

## ENFORCEABLE UNDERTAKING

This undertaking is **given** by Westpac Banking Corporation (ABN 33 007 457 141) and **accepted** by the Fair Work Ombudsman pursuant to section 715(2) of the *Fair Work Act 2009* in relation to the contraventions described in clause 8 of this undertaking.

## ENFORCEABLE UNDERTAKING

### PARTIES

1. This enforceable undertaking (**Undertaking**) is given to the Fair Work Ombudsman (**FWO**) pursuant to section 715 of the Fair Work Act 2009 (Cth) (**FW Act**) by Westpac Banking Corporation (ABN 33 007 457 141) (**Westpac**), 275 Kent Street, Sydney NSW 2000.

### COMMENCEMENT

2. This Undertaking comes into effect when:
  - (a) the Undertaking is executed by Westpac; and
  - (b) the FWO accepts the Undertaking so executed (**Commencement Date**).

### BACKGROUND

3. Westpac is an Australian public company and is one of the major banking organisations in Australia.
4. Westpac Group employs over 30,000 employees in Australia across its portfolio of financial services brands.
5. In April 2020, Westpac self-reported to the FWO that:
  - (a) Westpac had conducted an internal review of Long Service Leave (**LSL**) arrangements in preparation for future systems upgrades and to ensure any new systems would contain the correct LSL rules across the various cohorts of Westpac Group employees (and including some former employees of St.George Bank Limited whose employment was transferred to Westpac on or before 1 March 2010 (**St.George Employees**));
  - (b) as part of the internal review, Westpac had identified that it had not appropriately provided LSL entitlements to some of its current and former employees which led to incorrect LSL accruals and underpayments (and overpayments) for certain individuals. The arrangements which were not properly applied are detailed in Schedule D and summarised as follows:
    - i. LSL payments were either not calculated, or not correctly calculated, on average weekly hours in some instances;
    - ii. some overtime was not included in calculating LSL payments, as required in some specific circumstances, which affected certain St.George Employees and other employees of Westpac who, on or before 31 December 2015, were a *St.George*

*Banking Group Employee, a St.George CCC Employee, a St.George 2007 Heritage Employee, or a St.George 2010 Heritage Employee* as those terms are defined in the *Westpac Group Enterprise Agreement 2013 (WBC 2013 EA)* (**Preserved LSL Employees**);

- iii. some additional remuneration components (being, bonuses and/or commissions) were not included in calculating LSL payments, as required in some specific circumstances, which only affected certain Preserved LSL Employees;
  - iv. some employees had the incorrect LSL arrangements applied;
  - v. the LSL arrangements which formed part of an applicable National Employment Standard entitlement were not properly applied;
  - vi. some periods of unpaid sick leave were not taken into account in accruing LSL; and
  - vii. some LSL accruals were based on completed years and months of service rather than to the last day of employment,  
  
(collectively referred to as **LSL Issues**); and
- (c) Westpac had commenced a review to determine the amounts owed to current and former employees.
6. Prior to the execution of this Undertaking, Westpac notified the FWO that it had:
- (a) unreservedly apologised to all affected current and former employees and continues to sincerely regret that it did not apply the LSL provisions correctly. Westpac publicly apologised in a media release on 3 July 2020 to anyone impacted by the LSL Issues and confirmed it was committed to making remediation payments as a priority and communications with affected employees have contained an unreserved apology;
  - (b) identified 6,407 current and former employees who were underpaid LSL an amount of \$5,731,116.00 (exclusive of interest and superannuation) (**Underpayment**);
  - (c) by 28 February 2021, reviewed the LSL arrangements for all current and former employees of Westpac in Australia from 1 January 2014 and 28 February 2021:
    - i. by 28 February 2021, calculated and rectified the Underpayment in relation to 6,105 current and former employees by paying each of the employees referred to in column A of Schedule A to this Undertaking (**Schedule A Employees**) the amounts referred to in column B of Schedule A;
    - ii. by 29 October 2021, rectified any associated superannuation underpayments as required by law to each of the Schedule A Employees, by paying any such

required superannuation contributions to the chosen superannuation fund of the employee;

- iii. paid interest to each of the Schedule A Employees on the amount referred to in column B of Schedule A, in the sum referred to in column C of Schedule A, calculated using an interest rate of 4.75%;
  - iv. by 28 February 2021 calculated, but had not been able to locate and rectify the Underpayment in relation to 95 former employees referred to in column A of Schedule B to this Undertaking (**Schedule B Employees**);
  - v. by 8 October 2021 calculated the Underpayment in relation to 342 employees referred to in column A of Schedule C of this Undertaking (**Schedule C Employees**) (noting that 135 of these employees are also Schedule A Employees for whom additional payments are required to be made and are identified with an asterisk in column A of Schedule C);
  - vi. by 30 November 2021 will have:
    - 1. sought to rectify the Underpayment for each of the Schedule C Employees;
    - 2. rectified any associated superannuation underpayments as required by law to each of the Schedule C Employees Westpac is able to locate and rectify the Underpayment in relation to, by paying any such required superannuation contributions to the chosen superannuation fund of the employee;
    - 3. paid interest to each of the Schedule C Employees Westpac is able to locate and rectify the Underpayment in relation to, in the sum referred to in column C of Schedule C, calculated using an interest rate of 4.75%,  
  
(the current and former employees to whom the Underpayment relate are collectively referred to as the **Schedule Employees**);
  - (d) to determine the LSL accrual and payment errors engaged Ernst and Young (**EY**) to assist in developing 'calculators' and to advise about and verify the technical and legal accuracy of the 'calculators' (**EY Review**);
  - (e) updated payroll processes to ensure LSL entitlements are correctly captured and paid moving forward; and
  - (f) to the extent the LSL remediation was not within the jurisdiction of the FWO, notified the relevant State and Territory LSL regulators and worked collaboratively with those regulators as required.
7. Westpac has co-operated with the FWO at all times since the self-report in April 2020.



## ADMISSIONS

8. The FWO has a reasonable belief, and Westpac admits, that during the period from 1 January 2014 to 28 February 2021 Westpac contravened sections 44 and 50 of the FW Act by failing to correctly apply LSL entitlements, which led to the LSL issues resulting in underpayments and incorrect LSL accruals in respect of the Schedule Employees in accordance with the requirements of the following provisions of the applicable Westpac enterprise agreements and the underpinning National Employment Standard comprising the *Westpac Employees Award 2002 (Westpac Award)* and the *SEALCORP Employees Award 2003 (SEALCORP Award)* (see section 113(1) of the FW Act relating to LSL):
  - (a) from 1 January 2014 to 28 February 2021, by contravening award-derived long service leave terms pursuant to section 113(3) of the FW Act, being clauses 6.8, 21.1.2, 21.1.3 and 21.3.2 of the Westpac Award and clause 21 of the SEALCORP Award;
  - (b) from 30 January 2019 to 28 February 2021, by contravening clauses 26.1 to 26.10 of the *Westpac Group Enterprise Agreement 2019 (WBC 2019 EA)*;
  - (c) from 1 January 2016 to 29 January 2019, by contravening clauses 27.1 to 27.10 of the *Westpac Group Enterprise Agreement 2016 (WBC 2016 EA)*; and
  - (d) from 1 January 2014 to 31 December 2015, by contravening clauses 60.4, 60.7, 60.10, 60.13, 60.16, 60.19, 60.22, 60.25, 60.28, 60.31, 60.34, 60.37, 60.45 and 60.61 of the WBC 2013 EA.
9. The contraventions identified in clause 8 of this Undertaking do not include:
  - (a) any contraventions relating to the LSL Issues which impact current or former employees of Westpac not listed in Schedule A, Schedule B or Schedule C to this Undertaking (**Non-schedule Employees**). For the avoidance of doubt this Undertaking is not given in respect of any Non-schedule Employees who were underpaid as a result of the LSL Issues and the FWO's acceptance of this Undertaking is not based on any reasonable belief about the existence of any contravention because of any such underpayment; or
  - (b) any contraventions which have not yet occurred or been identified at the Commencement Date (whether or not those contraventions are identified in the Independent Assessment described at clause 15 below or the Independent Audits described at clause 23 below). For the avoidance of doubt this Undertaking is not given in respect of any contravention other than those specified in this Undertaking.

## UNDERTAKINGS

10. Westpac will take the actions set out at clauses 11 to 55 below.

### Review and rectification of underpayments

11. By 30 November 2021, Westpac will pay each of the Schedule B Employees and Schedule C Employees that have been located by that date:

- (a) the underpayment amount owing to them;
- (b) any superannuation payments which may be required by law, by making payment to their chosen superannuation fund; and
- (c) interest on the underpayment amount owing to them at an interest rate of 4.75%.

12. By 30 November 2021, Westpac will provide the FWO evidence of all payments made to all current and former employees listed in Schedules A, B and C to rectify the Underpayment.

13. If any of the Schedule B Employees or Schedule C Employees cannot be located by 30 November 2021, Westpac will pay the underpayment amount (being the amount in clause 11(a) above) owing to those employees to the Commonwealth of Australia in accordance with section 559 of the FW Act within 30 days of being provided with the necessary details for payment by FWO. Westpac will complete the required documents supplied by the FWO for this purpose.

14. In the event that the FWO is able to locate and contact any current or former Westpac employees to whom Underpayments are owed, the FWO will (in addition to its obligations under section 559 of the FW Act) notify Westpac in writing of the name and contact details of the current or former employee. Within 28 days of receiving any such notice Westpac will:

- (a) pay the current or former employee interest on the amount already paid by Westpac to the Commonwealth of Australia in respect of that employee, calculated for each financial year from the date that the employee first became entitled to that amount until the date on which that amount is paid, using an interest rate of 4.75% (calculated on a simple interest basis); and
- (b) pay to the employee's nominated superannuation fund an additional payment calculated to be the value of the superannuation payment which would have been required by law, had Westpac paid to the employee, as ordinary salary, the amount it paid to the Commonwealth.

## Independent Assessment

15. Provided approval has been granted under clause 16, by 30 November 2021, Westpac must, at its cost, engage an appropriately qualified, experienced, external and independent expert, approved in writing by the FWO under clause 16 (**Independent Expert**), to conduct an independent assessment of the outcomes of the EY Review (**Independent Assessment**).
16. Westpac must notify the FWO of its proposed Independent Expert and ensure that they are an:
  - (a) accounting professional (Certified Practising Accountant, Chartered Accountant);
  - (b) auditor (Registered Company Auditor within an Authorised Audit Company); or
  - (c) lawyer (admitted, practising lawyer and employment law specialist),by no later than 23 November 2021. The FWO may in its sole discretion approve the Independent Expert or otherwise require Westpac to propose other Independent Experts until the FWO has approved in writing an Independent Expert. The Independent Expert must be approved by the FWO in writing prior to being engaged by Westpac.
17. Westpac must ensure the Independent Assessment commences by no later than 10 January 2022 and that the Independent Expert assesses:
  - (a) the methodology of the EY Review, including the 'calculators' developed by EY; and
  - (b) the outcomes of the EY Review; and
  - (c) whether the Underpayment, superannuation and interest amounts relating to the Schedule Employees have been correctly calculated.
18. Westpac must ensure that the Independent Expert provides a report (**Expert Report**) of its Independent Assessment directly to the FWO, and for the benefit of the FWO, setting out its findings, and the facts and circumstances supporting its findings by 31 May 2022. Westpac must ensure the Independent Expert does not provide the Expert Report, or a copy of the same, to Westpac without the FWO's approval.
19. Westpac must ensure that the Expert Report contains the following declarations from the Independent Expert:
  - (a) the Independent Expert has no actual, potential or perceived conflict of interest in providing the Expert Report on Westpac to the FWO;
  - (b) notwithstanding that the Independent Expert is retained by Westpac, the Independent Expert undertakes that it has acted independently, impartially,

- objectively and without influence from Westpac in preparing the Expert Report;
- (c) the Expert Report is provided in accordance with applicable professional standards (which will be listed in the Expert Report); and
  - (d) the Expert Report is provided to the FWO for its benefit and the FWO can rely on the Expert Report.
20. If the Independent Assessment identifies that any Schedule A Employees, Schedule B Employees or Schedule C Employees are owed amounts additional to those calculated and paid by Westpac, Westpac will pay those additional amounts to the current and former employees, and provide evidence of such payment to the FWO within 28 days of being made aware of the precise additional amounts owing by the FWO or such reasonable period agreed between the FWO and Westpac if precise amounts to be paid are not notified by the FWO to Westpac.
21. If any of the Schedule A Employees, Schedule B Employees or Schedule C Employees identified in the Expert Report as being owed amounts additional to the Underpayments calculated by Westpac cannot be located and paid by 27 July 2022, Westpac will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. Westpac will complete the required documents supplied by the FWO for this purpose.
22. The FWO acknowledges that Westpac does not contravene this Undertaking in the event that the Independent Expert makes a finding in relation to coverage, classification and/or additional amounts to be rectified in relation to the LSL Issues that is contrary to the determination made by Westpac in its internal review under clauses 6(b)-(c) above, provided Westpac pays any additional amounts owing to current and former employees in accordance with clauses 20 and clause 21 above. For the avoidance of doubt, Westpac acknowledges that this Undertaking does not relate to any contraventions that may be identified by the Independent Expert which are not identified in clause 8 and/or are not contraventions relating to the LSL Issues during the Relevant Period.

### **Independent Audits**

23. Westpac must, at its cost, engage an appropriately qualified, experienced, external and independent accounting professional or an employment law specialist (**Independent Auditor**) to conduct two audits of Westpac's compliance with its LSL obligations to its employees under sections 44 and 50 of the FW Act (**Audits**).
24. Westpac will notify the FWO of its proposed Independent Auditor by no later than 18 February 2022. The FWO may in its sole discretion approve the Independent Auditor in writing or otherwise require Westpac to propose other Independent Auditors until the



FWO has approved in writing an Independent Auditor. The Independent Auditor must be approved by the FWO in writing prior to being engaged by Westpac.

25. Westpac must ensure that each of the Audits conducted by the Independent Auditor includes:
- (a) an assessment of whether the long service leave entitlements of at least 50 persons comprising of a mixture of current and former employees (**Sampled Employees**) have been correctly calculated by Westpac. The Sampled Employees will include a range of classification and employment types (full-time and part-time) and employees who work in a range of different locations;
  - (b) the production of a written report on each of the Audits setting out the Independent Auditor's findings, and the facts and circumstances surrounding them, to the FWO; and
  - (c) that each of the written reports referred to in (b) above contains the following declarations from the Independent Auditor:
    - (i) the Independent Auditor has no actual, potential or perceived conflict of interest in providing the report to the FWO;
    - (ii) notwithstanding that the Independent Auditor is retained by Westpac, the Independent Auditor undertakes that it has acted independently, impartially, objectively and without influence from Westpac in preparing the report;
    - (iii) the report is provided in accordance with applicable professional standards (which will be listed in the report); and
    - (iv) the report is provided to the FWO for its benefit and the FWO can rely on the report.

#### The First Audit

26. Westpac must ensure the Independent Auditor commences the first of the Audits by no later than 30 June 2022 (**First Audit**).
27. The relevant audit period for the First Audit must be 1 November 2021 to 30 April 2022.
28. By 31 May 2022, Westpac will provide for the FWO's approval, details of the methodology to be used by, and proposed sample size/s to be considered by, the Independent Auditor to conduct the First Audit.
29. Westpac will use its best endeavours to ensure the Independent Auditor provides a draft written report of the First Audit directly to the FWO by 30 October 2022, setting out the draft First Audit findings, and the facts and circumstances supporting the First Audit

findings. Westpac will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Westpac without the FWO's approval.

30. Westpac will ensure the Independent Auditor finalises the First Audit and provides a written report of the First Audit (**First Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Westpac will ensure the Independent Auditor does not provide the First Audit Report, or a copy of the same, to Westpac without the FWO's approval.

#### The Second Audit

31. Westpac must ensure the Independent Auditor commences the second of the Audits by no later than 31 May 2023 (**Second Audit**).
32. The relevant audit period for the Second Audit must be 1 November 2022 to 30 April 2023.
33. By 31 March 2023 Westpac will provide for the FWO's approval, details of the methodology to be used by, and proposed sample size to be considered by, the Independent Auditor to conduct the Second Audit.
34. Westpac will use its best endeavours to ensure the Independent Auditor provides a draft written report of the Second Audit directly to the FWO by 31 August 2023, setting out the draft Second Audit findings, and the facts and circumstances supporting the Second Audit findings. Westpac will ensure the Independent Auditor does not provide the draft written report, or a copy of the same, to Westpac without the FWO's approval.
35. Westpac will ensure the Independent Auditor finalises the Second Audit and provides a written report of the Second Audit (**Second Audit Report**) directly to the FWO within one month of FWO providing any comments on the draft report to the Independent Auditor. Westpac will ensure the Independent Auditor does not provide the written report, or a copy of the same, to Westpac without the FWO's approval.

#### **Outcome of Audits**

36. If any of the Audits identify underpayments to any current or former employees, Westpac will conduct a reconciliation of the amounts paid to those employees during the relevant pre-audit period and rectify any underpayments that are identified. The reconciliation period for each identified employee will be from the start of the relevant pre-audit period to the end of the relevant audit period.
37. Westpac will provide to the FWO evidence of such rectification within 28 days of being informed by the FWO of the requirement to undertake the reconciliation.

38. If any employees identified in the Audits as having underpayments owing to them cannot be located within 60 days of the conclusion of the Second Audit, Westpac will pay those amounts to the Commonwealth of Australia (through the FWO) in accordance with section 559 of the FW Act. Westpac will complete the required documents supplied by the FWO for this purpose.
39. If any of the Audits identify an underpayment of minimum entitlements to one or more employees, and the FWO reasonably believes that employees not included in the Audits are also likely to have been underpaid, Westpac will engage an accounting professional or an employment law specialist approved by the FWO to conduct a further audit of all its employees whom are entitled to Long Service Leave (or a particular cohort of employees within this group), as determined by the FWO (**Additional Audit**). Any Additional Audit must be paid for by Westpac.
40. If requested by the FWO, Westpac will provide the FWO with all records and documents used to conduct any or all of the Audits (including any Additional Audit), within 7 days of such a request or such period agreed in writing between Westpac and the FWO. The FWO will not unreasonably withhold a request for an agreement on an extension of time.

## **Notices – Internal and External**

### Media Release

41. Upon acceptance of the Undertaking, the FWO will publish a media release on its website in respect of this Undertaking.

### Public Notice

42. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Westpac will place a notice in the print and digital version of the Weekend Edition of the Australian Financial Review (**Public Notice**).
43. The Public Notice must:
  - (a) bear the name and logo of Westpac;
  - (b) appear within the first 5 pages of the Weekend Edition of the Australian Financial Review;
  - (c) be at least 10 cm x 8 cm; and
  - (d) be in the form of the Public Notice set out at Attachment A.
44. Westpac will inform the FWO when the Public Notice will be published and provide a copy to the FWO within seven days of its publication.



#### Website Notice

45. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Westpac will place a notice on its website, accessible through a hyperlink on the front page of Westpac Bank (<https://www.westpac.com.au/>), St George Bank (<https://www.stgeorge.com.au/>), and the Bank of Melbourne (<https://www.bankofmelbourne.com.au/>) (**Website Notice**).
46. The Website Notice must:
- (a) be in the form of the Website Notice set out at Attachment A;
  - (b) be displayed in at least size 10 font; and
  - (c) remain on the website for a period of 28 days.
47. Within 7 days of placing the Website Notice on its website, Westpac will provide to the FWO evidence of its placement.

#### Social Media Notice

48. Within 28 days of, but not prior to, the FWO publishing a media release on its website in respect of the Undertaking, Westpac will place a post on its Facebook page (**Social Media Notice**).
49. The Social Media Notice must:
- (a) be posted to Westpac's timeline in public view;
  - (b) remain on the Facebook page for a continuous period of at least 28 days; and
  - (c) be in the form of the Social Media Notice set out at Attachment B.
50. Within 7 days of posting the Social Media Notice to its Facebook page, Westpac will provide to the FWO evidence of the post.

#### **Contribution Payment**

51. Within 28 days of the Commencement Date, Westpac will make a contribution payment to the Consolidated Revenue Fund of \$343,866.96.
52. Westpac will provide evidence to the FWO of any contribution payment within 14 days of making payment to the Consolidated Revenue Fund.

#### **No Inconsistent Statements**

53. Westpac must not, and must use its best endeavours to ensure that its officers, employees or agents do not, make any statement or otherwise imply, either orally or in writing, anything that is inconsistent with admissions or acknowledgements contained in



this Undertaking.

### **Extension of times for completion**

54. Westpac may request of the FWO an extension on a time specified for completion of an obligation under this Undertaking. Westpac will provide information setting out the basis for such a request and make a request for an extension of time at least 7 days prior to the time that Westpac is required to complete the action as set out in this Undertaking, or such shorter period agreed in writing between Westpac and the FWO. The FWO will not unreasonably withhold agreement on a request for an extension of time.
55. Where a time specified for undertaking an obligation under this Undertaking is contingent on or follows from the time specified for the completion of another obligation under this Undertaking, and that time for completion has been extended by the FWO, the time specified for completion of the later obligation is correspondingly extended by the same period.

### **ACKNOWLEDGEMENTS**

56. Westpac acknowledges that:

- (a) the FWO may:
  - (i) make this Undertaking (including any of the Attachments) available for public inspection, including by posting it on the FWO internet site at [www.fairwork.gov.au](http://www.fairwork.gov.au);
  - (ii) release a copy of this Undertaking (including any of the Attachments) pursuant to any relevant request under the *Freedom of Information Act 1982* (Cth);
  - (iii) issue a media release in relation to this Undertaking;
  - (iv) from time to time, publicly refer to the Undertaking (and any of the Attachments hereto) and its terms; and
  - (v) rely upon the admissions made by Westpac set out in clause 8 above in respect of decisions taken regarding enforcement action in the event that Westpac is found to have failed to comply with its workplace relations obligations in the future, including but not limited to any failure by Westpac to comply with its obligations under this Undertaking;
- (b) consistent with the Note to section 715(4) of the FW Act, this Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct set out herein;

- (c) consistent with section 715(3) of the FW Act, Westpac may withdraw from or vary this Undertaking at any time, but only with the consent of the FWO; and
- (d) if Westpac contravenes any of the terms of this Undertaking:
  - (i) the FWO may apply to any of the Courts set out in section 715(6) of the FW Act, for orders under section 715(7) of the FW Act; and
  - (ii) this Undertaking may be provided to the Court as evidence of the admissions made by Westpac in clause 8 above, and also in respect of the question of costs.

## Executed as an undertaking

Executed by Westpac Banking Corporation by an authorised officer:

SIGNED for and on behalf of WESTPAC  
BANKING CORPORATION by its duly  
constituted Attorneys in the presence of:

- ) WESTPAC BANKING CORPORATION
- by its attorneys who hereby respectively
- ) state at the time of their executing this
- instrument they have no notice of the
- ) revocation of the power of attorney
- registered in the office of the Registrar
- ) General numbered 332 book 4299 under
- the authority of which they have executed
- ) this instrument

*Jessica Do*  
.....

Witness (signature)

Jessica Do  
.....

Name of Witness (Print)

*N. Berelowitz*  
.....

Name: Nadine Berelowitz

Position: Tier 1 Attorney

Date: 12 November 2021

*Jessica Do*  
.....

Witness (signature)

Jessica Do  
.....

Name of Witness (Print)

*Michael Johnston*  
.....

Name: Michael Johnston

Position: Tier 1 Attorney

Date: 12 November 2021

*This undertaking has been signed in counterpart and witnessed over audio visual link in accordance with section 14G of the Electronic Transactions Act 2000 (NSW).*

ACCEPTED by the FAIR WORK OMBUDSMAN pursuant to section 715(2) of the Fair  
Work Act 2009 on:

*Mark Scully*  
.....  
Mark Scully, Deputy Fair Work  
Ombudsman – Compliance and  
Enforcement

*15 November 2021*  
.....  
(Date)

Delegate for the FAIR WORK  
OMBUDSMAN

in the presence of:

*Gaye Atkinson*  
.....  
(Signature of witness)

*Gaye Atkinson*  
.....  
(Name of Witness)