

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

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

- 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.

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

2 Background

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

- 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 28th 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

- 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

- 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

- 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

- 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:

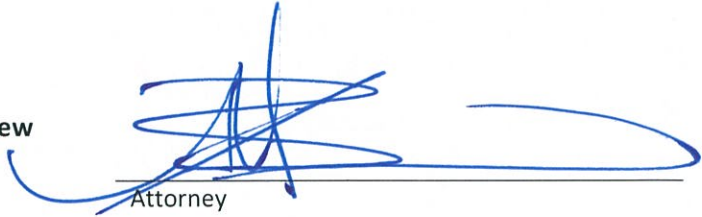
Westpac New Zealand Limited
Westpac On Takutai Square
53 Galway Street
Auckland 1010

Attention: Mike Hendriksen
Legal Counsel
Westpac New Zealand Limited

Email: michael_hendriksen@westpac.co.nz

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

MARIETTE VAN RYN

Name of Attorney



Signature of witness

Michael Hendriksen

Name of witness

Lawyer

Occupation

Auckland

City/town of residence

Signed for and on behalf of the Commerce Commission by:

Amanda Bennett
Chair

If not signed by two Commissioners then witnessed by:

Commissioner/authorised signatory

B. Walker
Signature of witness

QUEEN WALKER
Name of witness

OFFICE SUPPORT COORDINATOR
Occupation

AUCKLAND
City/town of residence

Schedule One (Confidential)

List of Named Customers with payment Schedule

Confidential

1

2

SETTLEMENT AGREEMENT
Interest Rate Swaps Investigation

Confidential

Confidential

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

- 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

- 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

- 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

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

5 Entire agreement

- 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

- 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

- 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]. 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 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].

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 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.

Westpac Interest Rate Swaps Settlement Confirmation of contact details	
Name: (Personal and Business entity)	
Current postal address:	
Current email address:	
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	Yes / No (please circle)
Signed:	
Date:	

Please return this to the Commission by no later than [insert date] by scanning and emailing to 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

Confidential

Confidential

Schedule Five

Customer Election Form

Confidential

Confidential

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 30th 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 30th day of January 2015



Mariëtte Maria Bernadette van Ryn