

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged:	Submissions
File Number:	ACT 1 of 2023
File Title:	APPLICATIONS BY AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED AND SUNCORP GROUP LIMITED



REGISTRAR

Dated: 13/09/2023 9:02 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



Applications by Australia and New Zealand Banking Group Limited and Suncorp Group Limited in the Australian Competition Tribunal: Act 1 of 2023

SUBMISSIONS OF WESTPAC BANKING CORPORATION

1. These are the submissions of Westpac Banking Corporation (**Westpac**) in respect of its application dated 12 September 2023, by which it seeks to redact certain of its documents before their production in these proceedings.
2. The directions made by the Tribunal on 29 August 2023 require that the ACCC file with the Tribunal, and serve on the parties, electronic bundles of documents, which are to include documents produced by third parties to the ACCC in connection with its Determination. In connection with the Determination, the ACCC required that Westpac produce documents to it, pursuant to a number of compulsory notices. Westpac complied with those notices, and produced a volume of material to the ACCC, which Westpac identified as confidential, but which it was not permitted to redact: Jacqueline Downes affidavit 12 Sep 2023 (**Downes Affidavit**), [10].
3. The documents that Westpac produced to the ACCC incorporated information that is highly confidential to Westpac or its customers, including board papers which traverse matters such as special internal projects, executive remuneration, succession planning, board performance, whistleblower matters and management accountability reviews: Downes Affidavit, [11(d), (f)-(g)]. Although this information was contained in documents required to be produced to the ACCC, it was not relevant to the Determination, nor does it appear relevant to the matters in issue in these proceedings (Downes Affidavit, at [11(g)]): its being withheld from the Tribunal and the Applicants, therefore, would not prejudice these proceedings.
4. Internally, Westpac closely guards the confidentiality of its board papers: historical board papers are securely stored in a system to which few Westpac employees have access; in advance of board meetings, papers are distributed securely to directors, and sometimes to a limited number of senior executives: Downes Affidavit, at [11(e)]. Disclosure of this information to the public raises the risk of significant damage to Westpac's commercial position.
5. Notwithstanding the above, under the existing directions made by the Tribunal, the ACCC would be required to file with the Tribunal and serve on the parties all of the documents that Westpac produced to the ACCC, including these highly sensitive board papers. Such disclosure is to be made electronically, with all of the attendant vulnerabilities of that medium.
6. The directions presently incorporate a 'Confidentiality Regime', which requires that most (but not all) persons with access to confidential information sign undertakings in relation to its disclosure. However, that regime, as set out in the Annexure to the orders of 29 August 2023, provides inadequate protection because it would still result in a large number of people (including multiple barristers, solicitors, support staff, experts and Tribunal staff members) having access to documents, and knowledge of matters, which are highly confidential to

Westpac, and of no apparent relevance to these proceedings. That presents a heightened risk of disclosure, however inadvertent, and is conspicuously at odds with the restrictions on access to the information which exist within Westpac itself.

7. In the light of the matters set out above, Westpac proposes that it be able to redact its documents to exclude from them information which is both commercially sensitive and irrelevant, before they are filed with the Tribunal or served on the parties. As a check and balance on that exercise, Westpac proposes that one nominated solicitor (only) of each of the parties be able to inspect the unredacted versions of the documents to either confirm or challenge the proposed redaction. In that regard, Westpac will by tomorrow provide to the Tribunal a confidential affidavit identifying in more detail examples of the information that Westpac proposes to redact. These protections will provide procedural fairness to the parties, and ensure that neither they nor the Tribunal suffers any substantive disadvantage due to the exclusion of relevant material from consideration.
8. The Federal Court has on several occasions accepted as appropriate the practice of redacting from documents otherwise liable to be discovered, information that is both commercially sensitive and irrelevant, where the party undertaking the redactions first approaches the Court, and in particular where it allows a representative of the responding party to assess those redactions: see e.g. *Esso Australia Pty Ltd v Australian Workers Union (No 3)* [2020] FCA 316, per Wheelahan J; *Fuji Xerox Australia Pty Ltd v Whittaker (no 2)* [2021] FCA 696, per Colvin J. Westpac relies on that line of authority in support of its application; see also the decision of Brereton J in the Supreme Court decision of *Drivetime Radio Australia Pty Ltd v Pivotal Creative Solutions Pty Ltd* [2010] NSWSC 763, [24]–[25].
9. To the extent that the Applicants contend that Westpac could achieve the same outcome within the existing Confidentiality Regime, by objecting to particular instances of disclosure pursuant to cl 3, that clause does not specifically contemplate, or provide a framework for, redactions being made to producible documents. Moreover, it would be more conducive to the expeditious conduct of these proceedings for Westpac to provide the ACCC with redacted documents for further production to the parties in accordance with the Confidentiality Regime, than to delay such production pending consultation between the various parties and their representatives. In that regard, Westpac proposes to produce the redacted documents to the ACCC within five days of its proposed orders being made.
10. In circumstances where Westpac faces disclosure of its most confidential information to the advisers of two of its competitors, where that information does not appear to have any relevance to the matters in issue in these proceedings, where Westpac will identify examples of that information confidentially to the Tribunal, where Westpac will allow an external legal adviser to each of the Applicants to review (and challenge) Westpac's redactions, where that process can commence shortly, and where the non-redacted material can shortly be produced pursuant to the Confidentiality Regime (with the other amendments proposed by CBA, NAB, Macquarie Bank, Westpac and ING), Westpac's application strikes an appropriate balance

between protecting its legitimate interests and those of the Applicants.

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