time.
- 7.6 Where ANZ or the Commission take any step in the payment process of this Agreement late, all dependent dates shall extend by the same period.
- 7.7 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 7.8 ANZ and the Commission 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.
- 7.9 This Agreement constitutes the entire agreement between the Commission and ANZ in relation to the Investigation and it supersedes all prior communications, understandings or representations whether oral or written between the Commission and ANZ.
- 7.10 No amendment to this Agreement will be effective unless it is in writing and signed by both of the parties.

- 7.11 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.
- 7.12 This Agreement may be executed in any number of counterparts. Once the parties have executed the counterparts, and each party has received a copy of each signed counterpart which that party did not execute, each counterpart will be deemed to be as valid and binding on the party executing it as if it had been executed by all the parties.
- 7.13 With the exception of Enforcement Action under section 5 of this Agreement, any question, difference or dispute between the parties concerning the implementation of this Agreement which the parties are unable to resolve themselves shall be referred to expert determination by a suitably qualified expert upon whom the parties can agree. If the parties are unable to agree on an expert within 10 Days of the date that they commence exchanging proposed names, then either party may ask the president for the time being of the New Zealand Institute of Chartered Accountants to appoint said expert.
- 7.14 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 19  
135 Albert Street  
Auckland 1143
- Attention: Mary-Anne Borrowdale  
Commerce Commission
- Email: mary-anne.borrowdale@comcom.govt.nz
- (b) If addressed to ANZ, by hand delivery or email to the following address:
- ANZ Bank New Zealand Limited  
Ground Floor, ANZ Centre 23-29 Albert Street Auckland 1010
- Attention: Company Secretary  
ANZ Bank New Zealand Limited
- Email: craig.mulholland@anz.com

**Execution**

Signed for and on behalf of ANZ Bank New Zealand Limited by its duly authorised attorney:

Attorney

  
**Craig Andrew Mulholland**

Name of Attorney



Signature of witness

Moana Brown

Name of witness

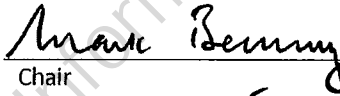
Executive Assistant

Occupation

Auckland, NZ.

Address

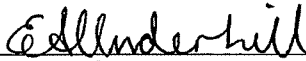
Signed for and on behalf of Commerce Commission by:



Chair

If not signed by two Commissioners then witnessed by:

Commissioner/authorised signatory



Signature of witness

Elizabeth Underhill

Name of witness

Executive Assistant

Occupation

Wellington

City/town of residence

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**Schedule One (Confidential)**

List of Named Customers

**Confidential**

Released under Official Information Act 1982

**Confidential**

Released under Official Information Act 1982

ND 11

**Confidential**

Released under Official Information Act 1982

**Confidential**

Released under Official Information Act 1982



## Schedule Two

### Form of wording for Customer Release

This agreement is entered into:

**Between** ANZ Bank New Zealand Limited (**ANZ**)

**And** [Names] (the **Customer** [may include various entities and individuals comprising one Risk Group])  
(together, the **parties**)

### 1 Background to agreement

---

- 1.1 The Commerce Commission (**Commission**) has investigated alleged contraventions of the Fair Trading Act 1986 (the **Act**) by ANZ in relation to the marketing, promotion and offer of interest rate swap transactions (the **interest rate swaps**) to rural customers from 2005 to 2009 (the **Investigation**).
- 1.2 ANZ and the Commission have entered into a settlement agreement (the **Settlement**) in relation to the Investigation.
- 1.3 Under the terms of the Settlement, ANZ has agreed to establish a payment fund (**Payment Fund**) from which ANZ has agreed to make an offer of payment to the Customer (**Payment Offer**).
- 1.4 ANZ has made a Payment Offer to the Customer.
- 1.5 This agreement records the terms and conditions on which the Customer accepts the Payment Offer.

### 2 Settlement payment

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- 2.1 The Commission has directed ANZ to make an offer to pay [\$●] from the Payment Fund to the Customer (the **payment**).
- 2.2 ANZ agrees to effect the payment to the Customer within 15 Days of ANZ's receipt of an executed copy of this agreement.

### 3 Settlement and release

---

- 3.1 The parties agree that the payment is in full and final settlement of any and all claims (not limited to claims under the Act) the Customer may have against ANZ or its past or present related parties, directors, officers, employees or agents (**Related Parties**) in relation to the matters that are the subject of the Investigation (whether or not known to, or capable of being known by, either party).
- 3.2 The Customer agrees not to issue, encourage or support any legal proceeding in relation to interest rate swaps against ANZ and/or any of its Related Parties.

- 3.3 The Customer agrees that upon entry into this agreement it will keep the terms of this Agreement and the Payment Offer (including the methodology making up the Payment Offer) strictly confidential.

#### **4 No admission**

---

- 4.1 ANZ's position is that the payments under this settlement do not represent:
- (a) that ANZ is liable in any particular case;
  - (b) any form of loss to the Customer, or represent any recoverable loss or damage suffered by a customer; or
  - (c) that any particular Customer has suffered loss, or that the payment is legally required.
- 4.2 Accordingly, nothing in this agreement constitutes an admission of legal liability by ANZ or its Related Parties.

#### **5 Entire agreement**

---

- 5.1 In addition to any prior settlements relating to Interest Rate Swaps, ANZ and the Customer acknowledge and agree that this agreement contains all of the terms, representations and warranties made between the parties with respect to its subject matter and supersedes any and all prior representations, discussions and agreements relating thereto.

#### **6 Independent advice**

---

- 6.1 The Customer acknowledges that it has agreed to enter into this agreement in reliance on such independent advice (including tax, legal and financial advice) as the Customer considers necessary and not on any representation or other conduct of ANZ or the Commerce Commission prior to this agreement being entered into, or at any subsequent time.

#### **7 Costs**

---

- 7.1 ANZ and the Customer each agree to bear their own costs for entering into this agreement.

**Executed as an agreement on [date] by:**

**Signed for and on behalf of [Customer Name] by:**

\_\_\_\_\_  
Director

If not signed by two directors then witnessed by:

\_\_\_\_\_  
Director/authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

**Signed for and on behalf of ANZ Bank New Zealand Limited by:**

\_\_\_\_\_  
Director

If not signed by two directors then witnessed by:

\_\_\_\_\_  
Director/authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

**Schedule Three (Confidential)**

**Payment Methodology Parameters**

**Confidential**

Released under Official Information Act 1982

## Schedule Four

### Pleadings (Statement of Claim)

#### The plaintiff says:

#### Parties

- 1 The plaintiff is a body corporate established under section 8 of the Commerce Act 1986.
- 2 The defendant (**ANZ**):
  - (a) is an incorporated company having its registered office at ANZ Centre, 23-29 Albert Street, Auckland;
  - (b) carries on business as a banking and financial services provider;
  - (c) (from 23 October 1979 to 27 June 2004) was known as ANZ Banking Group (New Zealand) Limited and (from 28 June 2004 to 29 October 2012) was known as ANZ National Bank Limited;
  - (d) acquired National Bank of New Zealand Limited (**National Bank**) from Lloyds TSB in 2003;
  - (e) operated using both the ANZ and National Bank brands from 2003 until 2012, when it underwent a technology and brand consolidation with National Bank; and
  - (f) is New Zealand's largest provider of banking and financial services to farmers and the farming industry in New Zealand (**Rural Sector**).

Except where the context requires, every reference in this statement of claim to ANZ is a reference to that entity carrying on business by its ANZ brand and by its National Bank brand.

#### Background

- 3 Interest Rate Swaps (**Swaps**) are financial derivatives that can be used to manage and hedge interest rate risks.
- 4 In or about July 2005, ANZ commenced offering Swaps to the persons or entities listed at Schedule 1 (**Affected Customers**).

#### The underlying funding

- 5 The Affected Customers to whom ANZ sold Swaps had obtained funding from ANZ. Although they obtained this funding in a variety of ways, the funding relevant to this claim was usually by way of a term loan, usually at a floating interest rate plus a margin (**Funding**).
- 6 The floating interest rate for the Funding was priced on the basis of the

BKBM (bank bill bid-market settlement) rate, which was reviewed (or reset) at pre-determined intervals, usually 30, 60 or 90 days or for 1, 2 or 3 months, depending on the product type (**Reset Date**).

- 7 The margin component of the Funding took into account a number of factors, including the Affected Customer's credit position (and consequently the level of risk to ANZ in lending the money to the customer) and ANZ's costs of providing the Funding.
- 8 ANZ's margin on the Funding differed among Affected Customers and was the subject of negotiation between ANZ and an Affected Customer before the customer obtained the Funding and, for some Affected Customers, again during the term and upon renewal of the Funding.

### Swaps

- 9 Affected Customers and ANZ entered into Swaps for a notional principal amount by which:
  - (a) the Affected Customer agreed to pay to ANZ a fixed rate (the **Swap Fixed Rate**) (and receive from ANZ a floating rate) multiplied by the notional principal amount; and
  - (b) ANZ agreed to pay to the Affected Customer a floating rate (and receive from the Affected Customer the fixed rate) multiplied by the notional principal amount.
- 10 Some Affected Customers entered into more than one Swap in relation to the Funding.
- 11 The Swap Fixed Rate was based on the bank bill bid-rate (also sometimes called the MID, FRA or bank bill mid-market settlement –BBMR) (**Market Fixed Rate**), and included a component constituting ANZ's revenue from the transaction.

### Swap Arrangements

- 12 The combination of the Funding and the Swap (the **Swap Arrangement**) served, for any particular Swap Arrangement, to fix the interest rate, excluding the margin, that the Affected Customer paid to borrow the agreed notional amount over the term of the Swap Arrangement.

### Early Termination

- 13 With ANZ's approval, Affected Customers could – and some did – terminate their Swaps before expiration of the agreed term.
- 14 Upon early termination, Affected Customers incurred either a financial cost or received a financial benefit, which ANZ referred to as an Early Termination Amount (**ETA**). The amount of the ETA paid or received depended on the difference between the Swap Fixed Rate at the time of the termination for the period remaining to maturity (**Replacement Swap Fixed Rate**) and the existing Swap Fixed Rate, as follows:

- (a) if the replacement Swap Fixed Rate was higher than the existing Swap Fixed Rate, the Affected Customers generally received an ETA (being a benefit) from the bank;
  - (b) if the replacement Swap Fixed Rate was lower than the existing Swap Fixed Rate, Affected Customers generally paid an ETA (being a break cost) to ANZ.
- 15 Of the Affected Customers that ANZ permitted to terminate one or more of their Swaps before maturity:
- (a) some ended the transaction in its entirety and paid an ETA cost or received an ETA benefit; and
  - (b) others entered into a new Swap, embedding the ETA benefit or cost from the terminated Swap into the new Swap on new terms, which generally included one or more of the following:
    - (i) a new fixed or floating interest rate;
    - (ii) a new maturity date;
    - (iii) a new notional principal amount,

**(Restructured Swap).**

#### **Contractual framework**

- 16 The ANZ contractual documents required to establish a new Swap Arrangement were:
- (a) An agreement for the floating rate loan associated with the Swap, which could be any of:
    - (i) A pre-existing floating rate loan;
    - (ii) A new floating rate loan; or
    - (iii) A new floating rate loan entered into as the Affected Customer broke a pre-existing fixed rate loan in order to enter into the Swap.
  - (b) the ANZ or National Bank "Terms and Conditions of Institutional Financial Markets Transactions";
  - (c) the "Institutional Financial Markets Authority"; and
  - (d) the Swap confirmation letter.

#### **Marketing Documents and Sales Presentations**

- 17 Typically, rural managers from the ANZ's Rural Banking Division (**Rural Managers**), who were the banking managers responsible for the day to day management of the Affected Customers, initiated the sale of Swaps to the Affected Customers, by introducing them as a concept to the Affected Customer.
- 18 As a result of the Affected Customers expressing interest in knowing more about Swaps or transacting Swaps, the Rural Managers arranged for a market dealer from the ANZ's Interest Rate Risk Management team (**IRRM**), a group of bank employees based in ANZ's Markets Division, to make a presentation on, or otherwise discuss, swaps to the Affected Customers (the **Sales Presentations**).
- 19 Generally, the Sales Presentations occurred one-on-one with Affected Customers in their homes, but they were sometimes held with groups of Affected Customers and their advisors, in local ANZ branches or at event venues (such as "Field Days").
- 20 From on or about 2005 to at least 2007 ANZ produced marketing documents to assist it to market and sell Swaps (the **Marketing Documents**).
- 21 ANZ provided or made available some of the Marketing Documents to Affected Customers at Sales Presentations, at some event venues and in some ANZ and National Bank branded branches.
- 22 Between 2005 and April 2009, in its Marketing Documents and Sales Presentations, ANZ made representations to the Affected Customers to the effect that:
- (a) Swap Arrangements operated like a fixed rate term loan, except with greater flexibility and benefits, including the ability to easily restructure with low cost, and as such:
    - (i) The Swap Arrangement fixed the all-up cost of the borrowing for the Affected Customer;
    - (ii) Margins on the Swap or the Funding would not change for the term of the original Swap and for any restructure, extension, or shortening of the term of the Swap (the **Margin Representation**); and/or
    - (iii) Any ETA payable by the Affected Customer on a Swap would be the same, or virtually the same, as the cost of terminating a fixed rate term loan of equivalent amount, interest rate, and duration (the **ETA Representation**).
  - (b) it could and would monitor and/or manage their Swaps to ensure they were able to take best advantage of the flexibility and benefits of the Swaps (the **Monitoring Representation**).
  - (c) Swap Arrangements were a suitable alternative and good substitute for a fixed rate term loan for the circumstances of the customer or potential customer (the **Suitability Representation**).



(together, the **Representations**)

**Breach – Margin**

- 23 The Margin Representation was false and/or misleading, as the Swap Arrangements did not fix the all-up cost of borrowing, because ANZ retained the right under the terms of the underlying floating rate loan to increase margins.
- 24 Between on or about April 2008 until on or about April 2009, ANZ increased margins on the underlying floating rate loans for some Affected Customers.
- 25 On or about April 2009, ANZ temporarily ceased increasing margins on floating rate loans where there was an associated Swap entered into by an Affected Customer before June 2008.

**Breach – the ETA Representation**

- 26 The ETA Representation was false and/or misleading with respect to National Bank branded Swaps, because the break cost for those Swaps was calculated using different interest rates from those used to calculate break costs for fixed rate loans as:
- (a) the rates for the ETA for Swaps used the wholesale swap rate excluding any customer margins;
  - (b) the rates for the ETA for fixed rate loans used the retail interest rate (that is, the all up interest rate charged to the customer), which included any customer margins built into the rate.
- 27 As a result of the Global Financial Crisis in 2008, the ETA payable by Affected Customers upon an early termination or restructure of National Bank branded Swaps was higher than the ETA that would have been payable upon the early termination of an equivalent fixed rate term loan.

**Breach – Monitoring**

- 28 The Monitoring Representation was false and/or misleading as ANZ was not able to monitor or manage Affected Customers Swaps to ensure that they were able to take best advantage of the flexibility and benefits of Swaps and it did not do so.

**Breach – Suitability**

- 29 The Suitability Representation was false and/or misleading because Swaps were not a suitable alternative or good substitute for fixed rate lending for some Affected Customers.

**Loss**

- 30 But for the Representations, Affected Customers would not have entered

into Swap Arrangements.

- 31 Affected Customers suffered loss as a result of the Representations, including by:
- (a) Paying higher margins than they otherwise would have.
  - (b) Paying higher ETAs than they otherwise would have.
  - (c) Paying higher interest rates, for longer, than they otherwise would have.

**By way of a first cause of action, the plaintiff repeat paragraphs 1 to 31 above and says:**

- 32 Between on or about July 2005, and 31 March 2009, ANZ, by a combination of its Marketing Documents and Sales Presentations (including, in particular, individual and private discussions between ANZ managers and the Affected Customers), engaged in conduct in relation to Affected Customers that was misleading, or likely to mislead, by understating the risks and/or overstating the benefits of the Swap Arrangements.
- 33 The conduct referred to at paragraph 32 above was an operating and/or effective cause of the Affected Customers deciding to enter into Swaps.
- 34 As a result of the conduct referred to at paragraph 32 above, the Affected Customers have suffered losses.

**Wherefore** the plaintiff claims against ANZ:

- A Declarations that by the conduct pleaded at paragraphs 32-34 above, ANZ breached s9 of the Fair Trading Act 1986.
- B An enquiry as to loss or damages suffered by the Affected Customers listed at Schedule 1 during the relevant periods for the purposes of s43(3)(f) of the Fair Trading Act 1986.

This statement of claim is filed on behalf of the Commerce Commission by its solicitor **John Christopher Leighton Dixon** whose address for service is at the offices of Meredith Connell, 17th Floor, Forsyth Barr Building, 55-65 Shortland Street, Auckland. Documents for service on the Plaintiff may be left at that address for service or may be:

- (a) posted to John Dixon at PO Box 2213; or
- (b) left for John Dixon at a document exchange for direction to DX CP24063; or
- (c) transmitted to John Dixon by facsimile to (09) 336 7629.

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## Schedule Five

### Pleadings (Statement of Defence)

The defendant says:

#### Parties

- 1 It admits paragraph 1.
- 2 It admits paragraph 2.

#### Background

- 3 It admits paragraph 3.
- 4 It admits paragraph 4 and says further:
  - 4.1 in offering Swaps to Affected Customers, it was meeting a demand for Swaps from its Affected Customers; and
  - 4.2 many Affected Customers were sophisticated business people running commercial operations (the average asset value of the Affected Customers was at least \$15.7m as at 30 September 2008). They were experienced in managing cash flows (including interest rate fluctuations) and were capable of understanding the nature of the transactions.

#### The underlying funding

- 5 It admits paragraph 5.
- 6 It admits paragraph 6.
- 7 It admits that the margin component took into account those matters in paragraph 7 amongst other factors.
- 8 It admits paragraph 8 and relies on the relevant terms of the Funding arrangements.

#### Swaps

- 9 It admits paragraph 9.
- 10 It admits paragraph 10.
- 11 It admits paragraph 11.

#### Swap Arrangements

- 12 It admits paragraph 12.

#### Early Termination

- 13 It admits paragraph 13.
- 14 It admits paragraph 14.
- 15 It admits paragraph 15.

### **Contractual framework**

16 It admits paragraph 16 and says further that:

- 16.1 the banking relationship between ANZ and each of the Affected Customers varied on a customer-by-customer basis;
- 16.2 the relevant swap relationship between each Affected Customer and ANZ was governed by a series of customer-specific contract documents which are likely to have included, amongst others:
  - (i) Master Account Mandate
  - (ii) Institutional Financial Markets Authority
  - (iii) Terms and Conditions of Institutional Financial Markets Transactions
  - (iv) confirmations
  - (v) Loan Agreements
  - (vi) Loan Variation letters(the **Contract Documents**),
- 16.3 The Contract Documents were comprehensive, identified the risks, and included confirmations from the Affected Customers and in many cases their solicitors as to the Affected Customers' understanding of the transaction.
- 16.4 In particular, the Contract Documents stated – amongst other things – that the Affected Customers:
  - (i) May suffer substantial losses as a result of interest rate fluctuations and ANZ is not liable for that loss.
  - (ii) Are responsible for understanding and monitoring the transactions they are entering into and that the transactions are suitable for their purposes.
  - (iii) Have taken independent advice (tax, legal and financial) as the Affected Customers consider necessary; and
  - (iv) Are not relying on any advice, or representation made by ANZ and that the Contract Documents were the entire agreement between the parties.

### **Marketing documents and sales presentations**

- 17 It admits that Rural Managers introduced interest rate risk management, including use of Swaps, to some of the Affected Customers but otherwise denies paragraph 17. It says further that some of the Affected Customers approached their Rural Managers and expressed interest in entering into Swaps as part of their interest rate risk management strategy.
- 18 It admits that the approach described in paragraph 18 was adopted from time to time, and says further that the discussions about the customer's options to manage their interest rate risk, (including Swaps), any sales process, and on-going dialogue was different for each Affected Customer. Furthermore, each customer had a different set

of circumstances which made the Sales Presentations, use of Marketing Documents and any other discussions different for each Affected Customer. Those unique Affected Customer circumstances included:

- 18.1 the Affected Customer's sophistication and previous experience with financial products;
  - 18.2 the scale, location, focus and trading history of each Affected Customer's business;
  - 18.3 whether and when ANZ and the Affected Customer restructured and/or renegotiated the Affected Customer's arrangements;
  - 18.4 the intended benefits each Affected Customer received from entering into the arrangements; and
  - 18.5 each Affected Customer's particular financial situation, funding needs and interest rate risk appetite throughout and beyond the term of the arrangement.
- 19 It admits that Sales Presentations occurred on a one-on-one basis with Affected Customers and repeats paragraph 18. It says further that occasionally presentations about interest rate risk management generally and market updates on interest rates would be presented by IRRM team members to groups of Affected Customers and/or their advisors. Save as is admitted, it denies paragraph 19.
- 20 It admits that it prepared certain marketing documents, repeats paragraph 18, and says further that the materials supplied to Affected Customers varied, and depended on the particular circumstances of each Affected Customer.
- 21 It admits that it provided some of the Marketing Documents to some Affected Customers based upon their particular circumstances. Save as is admitted, it denies paragraph 21 and repeats the statements in paragraph 18.
- 22 It admits that it made representations to certain Affected Customers to some (but not all) of the effect alleged, but otherwise denies the allegations as set out in paragraph 22 and says further that:
- 22.1 the representations made to each Affected Customer varied depending upon their different circumstances;
  - 22.2 it repeats paragraph 16;
  - 22.3 it was clear from the Marketing Documents that the margin was not part of the Swap Arrangement.
  - 22.4 ANZ managers believed any representations were true at the time they were made;
  - 22.5 it repeats paragraph 4 and says further that ANZ expected businesses, such as the Affected Customers, entering into commercial transactions to understand the implications of those transactions;
  - 22.6 it had regular interaction with and provided relevant information on a regular basis to some Affected Customers; and

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22.7 In many cases before entering into any Swap, ANZ received a solicitor's certificate, which ANZ accepted and relied upon, stating that the solicitor had explained the documentation to the Affected Customer and that the customer appeared to understand the effect of it.

**Margin**

23 It admits that the terms of the relevant loan agreements allowed ANZ to change margins. Save as is admitted, it denies paragraph 23 and says further that:

23.1 ANZ's managers expected at the time that any representation was made and that margins would not increase, as margins on rural floating rate loans had been decreasing for over 20 years;

23.2 Many Rural Swap Customers had used these terms to negotiate lower margins through the period prior to the Global Financial Crisis (GFC).

24 It admits paragraph 24 and further says that:

24.1 any margin changes were undertaken in accordance with the contractual terms and obligations of each Affected Customer's Funding;

24.2 the increases were agreed by the parties and recorded,

24.3 any margin changes followed the GFC, an unprecedented and unforeseen event

24.4 that the increased margins for some Affected Customers reflected some or all of the following factors:

(a) the increasing cost of funding to ANZ during the GFC;

(b) the deteriorating financial position of some Affected Customers as a result of the GFC, affecting the value of their loan security and the risk of default.

25 It admits paragraph 25.

**ETA**

26 It admits that the ETA for Swaps was calculated using different interest rates from those used to calculate break costs for fixed rate loans, and that the calculation of the ETA was applied differently between ANZ and National Bank brands; but otherwise denies paragraph 26 and says further that:

26.1 Based on their experience and on market data, ANZ's managers expected at the time that any representation was made that ETAs for Swaps would be similar to the break cost of a fixed rate loan; and

26.2 the ETA calculation for Swaps was a fair and reasonable calculation of the amount payable to compensate the bank as a result of the customer terminating their Swap prior to its contractually agreed expiry date.

27 It admits paragraph 27 and says further that:

27.1 Affected Customers entered Swaps for a set period. As with most transactions with an agreed term, neither party could terminate or vary that transaction without the consent of the other party (except for circumstances such as a

default). Where the parties agreed to terminate early, the party which was not the one seeking the early termination, could require certain terms to be met as a condition of agreeing to the early termination.

- 27.2 In the absence of the occurrence of certain events such as a default, it was the Affected Customer's choice to terminate the Swap and, in some cases, pay an ETA. Like many Affected Customers, it is not uncommon for Swap counterparties to terminate Swaps when their view changed as to future financial conditions or their circumstances changed;
- 27.3 Following the decision to terminate, many Affected Customers benefitted from terminating their Swap by taking advantage of a lower rate of interest on their Funding for the remaining term of that Funding.
- 27.4 Any differential which may have arisen between the ETA on a Swap and the break cost on a fixed rate loan was an unforeseen, unprecedented consequence of the GFC and its impact on the premium above wholesale rates which was payable for bank funding in New Zealand and globally.
- 27.5 Any differential which may have arisen between the ETA on a Swap and the break cost on a fixed rate loan was due to ANZ being unable to recover all of the costs incurred by ANZ as a result of the customer terminating their fixed rate loan prior to its contractually-agreed expiry date.

#### **Monitoring**

- 28 It denies paragraph 28, repeats the matters in paragraph 22.6, and says further that it had regular interaction with and continued to provide relevant information to some Affected Customers.

#### **Suitability**

- 29 It denies paragraph 29 and:

- 29.1 repeats the statements in paragraphs 4, 16, 18 and 22;
- 29.2 denies that the Swap Arrangements were unsuitable for the Affected Customers;
- 29.3 says that Affected Customers have been using interest rate swaps as an effective risk management tool since 2005 and continue to do so.
- 29.4 says further that numerous Affected Customers were sophisticated business people who were capable of monitoring and managing their interest rate exposure, or employing or engaging others to do so on their behalf, and many of them did so.

- 30 It admits that certain of its conduct was a cause of some Affected Customers deciding to enter Swaps, but says that the representations made by ANZ were not the sole cause of those Affected Customers deciding to enter Swaps, and otherwise denies paragraph 30.

It says further that:

- 30.1 it repeats the matters set out in paragraphs 4, 16, 18 and 22;



30.2 in most cases the Affected Customers would have entered into the Swap Arrangements because at least one, and usually more, of the following factors applied:

- (a) the Affected Customer approached ANZ because the Affected Customer knew of and wished to enter into a Swap;
- (b) the Affected Customer accepted the terms involved in entering into a Swap;
- (c) the Affected Customer received independent advice to the effect that the Swap was appropriate for the Affected Customer to enter into;
- (d) the Swap afforded the Affected Customer improved flexibility and control over the customer's cash flow at a time when the market and that customer anticipated that there would be rising interest rates for the foreseeable future.

31 It denies paragraph 31 and repeats the matters in paragraph 30 above.

32 It admits that it engaged in certain conduct that was misleading in relation to some Affected Customers, but otherwise denies paragraph 32.

33 It admits that certain of its conduct was a cause of some Affected Customers deciding to enter Swaps, but further says that its conduct referred to at paragraph 32 was not the sole cause of those Affected Customers deciding to enter Swaps, and that a number of the Affected Customers took legal, accounting and/or financial advice before entering into Swaps.

34 It admits that some Affected Customers may have suffered loss from entering swap arrangements as a result, in part, of certain of its conduct referred to at paragraph 32, but otherwise denies paragraph 34 and says further that the Fair Trading Act has a three year limitation period for affected persons to bring a claim for compensation. Every Affected Customer that entered into an interest rate swap is time-barred from pursuing ANZ for compensation under that Act.

This document is filed by Adam Stephen Ross, solicitor for the defendant, of the firm Chapman Tripp. The address for service of the defendant is at the offices of Chapman Tripp, Level 38, 23 Albert St, Auckland.

Documents for service on the defendant may be delivered to that address or may be:

- (a) posted to the solicitor at PO Box 2206, Auckland; or
- (b) left for the solicitor at a document exchange for direction to DX CP24029, Auckland; or
- (c) transmitted to the solicitor by facsimile to facsimile number +64 9 357 9099.

## Schedule Six

### Commission letter to Named Customers

[Insert date]

[Recipient Name]

[Recipient Address] / Email Address

Dear [Recipient].

### Interest Rate Swaps Investigation – ANZ Bank New Zealand Limited – Notice of settlement

The Commerce Commission has been investigating the ways in which ANZ and National Bank (now called **ANZ**) marketed and sold interest rate swaps (**Swaps**) to certain farmers between 2005 and 2009.

The Commission has now reached a settlement with ANZ.

The settlement resolves the Commission's concerns arising from this investigation. This is a lengthy but important letter. It outlines:

- our reasons for agreeing to settle; and
- the process that you will need to follow to obtain any payment or credit to which you may be entitled under the settlement.

Key aspects in your assessment of the offer may include that:

- The payment you receive may be reduced because of amounts that ANZ has previously written off against your indebtedness or that ANZ has paid you by way of settlement already; and
- You will need to forego any legal claims against ANZ for the conduct that the Commission has investigated.

While your assessment of this offer will be a matter for you to determine, we can advise that the Commission considers the settlement to be reasonable. Nevertheless, we recommend that you seek independent advice.

The Commission asks that you read this letter, and return the enclosed form to the address provided within 5 working days of receiving this letter. It is important that you do so, to ensure you are able to participate in the offer to be made to you.

### Background

In December last year, the Commission announced that it considered that there was sufficient foundation for it to commence legal proceedings against ANZ for alleged breaches of the Fair Trading Act 1986 (the **Act**). Since that announcement, however, the Commission has been in discussions with ANZ in an attempt to resolve the Commission's concerns.

### Settlement

As a result of those discussions, the Commission has now reached a settlement with ANZ. The Commission is of the view that this settlement is in the public interest and in the interests of the large majority of complainants (referred to as **Named Customers** in the Settlement Agreement between the Commission and ANZ).

The basis of the settlement is as follows:

- ANZ will admit in Court proceedings that it engaged in certain conduct that was misleading in relation to some customers that complained to the Commission;
- ANZ will pay \$18.5 million into an account, from which payments will be made to Named Customers and Rural Support Trusts, on a basis agreed between the parties (**Payment Fund**); and
- ANZ will pay \$500,000 to the Commission as a contribution to its costs of the investigation.

The full terms of the settlement are set out in the settlement agreement, which you can find at [insert link].

### Reasons for settlement

The Commission considers that this settlement is a satisfactory resolution of its investigation. In reaching the terms of settlement, the Commission and ANZ have considered:

- The complex nature of the factual issues involved in the case, including in particular the difficulties involved in establishing what losses have been suffered.
- The legal issues arising from possible legal defences that the bank would have, including as to limitation.
- The length of time that it would take before any proceedings would be resolved, and the likely delays that would cause in providing any compensation to farmers.
- The stress on farmers, and the distraction for them from their businesses, of having to come to court to give evidence about events that occurred some years ago.
- The sums involved in the settlement, and the breadth of payments to a significant number of ANZ's customers.

### Payment process

In the future you will receive a letter from a financial services firm called Northington Partners (**Northington**) who are assisting with the payment process. That letter will set out any entitlement you may have under the Settlement Agreement. For most customers, that will involve a payment to you. For some customers, however, particularly those who have previously settled with the bank relating to Swaps or for whom the bank has written off sums of money or who are under credit management, there will be no payment. Nevertheless customers who will not receive a payment for those reasons will be advised of those reasons in the letter.

The Northington letter will also explain the process by which you can accept any offer of payment from the Payment Fund.

ANZ and the Commission have calculated each customer's entitlement under the settlement on the basis of a methodology determined by the Commission. Although this is not a precise estimate of any loss you may have suffered, the Commission considers that it is a reasonable approximation. ANZ's position is that the payments do not represent that ANZ is liable in any particular case, that any particular customer has suffered loss, or that the payment is legally required.

As you would expect, the payments will differ for each Named Customer as they will be based on individual circumstances. If you would like more information as to how the payment methodology was applied to your circumstances you will be able to make an enquiry at the time – the details of how to do that will be included in the Payment offer.

### **Distribution Process**

The Northington letter you receive will include a Customer Release Agreement (**Customer Release**) that you will need to sign before any payment can be made.

This Customer Release will confirm that any payment to you is in full and final settlement of any and all claims you may have against ANZ in connection with interest rate swaps and ANZ's marketing, promotion and sale of rural swaps to you which were subject to the Commission's investigation. [Where appropriate: It will also apply to any other related parties within your business group. All parties will need to sign the document.]

Completion of the Customer Release is an important step and needs to be carefully executed. You should take your own legal and financial advice as to whether you wish to sign the Customer Release and accept any payment.

You do not have to accept any payment that is offered to you under the Settlement. If you do not, you should respond to the Northington letter by completing the Customer Election form that will be enclosed with that letter. That form will have an option for you to tick to indicate that you do not wish to accept the payment offered to you. But if you do wish to accept the payment, it is important that you return to Northington the Customer Election form with the acceptance box ticked, together with the Customer Release to be provided. You will not receive any payment or credit until you return those documents (properly executed) to Northington. Accordingly we urge you to respond promptly to Northington's letter.

I can advise you that ANZ has affirmed that:

- a) to the extent required by law, it will upon request provide you with access to your customer file; and
- b) you will not be disadvantaged merely as a result of your considering, accepting or declining the payment offered to you.

We expect that process will occur early in the second quarter of 2015.

### **Please confirm contact details**

The Commission has agreed to provide ANZ and Northington with your most recent contact details, to ensure that the Settlement can be completed promptly. The Commission seeks your consent to do so. Those details will be provided to ANZ and Northington strictly on the basis they are for the purposes of effecting this Settlement only.

Accordingly please complete and return the attached form by email to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz) confirming where Northington should send its letter regarding the offer of any payment. This is especially important if you are no longer a customer of ANZ. Please return this by no later than [insert date].

### **Questions and Answers (Q&A) about settlement process**

The Commission is updating its website to include further information about the settlement. We have attached a link to our website and also a copy of the Commission's media release about the settlement and its Q&A.

Northington will be providing a contact point for affected Named Customers to contact if they have any questions. This will be set out in the correspondence you will receive from Northington.

If you have any queries about this settlement you should contact the Northington contact point when Northington writes to you. In the interim you may call our contact centre on 0800 943 600 or send an email to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz) if you have any queries or concerns about the provision of your contact details to ANZ.

Yours sincerely

Mary-Anne Borrowdale  
General Counsel  
Competition

Encl.

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<b>ANZ Interest Rate Swaps Settlement Confirmation of contact details</b>	
<b>Name: (Personal and Business entity)</b>	
<b>Current postal address:</b>	
<b>Current email address:</b>	
<b>Confirmation that I consent to my current contact details as provided to the Commission to be provided to ANZ for the purposes of the Commission's settlement with ANZ</b>	Yes / No (please circle)
<b>Signed:</b>	
<b>Date:</b>	

Please return this to the Commission by no later than [insert date] by scanning and emailing to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz), or by sending by post to:

*Commerce Commission  
 "ANZ Interest Rate Swaps Settlement"  
 PO Box 2351  
 Wellington 6140*

**Schedule Seven (Confidential)**

Northington or Commission letter to certain farmers

**Confidential**

Released under Official Information Act 1982

**Confidential**

Released under Official Information Act 1982



**Confidential**

Released under Official Information Act 1982

**Confidential**

Released under Official Information Act 1982

**Confidential**

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## **Settlement Agreement**

regarding the Commerce Commission investigation into interest rate swaps  
transactions with rural customers between 2005 and 2009

**New Zealand Commerce Commission**

**ASB Bank Limited**

Dated 23 December 2014

Released under Official Information Act 1982

Agreement dated 23 December 2014

## Parties

ASB Bank Limited an incorporated company under the Companies Act 1993 (ASB); and

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

## 1 Introduction

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- 1.1 The Commission has investigated alleged contraventions of the Fair Trading Act 1986 (the Act) by ASB in relation to its marketing, promotion and sale of interest rate swap products to rural customers from 2005 to 2009 (the Investigation).
- 1.2 This Agreement records the background to the Investigation, the conclusions reached by the Commission, and the means by which the Investigation is to be resolved.
- 1.3 This Agreement will be made public by the Commission (including on the Commission's website), save for any material identified in this Agreement as confidential.

### Interpretation

- 1.4 For the purposes of this Agreement:

**ASB Information** means all information provided by ASB to the Commission, whether voluntarily or under compulsion, in respect of the Investigation.

**Customer Release** means the document as set out in Schedule Two.

**Days** means working days, save that time does not run between 24 December 2014 and 12 January 2015, inclusive.

**Break Cost** means the amount which is the cost (or in some cases a benefit) to a party to terminate (which includes the embedded cost on any Restructured Swap) a Rural Swap prior to its maturity date.

**Break Cost Differential** means the difference between the Break Cost incurred at the time of terminating or restructuring a Swap and the equivalent Break Cost that would have been incurred if the Named Customer Entity had broken a fixed rate term loan with the same term and principal, beginning on the same date.

**Independent Review** means the review conducted by NERA as set out at clause 3.8.

**Interest Rate Swaps (Rural Swaps, or Swaps)** comprise, in the case of Interest Rate Swaps sold to rural customers, contracts under which one party agrees to make payments based on a fixed interest rate on a notional principal amount, in exchange for receiving payments from the other party based on a floating interest rate on the notional principal amount. The principal amount is not exchanged.

**Loan** means the loan made by ASB to the Named Customer Entity – usually at a floating interest rate – that corresponds to the Interest Rate Swap.

**Margin** means the margin charged by ASB to the Named Customer Entity in addition to the floating rate interest rate charged as part of the Loan interest rate.

**Named Customer** means those persons listed in Schedule One, including their executors, administrators, successors and assigns and, in the case of a trustee, includes any substituted or additional trustee (if any). Named Customers comprise that group of customers whose details were provided by the Commission to ASB as the Commission's complainants of record as at 31 July 2014. Schedule One is confidential to the parties, but the Named Customers will be advised of the availability of a Payment Offer as per clauses 3.18 to 3.26 below.

**Named Customer Entity** means the contractual counterparties to the Loans made by ASB and to the Swaps sold by ASB that are associated with each Named Customer and listed in the Payment Offer for that Named Customer.

**Network for Women in Dairying (Dairy Women's Network)** is a charitable trust that assists farmers and, in particular, provides education and support to women involved in the dairy industry, as set out at [www.dwn.co.nz](http://www.dwn.co.nz).

**Offer Amount** means the amount to be offered to a Named Customer.

**Payment Methodology** means the methodology determined by the Commission, as defined at clause 3.10 below.

**Payment Offer** means the offer letter containing the Offer Amount that ASB has agreed to make to each Named Customer under this Agreement.

**Related Parties of ASB include:**

- (a) their past and present directors, officers, employees and agents; and
- (b) their past and present 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.

**Restructured Swap/Restructure** means an extension of the Swap, being the termination of an existing Swap and the taking of a new Swap, with the Break Cost charged to the Named Customer Entity by ASB being embedded into the Restructured Swap; a process also known as a 'blend and extend'.

## **2 Background**

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### **Interest Rate Swaps**

- 2.1 Between 2005 and 2009, ASB marketed Swaps to existing and potential rural customers, primarily through private meetings conducted with those customers by ASB's rural managers and dealers from ASB's Treasury Department (**Sales Presentations**). This marketing included documents and PowerPoint presentations provided to the customers (**Marketing Documents**).

#### Commission Investigation

- 2.2 During 2012, media reports indicated that certain rural customers were dissatisfied with Interest Rate Swaps.
- 2.3 In addition, the Commission received complaints about the manner in which ASB staff marketed Swaps to rural customers.
- 2.4 In August 2012, the Commission commenced the Investigation.

#### Commission Decision

- 2.5 The Commission has completed the investigation into ASB's conduct and concluded that, in its view, there is a sufficient foundation for it to commence proceedings against ASB alleging breaches of the Act. In particular, the Commission considers that ASB engaged in conduct that conveyed the impression to existing and potential customers, including the Named Customers, that:

- (a) Margins on the Loan could not change for the term of the original Swap and for any Restructure, extension, or shortening of the term of the Swap;
- (b) the Break Cost would be the same or materially similar to the cost of terminating a fixed rate term loan of equivalent amount, interest rate and duration; and/or
- (c) Swaps were a suitable alternative and good substitute for a fixed rate term loan for the circumstances of the customer or potential customer,

(the Conduct).

- 2.6 The Commission concluded that the Conduct was, or was likely to be, misleading because:
  - (a) with respect to Margins, under the contractual terms ASB could increase Margins;
  - (b) with respect to termination, the Break Cost could be significantly higher than was anticipated, such as to make it uneconomic to terminate the Swap;
  - (c) with respect to suitability, Named Customers could not take advantage of the flexibility of the Swaps because:
    - (i) doing so attracted a Break Cost (as referred to at clause (b) above) of an amount that was not foreseen by some Named Customers, which undermined the flexibility of the swap and dissuaded some Named Customers from exercising that option; and
    - (ii) the Named Customers were not technically equipped to monitor and adjust the swaps.
- 2.7 In addition, the Commission concluded, among other things, that:
  - (a) the fact that ASB's own Loan documents provided for it to change Margins indicated that it ought to have contemplated that Margins could or might change;

- (b) based on historical experience, ASB should have foreseen the risk that a material difference between the cost to break a Swap and an equivalent fixed rate term loan could occur as it did in the Global Financial Crisis (GFC); and
- (c) it is likely that some ASB rural customers, including the Named Customers, suffered loss as a result of the Conduct.

**ASB's position**

2.8 ASB does not accept the Commission's conclusions referred to at clauses 2.5 to 2.7 above.

2.9 In particular, ASB says:

- (a) Its description of the effect of Swaps as "similar to a fixed rate term loan but more flexible" was a reasonable opinion based on the bank's experience of market conditions prior to the GFC;
- (b) It provided comprehensive information to customers regarding Swaps, which clearly explained their effect and the risks associated with the product;
- (c) It sought to ensure that Swaps were fully explained to its customers in one-on-one meetings with an ASB representative so that it could be satisfied that the customer understood the product and that it was suitable for their circumstances;
- (d) It recommended that its customers take independent advice before entering into Swaps and some customers, including some Named Customers, did so;
- (e) Its managers expected at the time ASB sold Swaps to customers that Margins would not increase as margins on rural floating rate loans had been decreasing for over 20 years;
- (f) The terms of its Loan agreements provided for Margin changes and many rural swap customers had used these terms to negotiate lower Margins through the period prior to the GFC;
- (g) It made a decision not to, and did not, increase Margins under Loans hedged by Swaps entered into prior to May 2008 for the duration of the original term of the Swaps (save for a small number of administrative errors that were corrected);
- (h) Until the onset of the GFC, Break Costs on Swaps were similar to the Break Cost of a fixed rate term loan of a similar term and value. The emergence of a differential between the Break Costs on a Swap and the Break Costs on a fixed rate term loan of a similar term and value arose from the extraordinary, unforeseeable effect of the GFC;
- (i) Any representations made when marketing interest rate Swaps were not the sole cause of the Named Customers deciding to enter Swaps and, in most cases, the Named Customers would have entered into their swap arrangements with ASB regardless of ASB's conduct for reasons including the fact that Swaps provided the customers with improved flexibility and control over the customer's cash flow at a time when the market and the customer



anticipated that there would be rising interest rates for the foreseeable future;  
and

- (j) None of its customers suffered, or are likely to have suffered, any loss from its conduct.

#### **Settlement**

2.10 Notwithstanding the parties' differing views on ASB's conduct as set out above, following discussions between the Commission and ASB:

- (a) the Commission has concluded, based upon the Solicitor General's Prosecution Guidelines and its Enforcement Criteria, that it would be in the public interest for it to resolve the issues arising in the Investigation, on the terms set out below; and
- (b) ASB has concluded that it would be appropriate for it to do so in order to bring the Investigation to a conclusion, on the terms set out below.

2.11 In reaching the terms of this settlement, the parties have considered:

- (a) The complex nature of the factual issues involved in the case, including in particular the difficulties involved in establishing, on a customer-by-customer basis, what losses may have been suffered.
- (b) The legal issues arising from possible legal defences that ASB would have, including as to limitation.
- (c) The length of time that it would take before any proceedings would be resolved, and the likely delays that would cause in providing any payment to Named Customers.
- (d) The stress on Named Customers, and the distraction for them from their businesses, of having to come to court to give evidence about events that occurred some years ago.
- (e) The level of payment to the Named Customers.

### **3 Terms of Settlement**

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3.1 The Commission and ASB have agreed to resolve the issues between them arising from the Investigation on the terms set out below.

#### **Admissions**

3.2 ASB admits that:

- (a) between 2005 and 2009 it represented to some of its customers that Swaps were similar to fixed rate term loans but more flexible;
- (b) during a period in 2008 to 2009, break fees for Swaps were higher than they would have been for an equivalent fixed rate term loan;
- (c) in those circumstances, some of the benefits of the Swaps proved to be overstated for some customers and meant that:

- (i) some customers paid more to break or restructure Swaps than they would have with an equivalent fixed rate term loan; and
  - (ii) some customers may have decided not to break or restructure Swaps when they might have done so with an equivalent fixed rate term loan; and
  - (d) it omitted to inform customers with Swaps that under ASB's contractual terms, ASB could increase Margins on Loans hedged by Swaps.
- 3.3 Furthermore, ASB admits that between 2005 and 2009 it breached section 9 of the Act in that certain of its conduct misled some of the Named Customers in relation to the marketing of certain of their Swaps and that this conduct was a cause of some of the Named Customers deciding to enter their Swaps.
- 3.4 ASB does not, however, admit that any customers suffered, or are likely to have suffered, any loss or damage from this conduct.
- 3.5 The admissions in this Agreement are limited to those admissions expressly made. Nothing in this Agreement constitutes any wider admission of liability by ASB or its Related Parties.

#### **Payment Amount**

- 3.6 ASB will make available for payment an amount expected to be \$2,723,943. From that amount, ASB will pay a sum expected to be \$2,337,536 to individual Named Customers and/or Named Customer Entities, as set out at clause 3.23 below, and subject to clauses 3.15, 3.16 and 3.32 below.

#### **Independent Review**

- 3.7 In the course of negotiations between the parties, ASB has compiled and provided to the Commission certain details of the Interest Rate Swaps and related Loans transacted by the Named Customer Entities, together with some calculations agreed between the parties (**Transactional Information**). The parties have used this information in setting the total amounts to be paid to individual Named Customers and/or Named Customer Entities.
- 3.8 ASB has at its own cost retained NERA to conduct an independent review of the **Transactional Information**, to confirm its accuracy (**Independent Review**).
- 3.9 The Commission has reviewed the **Independent Review**, and accepts its conclusions.

#### **Payment Methodology**

- 3.10 The Commission has provided ASB with a methodology by which it has calculated the total amount to be offered to each Named Customer (**Payment Methodology**) and a schedule of those offer amounts.
- 3.11 The **Payment Methodology** takes into account:
- (a) Break fees paid by Named Customer Entities upon termination or restructure of a Swap or Swaps;
  - (b) costs incurred by Named Customer Entities who did not terminate or restructure their Swaps;

- (c) evidence indicating that Named Customer Entities sought to restructure or terminate a Swap or Swaps; and
  - (d) difficulties in establishing specific customer losses, particularly with respect to the larger, more financially experienced and better-resourced Named Customer Entities.
- 3.12 The Payment Methodology, and the amounts to be paid to each Named Customer and/or Named Customer Entities (subject to clauses 3.15 to 3.16 below) are set out at Schedule One, which is confidential.

**Differing positions regarding Payment Methodology**

- 3.13 The Commission considers that the factors taken into account in deriving the Payment Methodology and the Payment Methodology itself provide a reasonable proxy of the potential harm and recoverable losses (as applicable to their circumstances) that Named Customers and/or Named Customer Entities may have suffered.
- 3.14 ASB considers that the payments do not represent any form of loss to the Named Customer and/or Named Customer Entity, or represent any recoverable loss or damage suffered by any customer by reason of any conduct by ASB, and ASB does not acknowledge or accept:
- (a) that any particular Named Customer and/or Named Customer Entity has suffered loss; or
  - (b) that, other than as a result of ASB entering into this agreement, ASB is legally liable to any of the Named Customers and/or Named Customer Entities.

**Special Payment Provisions for certain customers**

- 3.15 ASB shall make all payments to Named Customers and/or Named Customer Entities in cleared funds, save that:
- (a) ASB is not required to make any payment to those Named Customers (and/or Named Customer Entities) listed in Part III(A) of Schedule One (being those Named Customers for whom ASB has already written off debts that exceed the amounts that they would otherwise be entitled to under this Settlement), and subject to clause 3.16 below.
  - (b) ASB shall be entitled to deduct from the amount to be paid to a Named Customer (and/or Named Customer Entities) the value of any payment, financial benefit or reduced obligation previously provided by ASB to that Named Customer and/or Named Customer Entity in relation to the matters that are the subject of the Investigation (**Prior Accommodation**) up to the value of the Payment Offer, as set out in Part III(B) of Schedule One.
- 3.16 ASB is to pay discounted amounts to the Named Customers (and/or Named Customer Entities) listed in Part IV of Schedule One.
- 3.17 ASB is to advise the Named Customers listed in Parts III-IV of Schedule One as to the basis for any non-payment or reduced payment to that Named Customer and/or Named Customer Entity, as set out in Schedule Four.

#### Offer process

3.18 The Commission will:

- (a) within 5 Days of signing this agreement (or as soon as practicable thereafter), send the communication in Schedule Three to the Named Customers advising of the settlement and the forthcoming offer; and
- (b) save where a Named Customer objects to the provision of their contact details to ASB, within 15 Days of signing this agreement (or as soon as practicable thereafter), provide ASB with the Named Customer contact details currently held by the Commission.

3.19 Within 10 Days of receipt of the Named Customer contact details from the Commission, ASB will send Named Customers (including any Named Customer referred to at clauses 3.15(a) and 3.15(b) above) via mail and email to the address of the customer advised to ASB by the Commission, the following documents:

- (a) The letter set out in Schedule Four (which is confidential) specifying the Payment Offer to the Named Customer;
- (b) The Customer Election form, as set out in Schedule Four; and
- (c) The Customer Release as set out in Schedule Two.

3.20 The parties agree that Named Customers will have 70 Days from the date of posting of the Payment Offer to make the Customer Election to accept or reject the offer (Response Date).

#### *Acceptance of Payment Offer*

3.21 In order to accept a Payment Offer, a Named Customer must complete, sign and return:

- (a) The Customer Election form, ticking the box marked for acceptance; and
- (b) The Customer Release, duly executed on behalf of each Named Customer Entity.

3.22 The date of such acceptance is deemed to be the date the Named Customer posts or emails both of those forms to ASB, properly executed by all parties.

3.23 Within 15 Days of receipt of those documents, properly executed, ASB will pay that Named Customer and/or Named Customer Entities in accordance with the Payment Offer. Payments will be made by electronic transfer to a bank account nominated by the Named Customer.

#### *Rejection of the Payment Offer*

3.24 A Named Customer can refuse the Payment Offer by returning the Customer Election form marked to indicate rejection of the offer.

3.25 Any Payment Offer not accepted by the Response Date is deemed to be declined, unless the customer has queried the offer, in which case the parties will provide that Named Customer with an additional period of 20 Days in which to accept or reject the Payment Offer after they have responded to that query.

*Defects in documentation*

- 3.26 Where there is an error or omission by a Named Customer in the Customer Election or Customer Release forms in response to a Payment Offer, ASB will promptly engage with the Named Customer to ask them to remedy the defect. The Response Date will be extended by a maximum of 20 Days for that Named Customer while an error or omission is being corrected.

**Ensuring Named Customers are made aware of the Offer**

- 3.27 If a Named Customer has not responded to the Payment Offer within 20 days of the date it was sent then, if the Named Customer is a current ASB customer, ASB will use its best endeavours to advise the Named Customer of the offer by other means, including having the Named Customer's ASB rural manager try to make contact with the Named Customer by telephone.
- 3.28 In addition, in its monthly reports as set out at clause 3.33 below, ASB will advise the Commission of all Named Customers who have not returned to ASB a Customer Election form.
- 3.29 The Commission may at any time take its own steps to contact and encourage any Named Customer to respond to the Payment Offer.

**Queries regarding Payment Offers**

- 3.30 ASB agrees that it will:
- (a) provide easily accessible points of contact for Named Customers with questions about the payment process;
  - (b) review and respond to any Named Customer's queries about Payment Offers or the payment process in a timely manner and in good faith;
  - (c) to the extent required by law, upon request provide Named Customers with access to their customer file; and
  - (d) not disadvantage a Named Customer merely as a result of the Named Customer considering, accepting or declining the Payment Offer.

For the avoidance of doubt, other than as provided for in clause 3.32, nothing in this clause 3.30 requires ASB to vary or adjust the Payment Offers that have been agreed with the Commission.

- 3.31 The parties agree that they will each provide any assistance reasonably requested by the other party to assist in resolving any Named Customer's queries.
- 3.32 ASB agrees that it will adjust a Named Customer's Payment Offer consistent with the Payment Methodology agreed between the parties or extend the time in which the Named Customer has to accept that Payment Offer, following review of a customer query if:
- (a) the calculation of the Payment Offer to the Named Customer by ASB has erroneously omitted payment for one or more of the Named Customer Entity's Swaps; or

- (b) there is a computational error in the Payment Offer.

**Verification and reporting**

- 3.33 By the 28<sup>th</sup> of each month from the date of signing this Agreement (commencing January 2015), ASB will provide a report to the Commission on the progress of the payment process, including:
- (a) the details of all Payment Offers made;
  - (b) the total value of all payments made;
  - (c) details of all Named Customers who received a payment and the amount of each payment;
  - (d) confirmation that the payments made to Named Customers were made in accordance with the amounts specified in Schedule One;
  - (e) the details of Named Customers (if any) who have declined to accept the Payment Offer; and
  - (f) the details of Named Customers (if any) who have not responded to the Payment Offer, and the steps taken to trace and make the offer to them.
- 3.34 Within 20 Days of the final payments, ASB will provide the Commission with a report (Final Report), which will include the details listed in clause 3.33 above as well as including the details of the payment to the Dairy Women's Network.
- 3.35 ASB will meet the cost of administering all payments under this Agreement, including the costs of preparing the monthly reports and the Final Report.
- 3.36 The parties agree to work in good faith to ensure that the payment process is completed as soon as is reasonably practicable.

**Dairy Women's Network**

- 3.37 ASB agrees to make a donation of \$250,000 to the Dairy Women's Network within 15 Days of signing this Agreement. This is in addition to any sums ASB has or would otherwise commit to that Network as part of its existing or future sponsorship arrangements.

**Payment of costs**

- 3.38 ASB agrees to pay to the Commission within 15 Days of signing this Agreement \$250,000 (including GST, if any) towards the Commission's actual and estimated further costs in relation to the Investigation.

**4 Closure of Commission's Investigation and releases**

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- 4.1 The parties agree that this Agreement is in full and final settlement of all claims and proceedings that the Commission has, or may have, whether in its own right or on behalf of any other person in relation to or arising out of the matters and the Swaps that are the subject of the Investigation.

- 4.2 Upon both parties signing this Agreement:
- (a) the Commission will close the Investigation; and
  - (b) any outstanding notices issued to ASB under the Investigation requiring it to provide documents or information will be deemed to be withdrawn.
- 4.3 The Commission undertakes not to issue, encourage or support any civil or criminal legal proceeding against ASB and/or each of its Related Parties in relation to or arising out of the matters and the Swaps that are the subject of the Investigation, except that the Commission may provide assistance to the Financial Markets Authority if asked to do so.
- 4.4 For the avoidance of doubt, this Agreement does not give rise to any legal entitlement or actionable right by:
- (a) any Named Customer or any Named Customer Entity against ASB, its Related Parties, or the Commission; and
  - (b) Dairy Women's Network against ASB, its Related Parties, or the Commission.

## **5 Undertakings and Specific Performance**

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- 5.1 ASB provides to the Commission court-enforceable undertakings under section 46A of the Act to:
- (a) make the Payment Offers to Named Customers as set out at Schedule One; and
  - (b) upon receipt of duly completed Customer Election Forms and Customer Releases pay the Named Customer in accordance with the terms of this Agreement.
- 5.2 The Commission can enforce clause 5.1, notwithstanding clauses 4.1 and 4.3.
- 5.3 Notwithstanding clause 5.1, either party has the right to sue for specific performance for breach of this Agreement.
- 5.4 In the event of action being taken against ASB by the Commission to enforce the undertakings given under clause 5.1 above (**Enforcement Action**), the other provisions of this Agreement continue in full force and effect notwithstanding the Enforcement Action.

## **6 Public Statements**

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- 6.1 Subject to clauses 6.5 and 6.6, 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 made in good faith and be consistent with the spirit and intent of this Agreement and, in particular, may include:
- (a) The Commission stating that it expects that the Payment Methodology will return to Named Customers a reasonable approximation of all of the potential losses that the Commission considers it could have recovered on behalf of Named Customers after trial in respect of Swaps, in particular:

- (i) all costs of terminating a Swap above those that would be incurred to terminate a fixed rate term loan of equivalent amount, interest rate, and duration, and
    - (ii) for those who did not pay a Break Cost, a reasonable portion of the extra costs that they may have incurred.
  - (b) The Commission also saying that:
    - (i) There are ASB rural Swap customers who are outside of the Settlement.
    - (ii) There is no money available to those customers under this Settlement.
    - (iii) Instead, the parties have agreed that ASB will make a donation to Dairy Women's Network, to support the rural community as a whole.
  - (c) ASB stating its view that no losses would be recoverable following trial.
- 6.2 The Commission agrees its public statement will include an acknowledgement that the smaller settlement amount compared with the Commission's recent settlement with ANZ arises from the fact that ASB did not increase Margins on Loans subject to Swaps sold to its rural customers through the relevant period for the duration of the original Swap term, despite facing increased funding costs in the aftermath of the GFC.
- 6.3 In accordance with its obligations under section 6 of the Act the Commission may at its own election publish on its website an Investigation Closure Report summarising the investigation and the conclusions reached.
- 6.4 The Commission agrees that it will provide ASB with a draft of any Investigation Closure Report before its intended release and afford ASB a reasonable opportunity to comment on that report. ASB's response, if any, shall be posted directly underneath the Investigation Closure Report on the relevant Commission web-site page.
- 6.5 Except as required by law, ASB agrees that it will not make any public comment in relation to this Agreement or the Investigation until after the Commission has issued a media release notifying the public of this settlement.
- 6.6 The parties agree to:
- (a) Provide written copies of their initial written media statements to the other party at least 24 hours 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; and
  - (b) Send a copy (by email) of any written media statement to the other party at the same time that it is provided to the media.

## **7 Miscellaneous**

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- 7.1 The Commission acknowledges that the ASB 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 ASB Information (an Information Request), it will notify ASB of that request and will consult with ASB as to whether
-



there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982. The Commission will:

- (a) take full and proper account of the confidential and/or commercially sensitive and/or privileged nature of the ASB Information, and of any views expressed by ASB, in accordance with the provisions of the Official Information Act 1982 when considering any Information Request; and
  - (b) notify ASB 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.
- 7.2 Each party will meet its own expenses incurred in the course of performing its obligations under this Agreement.
- 7.3 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 resolving any issues arising under this Agreement.
- 7.4 If necessary or desirable, the payment processes required to give full effect to the terms of this Agreement may be amended by the agreement of the parties.
- 7.5 The parties by mutual written agreement may vary any of the time periods stipulated in this Agreement, in which instance all other time periods will be extended by the same amount of time.
- 7.6 Where ASB or the Commission take any step in the payment process of this Agreement later than the period prescribed by this Agreement, all dependent dates shall extend by the same period.
- 7.7 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 7.8 ASB and the Commission 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.
- 7.9 This Agreement constitutes the entire agreement between the Commission and ASB in relation to the Investigation and it supersedes all prior communications, understandings or representations whether oral or written between the Commission and ASB.
- 7.10 No amendment to this Agreement will be effective unless it is in writing and signed by both of the parties.
- 7.11 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.
- 7.12 This Agreement may be executed in any number of counterparts. Once the parties have executed the counterparts, and each party has received a copy of each signed counterpart which that party did not execute, each counterpart will be deemed to be as valid and binding on the party executing it as if it had been executed by all the parties.

7.13 With the exception of Enforcement Action under section 5 of this Agreement, any question, difference or dispute between the parties concerning the implementation of this Agreement which the parties are unable to resolve themselves shall be referred to expert determination by a suitably qualified expert upon whom the parties can agree. If the parties are unable to agree on an expert within 10 Days of the date that they commence exchanging proposed names, then either party may ask the president for the time being of the New Zealand Institute of Chartered Accountants to appoint said expert.

7.14 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 19  
135 Albert Street  
Auckland 1143

Attention: Mary-Anne Borrowdale  
Commerce Commission

Email: [mary-anne.borrowdale@comcom.govt.nz](mailto:mary-anne.borrowdale@comcom.govt.nz)

(b) If addressed to ASB, by hand delivery or email to the following address:

ASB Bank Limited  
PO Box 35  
Auckland 1140

Attention: Graeme Edwards  
General Counsel  
ASB Bank Limited

Email: [graeme.edwards@asb.co.nz](mailto:graeme.edwards@asb.co.nz)

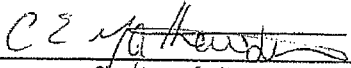
Released under Official Information Act 1982

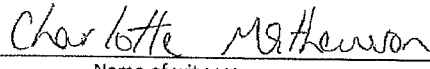
**Execution**

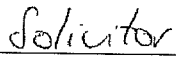
Signed for and on behalf of ASB Bank  
Limited by:

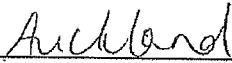
  
\_\_\_\_\_  
Authorised signatory

**Graeme Edwards  
General Counsel &  
Company Secretary  
ASB Bank Limited**

  
\_\_\_\_\_  
Signature of witness

  
\_\_\_\_\_  
Name of witness

  
\_\_\_\_\_  
Occupation

  
\_\_\_\_\_  
City/town of residence

Signed for and on behalf of Commerce  
Commission by:

\_\_\_\_\_  
Chair

If not signed by two  
Commissioners then witnessed by:

\_\_\_\_\_  
Commissioner/authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

Released under Official Information Act 2002

**Execution**

Signed for and on behalf of ASB Bank  
Limited by:

\_\_\_\_\_  
Authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

Signed for and on behalf of Commerce  
Commission by:

*Arunde Bunting*  
\_\_\_\_\_  
Chair

If not signed by two  
Commissioners then witnessed by:

\_\_\_\_\_  
Commissioner/authorised signatory

*[Signature]*  
\_\_\_\_\_  
Signature of witness

*Sally Brown*  
\_\_\_\_\_  
Name of witness

*Group Coordinator*  
\_\_\_\_\_  
Occupation

*Auckland*  
\_\_\_\_\_  
City/town of residence

Released under Official Information Act 1982

**Schedule One**

**Confidential – To be redacted from any public version of this Agreement.**

**List of Named Customers and Named Customer Entities for each Named Customer  
with Payment Schedule**

**Confidential**

Released under Official Information Act 1982

**Confidential**

Released under Official Information Act 1982

**Confidential**

Released under Official Information Act 1982

## Schedule Two

### Form of wording for Customer Release

This agreement is entered into:

**Between** ASB Bank Limited (**ASB**)

**And** [Named Customer]

**And** [Named Customer Entities]

(together, the **Customer**)

(the parties together being the **parties**)

### **1 Background to agreement**

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- 1.1 The Commerce Commission (**Commission**) has investigated alleged contraventions of the Fair Trading Act 1986 (the **Act**) by ASB in relation to the marketing of interest rate swap transactions (the **Swaps**) to rural customers from 2005 to 2009 (the **Investigation**).
- 1.2 ASB and the Commission have entered into a settlement agreement (the **Settlement**) in relation to the Investigation.
- 1.3 Under the terms of the Settlement, ASB has agreed to pay certain rural Swaps customers on the Commission's direction.
- 1.4 ASB has agreed to offer to make a payment to the Customer.
- 1.5 This agreement records the terms and conditions on which the payment is made to the Customer.

### **2 Settlement payment**

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- 2.1 The Commission has directed ASB to make a payment of [\$●] at the direction of the Customer in accordance with the Schedule to this Agreement (the **payment**).
- 2.2 ASB agrees to effect the payment at the direction of the Customer within 15 Days of ASB's receipt of an executed copy of this agreement.
- 2.3 The Customer warrants to ASB that the recipient of the payment is authorised to receive the payment on behalf of the Customer and agrees to indemnify ASB against any claim, loss or expense arising from or relating to any allegation that the recipient of the payment was not authorised to receive the payment on behalf of the Customer.

### **3 Settlement and release**

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- 3.1 The parties agree that the payments are in full and final settlement of any and all claims howsoever arising which the Customer may have against ASB or its past or



present related parties, directors, officers, employees or agents (**Related Parties**) in relation to or arising out of the matters and the Swaps that are the subject of the Investigation (whether or not known to, or capable of being known by, either party).

- 3.2 The Customer agrees not to issue, encourage or support any legal proceedings against ASB and/or any of its Related Parties in relation to or arising out of the matters and the Swaps that are the subject of the Investigation.
- 3.3 The Customer agrees that upon entry into this agreement it will keep the terms of this Agreement and the payment offer (including the methodology making up the payment offer) strictly confidential.

#### **4 No admission**

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4.1 Nothing in this agreement constitutes:

- (a) an admission of legal liability by ASB or its Related Parties to the Customer; or
- (b) an acknowledgement or admission that the Customer has suffered any form of loss recoverable against ASB.

#### **5 Entire agreement**

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5.1 In addition to any prior settlements relating to Swaps, ASB and the Customer acknowledge and agree that this agreement contains all of the terms, representations and warranties made between the parties in relation to or arising out of the matters and the Swaps that are the subject of the Investigation and supersedes any and all prior representations, discussions and agreements relating thereto.

#### **6 Independent advice**

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6.1 The Customer acknowledges that it has agreed to enter into this agreement in reliance on such independent advice (including tax, legal and financial advice) as the Customer considers necessary and not on any representation or other conduct of ASB or the Commerce Commission prior to this agreement being entered into, or at any subsequent time.

#### **7 Costs**

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7.1 ASB and the Customer each agree to bear their own costs for entering into this agreement.

**Executed as an agreement on [date] by:**

**Signed for and on behalf of [Named  
Customer and Named Customer Entities]  
by:**

\_\_\_\_\_  
Director

If not signed by two directors then  
witnessed by:

\_\_\_\_\_  
Director/authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

**Signed for and on behalf of ASB Bank  
Limited by:**

\_\_\_\_\_  
Authorised signatory

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Name of witness

\_\_\_\_\_  
Occupation

\_\_\_\_\_  
City/town of residence

## Schedule Three

### Commission Communication with ASB complainants announcing settlement

[Insert date]

[Recipient Name]

[Recipient Address] / Email Address

Dear [Recipient]

### Interest Rate Swaps Investigation – Fair Trading Act 1986 – ASB – Notice of settlement

As you are aware, the Commerce Commission has been investigating the way in which ASB Bank Limited (ASB) marketed and sold interest rate swaps (Swaps) to rural customers.

The Commission has now reached a settlement with ASB that resolves the Commission's concerns arising from this investigation. This letter summarises the reasons why the Commission has elected to settle this matter and the process that you will need to follow to obtain any payment or credit to which you are entitled under the settlement.

The Commission asks that you read this letter, and return the enclosed form to the address provided within 5 working days of receiving this letter. It is important that you do so, to ensure you are able to participate in the offer to be made to you.

#### Background

In December last year, the Commission announced that it considered that there was sufficient foundation for it to commence legal proceedings against ASB for alleged breaches of the Fair Trading Act 1986 (the Act). Since that announcement, however, the Commission has been in discussions with ASB in an attempt to resolve the Commission's concerns and in order to obtain a settlement payment for the ASB rural customers who complained to the Commission.

#### Settlement

As a result of those discussions, the Commission has now reached a settlement with ASB. The Commission is of the view that this settlement is in the public interest and in the interests of the large majority of complainants (referred to as **Named Customers** in the Settlement Agreement between the Commission and ASB).

The basis of the settlement is as follows:

- ASB admits that between 2005 and 2009 it breached section 9 of the Act in that certain of its conduct misled some of the Named Customers in relation to the marketing of certain of their Swaps and that this conduct was a cause of some of the Named Customers deciding to enter their Swaps;
- ASB will pay \$xx million, to be distributed to Named Customers, on the basis agreed between the parties;
- ASB will make a donation of \$250,000 to Dairy Women's Network; and
- ASB will pay \$250,000 to the Commission as a contribution to its costs of the investigation.

The full terms of the settlement are set out in the settlement agreement, which you can find at [www.comcom.govt.nz/irs-asb-settlement](http://www.comcom.govt.nz/irs-asb-settlement). Note that the payment payable to each individual farmer is confidential and is not contained in the publicly available version of the agreement.

### Reasons for settlement

The Commission considers that this settlement is a very satisfactory outcome to the investigation. In reaching this conclusion, the Commission has considered:

- The complex nature of the factual issues involved in the case, including in particular the difficulties involved in establishing what loss any individual farmer may have suffered.
- The legal issues arising from possible legal defences that the bank would have, including as to limitation.
- The length of time that it would take before any proceedings would be resolved, and the likely delays that would cause in providing any payment to rural customers.
- The stress on rural customers, and the distraction for them from their businesses, of having to come to court to give evidence about events that occurred some years ago.
- The sums involved in the settlement and the breadth of payments to the ASB Rural customers who contacted the Commission.

### Payment methodology

In the coming weeks, you will receive a letter from ASB setting out your entitlement under the Settlement Agreement. For most customers, that will involve a payment to you. For some customers, however, particularly those who have previously settled with the bank relating to Swaps or for whom the bank has written off sums of money, there will be no payment. Nevertheless customers who will not receive a payment for those reasons will be advised by ASB what the payment would have been, and the reason why the amount will not be paid to them.

ASB's letter will also explain the process by which you can accept any offer of payment from ASB.

The Commission has assessed each customer's entitlement on the basis of a methodology agreed between ASB and the Commission. Although this is not a precise estimate of any loss you may have suffered, the Commission considers that it is a reasonable approximation.

As you would expect, the payments will differ for each Named Customer as they will be based on individual circumstances.

### Distribution Process

The ASB letter you receive will include a Customer Release that you and each of your entities (eg, a company, partnership or trust) that have or had a Swap with ASB listed in the schedule to that letter will need to sign before any payment can be made.

This Customer Release will confirm that any payment to you is in full and final settlement of any and all claims that you and your entities may have against ASB in connection with ASB's marketing, promotion and sale of Swaps to you.

If you are at all uncertain as to your authority to sign the Release on behalf of the entities on the schedule, please make all necessary enquiries to ensure that you are authorised.

You should take your own legal and financial advice as to whether you wish to sign the Customer Release and accept any payment.

You do not have to accept any payment that is offered to you by ASB. But if you do wish to accept the payment, it is important that you return the completed Customer Release to ASB.

You will not receive any payment or credit until you return the Customer Release to ASB. Accordingly we urge you to respond promptly to ASB's letter.

I can advise you that ASB has undertaken to treat all customers fairly and it will not take any adverse action against any customer who chooses to accept, or decline, the offer.

**Requirement to confirm contact details for receipt of settlement correspondence**

The Commission has agreed to provide ASB with your most recent contact details, to ensure that the Settlement can be completed promptly. The Commission seeks your consent to do so. Those details will be provided to ASB strictly on the basis they are for the purposes of effecting this Settlement only.

Accordingly please complete and return the attached form by email to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz) confirming where ASB should send its letter regarding the offer of any payment. This is especially important if you are no longer a customer of ASB. Please return this by no later than [insert date]

**Questions and Answers (Q&A) about settlement process**

The Commission is updating its website to include further information about the settlement. We have attached a link to our website and also a copy of the Commission's media release about the settlement and its Q&A.

ASB will be providing a contact point for affected Named Customers to contact if they have any questions. This will be set out in the correspondence you will receive from ASB.

If you have any queries about this settlement you should contact the ASB contact point when ASB writes to you. In the interim you may call our contact centre on 0800 943 600 or send an email to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz) if you have any queries or concerns about the provision of your contact details to ASB.

Yours sincerely

Mary-Anne Borrowdale  
General Counsel  
Competition

Encl.

<b>ASB Interest Rate Swaps Settlement Confirmation of contact details</b>	
<b>Name: (Personal and Business entity)</b>	
<b>Current postal address:</b>	
<b>Current email address:</b>	
<b>Confirmation that I consent to my current contact details as provided to the Commission to be provided to ASB for the purposes of the Commission's settlement with ASB</b>	Yes / No (please circle)
<b>Signed:</b>	
<b>Date:</b>	

Please return this to the Commission by no later than [insert date] by scanning and emailing to [swaps@comcom.govt.nz](mailto:swaps@comcom.govt.nz) or by sending by post to PO Box care of "ASB Interest Rate Swaps Settlement" Commerce Commission PO Box 2351, Wellington 6140

**Schedule Four**

**ASB letter to customers**

**ASB letter to certain rural customers**

**Confidential**

Released under Official Information Act 1982

**Confidential**

Released under Official Information Act 1982



**Confidential**

Released under Official Information Act 1982

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