SUBMISSION 4A

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Our ref

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Dear Sir

Inquiry into the Competition and Consumer Amendment Bill (No. 1) 2011

1. INTRODUCTION

Allen & Overy appreciates the opportunity to make a submission to the House of Representatives Standing Committee on Economics on the *Competition and Consumer Amendment Bill (No. 1) 2011* ("**Bill**").

Allen & Overy has previously submitted comments to the Treasury in respect of the Exposure Draft of the Bill, a copy of which is **attached**. The following comments are those of the Allen & Overy only and do not necessarily represent the views of any of our clients.

2. EXECUTIVE SUMMARY

We have previously set out some of our general concerns with the breadth of the new prohibitions in the Bill. In this submission we seek to highlight significant practical concerns with the Bill and how they may be addressed constructively.

In summary, our key concerns with the Bill are that:

(1) ***The joint venture exception for syndicated lending is insufficient to provide legal certainty that this legitimate financing technique will continue to be lawful.*** The Explanatory Memorandum seeks to characterise syndicated lending as a "joint venture" and therefore exempt such lending from the private disclosure prohibition which may otherwise effectively prohibit the disclosure of pricing information among the financial institutions proposing to enter into the syndicated financing transaction. The disclosure of proposed pricing is necessary to assess the risks and costs associated with the proposed financing, including assessing the likely success of any syndication process.

In the absence of clear exemption provisions in the Bill, in our view the prohibitions still create significant uncertainty as to whether they apply to syndicated financing. Syndicated financing is an

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important aspect of commerce and this type of funding provides the basis for corporate transactions and investments in projects, including infrastructure projects, which are important for economic growth and employment. In circumstances where it is important to ensure that Australia is at least on a level playing field with other economic centres in Asia for corporate financing, laws which impede or stifle such everyday commercial functions or increase their risk profile need to be carefully considered for adverse consequences.

Accordingly, not only is it important not to create regulatory risks in financing, but in order not to see Australia become too out of step with what occurs globally, we believe it is important for the Government to provide an express and clear exemption for syndicated financing. That approach is consistent with the approach adopted for the interest withholding tax exception in the *Income Tax Assessment Act 1936* for syndicated lending and it would restore certainty to this important economic function. In addition, it would obviate the administrative and practical burdens of the proposed notification regime discussed below.

(2) ***The proposed notification regime, while perhaps well intentioned, is still administratively burdensome and is impractical.*** The Bill appears to recognise that the proposed prohibitions on information disclosure may prohibit certain types of legitimate business conduct. In order to allow that conduct to continue, the Bill seeks to modify the current notification regime in the *Competition and Consumer Act 2010* ("**CCA**") typically used for third line forcing or exclusive dealing. The Bill seeks to provide the Australian Competition & Consumer Commission ("**ACCC**") the opportunity to object to the proposed notified conduct in the same manner as for the operation of the exclusive dealing and third line forcing notification regimes. However, the exclusive dealing and third line forcing regimes are predicated on public disclosure and some form of market testing by the ACCC before an exemption is provided for the conduct, based on an analysis of whether the public benefit from the conduct outweighs any economic detriment in general terms. In addition, the notified conduct in the case of exclusive dealing and third line forcing is generally not so time critical as in the case of syndicated financing.

If the Government does not provide an express exemption for syndicated financing, then we believe that some form of "block exemption" with general parameters for this type of financing would be a preferred solution to reduce the administrative burden that notification of all syndicated financing arrangements could entail.

We appreciate the desire to ensure that the Bill is drafted in a manner to allow the operation of its provisions to have the potential flexibility for universal application to sectors beyond banking. However, we believe that there are unlikely to be other situations as time critical as syndicated lending that would require express exemption and therefore believe the better and more optimal regulatory policy is to provide for an express exemption.

3. SYNDICATED LENDING

One type of legitimate business conduct at risk of being caught by the prohibitions in the Bill is syndicated lending. While the Second Reading speech of the Bill stated that syndicated lending "would *likely* fit the definition of a joint venture", we believe this is very unlikely to be the case in practice. Syndicated financiers do not consider themselves to be in a joint venture. Although there may not be a definitive statement as to the meaning of joint venture under Australian law, a joint venture is usually considered to be a joint undertaking to generate a product to be shared amongst the participants. This is not the nature of a syndicated financing, under which financiers lend money separately, though on common terms, and have separate rights and receive a separate return, calculated by reference solely to the amount of financing provided by the particular financier. Courts have held that there is no relationship of trust or reliance between participants in a syndicated financing, which is another common characteristic of a joint venture. We also note that syndicated lending documentation commonly expressly state that the financiers do not purport to create a joint venture because of the legal implications for participants if a joint venture were

created. It is inappropriate to attempt to reclassify the relationship between financiers under a syndicated financing simply to make that relationship "fit" within an existing exemption for the purposes of this price signalling legislation.

While it seems that the legislative intent was to exempt syndicated lending, we do not believe the Bill actually achieves this and the resultant uncertainty will create unnecessary cost and expense and have the potential to stifle legitimate business lending practices. We submit that a clear exemption should be included in the Bill to allow for this. We note that there is precedent to have special exemptions dealing only with syndicated lending in federal legislation; for example, the specific exemption from interest withholding tax that applies to syndicated financing under section 128F of the *Income Tax Assessment Act 1936*.

Syndicated financing will not be the only legitimate financing practice that will be adversely impacted by the Bill. In a similar vein, corporate workouts will also be impacted. Where a borrower is in financial difficulties it will need to restructure its financing arrangements, often with multiple financiers, in order to ensure its economic survival. The disclosure of pricing information in such a circumstance is necessary, given that financiers will be assessing the relative merits, and costs, of adopting different approaches and strategies. If will be important that different financiers of the borrower communicate with each other, including in relation to pricing matters, even where the financiers are not part of a syndicated financing.

4. NEED FOR CERTAINTY IN EXEMPTION PROCESS

In an apparent attempt to address concerns that have been expressed as to the scope of the prohibitions, the Bill extends the existing notification regime under the CCA to enable companies to seek immunity from the Bill's provisions. However, the notification process carries a considerable degree of uncertainty for business. For example, the ACCC may reject a notification if it is not satisfied that the conduct in question would result in a public benefit, or if it considers that the resultant public benefit would not outweigh the likely anticompetitive impact of the relevant conduct.

The notification regime under the CCA is subject to public consultation and typically involve some form of market testing before an exemption is granted for the conduct in question. While transparency is desirable and appropriate in the context of third line forcing and exclusive dealing regimes for which the notification process in the CCA was designed, we believe that the public consultation requirement for assessing exemptions from the Bill's provisions in relation to syndicated loans (or corporate workouts) would be of limited value and could be problematic, as public disclosure of such arrangements could have adverse commercial ramifications for transaction parties.

Further, the public benefit analysis applied by the ACCC in evaluating notifications under the CCA does not easily or practically lend itself to assessing exemptions from the Bill for syndicated loans. First, because ascertaining the level of public benefit in financing arrangements confined to specific transactions is likely to be very difficult and imprecise in practice; and, second, the ACCC may not be a suitable regulatory body for analysing complex syndicated financing arrangements.

We submit that, in the circumstances, a more appropriate approach would be the formulation of explicit criteria or parameters, the satisfaction of which would automatically exempt a banking syndicated loan (or workout) from liability under the Bill, without the need for the ACCC to evaluate the level of public benefit or detriment which the conduct in question may be said to give rise to. In these circumstances, some form of "block exemption" could provide certainty and reduce the administrative burden of the provisions as they apply to syndicated lending and workouts.

5. GENERAL ISSUES OF APPLICATION OF THE BILL

The Bill applies to a very broad array of pricing information including discounts, allowances, rebates, or credits in relation to prescribed goods or services. The Bill also does not distinguish between historical and current or prospective pricing information, with the anomalous result that the disclosure of pricing

information which is no longer commercially sensitive could potentially result in a contravention of the Bill. This is out of step with most jurisdictions and there would appear to be limited scope for harm to the competitive process by the release of such historical data.

As identified in our previous submission, most jurisdictions recognise that there are many legitimate reasons for information exchanges between actual or potential competitors, whether directly or indirectly. Those jurisdictions recognise it is important that an analysis is conducted of the whole situation in which the disclosure is made. By contrast, the broad application of the Bill in effect presumes that disclosure of pricing information in respect of prescribed classes of goods and services is anticompetitive, and reverses the burden of proof, forcing companies to demonstrate that disclosure of price information will not harm competition.

6. CONCLUSION – INQUIRY INTO THE BILL

While it is clear that genuine attempts have been made since the Exposure Draft to remedy issues that were identified by interested parties on the Exposure Draft, we believe that some of these amendments are still not sufficiently practical and do not go far enough to address legitimate business concerns. We believe that in the absence of some further practical steps being taken as suggested in this submission, there is a danger that the current provisions of the Bill will stifle business lending which is important to the everyday operation of a vibrant economy. Accordingly, in this submission we have sought to provide constructive means to address some of the concerns in relation to unintended consequences of the Bill for legitimate business conduct.

Yours faithfully

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