

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Affidavit

File Number: ACT 1 of 2023

File Title: APPLICATIONS BY AUSTRALIA AND NEW ZEALAND
BANKING GROUP LIMITED AND SUNCORP GROUP LIMITED



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Dated: 12/09/2023 6:15 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.



COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2023
Re: Applications by Australia and New Zealand Banking Group Limited and Suncorp Group Limited for review of Australian Competition and Consumer Commission Merger Authorisation Determination MA1000023 Applicants: Australia and New Zealand Banking Group Limited and Suncorp Group Limited

AFFIDAVIT

Affidavit of: **Jacqueline Ann Downes**
Address: Deutsche Bank Place, Corner Hunter and Phillip Streets, Sydney NSW 2000
Occupation: Solicitor
Date: 12 September 2023

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1	Affidavit of Jacqueline Ann Downes in support of application for orders sworn on 12 September 2023	1-16	1-5

I, JACQUELINE ANN DOWNES of Deutsche Bank Place, Corner Hunter and Phillip Streets, Sydney in the State of New South Wales, solicitor, say on oath:

1. I am a Partner at the firm Allens, solicitors for Westpac Banking Corporation (**Westpac**).
2. I am authorised to make this affidavit on behalf of Westpac.
3. Save where otherwise indicated, I make this affidavit on the basis of my own knowledge, information and belief. Where I depose to matters on the basis of information or belief, I have no reason to doubt the veracity of those matters and I believe those matters to be true. Nothing in this affidavit is intended to waive any legal professional privilege, nor am I authorised to waive any such privilege belonging to Westpac.
4. I make this affidavit in support of Westpac's application to the Tribunal dated 12 September 2023 (**Application**) in proceeding ACT 1 of 2023 (**Proceeding**).

Documents produced by Westpac to ACCC and confidentiality claims

5. The Australian Competition and Consumer Commission (**ACCC**) issued the following notices to Westpac, pursuant to s 155(1)(a) and/or (b) of the *Competition and Consumer*

Act 2010 (Cth) (**CCA**), in connection with its review of the application for merger authorisation submitted by Australia and New Zealand Banking Group Limited (**ANZ**) on 2 December 2022 (**Authorisation Application**):

- (a) a notice dated 5 January 2023 (varied on 21 February 2023) (**First Notice**); and
 - (b) a notice dated 10 March 2023 (varied on 5 April 2023) (**Second Notice**).
6. Westpac produced documents and written responses to the ACCC in response to the First and Second Notices and subsequent email requests for additional information, on 28 February 2023, 5 April 2023, 13 April 2023 and June 2023 (**Westpac Produced Material**).
7. At the time that it produced documents and provided written responses, Westpac requested that its response be treated as confidential to Westpac and be excluded from the public register. The ACCC accepted Westpac's claims of confidentiality and confirmed that the Westpac Produced Material would be treated as confidential and excluded from publication on the public register.
8. Westpac maintains its claim of confidentiality in respect of the Westpac Produced Material. Westpac also maintains a claim of confidentiality in respect of information relating to Westpac produced to the ACCC by the Australian Prudential Regulation Authority in connection with the Authorisation Application.

Westpac's confidential information

9. I am informed by Simone Fletcher (Westpac's Head of Regulatory Reviews, Class Actions & Commercial Disputes) and believe that the Westpac Produced Material comprises:
- (a) two written responses;
 - (b) data schedules; and
 - (c) 277 board papers (including financial updates).
10. I am informed by Ms Fletcher and believe that:
- (a) Westpac made a verbal request to the ACCC that it be permitted to redact parts of a document which it considered to be highly confidential and not responsive to the First Notice;
 - (b) the ACCC did not permit any redactions to be made to that document; and
 - (c) Westpac did not seek to apply further redactions in light of the ACCC's usual approach to confidentiality.




11. I am informed by Ms Fletcher and believe that:
- (a) the board papers (including minutes) produced by Westpac cover the period from 1 July 2017 to 1 December 2022. The information in the board papers is, in the very large part, not publicly available;
 - (b) the terms of the First Notice required production of board papers which made mention of certain words;
 - (c) the board papers cover a broad range of issues, for example, risk management including key risk and compliance issues and emerging risks, remuneration, business and strategy updates, financial performance and forecasts, regulatory matters, employee engagement, and market and economic updates;
 - (d) the board papers contain information that is commercially sensitive to Westpac or its customers, and information that is fundamental to Westpac's business;
 - (e) Westpac treats its board papers internally in the following manner:
 - (i) historical board papers are stored by the Company Secretary in a secure file management system to which a limited number of Westpac employees have access;
 - (ii) ahead of each meeting, board papers are distributed or made available to Directors and, in some cases, a limited number of senior executives, via a secure board portal;
 - (iii) in some cases, board papers are distributed only to Directors through the secure Board portal and are not shared with Westpac's executive team. For example, Ms Fletcher was required to sign a non-disclosure agreement in order to obtain access to one of the board papers included in the Westpac Produced Material.
 - (f) the types of board papers that would be further restricted internally as described in paragraph (d)(iii) include board papers dealing with topics such as special internal projects, executive remuneration, succession planning, board performance, whistleblower matters and management accountability reviews;
 - (g) the Westpac Produced Material includes board papers and minutes addressing some of the topics listed at (f) above and other commercially sensitive information. Those board papers and minutes were produced not because the types of issues listed at (f) above were caught by the First or Second Notice, but because some other aspect of the document (for example an annexure or a limited portion of the minutes) was responsive to the First or Second Notice;



- (h) disclosure of the types of confidential information referred to in paragraph (f) above may result in damage to Westpac's commercial position; and
- (i) parts of the information contained in the Westpac Produced Material will not lose their commercial sensitivity over the period during which this proceeding is determined.

Access to documents under the current confidentiality regime

12. In my experience, in the event that access to the Westpac Produced Material is granted in accordance with the existing Confidentiality Regime, that would likely result in more than 50 solicitors, 10 barristers and 30 individuals engaged by independent expert and consultant firms (none of whom would be acting for Westpac) having access to the Westpac Produced Material.

Request to redact limited aspects of the Westpac Produced Material

13. I am informed by Ms Fletcher that:
- (a) Westpac accepts that the existing Confidentiality Regime, with the modifications that have been proposed by the Commonwealth Bank of Australia will provide protection for a large proportion of the Westpac Produced Material and Westpac APRA Material, even though that may result in a far larger number of people having access to that material than would have access to it within Westpac;
 - (b) there are a number of documents which are highly commercially sensitive and which Westpac is concerned would not be adequately protected under that regime, and any disclosure of which may cause damage to Westpac's commercial position. Those documents include the documents that I refer to at paragraph 11(f) above which are subject to special protections within Westpac's internal storage arrangements; and
 - (c) in holding that concern, Westpac acknowledges that any recipients would be required to sign a confidentiality undertaking. However, Westpac's concern arises in circumstances where access to those materials would become available to a large number and broad range of individuals and external firms.
14. As such, Westpac seeks directions which would permit:
- (a) Westpac to redact portions of documents which it assesses as being highly commercially sensitive and do not appear to be relevant to the present proceedings;
 - (b) the redacted versions would then replace the versions of the documents which would otherwise be produced by the ACCC in this proceeding; and

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- (c) an identified solicitor from the parties' external solicitors would be able to inspect the unredacted portions so that the parties may be satisfied that those portions are not relevant to this proceeding.

15. I am instructed by Ms Fletcher that, if Westpac were permitted to apply those redactions:

- (a) it would do so in a careful and considered manner and with the benefit of internal and/or external legal advice, with a view to ensuring that only parts of documents which are truly commercially sensitive, and which are unlikely to be relevant to the Proceedings are redacted; and
- (b) if required, it would provide to the Tribunal unredacted copies of the redacted documents with redacted portions marked, or a sample of those documents.

Amended Confidentiality Regime

16. Westpac has received a copy of the amended confidentiality regime proposed by the Commonwealth Bank of Australia and supports those amendments.

Sworn by the deponent
 at Sydney
 in New South Wales
 on 12 September 2023
 Before me:

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 Signature of deponent


 Signature of witness

Rosie Finlayson, solicitor