Westpac
Australia's First Bank

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The Secretary
Trade Practices Act Review
Department of the Treasury
Langton Crescent
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Email: TPAreview@treasury.gov.au

Dear Sir

Review of the Competition Provisions of the Trade Practices Act 1974

On 9 May 2002 the Commonwealth Government announced details of its review of the competition provisions of the Trade Practices Act 1974, and their administration. This letter constitutes Westpac Banking Corporation's response to the review committee's call for submissions.

Westpac's public position on competition policy

As indicated in its submission to the Wallis inquiry in January 1997, Westpac has been a strong public advocate of the view that competition policy is a vital component of the regulatory framework within which financial institutions operate. As such, competition policy should be applied to the banking and financial sector in an identical manner to its application to other industry sectors.

Westpac has also been an advocate of abolition of the Government's four pillars policy. While examining the merits of that proposal is outside the scope of the current review, this stance on the part of the Bank clearly demonstrates a willingness to accept competition policy embodied in the Trade Practices Act, as applied by the ACCC.

Westpac's willingness in this regard has been evidenced by its mergers with Challenge Bank and the Bank of Melbourne during the mid-nineties, and most recently by its sale of AGC to GE Capital. Further, Westpac has repeatedly expressed its intention to continue seeking

strategic growth opportunities in Australia, which it obviously expects will be subject to then-current competition policy as shaped by the current review.

Competition Policy – a global or a domestic focus?

Westpac's dealings with the ACCC in connection with the transactions mentioned above, and in connection with the implementation of the GST, have not given rise to serious concerns about the operation of the specific provisions of the Act, or the ACCC's administration of it.

They have led Westpac to conclude, however, that the ACCC's focus in administering the Act can be unduly biased towards a consideration of consumer protection considerations at the expense of those relating to market competitiveness, including competitiveness on an international level. If continued, this bias will not serve Australian consumers well as it will deny them the efficiency benefits of market restructuring consistent with the international marketplace. It will also see competition policy fall out of step with other Government initiatives - particularly in the area of trade for example - that are designed to secure Australia's position in the global arena.

Westpac was pleased to see the Government acknowledge these concerns in setting the review's terms of reference and stands ready to assist the review in seeking ways of addressing the concerns. One possible solution would be the introduction of an additional merger factor in s50(3) of the Act, requiring a consideration of dynamic characteristics in relevant segments of the international marketplace when determining the effect of an acquisition on competition in a market.

This submission

The joint challenge of responding to globalisation and building domestic social capital requires the ACCC to acknowledge some of the wider community benefits that result from rigorous competition conducted under light-handed regulation.

In this submission therefore, Westpac proposes to restrict its comments to those proposals for amendment to the Act that it believes are superfluous to the ACCC's role, either because there is no demonstrated need for change, or because it does not believe the proposals would enhance regulatory efficiency.

Those proposals are:

- the reversal of the onus of proof as to purpose in section 46
- the addition of an 'effects' test into section 46
- the introduction of divesture orders
- the introduction of cease and desist orders, and
- the introduction of criminal sanctions.

In opposing the first three of these proposals, Westpac endorses the reasoning set out in the respective "case[s] against" them, as summarised in the May 2002 Report of the Senate Legal and Constitutional References Committee "Inquiry into s46 and s50 of the Trade Practices Act 1974."

Westpac also objects to these proposals for the following reasons.

Reversal of the Onus of Proof as to Purpose

In its written submission to the Senate Inquiry, the ACCC described the process of discharging its current burden of proof as an "onerous forensic process". Given the grave reputational implications that flow from an allegation that a corporation has misused its market power for a proscribed purpose, Westpac believes that it is entirely appropriate that the party making the allegation should bear the burden of proving it. (In Westpac's view the price of any shift in the burden of proof should be clear sanctions against parties who make allegations of improper purpose that are subsequently demonstrated to have been without foundation).

The ACCC goes on to attribute the current difficulty of proving a proscribed purpose to the scarcity of "smoking gun" documents, however documentation is but one source of evidence, and the Act provides assistance by expressly allowing inferences to be drawn from conduct. An immediate alternative to reversing the onus of proof therefore would be to review the ACCC's investigatory powers/resourcing to ensure their adequacy for discovering other than documentary evidence from relevant sources within the allegedly offending corporation.

Finally, Westpac notes that one of the submissions to the Senate inquiry observed that the lack of successful prosecutions under s46 may actually be attributable to widespread compliance with the Act. Ultimately, Westpac believes that the heightened focus on corporate governance practices over the last few years is likely to have reduced the incidence of s46 breaches, and at the same time ensured the generation of corporate records suitable for establishing whether the concerted exercise of market power has been for appropriate purposes.

Introduction of an effects test

A number of respondents to the Senate inquiry expressed a concern that the incorporation of an effects test into s46 could adversely affect competition, because businesses would have no way of knowing in advance whether their conduct in a market could ultimately be shown to have had an anti-competitive effect. In Westpac's view, this regulatory uncertainty would significantly stifle innovation in the design and delivery of products and services, and lead many Australian businesses to opt for safety over boldness.

Introduction of divestiture orders

In its written submission to the Senate inquiry, the ACCC suggested that a divestiture power "would provide an appropriate structural remedy to overcome anti-competitive structural issues in the economy". The ACCC's submission suggests that the power could be used to rectify the "less than optimal performance" of a particular market, and would "reduce the need for ongoing regulation of a particular industry stemming from structural issues that result in anti-competitive conduct".

Westpac is concerned that these comments imply a degree of market intervention that neither the ACCC nor the courts are qualified to undertake. The submission claims support for the proposition from the "significant divestiture of publicly owned assets as a means of establishing competitive market structures as part of a broader reform process" that has taken place in Australia. In Westpac's view the voluntary divestiture of publicly held assets is entirely different from the mandatory divestiture of privately held assets.

While the ACCC proposes that a divestiture power should be looked upon as a 'reserve' power only, Westpac does not believe that a case has been made to demonstrate that existing powers under the Act have proven inadequate to deal with anti-competitive conduct in a market.

Normal market forces, including those that are customarily brought to bear following the imposition of severe regulatory sanctions upon an entity that has engaged in unlawful conduct, should determine the destiny of such an entity rather than the discretionary exercise of a 'reserve' power.

Introduction of cease and desist orders

Consistent with its view of divestiture powers, Westpac does not believe that an adequate case has been made out for the introduction of cease and desist orders.

Westpac has direct experience of having entered into exchanges of correspondence with the ACCC for the purpose of the ACCC forming a view on whether particular conduct may have contravened the Act. In these circumstances Westpac does not cease engaging in the relevant conduct while the ACCC conducts its deliberations, because such conduct is always based on considered legal and commercial analysis as to its lawfulness. As a practical matter, in almost all cases it would be extremely difficult to temporarily cease such conduct without creating significant customer service and business continuity impacts.

Westpac readily acknowledges the role of the Courts in granting injunctive relief to bring unlawful behaviour to a halt. Westpac does not see efficiency benefits in giving the ACCC quasi-judicial powers to conduct a similar degree of analysis on the question of whether a cease and desist order is warranted. Any lesser degree of analysis would compromise existing principles of justice and, as is the case for divestiture powers, Westpac has reservations about the ACCC's qualifications to make the relevant adjudication.

Introduction of criminal penalties

The Chairman of the ACCC has publicly stated his desire to see "the most serious, flagrant and profitable acts of collusion" made subject to criminal penalties, and to see Australia fall into line with the United States, Canada, Japan and South Korea in adopting 'the prison option".

Westpac does not believe that the issue of criminal sanctions should be ruled out from the review committee's deliberations. However, achieving comparability with international standards on competition law should be secondary to achieving comparability with the domestic standards that apply to ensure corporate accountability across the broader spectrum of corporate conduct. A primary aim therefore should be to seek consistency between the penalty provisions of the Act and those of the Corporations Act (as amended by the Financial Services Reform Act 2001), for example.

The review committee will be aware that the Commonwealth Attorney-General has asked the Australian Law Reform Commission to review the Commonwealth laws and arrangements relating to the imposition of administrative and civil penalties, and to report in November 2002. The Law Reform Commission has said that this reference will involve the setting out of general principles to cover such matters as:

> "the relationship between civil penalties and criminal liability in respect of the same conduct, including joint proceedings, double jeopardy, elections and bars to proceed".

This comment is suggestive of just some of the issues that need to be considered in harmonising penalty regimes. Westpac understands that the ACCC's thinking on the operation

of criminal penalties under the Act is relatively embryonic. Until the details of its proposals have been published, the review committee will be unable to determine the extent to which they properly fall within the committee's terms of reference, and the extent to which they are more appropriately addressed in another forum.

Conclusion

The review has stimulated enormous interest within the Australian business community, and Westpac will monitor developments over the coming months with considerable interest.

Should the review committee wish to speak with a representative from Westpac about this submission or any other matter pertaining to the review, they should contact Justin Moses, Head of Regulatory Affairs on 9216 0030 at first instance.

Yours sincerely