

# Westpac Banking Corporation - Credit Card Credit Limit Increase Submissions

Royal Commission into Misconduct in the  
Banking, Superannuation and Financial  
Services Industry

3 April 2018

# WESTPAC CREDIT CARD CREDIT LIMIT INCREASES

## 1 Overview

1. This case study concerns the process used within Westpac for deciding whether to offer bank-initiated credit card limit increases (**CLIs**) to its existing credit card customers between 12 September 2012 and 17 December 2014 (the **relevant period**).
2. The relevant period for this case study commenced on 12 September 2012 when the Australian Securities and Investments Commission (**ASIC**) sent a letter to the Australian Bankers Association (the **ABA**) setting out its views on responsible lending requirements in relation to CLIs. The relevant period ended on 17 December 2014, when Westpac suspended issuing CLI offers to its customers.
3. The letter raised important considerations in relation to how the responsible lending legislation should be interpreted. Westpac considered the matters raised in the letter and formed the view that its processes in relation to CLIs were consistent with the law. Westpac did not engage with ASIC on that topic until ASIC contacted it in 2014. Westpac accepts its approach to the engagement with ASIC was not appropriate and that it should have engaged more fully with the regulator in 2012. Since then, Westpac's approach to engaging with ASIC has changed materially and Westpac is confident that a different style of engagement would occur if a similar issue were to arise today.
4. This submission proceeds according to the following structure:
  - (a) Section 2 sets out the factual findings which Westpac submits the Commission should make with respect to this case study.<sup>1</sup>
  - (b) Section 3 addresses whether the Commission should make the findings of misconduct identified in paragraph 75 of Counsel Assisting's written submissions (**CAS**).
  - (c) Section 4 addresses whether the Commission should make the findings that Westpac's conduct fell below community standards and expectations identified in paragraph 76 of the CAS.
  - (d) Section 5 addresses whether the Commission should find that any of Westpac's conduct was attributable to its culture, governance or remuneration practices, as contended in paragraph 77 of the CAS.
  - (e) Section 6 addresses the general questions identified in paragraph 79 of the CAS as arising from this case study.
  - (f) Section 7 addresses the general questions identified in paragraph 70 of the CAS as arising from the CBA Credit Cards case study to the extent not otherwise addressed by these submissions. That case study also concerned credit card limit increases and

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<sup>1</sup> Pursuant to the invitation in paragraph 78 of Counsel Assisting's written submissions [RCD.9999.0003.0001].

the issues raised overlap with the issues raised in Westpac's case study.

## 2 Factual findings sought by Westpac

### 2.1 Westpac's credit card business

5. Westpac is the issuer and credit provider of credit cards carrying the Westpac, St.George, Bank of Melbourne and BankSA brands.<sup>2</sup> In January 2018, Westpac had 2,612,157 credit card accounts.<sup>3</sup> Credit cards comprise 1.5% of Westpac's total lending.<sup>4</sup>
6. Currently, Westpac offers 25 different credit card products.<sup>5</sup> Its products fall into three categories: low annual fee credit cards, low interest rate credit cards and rewards credit cards.<sup>6</sup> These cards have different features and interest rates and are designed by Westpac to meet a range of customer needs.<sup>7</sup> Currently, Westpac charges interest rates on credit card purchases in a range from 9.90% per annum (for low rate cards) to 20.49% per annum (for low annual fee cards with a 55-day interest-free period).<sup>8</sup>
7. Credit cards are used by consumers both as a payment mechanism and to finance purchases.<sup>9</sup> Credit card customers can be seen as falling into three broad groups:<sup>10</sup>
  - (a) 'transactors', who usually pay their full credit card balance each month and therefore do not pay interest or late fees. Transactors value credit cards primarily as a widely-accepted payment mechanism;
  - (b) 'revolvers', who usually do not pay the full balance and therefore hold a revolving balance from month to month. Revolvers generally use credit cards for short term finance to meet short term cash flow needs; and
  - (c) customers who switch between these groups from time to time.

### 2.2 Regulation of credit cards by the *National Consumer Credit Protection Act 2009 (Cth)*

8. Credit cards issued to consumers, like other forms of consumer credit, are subject to regulation under the *National Consumer Credit Protection Act 2009 (Cth)* (the **National Credit Act**). Chapter 3 of the National Credit Act deals with responsible lending conduct. It came into effect for entities such as Westpac on 1 January 2011.<sup>11</sup> Accordingly, the provision by Westpac of credit cards to consumers and any CLIs was subject to Chapter 3 of the National Credit Act on and from 1 January 2011.

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<sup>2</sup> Ex 1.164 Witness Statement of William David Malcolm dated 19 March 2018 [WIT.0001.0014.0001] (**Malcolm Statement**): [5].

<sup>3</sup> Malcolm Statement: [13].

<sup>4</sup> Malcolm Statement: [11].

<sup>5</sup> Malcolm Statement: [7]. Westpac also has 62 different credit card products in use by existing customers which are no longer offered to new customers: Malcolm Statement: [8].

<sup>6</sup> Malcolm Statement: [6].

<sup>7</sup> Malcolm Statement: [9].

<sup>8</sup> Malcolm Statement: [6] and Schedule 1.

<sup>9</sup> Malcolm Statement, [6].

<sup>10</sup> Malcolm Statement, [9].

<sup>11</sup> Sub-item 19(1) of Schedule 1 of the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009 (Cth)*.

## 2.3 RG 209

9. ASIC published Regulatory Guide 209 entitled “Credit licensing: Responsible lending conduct” (**RG 209**) in February 2010, with updates in June 2010, March 2011, February 2013 and September 2013. The current version was issued on 5 November 2014.

10. The March 2011 version of RG 209 was in place at the commencement of the relevant period. As with ASIC’s other regulatory guides, RG 209 sets out ASIC’s interpretation of the relevant legal principles, but says that it is not legal advice and reminds readers that it is their responsibility to determine their obligations.<sup>12</sup>

11. RG 209 described how ASIC intended to use the concept of ‘scalability’:<sup>13</sup>

The legislation requires that you make inquiries and verify information to a reasonable standard. We consider that the obligation to make reasonable inquiries and take reasonable steps to verify information is scalable—that is, what you need to do to meet these obligations will vary depending on the circumstances.

12. ASIC stated that the application of the scalability principle would mean that generally for a more basic credit contract, such as a small personal loan, credit licensees would need to make less detailed inquiries than for a mortgage.<sup>14</sup> ASIC set out examples of the types of reasonable inquiries which could, depending on a consumer’s financial situation, be made.<sup>15</sup> However, ASIC made clear it was up to credit providers to decide what was necessary in different circumstances:<sup>16</sup>

Credit providers and credit assistance providers should decide what inquiries it is reasonable for them to make about the consumer in the relevant circumstances. Because the requirement to make reasonable obligations is scalable, this means that you may make less or more inquiries than those set out below, or a different range of inquiries, depending on the circumstances.

13. ASIC noted that verification could occur using data held by the credit provider:<sup>17</sup>

We recognise that, in certain circumstances, credit providers will be able to verify a consumer’s financial situation without receiving information from the consumer. For example, a bank could look at a consumer’s regular deposited salary, the timing of credit card payments, and the payment of other expenses. However, credit providers should take care relying on such information, which may not reflect the consumer’s entire financial position—for example, if the consumer holds credit cards with other financial institutions.

14. ASIC recognised that credit providers hold data on customers which could be used, including through automated processes, to meet responsible lending obligations:<sup>18</sup>

The use of sophisticated automated systems and tools for testing the reliability of information about income provided by an intending borrower may play a role in satisfying the requirements to take reasonable steps to verify such information. It is

<sup>12</sup> RG 209, March 2011 version: [RG 209.13].

<sup>13</sup> RG 209, March 2011 version: [RG 209.17].

<sup>14</sup> RG 209, March 2011 version: [RG 209.18] (Example 1).

<sup>15</sup> RG 209, March 2011 version: [RG 209.27].

<sup>16</sup> RG 209, March 2011 version: [RG 209.26].

<sup>17</sup> RG 209, March 2011 version: [RG 209.40].

<sup>18</sup> RG 209, March 2011 version: [RG 209.41].

the responsibility of credit licensees to satisfy themselves that the use of any such system is adequate and appropriate for verifying information provided by a consumer about their financial situation, in relation to the credit being applied for. Credit licensees should ensure that any such systems are regularly monitored and reviewed to ensure their continued effectiveness.

## 2.4 Westpac's CLI process

15. During the relevant period, Westpac's general approach for a new credit card customer was to start with a relatively modest credit limit and then, if it assessed that it was appropriate to do so, to offer CLIs over time.<sup>19</sup> This approach allowed Westpac to be satisfied that the customer had the financial means and behaviours to manage the existing credit limit before considering any increase.<sup>20</sup> Any CLI offered by Westpac was proportional to the existing limit and no CLI exceeded \$5,000.<sup>21</sup> The average CLI offered by Westpac was around \$2,800.<sup>22</sup>
16. To seek to meet its responsible lending obligations (in accordance with the legislation and guidance described above), Westpac developed a process to assess whether to offer a CLI to its existing credit card customers (who had consented to receive such offers) and, if so, the amount of the CLI to offer and whether a further credit assessment of that customer was required. This process performed analysis on the data and information that Westpac held about its existing customers, which included:<sup>23</sup>
  - (a) customer-level data about Westpac's relationship with the customer, including their indebtedness to Westpac, payment history and demographic information and any external credit rating report which Westpac had obtained;
  - (b) account-level data, such as cash utilisation, history of limit changes, repayment history, average behaviour and other behaviours, which revealed the behaviour and characteristics of a customer based on monthly analysis of their credit card account; and
  - (c) daily transaction data on their credit card account recording the type (such as cash, gambling), frequency and amount of transactions.
17. The process also drew upon behavioural scores that Westpac developed, and used across its business, to assess the likelihood that a customer would have difficulty meeting their obligations.<sup>24</sup> Westpac's experience is that a customer's demonstrated behaviours are a highly predictive measure of whether they will be able to service their obligations.<sup>25</sup> The process was designed using Westpac's detailed understanding of the historical performance of customers across its broader portfolio of credit cards.<sup>26</sup> It was overseen by Westpac's

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<sup>19</sup> Malcolm Statement: [22].

<sup>20</sup> Malcolm Statement: [22].

<sup>21</sup> Ex 1.164.1 WDM-01 [WBC.104.002.0009] and Ex.1.164.9 Ex WDM-9 [WBC.104.002.0011] at [.0020].

<sup>22</sup> Transcript 23 March 2018 (Malcolm), T930:32.

<sup>23</sup> Malcolm Statement: [20].

<sup>24</sup> Malcolm Statement: [25].

<sup>25</sup> Transcript 23 March 2018 (Malcolm), T923.14-19.

<sup>26</sup> Malcolm Statement: [21].

- credit risk function.<sup>27</sup>
18. Westpac's process can be broadly described as comprising three steps.
  19. The first step was to allocate customers into two categories: customers who Westpac determined, based on its analysis of the data held about the customer, required further credit assessment before a CLI was provided (**FCA**) and those who were assessed as not requiring further credit assessment (**non-FCA**).<sup>28</sup> The purpose of this stage was to determine whether, if the outcome of Westpac's process was that a CLI would be offered to a customer, the CLI would only be provided if the customer gave further demographic, income, expenditure and liability information, and an analysis of this information (together with other data held by Westpac) indicated that the CLI was not unsuitable for them.
  20. The allocation was conducted using an analysis of historical transaction data from the customer's credit card account to determine the utilisation ratio (the average ratio between the balance and the credit limit at the time of the customer's last three statements) and the payment/balance ratio (the average ratio between the customer's payments and their credit card balance at the time of the customer's last four statements).<sup>29</sup> These ratios provided insights into the behaviour of each customer and were used to determine the theoretical maximum increase that the customer could service (the theoretical limit was never offered to customers; it was used for classification purposes only). This was charted on a classification table,<sup>30</sup> which included a cut-off between FCA and non-FCA customers. The cut-off was set by experienced credit managers and reviewed from time to time. A customer was classified as FCA if they fell below a certain serviceability threshold.<sup>31</sup>
  21. In summary, customers satisfied the double test and were classed as non-FCA if they were using their card sufficiently, and sufficiently regularly, that it was reasonable to conclude that they may have a use for a (reasonably modest) increase in limit, and their up-to-date payment pattern indicated they were comfortably managing their existing credit limit and could meet repayments (and a buffer) on the increased limit even if fully utilised.
  22. The second step was to apply various detailed exclusion rules to exclude particular categories of customers from further consideration.<sup>32</sup> These rules were updated over time.<sup>33</sup> These rules excluded customers who had characteristics which indicated they may have difficulty servicing a CLI, or that a CLI may be unsuitable, such as a recent request for a credit limit decrease, high utilisation of cash advances, a number of recent acceptances of CLIs and high utilisation, if Westpac's records identified them as unemployed (including by checking for social security payments in any Westpac transaction accounts)<sup>34</sup> or the customer had

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<sup>27</sup> Malcolm Statement: [17].

<sup>28</sup> Malcolm Statement: [16].

<sup>29</sup> Malcolm Statement: [28].

<sup>30</sup> Ex 1.164.1 WDM-01 [WBC.104.002.0009].

<sup>31</sup> Malcolm Statement: [29].

<sup>32</sup> Malcolm Statement: [32].

<sup>33</sup> Ex 1.164.2 Ex WDM-02 [WBC.104.002.0010]; Ex 1.164.3 Ex WDM-03 [WBC.104.002.0005]; Ex 1.164.4 Ex WDM-04 [WBC.104.002.0006]; and Ex 1.164.5 Ex WDM-05 [WBC.104.002.0008].

<sup>34</sup> Transcript 23 March 2018 (Malcolm), T920:17-46.

- contacted Westpac's hardship assistance service (Westpac Assist).<sup>35</sup> It also used Westpac's behavioural scores to exclude customers below particular thresholds. These rules did not imply that customers that fell within them would be ineligible for a credit limit increase if the customer asked for one themselves; the purpose and effect of the rules was simply to exclude them from the CLI process.<sup>36</sup>
23. The third step was for experienced Westpac credit risk staff to utilise specialised software to analyse predicted outcomes for each customer based on certain attributes. The software used decision trees which assessed, for each customer who had not been excluded earlier in the process, whether to offer a CLI and, if so, the amount and terms of the CLI.<sup>37</sup> The decision trees were designed based on data analysis of the historical performance of Westpac's credit card customers.<sup>38</sup>
24. Once this process was run, letters were produced and sent to eligible customers.<sup>39</sup> There were different letters for FCA<sup>40</sup> and non-FCA customers.<sup>41</sup> Both letters allowed customers to nominate a lower value increase than that nominated by Westpac. Both letters stated that the customer should make sure before applying for an increase of their limit that they were comfortable with the higher monthly payments and higher credit limit, and that if the customer's circumstances had recently changed or were likely to change then they should not apply for the credit limit increase.
25. The FCA letter required customers to provide the following additional information to Westpac: the number of dependents, the total credit limit and amount owing on non-Westpac credit cards, and, on a monthly basis, salary or wages, other income, mortgage repayments, rent or board, repayments on personal loans and lease agreements and all other expenses.<sup>42</sup> This information was not sought for non-FCA customers, as Westpac considered that it could make an informed assessment of whether the credit limit increase for those customers was not unsuitable based on the information that Westpac already had about them, including recent and historical repayment values and demonstrated utilisation of the credit card account and other accounts within the Westpac Group (where the customer held such products). Asking customers to obtain and provide accurate information of this nature was a significant burden on them, especially in the context of offering a reasonably modest increase in the limit of an existing facility that was being operated in an acceptable and regular fashion. The CLI process was designed to ensure that this information was only requested where Westpac considered it needed the further information to make its assessment of whether to provide a CLI to the customer.

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<sup>35</sup> Malcolm Statement: [33].

<sup>36</sup> Malcolm Statement: [36].

<sup>37</sup> Malcolm Statement: [37] and [39].

<sup>38</sup> Malcolm Statement: [38].

<sup>39</sup> Malcolm Statement: [42].

<sup>40</sup> Ex 1.164.7 Ex WDM-07 [WBC.104.002.0001].

<sup>41</sup> Ex 1.164.8 Ex WDM-08 [WBC.104.002.0003].

<sup>42</sup> Ex 1.164.7 Ex WDM-07 [WBC.104.002.0001].

## 2.5 ASIC's letter to the ABA

26. On 12 September 2012, Greg Kirk, a Senior Executive Leader of ASIC, sent a letter to Ian Gilbert, the Policy Director of the ABA (the **ABA Letter**).<sup>43</sup> In the letter, ASIC communicated its views in relation to CLI assessment processes. ASIC noted that it had provided in RG 209 a list of potentially relevant inquiries that could be made about a customer's financial situation.<sup>44</sup> ASIC said it did not expect that all of these inquiries would be made at all times, and that this reflected the concept of scalability introduced by RG 209. ASIC also acknowledged that CLIs were made to current customers, which meant that card issuers had the benefit of behavioural scoring when undertaking an assessment regarding suitability. ASIC continued as follows:

Despite that, and while continuing to encourage more extensive inquiries where appropriate, ASIC's current view is that before approving a CLI application card issuers should at least make inquiries about, and ascertain, a customer's current:

- level of income; and
- employment status.

## 2.6 The decision to continue Westpac's existing CLI process after the ABA letter

27. The ABA Letter came to the attention of Westpac and was discussed at an internal Westpac meeting on 3 October 2012.<sup>45</sup> It was also discussed in October 2012 between members of Westpac's product, credit risk and regulatory affairs teams.<sup>46</sup> The teams had differing views about how Westpac should respond to the letter (some involved in those discussions were in favour of making changes to Westpac's processes, while others thought that it was appropriate for the procedures to remain unchanged).

28. The issue was escalated to a steering committee meeting on 12 November 2012 which was managing the project to implement changes arising from recent amendments to the National Credit Act.<sup>47</sup> It was accepted that the matter could be resolved as a 'business as usual' issue by the product, risk and compliance teams. Rob Love, the Head of Unsecured Credit (an independent control function), was nominated to report back on the final position reached.

29. On or around 4 December 2012, Rob Love met with Nicholle Lindner, Head of Credit Card Product, to consider the ABA Letter.<sup>48</sup> Rob Love and Nicholle Lindner discussed Westpac's CLI process. They both considered that Westpac's approach remained appropriate and met Westpac's obligations as a responsible lender. They considered that Westpac's approach was a prudent use of a sophisticated and effective automated system for selecting customers to make a CLI offer to and that the form of the non-FCA letter drew attention to the importance of the customer only accepting the increase if they could afford to do so and their circumstances

<sup>43</sup> Ex 1.170 Letter ASIC to ABA dated 12/09/2012 [WBC.099.001.2054].

<sup>44</sup> RG 209, March 2011 version: [RG 209.27].

<sup>45</sup> Ex 1.171 WBC Email re ASIC Letter dated 05/10/2012 [WBC.099.001.0473].

<sup>46</sup> Ex 1.164.12 Ex WDM-12 [WBC.099.001.2070].

<sup>47</sup> Transcript 23 March 2018 (Malcolm), T934:20-32; Malcolm Statement: [63]; and Ex 1.164.13 Ex WDM-13 [WBC.050.099.2189].

<sup>48</sup> Malcolm Statement: [65].



had not recently changed and were not likely to change.<sup>49</sup>

30. This decision was reported back to the steering committee on 11 December 2012.<sup>50</sup>
31. Accordingly, Westpac considered the content of ASIC's letter to the ABA but ultimately decided that it did not give rise to a need to change the existing processes. Westpac formed the view that the totality of its processes, including detailed analysis of demonstrated behaviours, constituted reasonable inquiries having regard to the nature and extent of data held by Westpac on its customers and the size of the additional commitment being offered, which was relatively small.<sup>51</sup>
32. David Malcolm, Westpac's General Manager, Credit, acknowledged in his evidence to the Commission that Westpac's approach to the ABA Letter in 2012 was inappropriate.<sup>52</sup> In his view, it was inappropriate for Westpac not to engage with ASIC after deciding not to modify its processes to align with the guidance provided in the ABA Letter.<sup>53</sup> If ASIC did not agree, then his view was that (on this matter) Westpac should adopt ASIC's approach.<sup>54</sup>

## 2.7 ASIC's 2014 letter

33. At some point after this decision was reached, and before 13 January 2014, ASIC became aware that Westpac had not altered its processes in response to the ABA Letter.<sup>55</sup> On 13 January 2014, ASIC wrote to Westpac seeking information about Westpac's current CLI processes.<sup>56</sup> ASIC said:

As a result of previous discussions between ASIC and Westpac we are aware that Westpac's written credit card limit increase invitations largely relied on self-certification by customers. That is, Westpac did not make inquiries about a customer's income or employment and relied on the customer to determine whether the proposed credit limit was appropriate.

34. Although, as ASIC's letter noted, Westpac did not make direct inquiries of all customers about their income and employment, Westpac considered that its process went further than relying only on self-certification by customers, because (as described above) it based its decision to offer a CLI on an extensive analysis of data held about the customer. We also note that direct inquiries were made of FCA customers.
35. Westpac responded to this letter on 10 February 2014 and provided substantial information about its CLI processes.<sup>57</sup>

## 2.8 ASIC's investigation

36. In August 2014, ASIC informed Westpac that it was investigating its CLI processes.<sup>58</sup> ASIC

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<sup>49</sup> Malcolm Statement: [65].

<sup>50</sup> Ex 1.164.14 Ex WDM-14 [WBC.WBC.050.097.6212].

<sup>51</sup> Transcript 23 March 2018 (Malcolm), T919:37.

<sup>52</sup> Malcolm Statement: [68] and [69].

<sup>53</sup> Transcript 23 March 2018 (Malcolm), T939:11-18.

<sup>54</sup> Transcript 23 March 2018 (Malcolm), T952:1-5.

<sup>55</sup> Ex 1.172 ASIC Letter to Westpac dated 13/01/2014 [ASIC.0010.0005.0489] at [.0490].

<sup>56</sup> Ex 1.172 ASIC Letter to Westpac dated 13/01/2014 [ASIC.0010.0005.0489].

<sup>57</sup> This response was not tendered by Counsel Assisting.

<sup>58</sup> Malcolm Statement: [81].

issued several notices to Westpac requesting further information and met with Westpac on several occasions.<sup>59</sup>

37. Westpac provided ASIC with a further detailed explanation of Westpac's CLI process in response to a notice issued in August 2014.<sup>60</sup> In September 2014, Westpac notified ASIC that it intended to change its processes to include inquiries about employment and income status for all customers, including non-FCA customers, and would implement that change in March 2015.<sup>61</sup> In December 2014, Westpac decided to suspend further CLIs.<sup>62</sup> The systems changes to modify Westpac's processes were completed by March 2015, although CLI offers continued to be suspended.<sup>63</sup>

## 2.9 Agreement reached with ASIC

38. Westpac continued to engage with ASIC during its investigation. On 20 February 2015, Westpac provided ASIC with further information about Westpac's processes in response to a letter from ASIC of 6 February 2015.<sup>64</sup> Discussions occurred between ASIC and the Westpac Board, the Chief Executive and the Chairman on a range of topics including Westpac's approach to the CLI issue.<sup>65</sup> Following engagement and discussions between Westpac and ASIC during the year, on 13 November 2015, Westpac wrote to ASIC to set out a proposed negotiated outcome.<sup>66</sup> On 17 December 2015, ASIC accepted that proposal.<sup>67</sup> A media release confirming the negotiated outcome was released by ASIC on 20 January 2016.<sup>68</sup>

## 2.10 The remediation program

39. As part of the negotiated outcome, Westpac conducted a remediation program to identify any customers who received CLIs of whom Westpac did not make direct inquiries of their employment and income status (that is, non-FCA customers) and who subsequently faced financial difficulty. As was agreed with ASIC, the program commenced with a pilot phase of around 600 customers.<sup>69</sup> Once this program was completed and reviewed by KPMG, it was rolled out more broadly. KPMG's role was to monitor, review and report on the implementation of the remediation program.<sup>70</sup>
40. During the relevant period, 333,128 CLIs were approved on a non-FCA basis.<sup>71</sup> The list of customers was assessed by reference to the criteria for the remediation program, and the customers identified through this process were contacted by telephone by a member of the Westpac Assist team to obtain information about their current financial circumstances and

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<sup>59</sup> Malcolm Statement: [81].

<sup>60</sup> Ex 1.173. Letter WBC to ASIC re Section 253 Notice dated 23/08/2014 [ASIC.0010.0005.1008].

<sup>61</sup> Malcolm Statement: [83].

<sup>62</sup> Malcolm Statement: [83].

<sup>63</sup> Malcolm Statement: [84].

<sup>64</sup> Ex 1.174 Letter Westpac to ASIC dated 20/02/2015 [WBC.300.001.0331].

<sup>65</sup> Ex 1.175 ASIC Speaking Notes for Meeting with Chairman of Westpac dated 28/05/2015 [ASIC.0010.0010.2491].

<sup>66</sup> Ex 1.164.15 Ex WDM-15 [WBC.300.001.0384].

<sup>67</sup> Ex 1.161.17 Ex WDM-17 [WBC.300.004.4547] at [4577].

<sup>68</sup> Ex 1.164.16 Ex WDM-16 [WBC.104.002.0029].

<sup>69</sup> Transcript 23 March 2018 (Malcolm), T958:30-36.

<sup>70</sup> Malcolm Statement: [92].

<sup>71</sup> Malcolm Statement: [74].

whether at the time of the CLI they were employed or had had any reduction in income.<sup>72</sup> A decision-tree process was applied to determine whether the customer's financial difficulty or hardship occurred after they received a CLI and was attributable to their employment status or income.<sup>73</sup> For such customers, a remedy was devised, including debt waivers, the refund of interest and fees and the reversal of any adverse credit reporting.<sup>74</sup>

41. Ultimately, 3,397 customers were provided with some form of remediation. This was around 1% of customers who received a CLI offer on a non-FCA basis. The total value of remediation was approximately \$11.3 million.<sup>75</sup> As part of the negotiated outcome, Westpac paid \$1 million to the Salvation Army Financial Literacy program.<sup>76</sup>
42. The remediation project was carried out between January 2016 and February 2017.<sup>77</sup> KPMG completed a review of the remediation program and found it to have been implemented in accordance with the negotiated outcome reached with ASIC. Its report was issued in August 2017 and the program formally concluded at that time.<sup>78</sup> The total project delivery costs for the remediation program were \$1.288 million.<sup>79</sup>

### **3 Whether findings should be made that Westpac engaged in misconduct**

43. For the reasons developed below, the Commission should not make the findings of misconduct identified in paragraph 75 of the CAS.

#### **3.1 Alleged breach of section 128 of the National Credit Act**

44. Section 128 of the National Credit Act provides, relevantly, that a credit licensee must not increase the credit limit of a credit contract with a consumer unless the licensee, within 90 days before doing so, has:
  - (a) made an assessment in accordance with s 129 (which requires the assessment to specify the period it covers and assess whether the credit contract will be unsuitable for the consumer if the credit limit is increased); and
  - (b) made inquiries and verification in accordance with s 130 (which requires, relevantly, that the licensee must, before making the assessment, make reasonable inquiries and verification of the consumer's financial situation).
45. Section 131 of the National Credit Act provides, relevantly, that a licensee must assess that the credit contract will be unsuitable if, at the time of the assessment, it is likely that the consumer will be unable to comply with their financial obligations under the contract, or could only comply with substantial hardship, if the credit limit was increased.
46. Counsel Assisting have submitted that findings are open that Westpac contravened s 128 of

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<sup>72</sup> Malcolm Statement: [88(c)].

<sup>73</sup> Malcolm Statement: [88(e)].

<sup>74</sup> Malcolm Statement: [88(f)].

<sup>75</sup> Malcolm Statement: [90].

<sup>76</sup> Malcolm Statement: [95].

<sup>77</sup> Malcolm Statement: [88].

<sup>78</sup> Malcolm Statement: [94].

<sup>79</sup> Malcolm Statement: [96].

the National Credit Act both by not making reasonable inquiries about (CAS [75(a)]), and by not taking reasonable steps to verify (CAS [75(b)]), its customers' financial situation. It is convenient to deal with each allegation in turn.

#### *Reasonable inquiries*

47. As has been noted in the background paper published by the Commission, there has been and remains “*little authoritative interpretation and guidance on many aspects of the legal and regulatory regime for consumer credit protection*”.<sup>80</sup> This was especially so during the relevant period. The first case decided under Parts 3.1 and 3.2 of Chapter 3 of the National Credit Act was *Australian Securities and Investments Commission v Cash Store Pty Ltd (in liquidation)* [2014] FCA 926 (**Cash Store**), which was delivered on 26 August 2014, almost at the end of the relevant period. No other cases arising under Chapter 3 were decided in the relevant period.
48. In assessing the legal standard to be applied to the reasonable inquiries test generally, *Cash Store* provides only limited guidance, as it was an undefended case brought against an insolvent payday lender and so did not necessarily provide clear guidance as to the inquiries required in respect of other lending products and circumstances. However, in that case, Davies J emphasised that the determination of what the ‘reasonable inquiries’ and ‘reasonable steps to verify’ obligations require is determined by the task to which the inquiries and steps are directed; that is, the performance by the credit licensee of an assessment whether the credit contract will be unsuitable in the statutory sense. Her Honour stated that what constitutes reasonable inquiries about, and reasonable steps to verify, the consumer’s financial situation must be such inquiries and steps as will be “*sufficient to enable*”, in this case, the credit licensee to make “*an informed assessment*” as to whether it is likely that the consumer will be unable to comply with their financial obligations under the credit contract without substantial hardship.<sup>81</sup> Since *Cash Store*, there has been only limited further case law, which has provided little additional relevant guidance on the content of the obligations in Chapter 3 of the National Credit Act.<sup>82</sup>
49. By reason of its obligations under Chapter 3 of the National Credit Act, the relevant task that Westpac was required to perform before offering CLIs to its customers was to make an assessment as to whether the financial obligations under the credit contract with the proposed CLI would be ones with which the consumer would be *likely to be unable* to comply without substantial hardship. That assessment occurred in a context where:
- (a) each customer had been the subject of an assessment of unsuitability at the time they were first offered a credit card, and that assessment had concluded that the credit card was not unsuitable for that customer;

<sup>80</sup> Jeannie Marie Paterson and Nicola Howell, Commission Background Paper 4, Everyday Consumer Credit: Overview of Australian Law Regulating Consumer Home Loans, Credit Cards and Car Loans (**Background Paper 4**): 2.

<sup>81</sup> *Cash Store* at [28].

<sup>82</sup> Background Paper 4: 49, which identifies the cases subsequent to *Cash Store* as *Re Make It Mine Finance Pty Ltd* (2015) 238 FCR 562; *ASIC v Channic Pty Ltd (No 4)* [2016] FCA 1174; *Ennis v Credit Union Australia* [2017] FCCA 549; *ASIC v Australia and New Zealand Banking Group Limited* [2018] FCA 155.

- (b) any customer who had their credit card for less than 8 months was excluded,<sup>83</sup> which meant that Westpac had significant recent data on each customer's behaviour and evidence of their ability to comply with the financial obligations arising under the existing credit limit (in particular, each customer's utilisation ratio and the payment/balance ratio);
  - (c) the credit limit was only increased if the customer wanted the increase, in that customers were required to apply in response to the CLI offer (and they could nominate a lower increase than was offered); and
  - (d) the increases were relatively modest, averaging \$2,800 and capped at \$5,000.
50. In that context, it was reasonable for Westpac to make its assessment using the significant data held by it as to each customer's performance and behaviour. Westpac's approach was to analyse this data and assess, for each customer, whether it required further information to decide whether to provide a CLI to a customer.
51. For customers that were assessed as requiring further information (the FCA customers), Westpac did not approve a CLI for their accounts until it had requested, received and considered further demographic, income, expenditure and liability information about them.<sup>84</sup> The inquiries made of FCA customers substantially exceeded the requirements which ASIC had identified in the ABA Letter, which only required the customer to confirm their income and employment status (see paragraph 26 above). This indicates that the approach taken by Westpac was not one of merely achieving minimal compliance. Rather it was a careful effort to satisfy responsible lending obligations. ASIC did not have any concerns about Westpac's approach in relation to FCA customers.<sup>85</sup>
52. For customers that were assessed as not requiring further information, Westpac considered that it could make a properly informed assessment of unsuitability based on the information on the customer's financial situation it already had. That is, making inquiries and conducting verification using the information it already possessed was sufficient to enable it to perform the assessment and meet its responsible lending obligation. This assessment then occurred by analysing data held by Westpac regarding how the customer was complying with their existing financial obligations under the credit card.
53. For customers who were comfortably servicing their existing financial obligations and had behavioural characteristics which indicated they were likely to be able comfortably to service an increased credit limit, it was reasonable for Westpac to conclude that it did not need to make additional inquiries beyond inquiries of the customer's data in order to comply with its obligations to assess unsuitability in accordance with s 128 of the National Credit Act.

<sup>83</sup> Exclusion rule 9 excluded any account which was less than 8 months' old (Ex 1.164.2 Ex WDM-02 [WBC.104.002.0010]). From November 2013, this rule was amended so as to exclude any account which was less than 10 months' old (Malcolm Statement: [34(b)] and Ex 1.164.3 Ex WDM-03 [WBC.104.002.0005]).

<sup>84</sup> See FCA letter: Ex 1.164.7 Ex WDM-07 [WBC.104.002.0001].

<sup>85</sup> Paragraph 3 of ASIC's note dated 18 June 2015 stated that "ASIC does not have concerns about the inquiries made of FCA customers and the investigation only related to [non-FCA] customers" (Ex 1.176 ASIC Note dated 18/06/2015 [ASIC.0010.0006.2255]).

54. Rather, Westpac made appropriate use, through a sophisticated automated decision process (which was periodically reviewed and updated by experienced credit officers) of the data it already held about its customers. That process included inquiries and an assessment of a wide range of data that went beyond point-in-time, self-certified income and employment data (which, in Westpac's experience, was less reliable as a predictor of customer outcomes) and looked at more reliable predictors such as historical behavioural trends and recent transactional activity. That was a detailed assessment that considered a wide range of observed customer behaviours, such as the number and value of cash advances granted to the customer, periods of zero balance in the customer's account, whether they had ever exceeded their limit and whether they repaid more than the monthly minimum repayment.
55. In assessing Westpac's obligations to make inquiries of customers, in Westpac's view, it is important to consider customers' interests in obtaining credit efficiently (which is reflected in the obligation under s 47(1)(a) of the National Credit Act). In those circumstances, Westpac submits that it was appropriate for it not to ask non-FCA customers to provide additional information, having satisfied itself (based on the customers' demonstrated behaviours) that they could comfortably service the CLI. Westpac acknowledges that it was also in its interests to offer CLIs to customers, but considered that its approach (including the classification of FCA and non-FCA segments) managed any tensions between its and its customers' interests.
56. Westpac accepts that its then approach was not consistent with ASIC's expectation in relation to non-FCA customers, but considered that its data driven approach was reliable predictor of whether the CLI was not unsuitable.
57. Further, the fact that during the remediation process customers were identified who said that their income or employment status had changed at the time of the CLI offer does not itself mean that Westpac contravened s 128 of the National Credit Act.<sup>86</sup> The relevant question is whether the inquiries that the credit provider in fact undertook were sufficient to enable it to make an informed assessment (that is, were they reasonable in the circumstances) – not whether further inquiries would have altered that assessment. This question is guided by what ASIC calls “scalability” – that is, what is reasonable in all the circumstances of the particular assessment having regard to the nature and amount of the increase in the credit limit (in this case, on average \$2,800), as well as the complexity of the product and whether or not the relevant customer was an existing customer.<sup>87</sup>
58. Finally, it should be noted that her Honour's statement at paragraph 42 of *Cash Store*, that it is “axiomatic” that reasonable inquiries will include inquiries about customer's current income and living expenses, should be read in its context, which was a consideration of the reasonable inquiries that were necessary for the origination of new payday loans. It should not be read, and *Cash Store* did not decide, what inquiries were reasonable in the context of an increase to a credit limit of an existing credit card. In the current version of RG 209, ASIC

<sup>86</sup> See, for example, the customer referred to at Malcolm Statement: [75].

<sup>87</sup> Transcript 23 March 2018 (Malcolm), T929:29-930:3.

cites this paragraph of *Cash Store* but does not contend that it applies in terms in all cases. Rather, it notes the specific context in which *Cash Store* was decided and contends that it provides general support for ASIC's views as outlined in RG 209.<sup>88</sup>

59. For these reasons, the Commission should not find that, in making CLI offers to non-FCA customers in the relevant period, Westpac contravened s 128 of the National Credit Act by failing to make reasonable inquiries.

*Reasonable steps to verify*

60. The relevant principles have been addressed above. The credit provider is only required to undertake such steps to verify the customer's financial situation that are sufficient to enable it to make an informed assessment of unsuitability. Again, this question is guided by the concept of "scalability" which has the meaning identified above. It is important to note that, for non-FCA customers, Westpac's process was at once inquiry and verification – the interrogation and analysis of actual customer data fulfilled both functions.
61. As set out in the ABA Letter, ASIC considered that the minimum requirement was that credit card issuers should at least make inquiries about, and ascertain, a customer's current level of income and employment status, by asking the customer to provide that information unless the issuer could ascertain the customer's current level of income (and by inference, their employment status) without making that inquiry of the customer (for example, by reference to a transaction account held with the issuer which evidenced fortnightly or monthly salary payments). Accordingly, ASIC did not consider that it was reasonable or necessary to verify a customer's income and employment status beyond verifying that information by asking the customer to inform the issuer of it or to ascertain that information from data held by the bank. This guidance was consistent with the concept of 'scalability' set out in RG 209.
62. Again, in relation to FCA customers, Westpac did ask customers to provide further information that went beyond the minimum requirements of the ABA Letter. By requesting customers to provide this information when applying for the CLI offered to them and making inquiries of its own data, Westpac took steps to make inquiries and verify information that were reasonable in the circumstances. It was arguably not reasonable to conduct further inquiries at that time, including by seeking to check each of the items of information provided by FCA customers (being the number of dependents, the total credit limit and amount owing on non-Westpac credit cards and, on a monthly basis, salary or wages, other income, mortgage repayments, rent or board, repayments on personal loans and lease agreements and all other expenses) against primary documents. This would not be efficient or in the customer's interests and would have gone beyond what was reasonable and necessary in the context of a credit limit increase to an existing credit card, when the information and data held by Westpac (which was, by its nature, verified) indicated they were servicing the existing limit and could service the higher limit.

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<sup>88</sup> RG 209, November 2014 version: [RG 209.31].

63. For non-FCA customers, the same analysis applies. Westpac relied upon the information and data held by Westpac (which, as noted already, was, by its nature, verified). It was reasonable for Westpac to rely upon that information and use it. As noted by ASIC, *“what amounts to reasonable verification will depend on the information and resources that [the credit licensee has] access to and the facts and circumstances of each case”*. If, as is submitted above, Westpac made reasonable inquiries to assess non-FCA customers, it follows that it also took reasonable steps of verification, because the information and data on which it relied came from its own systems and was therefore appropriately verified by it.
64. For these reasons, the Commission should not find that, in making CLI offers to non-FCA customers in the relevant period, Westpac contravened s 128 of the National Credit Act by failing to take reasonable steps of verification.

### **3.2 Alleged breach of section 133(1)(b) of the National Credit Act**

65. Section 133(1)(b) of the National Credit Act provides that a credit licensee must not increase the credit limit of a credit contract if the contract is unsuitable for the consumer under s 133(2) of the National Credit Act. Relevantly, s 133(2)(a) provides that the contract is unsuitable if, at the time the credit limit is increased, it is likely that the consumer will be unable to comply with the consumer’s financial obligations under the contract or could do so only with substantial hardship. Subsection 133(4) relevantly provides that, for the purposes of making a determination under s 133(2), only information that satisfies both of the following tests can be used:
- (a) the information is about a consumer’s financial situation; and
  - (b) at the time the credit limit was increased, the credit licensee had reason to believe that the information was true or it would have so believed had it made the reasonable inquiries or verification required under s 130 of the National Credit Act.
66. The information as to the customer’s past performance with Westpac was objectively verifiable from Westpac’s data.
67. The data which Westpac used to determine whether to offer CLIs to non-FCA customers did not indicate that it was likely that the consumer would be unable to comply with their financial obligations without substantial hardship if the CLI occurred. The assessment that Westpac carried out for non-FCA customers indicated that these customers could comfortably service the increased credit limit. This process was subject to ongoing improvement over time,<sup>89</sup> and the data indicated that the arrears rates among customers who received a CLI offer on a non-FCA basis (0.38%) was substantially lower than the arrears rates for the total population of Westpac’s credit card customers (1.99%).<sup>90</sup>
68. For the reasons already set out, the process conducted by Westpac met its requirements to make reasonable inquiries or verification under s 130 of the National Credit Act. However,

<sup>89</sup> Malcolm Statement: [45] and [46].

<sup>90</sup> Malcolm Statement: [47].



even if it did not, it does not follow that Westpac contravened s 133 of the National Credit Act. An assessment of whether it did would require a consideration of what information Westpac would have obtained had it made the inquiries or verification which are found to be the necessary minimum to comply with s 130 of the National Credit Act.

69. No evidence of that kind has been put before the Commission. Of the four customers identified in the evidence, one said that he was unemployed and receiving social security payments at the time of the CLI offer,<sup>91</sup> and the other three were all employed at the time of the CLI offer.<sup>92</sup> While three of the four customers said that their income had reduced at the time of the CLI,<sup>93</sup> information as to the amount of the reduction was not obtained and is not in evidence. This was consistent with the purpose of the remediation, which was to ensure that customers had not been disadvantaged by receiving the CLI.<sup>94</sup> The purpose was not to obtain information to perform again the assessment of suitability. Doing that would have imposed an unnecessary burden on the customers contacted which was inconsistent with the purpose of the remediation.
70. Accordingly, the evidence before the Commission does not support any findings of contraventions under s 133 of the National Credit Act, as information of the character described in s 133(4) and which would be necessary to assess the likelihood of substantial hardship required by s 133(2) is not before the Commission.
71. For those reasons, no finding should be made that Westpac contravened s 133 of the National Credit Act in making offers to non-FCA customers. This is so even if the Commission were to find, contrary to what has been set out above, that Westpac failed to make reasonable inquiries or verification under s 130 of the National Credit Act.

### **3.3 Alleged failure to comply with RG 209**

72. The contention in paragraph 75(d) of the CAS with respect to RG 209 does not identify which part of RG 209 Westpac may not have complied with. As noted above, the March 2011 version of RG 209, in place at the beginning of the relevant period, expressly contemplated reliance on data; that processes could be “scaled”, depending on the circumstances; and that in some cases, no inquiries might be needed at all. This guidance was not changed in the February 2013 or September 2013 versions. By September 2014, and in advance of the November 2014 version of RG 209, Westpac confirmed to ASIC that it would change its CLI processes to align with ASIC’s guidance.<sup>95</sup>
73. In any event, RG 209 sets out what ASIC considers is necessary to comply with the responsible lending obligations in the National Credit Act. If a credit provider complies with their obligations under the National Credit Act, it has complied with the underlying object of RG 209. For the reasons already identified, Westpac’s conduct did not contravene the

<sup>91</sup> Malcolm Statement: [75(c)].

<sup>92</sup> Malcolm Statement: [76(d)], [78(c)] and [79(c)].

<sup>93</sup> Malcolm Statement, paras 75(c), 78(c) and 79(c). The other customer was not certain: Malcolm Statement 76(d).

<sup>94</sup> Ex 1.164.15 Ex WDM-15 [WBC.300.001.0384] at [.0385].

<sup>95</sup> Transcript 23 March 2018 (Malcolm), T943.35-41.

National Credit Act. The contentions raised by Counsel Assisting with respect to RG 209 raise the same issues as to Westpac's conduct as the contentions relating to the National Credit Act (addressed above) (though Westpac acknowledges that it should have engaged with ASIC in 2012 following receipt of the ABA letter to discuss ASIC's guidance).

#### **4 Whether findings should be made that Westpac's conduct fell below community standards and expectations**

74. Westpac accepts that its conduct fell below community expectations because a credit licensee in its position, having received guidance from ASIC regarding ASIC's view on how to comply with the responsible lending provisions in relation to CLIs, should have engaged with ASIC if it decided to take a different course from the guidance.
75. As to paragraph 76(a) of the CAS, Westpac respectfully submits that while it did consider ASIC's guidance, it did not appropriately respond to ASIC. Westpac considered the ABA Letter and a joint decision was made by a senior member of the product team (Nicholle Lindner) and a senior member of the credit risk team (Rob Love) that Westpac's existing processes complied with its responsible lending obligations and could be continued (although Westpac acknowledges that the appropriate course would have been for it to have engaged with ASIC about its views at that time). It is correct, as stated in paragraph 76(b) of the CAS, that after considering the ABA Letter and making the decision not to adjust its processes, Westpac maintained its existing processes.
76. As to paragraph 76(c) of the CAS, Westpac accepts that the process it adopted for non-FCA customers did not obtain direct information from customers about their current employment status, income or debts, and that Westpac knew that the process did not do this. However, there is no basis for finding a community standard or expectation that Westpac would obtain such information in the circumstances. The only relevant community standard or expectation was that Westpac would act in accordance with its legal obligations, keeping in mind that they are framed in terms of reasonable conduct, and efficiency, fairness and honesty. For the reasons explained above, inquiring of non-FCA customers as to their current employment status, income or debts was not reasonably required for Westpac to make its assessment of unsuitability under s 128 of the National Credit Act. And there is no basis for concluding that Westpac failed to act efficiently, honestly and fairly.
77. As to paragraph 76(d) of the CAS, it is not correct that Westpac did not seek to ensure that the CLIs it offered met its customers' needs. In that regard:
- (a) all customers who were offered a CLI during the relevant period had provided their express consent, and had opted in, to receiving CLI offers;
  - (b) whether to make a CLI and, if so, the amount was determined by Westpac for each customer having regard to data about how each customer was using their existing credit card (including how much of the existing limit they were utilising); and
  - (c) the letters conveying the CLI offers gave customers the choice of not accepting the

offer at all or accepting a lower increase and sought to ensure that customers only applied for an increase if they were comfortable with the higher limit and higher monthly payments, and their circumstances had or were not likely to change.

78. There was no community standard or expectation that Westpac would conduct any other needs-based assessment. Relevantly to the application of the responsible lending provisions to credit cards, the Explanatory Memorandum for the bill which became the National Credit Act noted that “[o]ften a credit card has no particular purpose and therefore there would be limited requirement to understand the consumer’s requirements and objectives in this case”.<sup>96</sup> This guidance was reflected in RG 209, including in the current version.<sup>97</sup> It is reasonable when offering a CLI not to make any further inquiries in this regard. It may be conceded that a credit card is less suitable for some uses than, for example, a personal loan. However, whether to seek a *credit limit increase for an existing card* is not a complex decision for a consumer. And as Mr Malcolm made clear, people who are using their credit card inefficiently were likely to be excluded by Westpac’s process.<sup>98</sup>
79. As to paragraph 76(e) of the CAS, Westpac commenced remediation as soon as it reached a negotiated outcome with ASIC. Until that outcome was agreed, there was no community standard or expectation by which Westpac was required to provide any remediation. Once the remediation program commenced, it proceeded quite quickly.<sup>99</sup> In any event, Westpac’s hardship assistance service, Westpac Assist, was available at all times.

## **5 Whether Westpac’s conduct was attributable to its culture, governance or remuneration practices**

80. While Westpac accepts that the decision it made in 2012 to proceed without further engagement with ASIC was not the appropriate decision and that, generally speaking, Westpac has a commercial interest in customers increasing their credit limits with Westpac, the evidence does not support the contention at paragraph 77(a) of the CAS that a significant (or any) cause of the decision was Westpac’s “*prioritisation of profitability*”. The decision was a joint decision made by Nicholle Lindner and Rob Love. Rob Love was a senior member of the credit risk team, which was a second line risk management position in Westpac’s governance structure. There is no evidence that Nicholle Lindner and Rob Love made their decision otherwise than in good faith having considered whether it was necessary to change Westpac’s processes to comply with its responsible lending obligations. There is also no evidence that they made their decision to prioritise profit over any other aim.
81. As to paragraph 77(b) of the CAS, the decision was made by senior members of Westpac’s product and risk teams, in accordance with their delegated authority, having heard the views of the product, credit risk and regulatory affairs teams and reported to the steering committee,

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<sup>96</sup> Revised Explanatory Memorandum to the National Consumer Credit Protection Bill 2009: [3.138] (Example 3.5). See also RG 209, March 2011 version: [RG 209.29].

<sup>97</sup> RG 209, November 2014 (current) version, para RG 209.37.

<sup>98</sup> Transcript 23 March 2013 (Malcolm), T937:35–T938:5.

<sup>99</sup> Transcript 23 March 2015 (Malcolm), T958:30–44.

which included representatives of the product, credit risk, regulatory affairs and legal teams.<sup>100</sup> Accordingly, the decision was made in accordance with appropriate governance procedures within Westpac, which involved a joint decision between product and risk. However, Westpac accepts that proceeding without further engagement with ASIC was not appropriate. To the extent that was caused by inadequacies in Westpac's policies and procedures as at 2012, since that time Westpac has strengthened its governance and David Malcolm's evidence was that if that same set of circumstances occurred today, a different decision would be made.<sup>101</sup>

82. The evidence does not support the contention at paragraph 77(c) of the CAS that Westpac's remuneration practices contributed to the decision not to amend Westpac's processes to align with the ABA Letter. The decision was made by Nicholle Lindner and Rob Love. There is no evidence that their remuneration either contributed to their decision or was enhanced in any way by it. While a few members of the credit cards product and marketing teams (six in 2013/14; two in 2014/15) had key performance indicators which related to CLIs,<sup>102</sup> meeting these did not give rise to any direct relationship with remuneration, including any variable reward.<sup>103</sup> Rather, outcomes measured against the key performance indicators fed into an overall assessment of the employee's performance by their leader, which resulted in an overall performance rating.<sup>104</sup> To be eligible for any variable reward, employees first had to satisfy basic criteria, referred to as 'gate openers', which included achieving the expected standards of behaviour, complying with risk and compliance requirements and demonstrating effective performance in their role.<sup>105</sup> Whether variable reward was ultimately awarded, and its amount, was discretionary and the decision had regard to a range of factors.<sup>106</sup>

## 6 General questions arising from the Westpac Credit Card Limited Increase case study

### 6.1 Assessing unsuitability of a revolving credit card facility

83. The credit cards which Westpac offers all function as revolving credit facilities. Westpac considers that the way it performs an assessment of whether a credit card is not unsuitable for a customer represents an appropriate means for a bank to perform that assessment.
84. Customers can apply for new Westpac credit cards in branches, through inbound calls to Westpac's call centre, through Westpac's website and mobile phone applications and through third party websites which compare credit cards across providers.<sup>107</sup>
85. A customer who applies for a credit card from Westpac is required to complete an application which provides the information which Westpac requires to perform an assessment of whether

<sup>100</sup> Transcript 23 March 2015 (Malcolm), T950:43-44.

<sup>101</sup> Transcript 23 March 2015 (Malcolm), T950:44-46.

<sup>102</sup> Ex 1.179 Supplementary Witness Statement of Carol Separovich dated 22 March 2018 [WIT.0001.0015.0001]

(Supplementary Separovich Statement): [4].

<sup>103</sup> Ex 1.178 Witness Statement of Carol Separovich dated 12 March 2018 [WBC.900.001.0115] (Separovich Statement): [25] and [27].

<sup>104</sup> The ratings were outstanding, high achievement, effective, needs development or unacceptable: Transcript 23 March 2018 (Malcolm), T959:35-39.

<sup>105</sup> Separovich Statement: [10]; Supplementary Separovich Statement: [10].

<sup>106</sup> Separovich Statement: [21].

<sup>107</sup> Malcolm Statement: [12].

the credit card is not unsuitable for the customer. The information required to be provided is:

- (a) the credit limit sought by the customer (or whether they would like to apply for the maximum available limit);
- (b) income from salaries, pensions or other sources;
- (c) total balances in savings or investments accounts;
- (d) the cost of any rent, board or mortgage payments;
- (e) other loan repayments;
- (f) the total credit limit and amount owing on non-Westpac credit, store or charge cards or lines of credit;
- (g) all other expenses; and
- (h) whether household expenses are shared, and the number of dependents.

86. Currently, Westpac assesses whether a credit card is not unsuitable based on the information in the application, a credit bureau check and based on other data Westpac holds about the customer. To make an informed assessment of whether the customer will be able to make the minimum monthly repayment (assuming the credit card is fully drawn) without substantial hardship, Westpac performs a calculation of the customer's ability to make repayments and determines their available surplus. This calculation takes into account monthly income, minus total credit liabilities (including the minimum monthly repayment on the proposed new card), minus residential commitments (rent, board or mortgage) minus the greater of the customer's other expenses or the Household Expenditure Measure, whether they share expenses with another person, their residential location and the number of dependents they have.
87. From 1 January 2019, the assessment of suitability will be modified to take account of amendments to the National Credit Act that come into effect on that day which require a customer's suitability for a credit card contract or credit limit increase to be assessed according to their ability to pay the credit limit within a certain period, which will be set by ASIC in due course by legislative instrument.<sup>108</sup>
88. The ability of Westpac to assess whether a credit card is not unsuitable for a customer will be enhanced by two legislative reforms currently being undertaken by the Commonwealth Government.
89. The first is *mandatory comprehensive credit reporting*. On 2 November 2017, the Commonwealth Government announced that comprehensive credit reporting would be made mandatory for the four major banks by 1 July 2018.<sup>109</sup> The legislation was tabled on 28 March 2018. If passed, the four major banks would have to provide a bulk supply of data in two stages (50% within 90 days of 1 July 2018 and 50% within 90 days of 1 July 2019) and

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<sup>108</sup> The amendments are effected by the *Treasury Laws Amendment (Banking Measures No 1) Act 2018* (Cth). See Background Paper 4: 58.

<sup>109</sup> Background Paper 4: 4.

then update it within 20 days of the end of each month. The data will be provided to eligible credit reporting bodies. The data will cover all accounts which provide, or can provide, consumer credit, including home loans, personal loans, credit cards and overdrafts (certain products may be exempted by regulation). The information to be provided includes repayment history information, default information, the type of consumer credit held by the individual and the credit limits of each consumer credit facility held by the individual. Under the 'principle of reciprocity', generally a credit reporting body cannot share credit information with a credit provider unless the credit provider itself has shared comprehensive credit information with it.

90. Mandatory comprehensive credit reporting will allow Westpac to obtain a more comprehensive view of a consumer's other credit obligations and will assist it in meeting its responsible lending obligations. By providing detailed information about a consumer's financial situation, and their behaviour in servicing existing obligations, Westpac will be able to make more informed assessments of customers using highly reliable information.
91. The second is *open banking*. On 20 July 2017, the Commonwealth Government commissioned the Open Banking Review, chaired by Scott Farrell. The Commonwealth Government is currently considering its response to the Review, and has asked for submissions on the Review's recommendations. The Review recommended that all banking customers should have the right (called the consumer data right) to access information about designated accounts including credit cards, mortgages and savings accounts, and direct that it be provided to accredited data recipients.
92. The rights that customers would have under these reforms would include to direct other banks to share the customer's data with a bank that a customer is applying for credit from. This will assist banks to undertake an informed assessment of suitability, because it will allow customers to provide assessing banks with highly reliable and detailed data about their history (among other things) with other banks.
93. As to whether a credit card meets the requirement and objectives of a customer, consistent with the guidance provided in the Explanatory Memorandum and RG 209, the requirement to understand the consumer's requirements and objectives for a credit card is limited, as the function of revolving credit is also its purpose.
94. In addition to the steps taken by Westpac to comply with its responsible lending obligations:
  - (a) Customers who apply through branches or call centres can speak with Westpac staff about the different products available. In branches, personal bankers and lenders are required to complete 'customer needs review' documentation for each conversation with a customer which describes their needs and then recommendations of products which may meet those needs and the reasons for the recommendations.<sup>110</sup> Westpac has a monitoring process to ensure this documentation is completed and staff who fail

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<sup>110</sup> Separovich Statement, para 19 and Exhibit CS-2.

to do so more than once in each quarter are ineligible for variable rewards.<sup>111</sup>

- (b) Customers who apply through Westpac's website can use product guides, which contain questions to help customers decide which type of credit card suits their needs, and comparison tables which compare the features, interest rates, fees and rewards of the various credit cards. Customers who apply through third party websites can compare Westpac's credit cards against all or most other competing products from other providers and compare the features, interest rates, fees and rewards provided by cards across many providers.

## **6.2 Assessing unsuitability of credit card limit increases**

95. From 1 July 2018, amendments to the National Credit Act will come into effect which will effectively prohibit credit providers from offering CLIs to their customers in any form (whether by letter, email, phone, in branch or on-line).<sup>112</sup> Until that time, Westpac's practice remains to request information from customers about their current income and employment status before confirming a CLI offer, in accordance with the guidance provided in the ABA Letter and implemented by Westpac in March 2015.

## **6.3 Whether a bank can use an automated system to assess unsuitability of credit card limit increases**

96. A bank can use appropriately designed automated systems to assess unsuitability of credit card limit increases. As explained above, the automated process used by Westpac for CLIs complied with responsible lending obligations.
97. The ability of banks to design and operate automated systems for assessing unsuitability will be greatly enhanced by mandatory comprehensive credit reporting and open banking. Through these reforms, banks will be able to improve automated systems so that they analyse and use, not only the bank's own data, but also data held by other credit providers in relation to the customer. This will allow detailed inquiries and verification to be made of all parts of the customer's financial situation, including income, expenses and other liabilities, and analyse the customer's credit behaviour across all credit products that they hold. The analysis that will be performed will be considerably richer by having access to more complete data about the customer. It would overcome many of the concerns which ASIC had with Westpac's CLI process.
98. The use of automated systems, provided they are appropriately designed and improved over time, assist a bank in providing its services:
- (a) efficiently, as the automated processes can be conducted more quickly and accurately than a manual review of the data;
  - (b) fairly, because it promotes consistent decision-making; and

<sup>111</sup> Separovich Statement, para 20; Separovich Supplementary Statement, para 2.

<sup>112</sup> The amendments are effected by the *Treasury Laws Amendment (Banking Measures No 1) Act 2018* (Cth). See Background Paper 4, pp 57-58.

- (c) honestly, because it eliminates or reduces fraud by the customer, any intermediary or by bank staff and instead makes assessments through defined decision pathways by reference to reliable verified data.

#### **6.4 How should banks respond to guidance issued by ASIC**

99. When ASIC issues guidance to entities by way of correspondence or a Regulatory Guide, the appropriate course is for the entity to follow that guidance. or, where it has a material difference of opinion about what the law requires, to proactively and promptly discuss its concerns or alternate approaches with ASIC.
100. Differences of opinion arise from time to time between entities and regulators as to the scope and content of legal obligations. Those differences should be discussed with the regulator and in some circumstances may need to be clarified by a Court. Taking Westpac's CLI case study as an example, Westpac considers that the appropriate way for it to have responded to ASIC's guidance in the 2012 ABA Letter would have been for it to have engaged with ASIC at that time to explain its difference of opinion, and to have changed its practices at that time if ASIC's position remained the same. That is Westpac's general approach to engaging with its regulators (acknowledging that it did not do so appropriately in 2012 with respect to CLIs).

### **7 General questions arising from the CBA Credit Cards case study<sup>113</sup>**

#### **7.1 Policies to comply with obligations under the National Credit Act when offering credit cards and credit card limit increases<sup>114</sup>**

101. Westpac explains its policies and processes to credit card and credit card limit increase policies and processes above in its response to the questions identified by Counsel Assisting as arising from the Westpac Credit Card Limits Increase case study. For the reasons set out there, Westpac's policies comply with its responsible lending obligations under the National Credit Act.

#### **7.2 Policies that might be appropriate for inquiries into discretionary expenditure<sup>115</sup>**

102. Generally, reasonable inquiries would require obtaining a declaration from the customer regarding their expenses, which would include any discretionary expenses. For reasons explained in Westpac's General submissions in relation other issues arising from the Consumer Lending hearings (filed around the same time as these submissions), the use of benchmarks such as HEM (where, if a customer declares expenses lower than the benchmark, the benchmark value is used) is an effective and appropriate means of ensuring that the responsible lending assessment occurs using an appropriate measure of expenses. As described in section 6.1 above, the proposed mandatory comprehensive credit reporting and open banking reforms, which Westpac is generally supportive of, will also provide more accurate and complete data about expenses, including those arising from other liabilities.

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<sup>113</sup> Pursuant to the invitation in paragraph 70 of the CAS.

<sup>114</sup> In response to paragraph 70(a) of the CAS.

<sup>115</sup> In response to paragraph 70(b)(i) of the CAS.



### **7.3 Inquiries into expenses incurred on other accounts held by a customer with the bank<sup>116</sup>**

103. The responsible lending obligations require a credit licensee to make such inquiries as are sufficient to enable the licensee to make an informed assessment as to whether it is likely that the consumer will be unable to comply with their financial obligations under the credit contract without substantial hardship (see section 3.1 above). When making that assessment, it will not always be necessary for a credit provider to inquire into the expenses incurred in respect of accounts for other products it has with the customer to make an informed assessment. The responsible lending obligations can be complied with without obtaining and reviewing detailed transactional data in respect of a customer. Even if the customer has other accounts with a bank, the information they offer is limited because the customer might have accounts with other financiers. However, it is Westpac's policy to make inquiries of existing accounts held by a customer (where reasonably practicable to do so) to confirm they are consistent with the customer's declared fixed expense information.

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<sup>116</sup> In response to paragraph 70(b)(ii) of the CAS.