

NOTICE OF FILING

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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: VID282/2016
File Title: Australian Securities and Investments Commission v Westpac Banking Corporation
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 5/04/2016 4:31:18 PM AEST

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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CONCISE STATEMENT

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

No. of 2016

IN THE MATTER OF WESTPAC BANKING CORPORATION (ACN 007 457 141)

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Plaintiff

WESTPAC BANKING CORPORATION (ACN 007 457 141)

Defendant

A. INTRODUCTION

- 1 This claim relates to Westpac's trading of negotiable certificates of deposit issued, and bank bills accepted, by Prime Banks,¹ (together, **Prime Bank Bills**) in the short dated securities market (**Bank Bill Market**).
- 2 ASIC contends that, on 16 occasions between 6 April 2010 and 6 June 2012,² Westpac traded Prime Bank Bills in the Bank Bill Market with the intention and likely effect of influencing the setting of the bank bill swap reference rate (**BBSW**) to its advantage and to the disadvantage of parties to certain products who had an opposite exposure to the BBSW.
- 3 ASIC seeks declarations, pecuniary penalties, costs and ancillary relief against Westpac: see section C below.

B. IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 4 During the Relevant Period, the trading of Prime Bank Bills on the Bank Bill Market informed the setting of the BBSW. The BBSW was set on the basis of observations submitted by nominated BBSW Panellists (including Westpac) as to the yield at which Prime Bank Bills in each tenor were trading at 10:00am each trading day.
- 5 The BBSW was and is intended to express the mid-rate of the yield on Prime Bank Bills for each relevant tenor and to measure genuine forces of supply and demand in the interbank lending market. The higher the yield at which Prime Bank Bills were trading at 10:00am on a particular business day, the higher the BBSW would set, and vice versa.
- 6 The BBSW functions as a key reference rate and benchmark in Australian financial markets. The independence and transparency of the BBSW is a critical factor in ensuring the efficiency, integrity and good operation of those markets.
- 7 Almost all trading in the Bank Bill Market took place between about 9:55am and 10:00am on each Sydney business day (**BBSW Rate Set Window**). The sale by a Bank Bill Market participant, in sufficient volumes, of Prime Bank Bills in a particular tenor during the BBSW Rate Set Window was likely to increase the yield at which Prime Bank Bills of that tenor were trading at 10:00am, and therefore raise the level at which the BBSW for

¹ As designated by the Australian Financial Markets Association Limited (**AFMA**). Westpac, ANZ, CBA and NAB are and were at all relevant times designated Prime Banks.

² Unless otherwise stated, 6 April 2010 to 6 June 2012 is the **Relevant Period**.

that tenor set that day. Conversely, the purchase of sufficient volumes of Prime Bank Bills was likely to lower the yield and therefore lower the BBSW.

- 8 During the Relevant Period, Westpac was a party to interest rate derivatives, lending transactions and deposit products (**BBSW Referenced Products**) in respect of which either Westpac or the counterparty would have an obligation to pay an amount of money quantified by reference to the BBSW rate set in a particular tenor on a particular day. Westpac's net revenue was therefore affected by movement in the BBSW in the relevant tenor (**BBSW Rate Set Exposure**).
- 9 During the Relevant Period, prior to the BBSW Rate Set Window, Westpac was able to and did ascertain its BBSW Rate Set Exposure, which was either:
 - a. a "long exposure", meaning that Westpac's net revenue would (i) increase if the BBSW set at a higher rate on that day; and (ii) correspondingly, decrease if the BBSW rate set was lower; or
 - b. a "short exposure", meaning that Westpac's net revenue would (i) increase if the BBSW set at a lower rate on that day; and (ii) correspondingly, decrease if the BBSW rate set was higher.
- 10 During the Relevant Period, including on the occasions specified in the Originating Process, Westpac traded during the BBSW Rate Set Window with an intention to affect the level at which the BBSW was set to favour Westpac's BBSW Rate Set Exposure.
- 11 On each occasion set out in Annexure A of the Originating Process, Westpac knew that it had a substantial long BBSW Rate Set Exposure and sold Prime Bank Bills in the Bank Bill Market during the BBSW Rate Set Window with the intention of raising or maintaining the BBSW rate for the relevant tenor.
- 12 On each occasion set out in Annexure B of the Originating Process, Westpac knew that it had a substantial short BBSW Rate Set Exposure and purchased Prime Bank Bills in the Bank Bill Market during the BBSW Rate Set Window with the intention of lowering or maintaining the BBSW rate for the relevant tenor on the relevant day. For example, on 6 April 2010, Westpac knew that it had a short BBSW Rate Set Exposure of about \$14.06 billion. Acting through Mr Roden, Westpac bought 30-day Prime Bank Bills with a face value of \$1.853 billion in the Bank Bill Market, comprising 100% of all purchases of that tenor made through brokers on that day. That trading did not constitute engagement in a genuine process of supply and demand in the Bank Bill Market as it was conducted in order to lower the rate at which the BBSW was set on that day, as recorded in statements made:
 - a. by Mr Roden to Ms Johnston during a telephone conversation on 6 April 2010:

Yeah, no, we made about 12 million bucks today right so that's, not, that's what you call a good day right? ... Make a good day and maybe make a bit. ... We had a massive rate set today like we had like a fucking, shit 14 billion of 1 month ... I had to buy like ... I bought like...fuck... I had 14 billion of 1 month...because it's a long... I got the 5 day run ... And 3 yards of 3 months probably about 4 yards of 3 months so I ended up buying like 2½ billion dollars ... 2 billion today. ... Today I got 1 month from everyone, because I pushed the 1 month down, right, it was going to set at 30, right, then I got it down to 23. ... I know I have got limit, I just wanna, I'm gonna just trash them on Friday. ... I know it's completely wrong but, I knew it was completely wrong but fuck it I might as well, I thought fuck it. We've got so much money on it, we just had to do it, right

b. by other Westpac employees on 7 April 2010:

*[W]e actually sold about a yard and a half of stock into it. ... Which is all the stuff that we've picked up in the last day or two like yesterday was really good because we got the one month down to 4.23 because we had a 13 or 14 yard rate set. ...*³

*Well Col spent a crap load of money yesterday and he sold quite a bit today ... he bought like 2 ½ billion dollars' worth of stock for the rate set so ... he's sold I think today. Spend 2 for 20's not bad. So he'll be selling stuff over the next couple of days because he's got no rate sets for like another week or whatever so that shouldn't be too much of an outflow of cash.*⁴

c. by Mr Roden and Ms Johnston on 8 April 2010:

Ms Johnston: *So look, it looks like you're keeping the one month down well?*

Mr Roden: *... Look you know we had a massive day one this week, right.*

Ms Johnston: *Yeah the 14. ...*

Mr Roden: *So we bought two on that day it was a shocker but um yeah there was just nothing left. ... we've got a big one on Monday but I just don't think they've really got much. They're all a little bit scared you know ...*

Ms Johnston: *You're a force to be reckoned with these days.*

Mr Roden: *I don't think so, I don't think so. Yeah that was a cracking result 32 today ... in fact, I could have got it to 30 but that's completely pointless doing that cause I would have had to spend money and what's the point of spending money, right ...*

- 13 On 6 April 2010, the 30-day BBSW was set by AFMA at 4.23. Westpac's trading had the effect or likely effect of causing the 30-day BBSW to set at a rate which did not reflect genuine forces of supply and demand, and of creating an artificial price for certain BBSW Referenced Products which were traded on a financial market in this jurisdiction ("**Traded BBSW Referenced Products**").
- 14 Westpac represented to counterparties to BBSW Referenced Products with Westpac, either impliedly or by its silence or non-disclosure, that the BBSW was an objective or independent reference rate whereas Westpac engaged in trading of Prime Bank Bills in the manner described above, with the intention of affecting the BBSW to its benefit and to the detriment of such counterparties.

C. SUMMARY OF RELIEF SOUGHT FROM THE COURT

- 15 ASIC seeks declarations to the effect that Westpac's conduct involved:
- a. transactions which created or were likely to create an artificial price for trading in Traded BBSW Referenced Products, in breach of s 1041A of the *Corporations Act 2001* (Cth) (**Act**);
 - b. unconscionable conduct in relation to counterparties to BBSW Referenced Products with Westpac, and other parties to a BBSW Referenced Product, who had an opposite exposure to the BBSW and who were not listed public companies in breach of s 12CB (for trading after 1 January 2012) and former s 12CC (for trading before 1 January 2012) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);

³ Recorded telephone conversation at 15:53:05 on Wednesday, 7 April 2010 between Ms Johnston and others.

⁴ Recorded telephone conversation at 18:32:68 on 7 April 2010 between Ms Johnston and others.

- c. a pattern of behaviour in connection with the supply of BBSW Referenced Products which was unconscionable in all the circumstances in breach of s 12CC of the ASIC Act (before 1 Jan 2012) and s 12CB of the ASIC Act (after 1 Jan 2012);
- d. unconscionable conduct in taking unconscientious advantage of the special disadvantage of counterparties to a BBSW Referenced Product with Westpac, and other parties to a BBSW Referenced Product, who had an opposite exposure to the BBSW and who did not and could not know that Westpac might engage in the conduct described above, in breach of s 12CA of the ASIC Act;
- e. misleading or deceptive conduct, or conduct likely to mislead or deceive, in breach of s 1041H of the Act and / or s 12DA of the ASIC Act, s 12DB(1)(a) and (e) of the ASIC Act, and / or s 12DF of the ASIC Act; and
- f. contraventions of s 912A(1) of the Act.

16 ASIC also seeks pecuniary penalties in respect of the contraventions of s 1041A of the Act and ss 12CA, 12CB (and s 12CC of the former ASIC Act), 12DB and 12DF of the ASIC Act and orders requiring Westpac to implement a comprehensive compliance program for all involved in its trading in the Bank Bill Market.

D. PRIMARY LEGAL GROUNDS FOR RELIEF SOUGHT

- 17 **Market Manipulation:** The Traded BBSW Referenced Products were financial products traded on a financial market operated within this jurisdiction for the purposes of s 1041A of the Act. The price for trading in these products was calculated by reference to the BBSW. On the occasions identified in the Annexures to the Originating Process, and in the circumstances set out above, Westpac engaged in trading of Prime Bank Bills with the effect, or likely effect, of causing the BBSW to set at an artificial level, in turn creating an artificial price for BBSW Referenced Products traded on a financial market.
- 18 **Unconscionable Conduct:** Westpac's trading in Prime Bank Bills in the BBSW Rate Set Window on the occasions set out in the Originating Process amounted to conduct in relation to financial services or in connection with the acquisition or supply of financial services which was unconscionable in the circumstances which include the following:
- a. counterparties to BBSW Referenced Products with Westpac, and other parties to a BBSW Referenced Product, entered into these products on the basis that the BBSW was an objective, independent and transparent benchmark;
 - b. counterparties to BBSW Referenced Products with Westpac, and other parties to a BBSW Referenced Product, did not and could not know that Westpac traded Prime Bank Bills with an intention of affecting the level at which the BBSW set to advantage itself in relation to the BBSW Referenced Products to their detriment;
 - c. Westpac took advantage of its status as a Prime Bank and its position in the Bank Bill Market, in undertaking the trading described in (b);
 - d. Westpac knew of the circumstances in (a) and (b) and took advantage of its position with respect to counterparties to BBSW Referenced Products with Westpac, and other parties to a BBSW Referenced Product, by not disclosing its conduct described in (b).
 - e. Westpac's conduct described in (c) was contrary to industry codes, including the AFMA Code of Ethics' requirement that AFMA members (including Westpac) not carry out trading that (i) would interfere with normal supply and demand factors in the

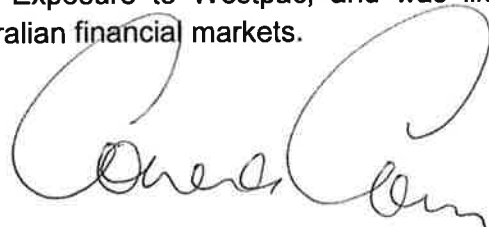
market for a financial product, (ii) had the potential to create artificial markets or prices, or (iii) was not based on a genuine trading intention.

- 19 Further or alternatively, Westpac engaged in a pattern of behaviour by trading Prime Bank Bills with the intention of affecting the price of BBSW Referenced Products which constituted unconscionable conduct in breach of s 12CB of the current, and s 12CC of the former, ASIC Act.
- 20 Further or alternatively, Westpac engaged in conduct that took unconscientious advantage of the special disadvantage of counterparties to BBSW Referenced Products with Westpac, and other parties to a BBSW Referenced Product, in the circumstances set out in 18(b) above in breach of s 12CA of the ASIC Act.
- 21 **Misleading or deceptive conduct:** Westpac engaged in conduct that was misleading or deceptive or likely to mislead or deceive by representing to counterparties to BBSW Referenced Products with Westpac that the BBSW rate was an objective and independent reference rate, and / or by silence or not disclosing that Westpac could engage and / or would in the future engage in the conduct described above with the intention of benefiting itself in relation to the BBSW Referenced Products.
- 22 **Breach of Financial Services Licence:** Westpac's conduct in the Bank Bill Market and in connection with the financial products and services referenced to the BBSW also breached its obligations as a financial services licensee under s 912A(1) of the Act.

E. ALLEGED HARM

- 23 Westpac's trading in Prime Bank Bills described above caused financial detriment or disadvantage to counterparties to BBSW Referenced Products with Westpac, was likely to cause financial detriment to any person who was a party to any BBSW Referenced Product with an opposite BBSW Rate Set Exposure to Westpac; and was likely to damage the reputation and operation of Australian financial markets.

Date: 5 April 2016



Signature of plaintiff or plaintiff's legal practitioner