

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

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

- 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.

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

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

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 28th 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

- 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

- 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

- 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

- 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

(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

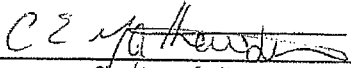
Execution

Signed for and on behalf of ASB Bank
Limited by:

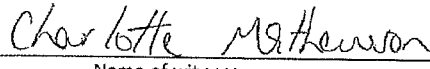


Authorised signatory

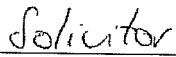
**Graeme Edwards
General Counsel &
Company Secretary
ASB Bank Limited**



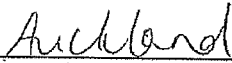
Signature of witness



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

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:

Arnette Bennett

Chair

If not signed by two
Commissioners then witnessed by:

Commissioner/authorised signatory



Signature of witness

Sally Brown

Name of witness

Group Coordinator

Occupation

Auckland

City/town of residence

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

Confidential

Confidential

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

- 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

- 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

- 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

- 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

- 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

- 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

- 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. 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 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 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.

ASB 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 ASB for the purposes of the Commission's settlement with ASB	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 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

Confidential

Confidential

Confidential

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