

**WESTPAC NEW ZEALAND LIMITED;
WESTPAC BANKING CORPORATION; AND
THE FINANCIAL MARKETS AUTHORITY**

**SETTLEMENT AGREEMENT REGARDING INTEREST RATE SWAPS SALES TO
CERTAIN RURAL CUSTOMERS**

16 February 2015

MEREDITH | CONNELL
BARRISTERS AND SOLICITORS

AGREEMENT DATED THIS SIXTEENTH day of FEBRUARY 2015

PARTIES

This deed is entered into:

BETWEEN **WESTPAC NEW ZEALAND LIMITED;**

WESTPAC BANKING CORPORATION (together, *Westpac*)

AND the **FINANCIAL MARKETS AUTHORITY**, an independent Crown entity established under section 6 of the Financial Markets Authority Act 2011 (the *FMA*)

 (together, *the parties*).

1 **RECITALS**

- 1.1 The New Zealand Commerce Commission (*the Commerce Commission*) has investigated alleged contraventions of the Fair Trading Act 1986 by Westpac in relation to the marketing, promotion and sale of interest rate swaps to rural customers from 2005 to 2012 (*the Commerce Commission Investigation*).
- 1.2 Based on the FMA's understanding of the results of the Commerce Commission Investigation, the FMA has concerns regarding the marketing, promotion and sale of Interest Rate Swaps to rural customers from 2005 to 2012.
- 1.3 In particular, the FMA has concerns regarding Westpac's conduct in relation to potential contraventions of the Legislation (defined below).
- 1.4 Westpac does not accept that the FMA has grounds for its concerns or that its conduct potentially contravenes the Legislation in the event that the Legislation is applicable.
- 1.5 Westpac and the Commerce Commission have now agreed the means by which the Commerce Commission Investigation is to be resolved and recorded those terms in a settlement agreement dated 30 January 2015 which is conditional on this agreement (*the Commission Settlement Agreement*).
- 1.6 In light of the Commission Settlement Agreement, the FMA and Westpac have agreed the means by which the FMA's concerns are to be resolved as recorded in this agreement (*the Agreement*).
- 1.7 Under the terms of the Commission Settlement Agreement, Westpac will offer to pay a sum expected to be \$1,878,899 to Named Customers. Westpac has also agreed that it will pay the sum of \$250,000

to Rural Support Trusts and \$250,000 to the Commerce Commission as a contribution to its costs of the Commerce Commission Investigation.

2 INTERPRETATION

2.1 For the purposes of this Agreement:

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

2.1.2 "*Global Liquidity Cost*" (*GLC*) means the additional charge 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 a restructure of the Interest Rate Swap.

2.1.3 "*Interest Rate 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.

2.1.4 "*Legislation*" means, as applicable, the Securities Act 1978 and the Securities Markets Act 1988.

2.1.5 "*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).

2.1.6 "*Named Customer*" means a Named Customer as defined in the Commission Settlement Agreement.

2.1.7 "*Related Parties*" of Westpac include each of their:

- (a) past and present directors, officers, employees and agents; and
- (b) its related companies and each related company's past and present directors, officers, employees and agents, where "related company" has the same meaning as in the Companies Act 1993.

3 **BACKGROUND FACTS**

3.1 Between 2005 and 2012, Westpac marketed and transacted Interest Rate Swaps to existing and potential rural customers, primarily through private meetings arranged by Westpac Agribusiness relationship managers and conducted by a Westpac Financial Markets Specialist. This marketing often included Westpac providing documents and PowerPoint presentations to the customers.

3.2 **THE FMA'S CONCERNS ARISING FROM THE COMMERCE COMMISSION INVESTIGATION**

3.2.1 In 2012, media reports emerged indicating that certain rural customers were dissatisfied with Interest Rate Swaps.

3.2.2 The Commerce Commission received complaints about the manner in which Westpac sold and marketed Interest Rate Swaps to rural customers. In August 2012, the Commerce Commission commenced the Commerce Commission Investigation.

3.2.3 In November 2013, the Commerce Commission contacted the FMA in relation to the Commerce Commission Investigation and to Westpac's potential liability under the Legislation.

3.2.4 As a result of the Commerce Commission Investigation, the FMA conducted its own enquiries about the way in which Interest Rate Swaps were marketed and transacted by Westpac to rural customers (the *FMA's enquiries*).

3.3 **THE FMA'S CONCERNS**

3.3.1 The FMA's enquiries have led to concerns that Westpac's conduct relating to the marketing and sales of Interest Rate Swaps to certain rural customers may have been misleading on the basis that the Commerce Commission Investigation concluded that Westpac's marketing conveyed to rural customers that:

- (a) margins on the underlying loan would not change for the term of the original Interest Rate Swap and for any restructure, extension, or shortening of the term of the Interest Rate Swap;
- (b) there would be no, or only a nominal, Break Cost to terminate an Interest Rate Swap;
- (c) there was no additional cost for the Named Customer to restructure an Interest Rate Swap; and
- (d) Interest Rate Swaps were a suitable alternative and good substitute for a fixed rate term loan for the circumstances of the customer or potential customer.

3.3.2 However, the FMA acknowledges that its concerns and the Commerce Commission's conclusions have not been tested in court.

4 WESTPAC'S POSITION

4.1 Westpac disagrees with the Commerce Commission's conclusions. In particular, Westpac says that:

- (a) it provided comprehensive information to customers regarding Interest Rate Swaps;
- (b) it did not sell Interest Rate Swaps unless they were fully explained, understood by, and suitable for a customer; and
- (c) it recommended that customers take independent legal advice before entering Interest Rate Swaps.
- (d) its customers ought to have been aware of its ability to increase margins or impose break costs upon early termination of an Interest Rate Swap;
- (e) break costs were fully explained to customers;
- (f) only customers who consented to payment of a GLC were charged a GLC;
- (g) customers were supported by Westpac during the term of their Interest Rate Swaps;
- (h) it does not accept that the Legislation applies to the relevant communications and says, in any event, that it has limitation defences.

4.2 Westpac does not accept that any proceedings under the Legislation would necessarily succeed, or that fines, penalties, refunds or damages would be payable at law, whether under the Legislation or any other legislation, regulation or rule of law.

5 TERMS OF SETTLEMENT

5.1 Notwithstanding the parties' differing views, Westpac and the FMA have agreed to resolve the issues arising out of the FMA's enquiries and the Commerce Commission Investigation on the terms set out below.

5.2 WESTPAC OBLIGATIONS

5.2.1 Westpac will appoint an independent party to review the marketing, promotion and sale of the Agreed Products as set out in the **Schedule** (the *Review*).

5.2.2 For the avoidance of doubt the Review is conducted without prejudice to whether the Agreed Products and any communications concerning the Agreed Products are subject to the Legislation.

5.3 Westpac will comply with its obligations to offer to make payments to the Named Customers as set out in clause 3.1(b) of the Commission Settlement Agreement.

5.4 **NO FURTHER ACTION BY THE FMA**

5.4.1 Upon the execution of this agreement, the FMA enquiries will cease.

5.4.2 The FMA undertakes not to issue, encourage or support any civil or criminal legal proceedings against Westpac and/or each of its Related Parties in respect of matters that are the subject of the FMA's enquiries.

5.4.3 The parties agree that this Agreement is in full and final settlement of all claims and proceedings that the FMA has, or may have, whether in its own right or on behalf of any other person, in respect of the matters the subject of the FMA's enquiries.

6 **MISCELLANEOUS**

6.1 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 FMA, by hand delivery or email to the following address:

The Financial Markets Authority

Attention: Rob Everett, CEO

Email: rob.everett@fma.govt.nz

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

Westpac New Zealand Limited

Attention: Michael Hendriksen, Head of Dispute Resolution

Email: michael_hendriksen@westpac.co.nz


Signed by and on behalf of Financial Markets Authority



Authorised signatory

ROB EVERETT

Name

In the presence of: 
Witness Name: Shane Petford
Witness Address: Wellington
Witness Occupation: PA


Signed by and on behalf of WESTPAC NEW-ZEALAND LIMITED by its attorney




Authorised signatory

Mariette van Ryn

Name


In the presence of: 
Witness Name: Michael Hendriksen
Witness Address: Auckland
Witness Occupation: Lawyer

Signed by and on behalf of WESTPAC
BANKING CORPORATION by its attorney



Authorised signatory

Mariette van Ryn
Name

In the presence of: 
Witness Name: Michael Hendriksen
Witness Address: Auckland
Witness Occupation: Lawyer

SCHEDULE

Westpac's review obligations in relation to financial products

- 1 Westpac New Zealand Limited and Westpac Banking Corporation (Westpac) agree to engage an external party acceptable to the Financial Markets Authority (the FMA) to conduct the Review and report as to whether Westpac has processes and procedures in place which are appropriate to minimise the risk of it making false, misleading or deceptive representations in relation to the marketing, promotion and sale of the Agreed Products.
- 2 Where possible, the Review will take a sample of Westpac's actual practices and provide conclusions as to whether those practices are consistent with Westpac's current, approved processes and procedures.
- 3 If the independent reviewer concludes that Westpac has reasonably appropriate processes and procedures in place (as specified above) it may, nevertheless, identify Optional Recommendations for Westpac to consider.
- 4 In the event that the Review concludes that Westpac does not have reasonably appropriate processes and procedures in place (as specified above), then the independent reviewer will specify Required Recommendations and the independent reviewer may also make Optional Recommendations.
- 5 Subject to the parties and the independent reviewer agreeing a different timetable:

Westpac will request the independent reviewer to provide a draft of its report to Westpac within six weeks of the date on which Westpac and the FMA agree the independent reviewer's terms of reference ; and

Westpac will have a further three weeks to provide comments on the draft report to the independent reviewer; and

within three weeks of providing its comments, Westpac will request the independent reviewer to provide to the FMA (on a confidential basis) the independent reviewer's final report.
- 6 Subject to clause 7, Westpac agrees to implement any Required Recommendations by 18 December 2015 or such other timeframe as is reasonably practicable and agreed with the FMA.
- 7 Where Westpac does not agree that a Required Recommendation is necessary, it will provide its reasons for this view to the FMA and the FMA will consider in good faith whether it will require Westpac to implement the Required Recommendation or whether some adjustment to the Required Recommendation can reasonably be made.

8 Westpac agrees to consider in good faith the implementation of any Optional Recommendations.

9 For the purpose of this Schedule:

Agreed Products means:

9.1 Interest Rate Swaps; and

9.2 Notice Saver PIE.

Required Recommendation means a change to Westpac's processes and procedures which, in the reasonable opinion of the independent reviewer, is necessary to prevent a substantial risk of false, misleading or deceptive representations being made in relation to the marketing, promotion and sale of the Agreed Products.

Optional Recommendation means a change to Westpac's processes and procedures which, in the reasonable opinion of the independent reviewer, is desirable to further minimise the risk of Westpac making false, misleading or deceptive representations in relation to the marketing, promotion and sale of the Agreed Products.

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 16th day of February 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 16th day of February 2015



Mariëtte Maria Bernadette van Ryn