SUBMISSION 8A

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Mr Craig Thomson MP
House of Representatives
Economics Committee

Per email: economics.reps@aph.gov.au

Dear Sir / Madam

Exposure Draft – Competition and Consumer Amendment Bill (No.1) 2011

The Westpac Group (**Westpac**) appreciates this opportunity to comment on the Competition and Consumer Amendment Bill (No. 1) 2011 (**Bill**). Westpac supports the Government's policy objective of prohibiting any deliberate attempt to substantially lessen competition.

The Bill currently establishes two prohibitions:

- The first prohibits disclosing certain information for the purpose of substantially lessening competition (**SLC Prohibition**);
- The second imposes a blanket prohibition on disclosing pricing information to competitors and not to any other person (**Private Disclosure Prohibition**).

Whilst, Westpac does not believe there is any credible evidence of price signalling occurring in the banking sector, Westpac understands the Government's contention that the existing provisions of the Competition and Consumer Act 2010 don't sufficiently address anti-competitive price signalling. The SLC prohibition is designed to achieve this goal, without adversely impacting legitimate business activities. However, Westpac submits that it is fundamentally flawed to single out a particular industry for treatment in this way and believes that anti-competitive behaviour should be prohibited across every industry. Therefore, the SLC Prohibition should apply generally and not only to the class of goods or services prescribed by regulation.

Westpac **does not support** the Private Disclosure Prohibition. Consistent with our submission in response to the Exposure Draft, Westpac continues to have significant concerns with this prohibition including:

- Inappropriately Broad

  The Private Disclosure Prohibition establishes an offence which does not consider whether the disclosed information is historical, publicly available or whether those discussing the information are able to influence price or strategy. The offence will not consider whether the disclosure is in pursuit of a legitimate business activity and will be infringed regardless of whether the intent or effect of the disclosure was to substantially lessen competition.

  Given its extremely broad coverage, it is inevitable that individuals will inadvertently commit an offence by disclosing harmless material. For example, an offence will occur should a branch employee discuss published interest rates with a competitor's employee at a social function.

  Given the breadth of the prohibition, it will rely on non-enforcement to operate effectively. It is inappropriate to establish an offence so broad that it necessary to assume that the regulator will not

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enforce the offence to its full extent. It is also inappropriate to establish an offence which will apply to conduct not offending public policy

- Legislation not required

  The SLC Prohibition will prohibit disclosing price, capacity or strategic information for the purpose of substantially lessening competition. This will eliminate the perceived gap in the existing legislation. With the perceived gap closed it is not necessary to also introduce the Private Disclosure Prohibition.

- Not universal

  Prohibiting anti-competitive behaviour is relevant and appropriate to all industries. At present, the prohibition only applies to the classes of goods or services prescribed by regulation. This approach is inconsistent with the Act's existing protections which apply to all industries. Were the Private Discussion Prohibition required and appropriate, the prohibition should apply generally.

- Prohibit legitimate business activity

  As the Private Discussion Prohibition does not consider the intention or effect of the disclosure, it will prohibit legitimate business activities. One example of this involves corporate workouts.

  Where a company becomes financially distressed, prior to entering into voluntary administration it is desirable for the company to approach its lenders to discuss whether loan arrangements can be adjusted to reduce immediate financial pressures. A successful corporate workout will enable the company to continue trading which benefits shareholders, creditors and employees.

  A workout often requires multiple unrelated lenders to discuss the price of existing and new loan arrangements. The Private Disclosure Prohibition will prohibit those discussions from occurring thereby removing the opportunity for the distressed company to avoid voluntary administration.

- Exemptions not sufficient

  The exclusions included within the Bill do not address the above concerns.

  I note the suggestion made in the Second Reading Speech that the ACCC notification regime will address concerns around corporate workouts. The notification regime is not practical in a workout situation where directors of the distressed company have an ongoing duty to avoid insolvent trading. That duty requires directors to determine whether the distressed company is able to pay all debts as and when they become due and payable. Understanding the lenders' intentions is critical in making that assessment. Given that this duty gives rise to personal liability, it is not feasible that directors will wait 14 days to know whether a workout can commence. In many cases directors require that lenders provide an overnight response as to the likelihood of a successful workout taking place. Upon the implementation of the Private Disclosure Prohibition, we expect that the directors will be left with no alternative other than to enter into voluntary administration.

Westpac recommends that the Private Disclosure Prohibition be removed from the Bill retaining the SLC Prohibition.

Westpac emphasises its support for measures which prohibit any deliberate attempt to substantially lessen competition but without causing unnecessary uncertainty or restraint in the conduct of legitimate business activity.

Yours faithfully

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