

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: NSD386/2021
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
WESTPAC BANKING CORPORATION ACN 007 457 141
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 5/05/2021 10:44:10 AM 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

No. NSD



of 2021

Federal Court of Australia
 District Registry: New South Wales
 Division: General

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

- 1 ASIC brings this proceeding against Westpac in relation to its involvement in the largest interest rate swap executed in one tranche in Australian financial market history. ASIC alleges that Westpac engaged in insider trading and unconscionable conduct, and failed to comply with its AFSL obligations, contrary to s 1043A(1)(c) of the *Corporations Act 2001* (Cth) (**Corporations Act**), s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and s 912A(1) of the *Corporations Act*.

IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 2 At about 7am on 20 October 2016, a consortium of investors made up of an IFM Investors group of entities and AustralianSuper Pty Ltd as trustee for AustralianSuper (**Consortium**) entered into an agreement with the NSW Government to acquire a 50.4% interest in Ausgrid, an electricity provider then owned by the State of New South Wales (**Ausgrid transaction**).
- 3 Throughout October 2016, and until 20 October 2016, the Consortium communicated with several banks, including Westpac, about one or more of those banks potentially entering into an interest rate swap deal with a special purpose vehicle (**Consortium's SPV**) to hedge the floating interest rate risk associated with syndicated debt funding for the acquisition and ongoing funding requirements of Ausgrid (**Swap Deal**). The Swap Deal had a notional value of approximately \$12 billion and comprised 11 interest rate swaps that amortised over 10 years.
- 4 By about 8.30am on 20 October 2016, Westpac knew or believed certain information, which ASIC articulates in four alternative ways:

Filed on behalf of (name & role of party)	Australian Securities and Investments Commission, Plaintiff		
Prepared by (name of person/lawyer)	Philip Crutchfield QC, Catherine Button QC, Caryn van Proctor, Christopher Tran, Julie Granger and David Foster of counsel		
Law firm (if applicable)	Holding Redlich		
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- a. it was highly likely that the Consortium, via the Consortium's SPV, was going to seek to enter into the Swap Deal during the morning of 20 October 2016 with a single bank, Westpac, for about \$12 billion face value and comprising 11 interest rate swaps that were to amortise over 10 years with a particular cash flow profile (**First Alternative Ausgrid Information**);
- b. it was highly likely that the Consortium, via the Consortium's SPV, was going to seek to enter into the Swap Deal during the morning of 20 October 2016 with a single bank, Westpac, for about \$12 billion face value (**Second Alternative Ausgrid Information**);
- c. it was at least more likely than not that the Consortium, via the Consortium's SPV, was going to seek to enter into the Swap Deal during the morning of 20 October 2016 with a single bank, Westpac, for about \$12 billion face value and comprising 11 interest rate swaps that were to amortise over 10 years with a particular cash flow profile (**Third Alternative Ausgrid Information**);
- d. it was at least more likely than not that the Consortium, via the Consortium's SPV, was going to seek to enter into the Swap Deal during the morning of 20 October 2016 with a single bank, Westpac, for about \$12 billion face value (**Fourth Alternative Ausgrid Information**).

These are alternative formulations of what this Concise Statement refers to as the **Ausgrid Information** when it is unnecessary to distinguish between them.

- 5 Nicholas Allen, Benjamin Mitchell and Shane Dorman on the Derivatives Trading desk knew some or all of the Ausgrid Information, as did Simon Masnick (head of Fixed Income Trading), Michael Correa (Managing Director of Corporate and Institutional Distribution and Origination in Financial Markets) and Lyn Cobley (Chief Executive of Westpac Institutional Bank). The Ausgrid Information was not generally available, and it was information which, if generally available, a reasonable person would expect to have a material effect on the price or value of the Traded Products (as defined in [7] below). Westpac knew or ought reasonably to have known this.
- 6 The Consortium's SPV, and thus the Consortium, executed the Swap Deal with Westpac at 10.27am on 20 October 2016. Prior to that execution, Westpac had quoted the spread and execution margins it would charge on top of the **Quoted Rate**, being a single mid-rate Westpac would quote for the Swap Deal based on the price in the market of certain financial products, including the Traded Products below, at the time of executing the Swap Deal.
- 7 While in possession of the Ausgrid Information, from about 8.30am to 10.27am on 20 October 2016, Westpac (through Allen, Mitchell, Dorman and Jeffrey Tjeuw) conducted:

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- a. 692 trades by which it sold (disposed of) 35,902 3-year Commonwealth Treasury Bond Futures Contracts (**Bond Futures**), which had a total notional value of \$3,590,200,000, and 8,189 10-year Bond Futures, which had a total notional value of \$818,900,000, each expiring in December 2016;
- b. 21 trades by which it received (acquired) the total notional amount of \$2,075,000,000 for 5-year, 7-year and 10-year Australian dollar denominated 6s3s tenor basis swaps;
- c. 35 trades by which it paid (acquired) the total notional amount of \$3,980,000,000 for 3-year, 5-year and 10-year Australian dollar denominated interest rate swap exchange for physicals; and
- d. 128 trades by which it sold (disposed of) 6,109 Bank Accepted Bill Futures Contracts, which had a total face value of \$6,109,000,000, expiring in September 2017, December 2017, March 2018 and September 2018.

This Concise Statement refers to this trading as the “**Morning Trading**”. The products traded in the Morning Trading are the “**Traded Products**”.

- 8 Westpac planned to pre-position its trading books by trading in the Traded Products ahead of executing the Swap Deal if it became aware, knew or believed that it had been selected to execute the Swap Deal. It did not disclose this intention to the Consortium or the Consortium's SPV. The Morning Trading affected, or was likely to affect or had the potential to affect, the prices of the Traded Products. Their prices were inputs into the Quoted Rate. The Morning Trading thus affected, or was likely to affect or had the potential to affect, the Quoted Rate to the detriment of the Consortium and/or the Consortium's SPV. Westpac knew or should reasonably have known this.
- 9 From the time of signing the agreement with the NSW Government for the Ausgrid transaction, the Consortium's SPV was “on risk” and the Consortium sought to execute the Swap Deal as soon as possible. The Consortium could observe the prices for the Traded Products moving during the morning of 20 October 2016 to its detriment but could not know if it was trading by Westpac that was moving those prices. Being under time and risk pressure, and having decided to limit its risk by executing the Swap Deal with a single bank, the Consortium's SPV had no practical alternative but to execute with Westpac.

RELIEF SOUGHT FROM THE COURT

- 10 ASIC seeks the relief sought in the accompanying originating application against Westpac.

PRIMARY GROUNDS FOR THE RELIEF SOUGHT

- 11 ***Insider Trading.*** Westpac engaged in the Morning Trading when it possessed one or more of the alternative formulations of the Ausgrid Information. That Ausgrid Information is “inside information” within the meaning of s 1042A of the Corporations Act. Westpac knew or ought

Form NCF1

reasonably to have known that the Ausgrid Information had that character. Westpac therefore contravened s 1043A(1)(c) of the Corporations Act on 876 occasions.

- 12 **Unconscionable conduct.** The Morning Trading was in trade or commerce and in connection with the supply or possible supply of financial services to the Consortium's SPV and/or the Consortium. Engaging in the Morning Trading on 20 October 2016 was unconscionable in all the circumstances contrary to s 12CB of the ASIC Act.
- 13 In particular, Westpac intended to pre-position its trading books by trading in the Traded Products ahead of executing the Swap Deal to hedge up to 50% of its anticipated risk associated with the Swap Deal (if it became aware, knew or believed that it had been selected to execute it). It did not disclose that intention to or seek consent from the Consortium and/or the Consortium's SPV. Absent disclosure by Westpac of its intentions, the Consortium and/or the Consortium's SPV had no means of knowing about Westpac's intended trading. Westpac knew, or should reasonably have known, this. Westpac was aware that the Consortium was concerned about the risk of the selected counterparty to the proposed Swap Deal engaging in trading that might affect the Quoted Rate. The Consortium and/or the Consortium's SPV were vulnerable to Westpac engaging in the Morning Trading, and Westpac knew or should reasonably have known this. The Morning Trading had the actual effect, or was likely to have the effect or had the potential to have the effect, of influencing the Quoted Rate and thus the execution price of the Swap Deal to the detriment of the Consortium and/or the Consortium's SPV. Westpac was aware, or should reasonably have been aware, or was indifferent to the risk that engaging in the Morning Trading would have this effect, and engaged in the Morning Trading regardless and without disclosing its intentions beforehand. Westpac engaged in the Morning Trading while in possession of the Ausgrid Information.
- 14 **Section 912A.** Westpac held an Australian Financial Services licence. Having regard to its conduct in connection with the Swap Deal (whether or not Westpac contravened s 1043A of the Corporations Act and s 12CB of the ASIC Act), it did not do all things necessary to ensure that the Swap Deal was provided to, and executed with, the Consortium's SPV and/or the Consortium efficiently, honestly and fairly, contrary to s 912A(1)(a).
- 15 Further, Westpac's interest in managing its anticipated risk associated with executing the Swap Deal and the interest of the Consortium's SPV and/or the Consortium in avoiding any increase in the Quoted Rate were in conflict. Westpac did not have any or any adequate arrangements in place to manage this conflict, contrary to s 912A(1)(aa).
- 16 Further, in circumstances where Westpac was in possession of the Ausgrid Information, it failed to prevent its traders from (and did not reinforce to its traders that they should not engage in) trading to pre-position its trading books ahead of the execution of the Swap Deal. It failed to prevent its traders from trading when such trading would contravene, or there was a material risk such trading would contravene, s 1043A of the Corporations Act. It failed to

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ensure its traders or other representatives obtained consent of the Consortium's SPV and/or the Consortium, or made disclosure to them, before its traders engaged in trading that affected, was likely to affect or had the potential to, affect prices of the Traded Products to the detriment of the Consortium's SPV and/or the Consortium. It had no formal written policy on pre-positioning trading books ahead of deals, and had no or no adequate training, practice or procedure for its traders as to the documentation of disclosure of pre-positioning to customers and consent of customers to the same. It had no or no adequate mechanism in place to monitor and/or review its traders' trading ahead of deals to ensure that it occurred in compliance with financial services laws, or did not apply any such mechanism adequately or at all to the Morning Trading. Westpac's traders were its representatives within the meaning of s 912A(1)(ca) and (f) of the Corporations Act. Westpac thus contravened s 912A(1)(ca) and (f) of the Corporations Act.

- 17 Finally, by contravening s 1043A of the Corporations Act and/or s 12CB of the ASIC Act and/or ss 912A(1)(a), (aa), (ca) or (f) of the Corporations Act, Westpac failed to comply with the financial services laws within the meaning of s 912A(1)(c) of the Corporations Act.

THE ALLEGED HARM SUFFERED

- 18 Westpac's conduct caused harm to the Consortium and/or the Consortium's SPV, including because it caused, was likely to cause or had the potential to cause the Quoted Rate to move to the detriment of the Consortium and/or the Consortium's SPV. Other market participants traded in the Traded Products at prices that were affected or might have been affected by the conduct. Breaches of ss 1043A and 912A of the Corporations Act, and of s 12CB of the ASIC Act, also cause harm by undermining the integrity of markets for financial products and confident and informed decision-making by consumers of financial products and services.

This concise statement was prepared by Philip Crutchfield QC, Catherine Button QC, Caryn van Proctor, Christopher Tran, Julie Granger and David Foster of counsel.

Certificate of lawyer

I, Susan Goodman, and I, Howard Rapke, certify to the Court that, in relation to the Concise Statement filed on behalf of the Plaintiff, the factual and legal material available to me at present provides a proper basis for each allegation in the Concise Statement.

Date: 5 May 2021


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Signed by Susan Goodman
Lawyer for the Plaintiff


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Signed by Howard Rapke
Lawyer for the Plaintiff