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21 December 2020

Commonwealth Competitive Neutrality Complaints Office
Locked Bag 3353
Belconnen ACT 2617

Re: Breach of Competitive Neutrality – The Australian Business Growth Fund

Dear Sir/Madam

I am writing to lodge a formal complaint with the Commonwealth Competitive Neutrality Complaints Office (***AGCNCO***) in relation to breaches of the Government's Competitive Neutrality Policy 1996 (the ***Competitive Neutrality Policy***) in connection with the Australian Business Growth Fund (***ABGF***).

We respectfully seek the AGCNCO's assistance through exercising its powers under the Productivity Commission Act 1998 including referring matters to the appropriate regulators. We reserve our rights in respect of all matters in this letter.

EXECUTIVE SUMMARY

- The ABGF is a substantial Government business, with a $100 million Government shareholding
- Under terms agreed with the banks, the Government caused its agency, APRA, to change prudential regulations for the purpose of lowering the cost of capital supplied by bank shareholders to the ABGF. This has the effect of lowering the ABGF's cost of capital to a fraction of the commercial cost of capital of competitors. This provides the ABGF with an unassailable competitive advantage in the market for financing equity investments in SMEs. The use of regulatory power to confer a commercial advantage on a Government business contravenes the Competitive Neutrality Policy.
- APRA has acknowledged it did not examine its regulatory change for competitive neutrality, as it was required to do under section 8 of the Australian Prudential Regulation Authority Act 1998 (***APRA Act***). APRA stated that it believed, erroneously, that competitive neutrality is a *"matter for the government"*. This is an astonishing abrogation of responsibility and a contravention of the APRA Act.
- Neither the Government, Treasury nor bank shareholders undertook a market analysis. We have. Over a 2-year period, 2017-2019, in Australia there was an average of 61 equity capital market transactions that raised an average total of $507 million within the universe of SMEs meeting the ABGF investment criteria. The shareholders have proposed that ABGF will invest $5-$15m in 30-50 SMEs of per year (a total of ~$400m per annum). That is, the ABGF is intending to take 50% - 85% of the market.
- In our view, and as set out below, the ABGF and its shareholders have contravened various provisions of Part IV of the Competition and Consumer Act 2010 (Cth) (***CCA***), including ss 45AF/45AG (the prohibition on cartels), 45 (prohibiting giving effect to arrangements for the purpose or effect of substantially lessening competition), and 46 (prohibition on misuse of market power).

The ABGF shareholders have chosen not to seek ACCC approval, despite, over the course of the 2½ years prior to the signing of shareholders agreement:

- We met with and explicitly informed senior NAB executives of the contraventions of the CCA.
- Shareholders were made aware of the contraventions more than a year ago via prominent articles in:
  - The Australian: Cosy plan will allow banks to cream off even more cash
  - The Australian Financial Review: Growth fund just another 'bank cartel' say critics

- We detailed breaches of the Competitive Neutrality Policy in hearings & submissions to a Senate Inquiry
- We drew all banks' attention to the competitive impact via a CBA shareholders' resolution
- We have continued throughout the process to transparently and extensively detail the detriment to a competitive market that the ABGF will cause with the Government and the bank shareholders in numerous meetings, emails, phone calls and presentations over the course of 2½ years. No action has been taken to mitigate or address any of these issues.

The shareholders' disinterest reveals a flagrant disregard for the Government's Competitive Neutrality Policy (1996), legislated balances within the APRA Act and Australia's competition laws.

OnMarket is an equity raising platform for large companies, SMEs that meet the ABGF criteria and start-ups. Equity raising for SMEs comprises most of our transactions and revenue. In the last 5 years, we have raised $125 million in equity from ~55,000 investors for 173 companies by working with 79 lead managers.

OnMarket has standing due to material financial losses it will suffer due to breaches by ABGF & shareholders:

- In April 2016, OnMarket issued 3 million ordinary shares at $1 per share to an institutional investor. With 132,478,100 shares and options on issue, this valued OnMarket at $132.5 million. The valuation did not include a control premium.
- The performance of OnMarket in the 5 years since its last valuation is reflected in client returns. Each OnMarket client that invested the same amount into each OnMarket listed deal & realised each investment after a standard holding period of 6 months has earnt a compound annual growth rate (CAGR) of 36.33% from inception to COB 4 Dec 20. An investor whose standard holding period was 1 month has earnt a CAGR of 45.74%. These returns have been independently calculated by Sharesight, & performance and its components have been published monthly on our website since inception.

The ABGF will destroy the OnMarket business through illegal cartel arrangements and its misuse of market power that enables it to cherry-pick the best SMEs by investing equity at a cost that is not commensurate with the investment risk.

1. Background – About the ABGF

The ABGF is a company limited by shares and incorporated under the Corporations Act 2001.
On 16 October 2020, the Liberal Party announced in a media release:

> *"The Australian Business Growth Fund (BGF) has been formally established, with the Shareholders Agreement now signed by all seven shareholders…*
>
> *"The Government is making an investment of $100 million and partnering with other financial institutions to provide equity funding to SMEs through the BGF. The major banks including ANZ, CBA, NAB, and Westpac have also each committed $100 million to the BGF. HSBC and Macquarie have also committed $20 million each in support of the BGF.*
>
> *This will give the BGF an initial investment capacity of $540 million, with the ambition to grow the fund to $1 billion as it matures."*

A media release by the Treasurer on the same date adds that the ABGF will:

- subscribe for $5-$15 million in equity for stakes of between 10-40% of total share capital
- in businesses that have generated $2- $100 million annual revenue with 3 years of revenue growth and profitability, allowing for the impact of COVID-19 on recent business performance.

The Shareholders Agreement has not been publicly disclosed, despite public funding of $100 million and the Government agreeing to grant ~$5 billion of prudential concessions and assurances by the CBA Chairman, immediately prior to a vote on the ABGF, to shareholders at CBA's AGM that it would be released by the Government.

2. Use of Government's regulatory power to confer a commercial advantage on the ABGF

2.1 Acknowledged reason for the regulatory concession

For 12 months from Nov 2018 - Nov 2019, despite Government cajoling, the large commercial banks resisted committing to invest in the ABGF. Apart from NAB. NAB's spokesperson has since been appointed CEO, and an ex-NAB, ex liberal party premier has been appointed as Chairman. Both these appointments raise concerning questions about conflicts of interest, discussed later.

On 27 November 2019, The Treasurer and the Minister for Employment, Skills, Small & Family Business released a media statement:

> *The Morrison Government has today announced that it has **agreed to terms** with the four major banks, HSBC and Macquarie Group to establish the Australian Business Growth Fund (BGF).*
>
> *[bold/underlining added]*

Eight business days later, Monday 9 December 2019, APRA released new prudential concessions for the banks in respect of their investment in the ABGF, and explicitly acknowledged the role of the Government in its decision to provide prudential concessions to the banks:

> *The inclusion of the Australian Government as a founding shareholder in the ABGF supports APRA providing a special treatment…*

The corollary is that, but for the Government's shareholding, APRA would not grant this new prudential concession. APRA has also specified that the concession will be exclusively for the ABGF. No other collective investment vehicle or direct investment in an SME qualifies for the concession; irrespective of whether the financial risk is equal to or less than the ABGF. The presence of the Government as a co-investor with the banks does not change the high-risk and illiquid nature of the underlying investments in SME equity.

It is clear that a *quid pro quo* exists where the banks and Government agreed that, in return for the Government procuring that APRA extend prudential concessions to the banks, the banks would invest in the Government's proposed ABGF.

It is self-evident that the terms that had been agreed included the APRA concessions and that these concessions conferred sufficient commercial advantage on the banks by reducing their cost of capital invested, and therefore the ABGF's cost of capital received, to be the definitive difference between the banks investing in the ABGF or not.

2.2 Acknowledged abrogation of legislated responsibility

In the Senate Economics Legislation Committee Inquiry (the ***Senate Inquiry***) hearing, APRA acknowledged that it was not APRA, but rather the Government "*that determined the structure and the approach for this fund and conducted consultation on it*".

APRA's purpose is set out in subsection 8(2) of the APRA Act:

> *In performing and exercising its functions and powers, APRA is to balance the objectives of financial safety and efficiency, competition, contestability and* ***competitive neutrality*** *and, in balancing these objectives, is to promote financial system stability in Australia.*
>
> *[Bold added]*

It is telling and disturbing that, in the Senate Inquiry hearing, the APRA executive director responsible acknowledged that APRA had not examined the impact of the change to prudential concessions with respect to competitive neutrality, and did not know that this is one of APRA's most fundamental responsibilities.

> *Senator PATRICK: We were talking before about some of these risk ratios and how much money the bank has to put in. The government has a competitive neutrality policy. Is it APRA's role to examine that—or is that a question outside of your remit?*
>
> *Ms Richards: I think it's outside of our remit. It was the government that determined the structure and the approach for this fund and conducted consultation on it, so our view is that those issues are more a matter for them.*
>
> *Hansard page 14*

Acknowledging its failure to perform its legislated duty before a Senate Inquiry hearing is an astonishing admission of abrogation of responsibility by this Government agency and a contravention of the APRA Act. No action or change to the ABGF concessions have been made to rectify this, despite 10 months passing since that statement.

3. <u>Significance of Government Advantages</u>

3.1 Explanation of APRA Ratios

Both APRA and Treasury testified, respectively, in the Senate Inquiry that *"it is not clear to us that there's necessarily any sort of competitive impact"* and "*the issue of competition is, I would say, exaggerated in this point, because APRA is not providing a significant subsidy to the banks"*. This section sets out a basic framework to assist those agencies to understand how changing prudential ratios has a competitive impact on other (non-ADI) participants in the financial system. We respectfully submit, based on our reading of the Productivity Commission's *Competition in the Australian Financial System Final Report* (see 5.2 of this letter), that the AGCNCO may already have this understanding.

ADIs (the banks) enjoy financial advantages not available to other commercial entities. The most notable of these is the capacity to take deposits, and that the Government guarantees depositor

funds up to $250,000. Because deposits are considered 'risk-free', deposits provide banks with the lowest cost of capital in the economy outside of sovereign debt and other forms of Govt support.

It is widely acknowledged that the major four banks enjoy an implicit guarantee that the Government would not allow any of them to fail in the event of a financial crisis. These guarantees significantly lower the cost of wholesale debt compared with other market participants.

As a trade-off for providing these huge benefits to a private-sector business, banks are governed by a prudential regime administered by APRA. Of all the prudential ratios that a bank must meet, the CET1 ratio is the most fundamental measure. The Australian Prudential Regulation Authority has announced its definition of unquestionably strong: *"the four major Australian banks need to have CET1 capital ratios of at least 10.5% to meet the 'unquestionably strong' benchmark" definition."*

CET1 ratio = Common Tier 1 Equity / Assets

A key purpose of the ratio is to ensure that the bank can always pay its depositors and provide confidence to creditors. Assets that are illiquid are treated as deduction to the numerator (i.e. a deduction to Common Equity Tier 1, in the calculation above), because they cannot be quickly realised to pay depositors and creditors. Unsurprisingly, prior to the APRA concessions, an investment in the ABGF (investing in high-risk, illiquid, minority stakes in SMEs) would have had a capital treatment of a deduction from Common Equity Tier 1 (CET1) Capital.

No major bank in Australia currently lends to investors that undertake the same business model as the ABGF (i.e. investing equity in 10-40% minority positions in high-risk SMEs with an indefinite holding period). All investments must be funded 100% through equity. That is, every competitor faces the same situation as the banks faced under the previous capital treatment (before APRA's concessions).

Less risky, and more liquid assets, such as mortgages, have a capital treatment of being added to the denominator of the CET1 ratio, after application of a specified risk-weighting. For example, consider a residential mortgage with a loan-to-value ratio (LVR) of 60-80% attracting a risk weighting of 35%. In this example, if a bank holds (lends) $100 in residential mortgages, then only $35 is added to the denominator above. This means a bank with $10 in Common Equity Tier 1 assets can lend $271.53 and satisfy a 10.5% CET1 ratio, calculated as follows:

Bank Common Equity	$10.00
Residential Mortgages	$271.53
Risk weight	35%
Risk-weighted assets	$95.04
CET1 ratio = ($10/$95.04)	10.5%

The mathematical calculation is such that an asset with a 952% risk-weighting has the same effect on achieving a CET1 Ratio of 10.5% as a deduction to equity. This is because 1 divided by 10.5% is 952%.

3.2 Explanation of APRA Concession – competitive impact

APRA's letter of Monday 9 December 2019 provided the following concessional prudential treatment:

> *An ADI that invests in the ABGF will be able to apply a risk weight of 250 per cent to their investment. This compares to the current capital treatment of a full deduction from Common Equity Tier 1 (CET1) Capital for these investments.*

Therefore, when the banks invest in the ABGF they only have to account for 26.25% against Common Equity Tier 1 assets, calculated as follows:

Risk-weighting attributed to ABGF investment	250%
Unquestionably strong CET1 ratio target	10.5%
Amount of investment in ABGF that is financed by Common Equity Tier 1 (250% x 10.5%)	26.25%
Balance (i.e. financed by wholesale debt, TFF, deposits etc)	73.75%

Typically, equity investments in SMEs have required an expected return on equity of +30%. OnMarket's own clients' performance of 36.33% (CAGR) over 172 investments over 5 years is indicative of the risk-weighted returns expected by the market. This reflects the risk and illiquidity of investments in SMEs.

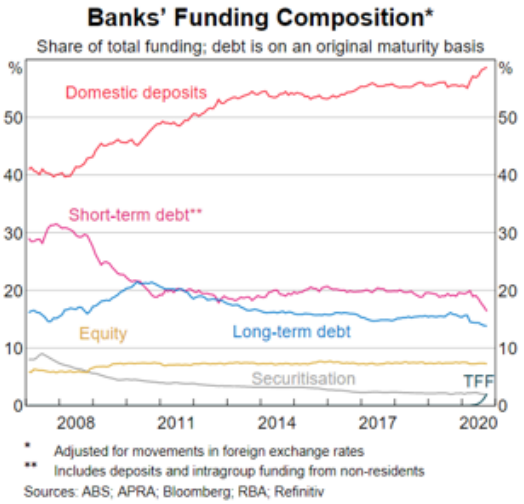
Other market participants are unable to obtain commercial loan funding for a vehicle that invests in minority positions in high-risk SME equities. Using 30% as an indicative benchmark for the cost of equity required to invest in SMEs, the weighted average cost of capital for competitors to the ABGF is calculated as follows:

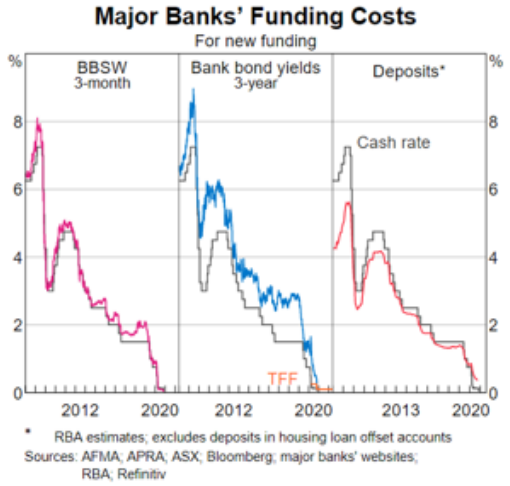
Competitors WACC = E/V * Ke + D/V * Kd * (1 - Tax) =100/100 x 30% + (0/100) x (1 - 30%) = 30%

In contrast, APRA's concessions enable the banks to finance the investment with only 26.25% equity, and the balance with Government guaranteed deposits, Government supplied debt, and an implicit Government guarantee. This substantially reduces/distorts the ABGF's cost of capital compared to commercial returns required by the market to invest in this asset class.

RBA stated in November 2020:

> *The RBA's package of policy measures has worked to lower banks' funding costs to historically low levels...Banks' non-equity funding costs are estimated to have declined by around 60 basis points between end February and end September. Much of the banks' wholesale debt and deposit costs are ultimately linked (either directly or via hedging) to BBSW rates, which have declined by around 75 basis points since the end of February. Low-cost funding from the TFF and deposit inflows have reduced banks' need to seek new wholesale funding, with the cost of new 3-year bank bonds remaining higher than the rate on TFF borrowing. The policy measures announced by the Reserve Bank in September and November are expected to further lower banks' funding costs over the period ahead.*





Assuming an average (across all the banks) long-term cost of equity to the banks of 12%, and a weighted cost of short-term debt, long-term debt, the Term Funding Facility (***TFF***) (provided by Government) and deposits (guaranteed by Government) of 0.25%, then the WACC for the bank portion of funding to the ABGF is:

Banks' WACC to ABGF = E/V * Ke + D/V * Kd * (1 – Tax) = 0.2625*12%+0.7675*0.1%*(0.7%)

= 3.15%

Government's WACC to ABGF = 0.1% (using the RBA's cash rate)

Banks' proportion of funding to ABGF = $440/$540 = 81.48%

Government's proportion of funding to ABGF = $100/$540 = 18.52%

ABGF WACC = 81.48% x 3.15% + 18.2% x 0.1% = 2.59%

The ABGF's doctored low cost of capital (2.59% vs a market rate of +30%) is only possible through the distortion of prudential ratios by APRA not correctly treating an investment in the ABGF as high-risk, illiquid equity. No private sector investee in SMEs can compete against this price distortion.

APRA has granted concessional treatment for up to 2% of CET1 capital. According to the Treasurer, as of 1 November 2020, ADIs held $247 billion in CET1 capital. This means the ABGF has access to ~$5 billion of concessional capital from the banks. Assuming the Government maintains its 18.5% stake, then the ABGF has access to total concessional capital of $5.85 billion.

4. The effects of advantages conferred by APRA and Government Funding

4.1 Effects on our business and/or private competitors more generally

As of 4 December 2020, since launch of its new facility in October 2015, OnMarket has completed 173 equity raisings, by offering the shares to Australian resident investors, and partnering with lead managers that span specialist advisers, medium-size brokers and large investment banks. From inception to 4 December 2020, an investor that invested the same amount into every transaction and sold at the 6-month closing price for each transaction would have earned a 36.33% compound money-weighted annualised return. These returns have been independently calculated by Sharesight and we have updated aggregated performance and its components on our website since inception, as the beginning of each month.

Per paragraph 3.2, the ABGF enjoys a cost of equity of 2.59%. The ABGF enjoys a 33.74% cost-of-capital advantage over the members of the public that may otherwise invest via OnMarket, or via

another intermediary. OnMarket IPOs are open to all Australians, without a fee, so the investors' average returns represent the average cost of equity capital to SME's.

The ABGF will be able to cherry-pick all the best SMEs. For example, consider an SME who, based on projected earnings and comparable multiples on exit is forecast to be worth $100 million in 5 years. This means a 10% holding is expected to be worth $10 million in 5 years.

For 10% equity, the ABGF can pay a maximum today of $8.8 million (based on discounting $10m by its distorted WACC of 2.59%) or mitigate its competitive impact. Compare this with a private sector participant who can pay a maximum of $2.7 million (based on discounting $10m by a truer cost of high-risk equity of say, 30%). This is not a bridgeable gap. Naturally, any SME would prefer to receive $8.8m for 10% of its equity rather than $2.7m.

Nothing about the way in which the ABGF has been structured will assist marginal SMEs to access equity. The ABGF is majority owned by profit-seeking, private-sector businesses, who will direct the ABGF to invest in the best SMEs. These SMEs already have the opportunity to access equity from private sector investors on commercial terms.

The ABGF will have the effect that other private-sector investors are not offered the opportunity to invest in the most promising, growing and profitable SMEs. The ABGF will create adverse stock selection for other investors. Only "ABGF-rejects" will be available for the public to invest in because, naturally, SMEs seeking equity will seek equity from the lowest cost provider (the ABGF) before seeking higher-cost equity from other private-sector investors.

Part 3.2 of this letter outlines the *average* returns to investors that invested the same amount into every OnMarket equity raising. However, it is important to note that the *median* return of all listed raisings via OnMarket since inception has been -8%. That means that the majority of SMEs, by number, that are financed actually lose money for the investors. However, the investments that are successful increase in value so much as to make it worthwhile for investors to keep risking their investment capital. In effect, success stories give investors the confidence, and returns, to continue to invest in risky SMEs. Removing competition by creating a dominant player that can cherry-pick the best SMEs will mean that other participants will be unable to continue to use those returns to attract finance for marginal SMEs.

The effect of the ABGF will be that our business & others that enable investment by the private sector in both the best SMEs and also marginal SMEs will not be sustainable. It would be unrealistic to expect that we, and other market participants, can continue to motivate investors to risk their capital by offering only "BGF rejects" when it is a small number of the best SMEs that create adequate risk-weighted returns. The ABGF will reduce the availability of equity finance for marginal SMEs. The ABGF will not achieve a public policy goal of increasing equity for SMEs that cannot currently access it and the ABGF will substantially lessen competition in the process.

4.2 Benefits of APRA concessions mostly retained by ABGF

On 16 October 2020, the first day that it was reported that the ABGF shareholders' agreement had been signed, the Australian reported "*The fund will target investment yields of up to 20 per cent*", amongst quotes from Mr Healy (the ex-NAB, inaugural CEO).

Twenty per cent returns enables the ABGF to undercut the competition, while still retaining excess returns for the bank shareholders (i.e. returns exceeding the 2.59% WACC). This is typical behaviour of a profit-driven monopolist. Due to implicit and explicit Government guarantees, their size, and the nature of their major business undertakings, the banks already have a cost of equity well below 20%. That is, each of the banks could have made excess returns without the APRA concessions, as it could have funded the ABGF from equity like other investors, rather than funding 73.75% from cheap wholesale debt and deposits. Even without the exclusive prudential concessions, a joint venture

comprising the major banks would have substantially lessened competition, as opposed to competing against one another.

The banks' initial investment utilised only $440 million of the ~$5 billion of APRA concessions. Even though the ABGF has only 1 employee, and no track record, office or operations, within a week of signing the shareholders' agreement, the Government expressed an ambition to double the size of the fund to $1 billion. Based on this conduct, it is reasonable to expect that, unconstrained, the ABGF, Government and banks will move as quickly as possible to exploit the full $5 billion of prudential concessions.

Consider the earlier example (in paragraph 4.1), where the ABGF and competitors hold the same investment thesis that a 10% stake in a prospective SME will be worth $10 million in 5 years. The ABGF can offer $4.0m for a 10% stake in the company (20% expected returns). Existing competitors can offer a maximum of $2.7m (~30% expected returns). Acting rationally, the SME will select the ABGF as its investor. The ABGF could offer up to $8.8 million (calculating its entry price by reference to its reduced cost of capital due to the APRA concessions, 2.59%), but instead keeps the difference ($4.8 million) from APRA's concessions and Government funding as excess profits.

The market competitors can lower their return expectations, but the ABGF can always continue to undercut, no matter how low the market competition goes. The distortions created by the ABGF will crowd-out private investment into SMEs, as rational investors in SMEs and intermediaries that facilitate them leave the market and allocate capital to lower risk investments that are expected to achieve the same financial return.

4.3 Observations about the UK BGF

Each of the shareholders has variously claimed that the ABGF is modelled on the UK BGF. Therefore, it is instructive to consider its behaviour.

4.3.1 Unrestrained growth

The growth of the UKBGF, enjoying similar prudential concessions but without direct Government investment as a shareholder, supports the proposition that the ABGF will be able to leverage its advantage to outcompete market competitors. The UK BGF was formed in 2011. In its 2019 Annual Report, the UKBGF states *"in 2019 we were ranked the most active investor globally in the growth/expansion segment, the leading firm in Europe for overall private equity deals, and the joint sixth most active investor in the world by deal count".* The UKBGF has outgrown the private SME market for which it was established: not only does it invest in companies listed on the UK's AIM market, according to its 2019 Annual Report it is *"the largest small cap investor in the UK in the sub £100 million market cap sector*". Having outgrown its original mandate to invest in the unlisted SME market, the UK BGF now also extends into adjacent markets: early stage ventures (i.e. "start-ups") and quoted companies (i.e. listed companies). It has also extended its geographical footprint to be "*the most active investor in Europe…for overall private equity deals"* (2019 Annual Report).

4.3.2 Empire building

The UK BGF's non-executive directors have been paid an astonishing ~AUD$29 million in the 9 years since the UK BGF was formed, representing 8.4% of the total employee costs. Employee numbers have grown every year from 26 (31 Dec 2011) to 173 (31 Dec 2019). Employee costs were ~AUD$347 million over this period.

UK BGF - Operating Expenses (£)				
	Staff Costs	**Premises Costs**	**Other Total Costs**	**Total**
2019	33,405,000	3,312,000	10,574,000	47,293,019
2018	34,477,000	2,910,000	9,131,000	46,520,018
2017	27,429,000	2,356,000	7,435,000	37,222,017
2016	24,844,000	2,281,000	5,852,000	32,979,016
2015	21,730,000	not disclosed	6,955,000	28,687,015
2014	18,426,000	not disclosed	5,750,000	24,178,014
2013	14,471,000	not disclosed	4,921,000	19,394,013
2012	11,966,000	not disclosed	4,238,000	16,206,012
2011	4,079,000	not disclosed	8,249,000	12,330,011
Total				**£264,809,135**

UK BGF -Operating Expenses ($AUD)				
	Staff Costs	**Premises Costs**	**Other Total Costs**	**Total**
2019	60,690,204	6,017,242	19,210,843	85,921,957
2018	62,637,814	5,286,888	16,589,201	84,517,569
2017	49,833,007	4,280,381	13,507,908	67,624,960
2016	45,136,579	4,144,121	10,631,914	59,916,276
2015	39,479,064	not disclosed	12,635,844	52,118,569
2014	33,476,357	not disclosed	10,446,600	43,926,616
2013	26,290,913	not disclosed	8,940,473	35,235,043
2012	21,739,829	not disclosed	7,699,598	29,443,083
2011	7,410,727	not disclosed	14,986,783	22,401,164
Total				**AUD $481,105,236**

£/AUD exchange rate: source xe.com on 6 December 2020

4.3.3 Overpaid insiders

The UKBGF CEO alone has extracted over AUD$16 million in wages over the last 9 years. In addition to this, it is unclear from the Annual Reports how much additional remuneration the CEO will earn under the Long-Term Incentive Plan.

The UKBGF CEO was paid £1.2m (AUD $2.15) in 2018 and £1.8 million (AUD $3.3m) in 2019. This represented 2.5% of the UKBGF OPEX in 2019 and 3.9% in 2018. To put this in context, the CBA CEO was paid $3.9m in FY2020, a mere 0.04% of CBA's OPEX. On a measure of proportion of OPEX, the UKBGF CEO is paid up to 100 times the CBA CEO. Or, measured by employees, where CBA has a 48,167 employee headcount, the UKBGF has a 175 employee headcount. The CBA CEO was paid $81 per employee. The UKBGF CEO was paid $12,423 per employee in 2019 and $20,847 per employee in 2018.

It would appear that the UK BGF leadership is given a mandate to reward the CEO, NEDs, employees, and finance growth, without reference to providing risk-weighted investment returns on the capital invested. With so much of the UK BGF's capital and returns being used for remunerate the board, senior management and for empire building, is it any wonder that the leadership of Australian banks

and politicians think that the UK BGF is a good model to follow? The ABGF will be a lucrative place for bank executives and politicians to retire without accountability to anyone but friends who can aspire to feed at the same trough.

The UK BGF appears to have an agency problem. The majority of the board of directors are ex-employees or directors of the bank shareholders or the Government. This has the appearance of the bank and Government shareholders giving 'plum jobs' to reward executives in a subsidiary that is not subject to the governance and oversight by a single majority shareholder, limited public accountability and where no major shareholder has to consolidate the performance of the UK BGF in its accounts.

4.3.4 Copying bad behaviour

The ABGF appears to have made early headway in this regard with its first appointments. It is not surprising that the inaugural CEO and Chairman are insiders, having worked for NAB and as senior members of the Liberal party, respectively. Neither appear to have experience in investing equity in SMEs. The ABGF is excluded from reporting under the Public Governance, Performance and Accountability Act 2013. No shareholder owns more than 20%. Consequently, the banks will only show the investment in the ABGF at cost in their accounts. The ABGF has been structured to avoid accountability.

The dramatic growth of the UKBGF to be the largest investor in SMEs in the world is indicative of a failure of competition due to an uneven playing field. The bank shareholders and Government are seeking to replicate this failure in Australia. While it is unclear whether the benefits of the ABGF monopolising the investment market in Australian SMEs will flow through to ordinary shareholders of the banks, it appears most likely that it will benefit insiders who are rewarded with roles on the board or senior management of the ABGF, with lucrative compensation and minimal accountability.

5. Other avenues we have pursued

5.1 2 ½ years of attempted consultation

Over the course of 2 ½ years, we have tried to engage with the shareholders and explain the negative effect of the proposed ABGF on a competitive market on the issue of the ABGF via the following channels and means:

- Pre-emptive discussions with Treasury, 6 months before policy announcement
- Meetings with Treasury, APRA, RBA, ASBFEO, and the Treasurer's senior adviser
- Offering multiple times to meet with the Treasurer
- Meetings with NAB, CBA, Westpac, HSBC, and the Future Fund
- Meetings with Senators and MPs in Canberra
- Public submission to Treasury (despite them shortening the public consultation period to 4 days)
- Appearance at the Senate Inquiry hearing (despite them providing only 2 days' notice)
- Five publicly available written submissions to Senate Inquiry (we had 1 week between the public inquiry and its reporting date)
- Preparation of a legislative amendment
- CBA s249N shareholder resolution from >100 CBA Shareholders

A timeline of key events that resulted in numerous meetings, emails, telephone calls and presentations is contained in the Annexures. The correspondence, file notes and presentations are too voluminous to annex to this letter, so we have established a secure online dataroom for the AGCNCO. Access details will be provided by telephone on request.

Our attempts to raise competition concerns have been met with an established pattern of misleading and deceptive conduct, which is summarised in the Annexures. This conduct, by Government agencies, led to false statements being used to support the ABGF in Parliamentary and Senate debates. At no stage has the Government made any attempt to correct the false statements, take genuine steps to achieve competitive neutrality, ameliorate the negative competitive impact, seek ACCC approval or assess the alternative proposal that we have explained in detail.

5.2 Competition in the Australian Financial System - Final Inquiry Report

We note that the Productivity Commission's Competition in the Australian Financial System Final Inquiry Report was handed to the Australian Government on 29 June 2018 and tabled on 3 August 2018, and that there has not been a government response to the Final Report yet. We have much in common. We first provided a written recommendation to Treasury in April 2018 (6 months prior to the first announcement of the ABGF policy) setting out an alternative structure and have also yet to get a response (other than to hear from Treasury at the Senate Inquiry that, 2 years on, they had not looked at it).

If the Government had read the Productivity Commission's Final Report, it may have recognised the Productivity Commission's page 1 recommendation that:

> *"More nuance in the design of APRA's prudential measures — both in risk weightings and in directions to authorised deposit-taking institutions — is essential to lessen market power"*

It is telling that, on no less than 4 occasions at the Senate Inquiry, Treasury blithely rejected the Productivity Commission's recommendation:

> *"I want to address this issue about the concept of subsidy that APRA is providing to the fund. As APRA said, they are providing a risk-weighted capital ratio to the fund that is less onerous than the one that exists for equity investments at the moment. The one that exists at the moment is effectively that, if an institution invests in an equity product, it has to put up capital equal to that amount. The risk-weighted asset ratio that APRA is applying at the moment allows them to put up 25 per cent, effectively, of equity against that…*
>
> *"So, the concept of a subsidy and cheap financing, I think, is incorrect…*
>
> *"the work that APRA has done is not to provide a significant subsidy to the banks, and the way that the fund is being structured is to enable other investors to come in over time and provide additional sources of funding. So, the fund is not closed to other investors. There is an opportunity for others to enter the fund.*
>
> *"As I said, the issue of competition is, I would say, exaggerated in this point, because APRA is not providing a significant subsidy to the banks"*

It is difficult reconcile Treasury's flawed submissions to the Senate Inquiry with its ostensible purpose "to support and implement informed decisions on policies". It would appear that Treasury considered its role in advising the Senate Inquiry to be to support partisan political objectives. Even the simplest analysis (see section 3 of this letter) shows the competitive advantage conferred on the ABGF by the APRA concessions.

We recognise the distinction between anti-competitive conduct and competitive neutrality and note the Productivity Commission's observation that:

"markets may be competitively neutral and yet impede innovation and effective competition (evenly) across all players."

Inquiry Report: Competition in the Australian Financial System (2018)

Markets that are not competitively neutral do impede innovation and effective competition.

The Productivity Commission's Final Inquiry Report correctly stated that: *"APRA is already required to consider competition alongside a number of other factors in the pursuit of financial stability."* As noted in Part 2.2 of this letter, APRA has acknowledged that it did not have regard to competition issues with respect to the $5 billion in prudential concessions that it granted exclusively to the ABGF. It is significant to note that the Productivity Commission recognised that APRA is "*required"* to consider competition. APRA has not been granted discretion to fail to consider competitive effects and competitive neutrality implications when setting prudential standards simply because the Government of the day wants to win political points.

5.3 Concerns about the lack of impartiality of certain Government agencies

We have the greatest respect for the ACCC and have no reason to suggest or believe that they will not impartially apply the full force of the law to all the shareholders, including the Government. However, our confidence in Government agencies to undertake their roles free of political interference have been greatly undermined by the actions of Treasury and APRA, as described in more detail in the Annexures and data room.

We respectfully seek the Productivity Commission use its extensive powers to refer the following contraventions of the Competition and Consumer Act 2010 (Cth) to the ACCC.

6. Breaches of the Competition and Consumer Act 2010 (Cth)

6.1 Defining the market

There is clearly a market in Australian for the provision of equity finance for growing and profitable SMEs. OnMarket is one of many participants that facilitates that market. The ABGF proposes to also service that market. Conveniently, the boundaries of the market can be defined by reference to the investment criteria adopted by the ABGF.

> *The Government is making an investment of $100 million and partnering with other financial institutions to provide equity funding to SMEs through the BGF.*
>
> *Established Australian businesses will be eligible to apply for long-term equity capital* ***investments between $5 million and $15 million****, where they have generated* ***annual revenue between $2 million and $100 million*** ***and*** *can demonstrate* ***three years of revenue growth*** ***and*** ***profitability****, allowing for the impact of COVID-19 on recent business performance.*
> *…*
> *The BGF's investment will constitute a minority economic interest of typically between* ***10-40%*** *of total, fully-diluted, share capital (on an 'as-converted' basis).*
>
> [Treasurer's media release of 16 October 2020 – bold/underlining added]

The four 4 elements (the ***ABGF Investment Criteria***) that describe companies within the market for equity finance for growing and profitable SMEs are:

1. companies seeking $5-$15 million, in exchange for 10-40% of fully-diluted share capital (i.e. companies with a post-money implied valuation between $12.5m - $150m)
2. annual revenue of $2-$100 million
3. three years of revenue growth; **and**
4. profitability.

At the Senate Inquiry hearing, Treasury falsely implied that that the ABGF had the RBA's support: *"We've looked at the same issues that the Reserve Bank of Australia has looked at and the ombudsman has looked at, and we strongly endorse the conclusions that they've come to".* RBA confirmed to me in writing that they had not undertaken any studies of the SME equity market (as opposed to the availability of credit/loan finance), nor given a recommendation of the ABGF.

OnMarket's independent research of equity capital raisings in Australia from 2017 - 2019 identified:

- a total of 704 equity capital raising transactions, of which 123 met the ABGF Investment Criteria
- the average raising size was $8.3 million.

This means the annual Australian market comprised:

- 61 SMEs per year
- $508 million pa in total capital raised.

The Government has announced that the ABGF will invest $5-$15 million in 30-50 SMEs per year. This implies the ABGF intends to invest approximately $400 million per year ($10m x 40 investments).

That is, the expressed intention of the ABGF is to take:

- **~50% - 82% of the existing market** (by number of SMEs funded)
- **~80% of the existing market** (by value funded).

The data room contains our detailed market analysis, including a list of all transactions, revenue, profitability, amount raised and growth.

6.2 Contract, arrangement or understanding

The first element of a contravention of ss 45AD, 45 and 46 of the Competition and Consumer Act 2010 (Cth) (***CCA***) is the existence of a contract, arrangement or understanding (***CAU***).

On 27 November 2019, The Treasurer and the Minister for Employment, Skills, Small & Family Business published a media release (see annexure D).

> *The Morrison Government has today announced that it has **agreed to terms** with the four major banks, HSBC and Macquarie Group to establish the Australian Business Growth Fund (BGF).*
>
> *[bold/underlining added]*

Eight business days later, Monday 9 December 2019, APRA released new prudential concessions for the banks in respect of their investment in the ABGF, and explicitly acknowledged the role of the Government in providing prudential concessions to the banks:

> *The inclusion of the Australian Government as a founding shareholder in the ABGF supports APRA providing a special treatment…*

APRA's letter also confirmed the concessional prudential treatment would not extend to any other collective investment vehicle in SMEs, or any other direct investment by the banks in an SME, other than the Australian Business Growth Fund.

> *"The capital treatment outlined in this letter is available to all ADIs that invest in **the** ABGF"*
>
> [as defined, bold/underlining added]

The contemporaneous timing of the banks' agreement to invest, the Government's media releases and meetings with APRA and the banks, and APRA's revised policy announcement makes it clear that a "meeting of minds" exists between the shareholders that:

a) the Government, through its agency APRA, would provide concessional prudential treatment to the banks in relation to their investment in the ABGF up to 2% of the $247 billion of CET1 capital (***Prudential Concessions***); and

b) these Prudential Concessions would ***only*** be provided in respect of investments in the ABGF (the ***Exclusivity Provision***); and

c) in return, the banks would initially invest $440 million in the ABGF and the Government $100 million, as shareholders.

It is not necessary to have direct evidence of these matters to establish the existence of an arrangement or understanding – the arrangement of understanding may be inferred from surrounding circumstances.

In our view it is clear that the element of an CAU between the ABGF shareholders has been satisfied.

6.3 Breach of Section 45AF/45AG

6.3.1 The cartel offence

Section 45AF/45AG prohibit making or giving effect to an agreement containing a cartel provision (as defined in s 45AD). The formation of cartel agreements, is prohibited per se. It is a criminal offence, and also exposes the contraveners to a civil penalty. It is a breach of the law to:

a) make a contract or arrangement or arrive at an understanding containing a cartel provision (ss 45AF and 45AJ); or

b) give effect to a cartel provision in a contract, arrangement or understanding (ss 45AG and 45AK).

6.3.2 The cartel provision

After a CAU has been established, the second element of a contravention is that the CAU contains a cartel provision. For the purposes of the CCA, a provision is a cartel provision if, relevantly (s 45AD(1)):

a) either of the following conditions is satisfied in relation to the provision:
   i. the purpose/effect condition set out in subsection (2);
   ii. the purpose condition set out in subsection (3); and
b) the competition condition set out in subsection (4) is satisfied in relation to the provision.

The "purpose/effect condition" is defined in s 45AD(2):

> *The purpose/effect condition is satisfied if the provision has the purpose, or has or is likely to have the effect, of directly or indirectly:*
>
> *a) fixing, controlling or maintaining; or*
> *b) providing for the fixing, controlling or maintaining of;*
>
> *the price for, or a discount, allowance, rebate or credit in relation to:*
>
> *c) goods or services supplied, or likely to be supplied, by any or all of the parties to the contract, arrangement or understanding; or*
> *d) goods or services acquired, or likely to be acquired, by any or all of the parties to the contract, arrangement or understanding;*

The "purpose condition" is defined in s 45AD(3) to include, relevantly:

> *The purpose condition is satisfied if the provision has the purpose of directly or indirectly:*
>
> *a) preventing, restricting or limiting:*
> *…*
> *(iii) the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding*
> *…*
> *b) allocating between any or all of the parties to the contract, arrangement or understanding:*
> *…*
> *(i) the persons or classes of persons who have acquired, or who are likely to acquire, goods or services from any or all of the parties to the contract, arrangement or understanding;*
> *…*

Contraventions satisfying the purpose/effect condition are commonly referred to as "price fixing contraventions". Contraventions satisfying the purpose condition are referred to as "market sharing contraventions".

It is apparent that the banks agreed to participate in the ABGF as a *quid pro quo* for the Government procuring that APRA provide the Prudential Concessions and the Exclusivity Provision.

The Prudential Concessions have the effect of distorting the market for the supply of equity capital to growing and profitable SMEs:

- the ABGF's cost of capital is significantly lower than any other participant in the market for the supply of equity capital to SMEs
- the ABGF's significantly lower cost of capital means that it can afford to supply equity capital to SMEs on more favourable terms (including as to price) than any other participant in the market for the supply of equity capital to SMEs

- the purpose of the ABGF is described to deliver "patient capital", see 6.5.3 of this letter (defined as seeking a lower *rate of return* than commercial investors would require or accept)
- in practical terms, the ability to supply equity capital to SMEs on more favourable terms (including as to price) means that SMEs will only acquire equity capital from the ABGF; and
- the ABGF will become the dominant, if not exclusive, participant in the market for the supply of equity capital to SMEs, and able to engage in monopolistic behaviour.

The Prudential Concessions allow ADIs to invest up to 2% of CET1 capital in the ABGF. On 1 November 2020, ADI held approximately $247 billion in CET1 capital. Hence, the ABGF can access $5 billion of Prudential Concessions from bank shareholders and, assuming the Government maintains its shareholding, another $1 billion from Government.

The market size is approximately $500 million per year (see 6.1 of this letter). The ABGF has access to $6 billion of concessional capital. This means the ABGF can supply 100% of the current market for 12 years. The ABGF has expressed its intention to supply $400m of capital (80% of the market) per year. At a rate of 80% market share, the ABGF has 15 years supply of capital and can cherry-pick the best SMEs, leaving only loss-making investments in SMEs for other market participants.

With an expressed intention to distort market prices (see 6.5.3 of this letter), and the financial capacity to do so for up to 15 years, it is our view that Prudential Concessions will have the *effect* that the ABGF can *fix, control or maintain* the price of equity in the market for investing in growing and profitable SMEs.

6.3.3 The competition condition

Finally, the last element of the contravention is the "competition condition" as defined in s45AD(4):

> *The competition condition is satisfied if at least 2 of the parties to the contract, arrangement or understanding:*
>
> *a) are or are likely to be; or*
> *b) but for any contract, arrangement or understanding, would be or would be likely to be;*
>
> *in competition with each other in relation to:*
>
> *c) if subparagraph (2)(c) or (3)(b) applies in relation to a supply, or likely supply, of goods or services – the supply of those goods or services in trade or commerce ....*

The dominant, if not sole, *purpose* of the Financial Concession is to lower the cost of capital of the ABGF below the market price required to invest in minority equity positions in SMEs. The purpose of the ABGF is described to deliver "patient capital", see 6.5.3 (to effectively seek a lower *rate of return* than commercial investors would require or accept).

The *effect* of the Financial Concession will be to provide a systemic significant advantage in the cost of capital, created via regulatory distortion, for a business whose main purpose is to supply capital downstream. This places the ABGF at a permanent advantage over all market competitors that do not share such an advantage. It is likely (see below for a discussion on the meaning of this term) that the Prudential Concessions will cause competing businesses and investors that seek to obtain a commercial rate of return commensurate with the risk of investing in SMEs to fail, due to lack of investments, or leave the market to obtain commercial returns in other less-risky asset classes. The absence of a level playing field will result in significantly less competition in the market.

The dominant, if not sole, *purpose* of the Exclusivity Provision is to cause any ADI that proposes to invest in a collective investment vehicle (that has the purpose of investing in SME equity) to do so via

the ABGF, rather than in competition to it. i.e. but for the Exclusivity Provision, banks would otherwise be likely to be in competition.

The *effect* of the Exclusivity Provision is to create a commercial imperative that any bank (including current and any potential future shareholders) that wishes to participate in the market for funding SME equity only does so via the ABGF. To invest in SMEs via another vehicle, or directly, would cause such bank to incur a capital charge against CET1 equity 4x an investment of the same size in the ABGF.

Investments in specific financial services businesses that offer strategic value to a bank's operations (i.e. not SMEs generally) that outweigh the benefits of Prudential Concessions may be an exception to this rule.

In our opinion, the better view is that the Prudential Concession amounts to a price fixing contravention, and the Exclusivity Provision amounts to a market sharing contravention.

6.3.4 Potential exemptions

There are a number of exemptions to the cartel prohibition. Relevantly, these include the joint venture exemption. Separately, ss 45AO and 45AP provide an exemption from the cartel prohibition for joint ventures. In order to be exempt, from 7 Nov 2017 the cartel provision in the CAU must be:

a) *for the purpose of a joint venture; and*
b) *reasonably necessary for undertaking the joint venture.*

The prior history of ANZ operating a fund for investing in SMEs provides a strong evidentiary basis that the Prudential Concessions and the Exclusivity Provision are not "reasonably necessary" for undertaking the joint venture.

The ABGF could as easily continue if any ADI, including the shareholders, were willing to invest 100% CET1 capital. In our opinion, it is unlikely that the court will accord any weight to ADIs having a greater need to fund their investments from sources other than equity, than other market participants, for whom funding from equity is market practice.

The Exclusivity Provision does not appear to be reasonably necessary for undertaking the joint venture either. The ABGF could as easily continue if any ADI, including the shareholders, were eligible for the prudential concession for investments either directly in SMEs, or via a collective investment vehicle, that competes with the ABGF.

When a joint venture defence was introduced in 2006, the Explanatory Memorandum stated at [76]:

> *Section 4J defines a joint venture to be 'an activity in trade or commerce…carried on jointly by two or more persons' or 'an activity in trade or commerce…carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly'. Satisfying this requirement will ordinarily require the parties to provide evidence that the activity in question is separable from the activities they are individually engaged in and evidence of each party's contribution to that activity, for example, the capital or skill.*

In the case of the ABGF, each of the shareholders are, in their own capacity, amongst the largest financial services businesses in Australia, each with access to considerable amounts of CET1 capital. Further, through access to deep listed equity capital markets, these businesses have demonstrated that they can access more CET1 capital on demand. A joint venture (let alone the Prudential Concessions and the Exclusivity Provision) is not necessary for the banks to access the capital required to enter the SME equity market. They may find it commercially desirable to have less competition and a lower distorted WACC, but this would not form a basis for satisfying the exemption.

In our opinion, the better view is that the Prudential Concessions and the Exclusivity Provision do not satisfy the requirements of ss45AO and 45AP and the exemptions will not apply.

6.4 Breach of Section 45

Section 45 of the CCA prohibits engaging in a concerted practice that has the purpose or likely effect of substantially lessening competition.

Section 45(1) of the CCA relevantly provides:

> *A corporation must not:*
> *a) make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition; or*
> *b) give effect to a provision of a contract, arrangement or understanding, if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition; or*
> *c) engage with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect, of substantially lessening competition.*

The Exclusivity Provision and the Prudential Concessions may be considered both separately and collectively to assess the impact on competition. The ACCC and courts have tended to adopt a framework which looks at the likely state of competition "with" the impugned conduct, and compares it to the likely state of competition "without" the impugned conduct (sometimes called the counterfactual), to assess whether the conduct is likely to have the effect of substantially lessening the level of competition that would otherwise occur.

Some of the key articulations of the "with and without" framework by Australian courts and tribunals were developed in the authorisation context, where proposed conduct is evaluated. As a result, when articulating the test, courts and tribunals necessarily focused on the future with and without the proposed conduct. In the context of alleged anti-competitive conduct, existing and past conduct is often under examination, meaning the test will not necessarily be forward looking from the point at which the assessment is being conducted, but rather needs to assess the impact on competition from the time the relevant conduct occurred.

The question to be considered is not whether the ABGF can offer a lower the cost of capital for those SMEs that receive the benefit of concessional funding. The question is whether the conduct will substantially lessen competition in the market for equity in growing and profitable SMEs (noting that the boundaries of the market have been described by the ABGF's Investment Criteria).

But for the Exclusivity Provision, it is likely that the commercial banks, if they chose to finance SME equity, would be in vigorous competition with each other, as they do in most other financial services (e.g. commercial loans, housing loans, personal loans, credit cards). ANZ previously operated an SME equity fund (2007-2013), without the Prudential Concessions. The counterfactual is to consider whether, the commercial banks would individually enter the market in the absence of the Exclusivity Provision, but with the Prudential Concessions. The prior activities of ANZ provide a strong evidentiary basis for this proposition.

The shareholders of the ABGF comprise the largest commercial banks in Australia and the Australian Government. Even without the Prudential Concessions and the Exclusivity Provision, these shareholders, via operating the majority of banking functions in Australia, have unrivalled access to financial information and performance of prospective SMEs. While we note that the Government has stated that the ABGF will operate independently of its shareholders, we are not aware of any restrictions on the shareholders using their extensive banking operations to refer customers to the ABGF, their investment, for growth equity. Even without the Prudential Concessions and the Exclusivity Provision, the bank's equity capital costs will be lower than competitors whose dominant business is providing equity to SMEs.

It is not unreasonable to posit that competitors will leave a market where a financially dominant new entrant enjoys a permanent cost-of-capital advantage (where capital is the main input required to supply the market). While the Prudential Concessions and Exclusivity Provisions most certainly provide a significant cost-of-capital advantage, these are not the only meaningful advantage attributable to a joint venture between the 4 largest commercial banks in Australia, plus the 4th largest bank in the world, plus Australia's largest investment bank, plus the Australian Government.

A strong case can be made that a joint-venture between 6 of the largest banks in Australia and the Australian Government formed for the purpose of providing capital to SMEs at a price less than commercial rates, and with access concessional capital treatment equivalent to 12 years of the entire market supply is likely to have a significant impact on current market participants capacity to continue to compete in the market.

In our opinion, the better view is that each of the Prudential Concessions, the Exclusivity Provision, and the agreement between the banks and the Government to jointly invest in the ABGF contravene section 45 of the CCA.

6.5 Breach of Section 46

Section 46 of the CCA prohibits a corporation that has a substantial degree of market power in a market from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in:

a) *that market; or*
b) *any other market in which that corporation or a related body corporate supplies or acquires, or is likely to supply or acquire, goods or services (whether directly or indirectly).*

6.5.1 Substantial Market Power

Market power is the power to act for a sustained period in a manner unconstrained by competitors. "Substantial" in the context of a substantial degree of market power means "considerable or large".

Section 46(4) relevantly provides:

> *(4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate have in a market:*
>
> *…*
>
> *(b) regard may be had to the power the body corporate or bodies corporate have in that market that results from:*
>
> *(i) any contracts, arrangements or understandings that the body corporate or bodies corporate have with another party or other parties; or*
>
> *(ii) any proposed contracts, arrangements or understandings that the body corporate or bodies corporate may have with another party or other parties.*

In determining whether or not each bank shareholder has substantial market power for the prohibition to apply, the position in the relevant market of the shareholders together is to be considered. Each of the shareholders have a CAU in relation to the relevant conduct, forming the ABGF as an incorporated joint venture. The test is not whether ANZ, CBA, NAB, Westpac, Macquarie and HSBC individually have substantial market power, but whether they collectively do.

The bank shareholders are the major competitors to one another in the provision of most financial services. However, the Exclusivity Provision ensures that they will not compete in the market for providing equity to growing and profitable SMEs. It is likely that the court would find that the big four

commercial banks, plus Macquarie and HSBC, collectively, hold substantial market power in an upstream market, irrespective of whether that market for finance is defined broadly or narrowly.

The ultimate determinant of market power is barriers to entry. In the case of non-bank investors, it would not be rational to enter, or continue in, the market if the returns from investing in high-risk SMEs are, through the actions of the ABGF, pushed below the rate of return that could be earned from investing in a less risky asset class. The absence of lending to finance high-risk investments is a barrier to entry.

In the case of investors that are ADIs, it would not be rational to compete against the ABGF, with a capital treatment that results in approximately four times the charge against CET1 equity, versus co-investing in the ABGF and receiving economic exposure to the same underlying asset class.

The banks are using their market power in an upstream market to obtain cheap wholesale debt and deposits, backed by implicit and explicit Government guarantees, to fund their (collective) subsidiary in the downstream market that provides equity finance to SMEs. At the same time, the banks refuse to supply finance on comparable terms to potential competitors to the ABGF.

6.5.2 Purpose, effect or likely effect of substantially lessening competition

The Prudential Concessions appear to have been provided as a financial inducement to the banks to invest in the ABGF. APRA stated in its letter titled "Capital treatment of investments in the Australian Business Growth Fund" of Monday 9 December 2019 that "*This revised treatment recognises the wider financial system benefits from increasing access to financing for SMEs."*

At the Senate Inquiry on Thursday 13 February 2020, Ms Heidi Richards, Executive Director, Policy and Advice, Australian Prudential Regulation Authority stated the following:

> *Ms Richards: We only regulate banks and we've applied a capital treatment that we think is appropriate given the risks. We don't impose capital requirements on any other participant. I guess it's not clear to us that there's necessarily any sort of competitive impact.*
>
> *Senator PATRICK: We were talking before about some of these risk ratios and how much money the bank has to put in. The government has a competitive neutrality policy. Is it APRA's role to examine that—or is that a question outside of your remit?*
>
> *Ms Richards: I think it's outside of our remit.*
>
> [Hansard at p14]

It would seem unlikely that the court would find that the *purpose* of the Prudential Concessions is to *substantially lessen competition* (even if that is their *effect*).

On the other hand, the purpose of the Exclusivity Provision is another matter. The presence of the Government as a shareholder was provided as the reason in APRA's letter of 9 December 2020:

> *The inclusion of the Australian Government as a founding shareholder in the ABGF supports APRA providing a special treatment, subject to prudential safeguards, for this investment compared to other equity investments.*

Ms Richards presented to the Senate Inquiry that:

> *Ms Richards: It was the government that determined the structure and the approach for this fund and conducted consultation on it, so our view is that those issues are more a matter for them.*
>
> [Hansard at p14]

Purpose may be determined on the basis of inferences drawn from conduct in all of the circumstances, on a balance of probabilities: s46(7). Further, section 46 has been said not to permit the drawing of a

distinction between short-term anti-competitive purposes and long-term pro-competitive objectives and does not permit the former to be nullified or excused by the latter.

A purpose of substantially lessening competition need not be the only purpose to attract the operation of the section. It need only be a substantial purpose: s4F(b). The conduct of the Government in attempting to deliver its election promise to create a business growth fund comparable to the UK BGF, provides a strong inference that a substantial purpose of the Exclusive Provision was to prevent one or more of the founding shareholder banks from using the Prudential Concessions to establish separate business growth funds to invest in SMEs that might compete with the ABGF. Thus, a counterfactual is whether the Exclusivity Provision has the purpose of substantially lessening competition versus the Prudential Concessions being available to all ADIs in respect of an investment in any business growth fund, or other vehicle for investing in SMEs.

A secondary substantial purpose may have been to prevent other ADIs from establishing funds in the future to compete with the ABGF. As the ABGF already counts the largest four commercial banks, a large international investment bank, and a founding investor of the UK BGF, plus the Australian Government as its shareholders, it seems unlikely that protecting the ABGF against relatively small ADIs would be necessary, because even if such ADIs were to try to enter the market, they would not have sufficient financial capacity to genuinely compete with the ABGF.

In our opinion, the better view is that a substantial purpose of the Exclusivity Provision was to prevent the initial shareholder banks from establishing funds that would compete with the ABGF, and that this represents a substantial lessening of competition in the counterfactual, thus contravening the prohibition in section 46.

6.5.3 Predatory pricing

Although the CCA previously contained two provisions proscribing predatory pricing, those provisions have both been repealed. The position is now that predatory pricing will contravene section 46 if engaged in by a corporation with market power and the likely effect of the conduct will substantially lessens competition in any relevant market, or that is its purpose: s46(1).

The fundamental question is not whether prices are below cost, but whether the conduct in question – in this instance changes to regulated capital treatment that enables commercial banks to deploy capital in high-risk, illiquid investments and not achieve a commensurate commercial rate of return - will substantially lessen competition from other market participants that have to operate on a commercial basis without the benefit of the CAU.

The Explanatory Memorandum to the Australian Business Growth Fund Bill 2019 (the ***ABGF Bill***) states the bill:

> "*gives effect to the Government's commitment to increase the availability of **patient capital** for small and medium enterprises by authorising the contribution of $100 million to invest in an Australian Business Growth Fund."* *[bold/underline added]*

There is limited detail in the ABGF Bill or explanatory material about what "patient capital" means in terms of a required rate of return. Typically, a Commonwealth entity that makes investments in private sector businesses would be subject to an 'investments mandate' that outlines (among other things) the expected 'benchmark' rate of return. The ABGF Bill does not provide for the issuing of such an investment mandate in relation to the Fund. The ABGF Bill allows for the Minister, on behalf of the Commonwealth, to enter into arrangements with the ABGF in relation to the operations of the ABGF. However, to date, there is no information as to what rate of return the Commonwealth is expecting on its 'patient capital' of $100 million.

However, the Parliamentary Library Bills Digest No.79 provides further detail, referencing the UK BGF and the European Commission's statement on the meaning of patient capital:

> *A patient capital fund … would provide equity funding in the expectation of a return, but on a less demanding basis than pure commercial private equity capital as the returns are either lower or expected over a more deferred time frame than commercial investors would require or accept.*

That is, the expressed *purpose* of the ABGF is to systemically undercut the *rate of return* (i.e. the price) required, whatever it may be, by the private-market to achieve commercial returns. In the parlance of the previous provisions, this question may have turned on the cost of that capital to the banks. Although, in *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 106 ALR 297; 35 FCR 43; (1992) ATPR 41-167 the court expressed the view that no pre-ordained level of pricing necessarily controls the inference that there has been a misuse of market power.

For the ABGF to lower equity raising costs for SMEs, it must logically, pay higher prices for each share that the SME issues than the private market will pay. The ABGF has an expressed intention to pay a higher price for SME equity *no matter what price* the competitors are willing to pay. The ABGF Act does not specify a required rate of return, only that it must be below the commercial terms required by the market. Further the Prudential Concessions, fully extended would comprise 2% of CET1 capital. The UK BGF, on which the ABGF has purportedly been modelled, provides a precedent to suggest that banks will continue to fund expansion. Accordingly, unless the Prudential Concessions are reduced, the ABGF appears to have the capacity to access concessional finance from the Government and the banks in respect of funding for 12 years of the entire market supply.

It would be difficult to maintain an argument that rational competitors would attempt to compete in the market on these terms against a competitor funded with the combined financial power of Australia's largest 4 commercial banks, plus the 6th largest bank in the world, plus the largest investment bank in Australia and the Australian Government. One would expect that rational competitors would leave the market. For those that attempt to compete, it is likely that the ABGF will use its market power to offer more favourable commercial terms for the best SMEs, depriving the competition of investible SMEs.

In our opinion, the better view is that the ABGF, and the shareholders by virtue of their CAU in respect of the ABGF, have market power and the ABGF will have the likely effect of substantially lessening competition, combined with it's stated purpose to systemically undercut commercial returns, is a breach of section 46.

6.6 Exacerbating Factors

The shareholders have not sought ACCC approval for the ABGF, despite their knowledge of its detrimental effect on competition and, in advance, our advice that the ABGF would breach the CCA:

- via our submission to Treasury, at the Senate Inquiry and in our multiple correspondences to Treasury, which detailed the negative impact on competition and the s249N shareholders resolution (all publicly available)
- via prominent articles in national newspapers, which explicitly referred to the ABGF as a "bank cartel" (in the heading) and "a double whammy of market manipulation", respectively
- via meetings with National Australia Bank where we explicitly informed them of our view that the ABGF "would cause a substantial lessening of competition" (see page 35)
- three hours of debate in the Senate, including this warning from Senator Whish-Wilson:

We are about to give $100 million of taxpayers' money at a time when your government is riddled with scandals from pork-barrelling—using public funds for your own personal and electoral benefit. You're about to take $100 million of taxpayers' funds and put it into a private equity fund that will have enormous power in this country. It is essentially going to be run by the big banks at a time when we have worked as a chamber over many years to breakdown the power of the banks and the concentration of the banks in Australia. Why give them a leg-up, by essentially giving them control of an enormously influential private equity fund in the area of small and medium enterprise financing?

You've admitted to the Senate today that you haven't even talked to some of the existing IPOs, the public equity financers, who have clearly raised concerns with us as a Senate about the fact that they're going to be crowded out. They will not be able to compete. They are providing capital to hundreds, if not thousands, of small businesses already, and successfully providing capital. ***They have rung the loudest alarm bell you could possibly ring about your fund.***

[bold underlining added, Senate Hansard: Thursday 27 February 2020]

The benefit obtained by the banks is $5 billion in exclusive prudential concessions and market dominance. But, what is the value of those concessions to the banks?

The inaugural CEO of the ABGF has stated that it will seek 20% returns. Using the CEO's numbers, the annual benefit is to the ABGF and through their ownership, its bank shareholders, is $1 billion per annum. We respectfully submit that the capital value of the concessions to the shareholders can be calculated though the application of the average earnings multiple on which the banks trade against the expected ABGF returns. The current average P/E multiple of the banks is approximately 18.2x.

We understand that the maximum financial penalty for corporations is the greater of:

- $10 million; or
- three times the benefit reasonably attributable to the cartel; or
- where the gain cannot be readily ascertained, 10% of the annual turnover of the body corporate in the first 12 months of the cartel: section 45AF(3).

6.7 Applicability to Governments

The Acts Interpretation Act 1901 provides that the word "person" includes a body politic unless the legislation evidences a contrary intention. There is a contrary intention in relation to the term "person" in s6(3) resulting from s2A: *Bass v Permanent Trustee Co Ltd* [1999] HCA 9; (1999) 198 CLR 334; 161 ALR 399; 73 ALJR 522; (1999) ATPR 41-682.

However, Section 2A of the CCA states that the CCA binds the Crown in the right of Commonwealth in so far as the Commonwealth carries on a business, either directly or by an authority of the Commonwealth. Additionally, it is open to an applicant to take action against a person involved in the contravention of the Act, without necessarily proceeding against the person whose actions were in breach of the Act: *Matheson Engineers Pty Ltd v El Raghy* (1992) 37 FCR 6; (1992) ATPR 41-192. Hence, the better view is that the Crown and its officers are not exempt from the reach of the CCA.

6.8 Summary of Contraventions

The market-distorting effect of the prudential concessions not only give rise to a breach of competitive neutrality principles. They also give rise to contraventions of various provisions of Part IV of the CCA.

In particular, and without limitation:

- The Prudential Concession and Exclusivity Provision has the purpose, or is likely to have the effect, of directly or indirectly, maintaining the price for the supply of equity capital to SMEs, and therefore constitutes a cartel provision for the purposes of s 45AD of the CCA. The making of, or giving effect to, of a contract, arrangement or understanding containing a cartel provision is a criminal offence: ss 45AF, 45AG.
- The Prudential Concession and Exclusivity Provision has the purpose, or is likely to have the effect, of substantially lessening competition in the market for the supply of equity capital to SMEs. Alternatively, the supply of equity capital by the banks on the basis of the prudential concessions would constitute a concerted practice that has the purpose, or is likely to have the effect, of substantially lessening competition in the market for the supply of equity capital to SMEs: s 45.
- By reason of the Prudential Concession and Exclusivity Provision, the banks (through the ABGF) have a substantial degree of power in the market for the supply of equity capital to SMEs, and the proffering of equity capital to SMEs on more favourable terms (including as to price) than other participants in the market would constitute conduct that has the purpose, or is likely to have the effect, of substantially lessening competition in that market: s 46.

CONCLUSION

Government agencies and the commercial banks have established a pattern of misconduct in relation to the formation of the ABGF involving:

- misleading, deceptive and negligent conduct by Government agencies leading to misinformed Parliamentary and Senate debates in relation to the negative impact of the ABGF on the competitive landscape for SME equity financing, a failure to conduct a market analysis and a cover-up by falsely attributing analysis, recommendations and data estimates to other (not present) Government agencies
- potential undisclosed conflicts of interest by senior banking executives involved in the ABGF followed by questionable appointments to the ABGF
- misleading shareholders at an AGM immediately prior to a shareholder vote about whether the ABGF Shareholders Agreement would be publicly disclosed
- breach of the Government's Competitive Neutrality Policy 1996
- breach of the Australian Prudential Regulation Authority Act 1998 (Cth)
- multiple contraventions of the Competition and Consumer Act 2010 (Cth).

The ABGF bill was talked down three times when it was considered by the full Senate. The Government then opportunistically slipped the bill into its omnibus COVID measures bill, despite being conceived and drafted well in advance of COVID-19. It would appear that the purpose of doing this was to take advantage of the absence of the cross-bench, due to COVID-19 travel restrictions. The only material amendment to the bill was to change the power on which it purported to rely. It purports to rely on the ambiguous Commonwealth power to make laws "with respect to nationhood". In addition to the cynical exploitation of a public health crisis to subvert the proper oversight and governance of the Senate, the constitutional validity of the Act is dubious.

We have been an effective and growing business that has helped 172 companies, mostly SMEs, raise $125 million in permanent equity from more than 55,000 investors over the last 5 years. We do not believe it is fair or consistent with the Government Competitive Neutrality Policy (1996) to have to compete against a cartel of Australia's largest commercial banks, subsidised by the Government using its regulatory powers to confer an unassailable cost of capital advantage and deployed for the purpose of undercutting commercial rates of return.

We have worked for a decade to make markets fairer, more transparent and more efficient for investors and companies raising capital. It is ironic that the destruction of those pillars of market integrity by the Government should now be used to cause irrevocable damage to our business.

Given the multiple and serious breaches (CCA, APRA Act, Competitive Neutrality Policy, and potential constitutional invalidity of the Business Growth Fund Act), and the misrepresentation by Treasury of the size of the market, and falsely invoking the RBA as having recommended the ABGF, we respectfully ask AGCNCO to use its extensive referral powers to engage appropriate Government agencies.

The volumes of materials that we have supplied Government agencies and the bank shareholders, are too substantial to annex to this letter.

We have established a data room available for the AGCNCO that contains file notes, emails and presentations to the Government and the shareholders concerning the matters set out in this letter, and would be happy to provide you with secure access on request.

Yours sincerely

Ben Bucknell, CEO

ANNEXURES

A. History of attempts to liaise with Government

I have complete records of the multiple presentations, meetings, telephone calls and emails of attempting to liaise with Government over a period of 2 ½ years. This record sets out the main items but does not purport to be exhaustive.

At no stage has any attempt been made by any Government department or official to address the negative competitive impact which has been explained in detail, nor has any examination of the detailed alternative structure provided to Government, and its agencies, been addressed.

April 2018:

OnMarket CEO, Ben Bucknell, & a colleague briefed Treasury official Warren Tease and a teleconference of various Canberra treasury staff about the damage to competition that would occur by introducing a model, in Australia, based on the UK BGF. We supplied a presentation with market data and proposed a structure for a Government-backed fund that would make partially underwritten offers: i.e. the shares offered to the public first, ABGF takes up shortfalls (if any) to the extent of the underwritten amount: thus ensuring no-crowding out, rotation of capital & a multiplier effect.

Despite following up Treasury numerous times in the following 6 months, by email and phone, then providing details to the Treasurer's office, NAB, and in the CBA s249N notice, Warren Tease testified to the Senate Inquiry 2 years later that: "*There's been no analysis done on this proposal*".

November 2018: the liberal party announces an election policy to establish a fund following international precedent, namely the UK BGF. I called Warren Tease and he recommended that I contact Adam Clark (senior adviser to Josh Frydenberg and ex-NAB employee).

November 2018 - June 2019: we try on multiple occasions via email, text messages and voicemails to engage Adam and the Treasurer both through 3rd party channels and directly (attaching proposals and outlining concerns, from 1 page summaries to larger works). We receive no engagement on the issue during this time in response to any of the above.

23 April 2019: a Liberal party media release announced that the Morrison Government would invest $100 million of taxpayer funds into the ABGF. The media release also stated that:

> *"The Fund will be modelled on the similar vehicles that have been set up in both Canada and the United Kingdom."*
>
> *"The Government has also had positive discussions with the Australian Prudential Regulation Authority (APRA)".*

Despite repeated references to the UK and Canadian BGFs as international comparables, at no stage have the Government media releases acknowledged that the UK and Canadian funds are funded solely by the private sector.

The Government election commitment costings stated that that there would be no increase in public debt as *"interest will be offset by dividends paid by the ABGF to the Australian Government".* The costings did not explain the contradiction between investing in SMEs that need equity, if those same SMEs were expected to generate dividends to pay the ABGF to pay the Government interest costs. Nor did the election commitment costings reconcile its expectation of "net returns on its investments" to pay the costs when the ABGF would be a long-term, patient investor, with a 7-10 year holding period in each investment.

23 April 2019: The Australian Financial Review reported that ANZ and Westpac had refused to join the ABGF and the working group, respectively. Commonwealth Bank had not publicly expressed its intention to invest. The Australian reported likewise on the same day.

24 April 2019: The Institute of Public Affairs wrote:

> *"Besides missing the main causes of small business decline, the Australian Business Growth Fund is itself a questionable undertaking. History is replete with examples of taxpayer subsidised, government-backed finance going wrong, from Fannie Mae and Freddie Mac abroad, to Tricontinental and the Victorian Economic Development Corporation at home.*
>
> *"The only beneficiaries of the new fund will be the major banks who will be "partnering" with government."*

24 June 2019: I travel to Canberra to meet with 6 Treasury officials for an hour or so and provide a 36-page presentation, as well as a 2-page summary of the issues and solution. Neither the proposal nor the issues appear to have been seriously analysed by Treasury despite multiple follow-ups.

23 July 2019: we emailed Adam Clark and advised that we have met with APRA, RBA, AIC, AESOB, Treasury (face to face in Canberra), Future Fund, NAB, CBA, Westpac and HSBC. I offer to fly to Melbourne and Adam agrees to a meeting. Adam cancels the meeting the day before and offers a phone call.

We provide Adam with a 39 page briefing document, about us, the market, our concerns that the ABGF will misallocate capital and how the ABGF will put us out of business, and how an alternative model would ensure the ABGF does not crowd out private capital (the model proposed in April 2018 to Treasury).

8 August 2019: I brief Adam Clark about our concerns over a 1 ¼ hour telephone call. I advised that several of the banks had indicated that they had no issues with us joining the steering committee. Adam replied that he would "object" to OnMarket joining the steering committee (unless we also want to fund the ABGF to the extent of the banks' commitment, i.e. invest $100m into the ABGF).

12 August 2019: I meet with Senator Hume's staff member and deliver a presentation over 1 ½ hours, outlining all the issues and a proposed solution. I follow up with emails. I receive no response.

16 August 2019: I meet with Warren Tease, Head of Markets for Treasury, in our offices for 1 hour 20 minutes and walk through a 40-page presentation prepared for Warren outlining the issues and a proposed solution. My contemporaneous file note records the following: "*Warren said:*
1) he understood the concerns about crowding out - and the BGF competing with private sector
2) he would convey to Adam Clark that my reasoning was reasonable (though he could not himself assess whether the extent of the damage the BGF to our business would be as significant as I said - he noted that he wasn't contradicting me, but he doesn't know)
3) he would let Adam know that we would be approaching back-benchers
4) he would recommend to Adam that the banks + Govt should engage with us now (before it is constituted)."

19 August 2019:

Warren Tease called back Ben. My contemporaneous file note records the following: "*he had discussed with Adam, and explained that he believed our issue was genuine that the BGF would just crowd-out our investors with a zero sum result (assuming Aust BGF does as much as UK BGF). He also told Adam that I'd said we would approach the back-benchers.* ***Adam was unmoved, and said we would "have to take it up with the banks"****.*

I explained to Warren that we plan to ask CBA shareholders to come forward from our database of 50,000 investors and lodge a s249N notice to requisition a notice of meeting. And, that this would

only require 100 CBA shareholders. Warren replied that he understood why we would do that, and that he'd expect to be in touch once Adam forwarded him the email [that I indicated I would send to Adam advising him of our intention to initiate a s249N resolution]*."*

We email Adam Clark advising that we have been left with no option but to ask OnMarket investors if they own shares in CBA and want to lodge a shareholders' resolution. We receive no reply.

We prepare a s249N shareholders resolution and s249P supporting statement outlining the unfair competitive advantage that the ABGF will have over ordinary investors and on 20 August, email a subset of OnMarket investors. We receive signed s249N notices from more than 100 CBA shareholders, requesting a shareholder vote.

22 August 2019: Ben called Warren and he returned the call. My contemporaneous file note records the following: *"Warren said that Adam had forwarded the email, but not raised any prospect of any changes (and that Adam and he had spoken this morning). I explained that we had >100 CBA shareholders. He asked if we would lodge it tomorrow and I said no, not until Monday - as we had told the Govt they have this week to have a constructive discussion with us.*

Warren said he was sure Adam had not changed his mind. I reiterated that once I lodge the s249N notice that it was out of my hands, and there is no provision that I know of that would allow it to be withdrawn. He would convey that to Adam."

23 August 2019: I call the CBA investor relations team and advise them that we have a s249N coming, but that we could amend it, if doing so would elicit a CBA board recommendation. Over the next few days, we have multiple and constructive discussions with the CBA legal team, providing them drafts of the s249N resolution and s249P statement and time to propose an alternative solution or amendments that may enable the CBA board to recommend the resolution. I am assured that internally CBA is working hard on trying to develop a solution. My contemporaneous file notes are that I *'thanked [CBA cosec] for the transparency of their communications'.*

I discussed potential timing for lodging the s249 with CBA and decided to delay several days. I explained that I would not be seeking media, so that all parties could continue to work toward a ABGF structure that would not have a negative impact on competition.

29 August 2019: we lodge the notice with CBA, who announces it to ASX for inclusion in the 2020 AGM.

October 2019: Treasury released an exposure draft of the legislation purporting to run a **4-day "public consultation" from Monday, 4 November until Friday, 8 November 2019**. We provide a 9-page submission outlining the negative competitive impacts of the proposed ABGF structure. Despite statements on its website that it would transparently release public submissions, Treasury withheld public submissions until ***after*** the legislation was put to a vote by the House of Representatives and Senate (March 2020)

November 2019: The Government secures APRA concessions for bank shareholders and announces prudential concessional treatment for banks for up to 2% of the $247 billion of banks' CET1 capital (~$5 billion) of investment in *the ABGF* and the banks concurrently pledge to invest $440 million.

27 November 2019: The Treasurer announced:

> *The Morrison Government has today announced that it has agreed to terms with the four major banks, HSBC and Macquarie Group to establish the Australian Business Growth Fund (BGF).*

28 November 2019: the Australian Financial Review published a p2 opinion piece: *Growth fund just another 'bank cartel', say critics.*

February 2020: The ABGF bill is tabled.

10 February 2020: I travel to Canberra and meet with a representative from the Treasurer's office and have meetings with MPs and Senators from the major parties and the cross-bench to explain concerns.

I attempted to arrange a meeting with the Treasurer, or his senior advisers on the ABGF. The Treasurer's office arranged for his media relations senior adviser to meet. He expressed to me that he did not have a working knowledge of either the ABGF proposal or the SME equity-raising landscape. Nevertheless, he advised me that "*you will not make any friends in Canberra"*. I took this to be a veiled threat or warning of some form of Government retaliation from the Treasurer's senior media relations adviser, given I was not in Canberra for social reasons.

All other meetings with MPs and Senators from the major parties and the cross-bench were receptive to concerns raised. Several MPs and Senators were very concerned about the attempts to stifle public consultation (i.e. 4-day period only). The Senate refers the ABGF bill to a Senate Inquiry and requires it to report within 2 weeks.

11 February 2020: I was advised of the Senate Inquiry and asked to attend a hearing in Canberra 2 days later, 13 February 2020, and invited to provide a written submission.

13 February 2020 (Senate Inquiry) (Hansard and submissions in the data room)

On the morning of the Senate Inquiry I met with and briefed two Senators (one Liberal, one Labor) and an MP's chief of staff.

Submissions from Ben Bucknell

I discussed the Competitive Neutrality breach in my opening statement and provided a considerable body of market data to the Senate Inquiry to support my arguments. At the hearing, Treasury stated it could not provide a report on whether the ABGF complied with the Government Competitive Neutrality policy. On 19 February 2020, Treasury provided written acknowledgement that competitive neutrality applied, and said the ABGF had been "*designed to minimise potential detrimental effects on competition in a manner consistent with achieving competitive neutrality*". This statement is not plausible and disingenuous. It was clear to me that before I raised competitive neutrality at the Senate hearing (13 February 2020) that Treasury had not considered competitive neutrality in relation to the ABGF & no change had been made to the ABGF in the intervening 6 days.

In the 5 business days following the hearing (it was reporting on the 7th business day), I provided 5 subsequent written submissions to the Senate Inquiry. These additional submissions were necessary to correct false and misleading information provided by the Australian Small Business and Family Enterprise Ombudsman (***ASBFEO***) and the Treasury official attending the Senate Committee hearing.

Each of my submissions to the Senate Committee are public. There is also a copy in the data room. In summary, my further written submissions responded to the most egregious false and misleading statements:

- by Treasury that the ABGF *been "designed to minimise potential detrimental effects on competition"*
  (this is patently false; there are no design features to this effect, and Treasury provides no examples to support this statement; the points in Treasury's letter are irrelevant or incorrect)
- by Treasury and ASBFEO that the ABGF was based on RBA's analysis and recommendation
  (RBA confirmed in writing that they had not conducted any analysis of SME's access to equity, nor made any recommendation – yet the claim was repeated in the House of Representatives in support of the bill)

The following statement is illustrative of the misinformation provided by ASBFEO throughout her submission to the Senate Inquiry:

"It's [the ABGF is] *for a particular sort of business, and it's where, I'd say, market failure really is. The fintechs don't do it. Private equity in Australia doesn't do this longer term. Banks certainly do it. And that's why the RBA put up their hand and said, 'Yes, there is a problem here.'"*

- "*it's where, I'd say, market failure really is*". This is false. No evidence of market failure in the market for **equity** has been in small business was proffered, let alone established. ASBFEO referred to its own report as supporting the ABGF proposal. That report *literally* only had these 12 words in the entire report that related to equity: "*SMEs are 30 per cent more likely to be rejected for equity finance* [than larger businesses]." Those 12 words were quoting another, non-public report by Jobs4NSW. I submitted an GIPA request and was finally given access to the Jobs4NSW report months later (after the legislation had been passed). The NSW report *literally* only contained the same sentence, and no further analysis establishing a market failure to provide equity to growing and profitable SMEs. It is rational that larger, lower-risk businesses would have more success of raising equity than high-risk SMEs. This is not evidence of market failure.
- "*Fintechs don't do it*". This is false. We are a fintech. In 2018, we won the Fintech Business Award and the Finnies fintech award for crowdfunding, and a finalist in the award for Fintech Organisation of the Year. In the last 5 years, we have raised $125 million in new equity from ~55,000 investors for 173 companies by working with 79 lead managers.

- *"Private equity in Australia doesn't do this longer term."* This is false. According to Preqin & Australian Investment Council Yearbook 2020, there are $33 billion in assets under management by private equity and venture capital funds in Australia. I believe most private equity funds have an investment and holding period of 5-7 years and many invest in SMEs.
- *"Banks certainly do it."* This is false. ANZ did operate an SME equity fund, but closed that fund in 2012: ANZ to close fund after $100m lost. At the time of the statement, the banks did not have operations that invested in SME equities.
- *"And that's why the RBA put up their hand and said, 'Yes, there is a problem here."* This is false. The RBA did no such thing. Two business days after the Senate hearing, the RBA confirmed to me in writing that *"we [RBA] have not made any formal recommendations for a business growth fund to the government".* They also provided me with links to "a good summary of the recent work we have done on this". The only studies and analysis that the RBA had undertaken related to credit/debt, and not SME' access to equity.
- Without repeating here, The Hansard shows the Treasury official repeated much of the misinformation proffered by the Ombudsman.
- Various statements that there is no competitive market to consider – This is clearly false, as OnMarket's own track record demonstrates.
- Various statements by Treasury that the APRA concessions do not subsidise the banks and do not provide a competitive advantage (despite incontrovertible evidence that the capacity to debt fund ~75% of their investment through wholesale bank debt and government-guaranteed deposits provides the ABGF with an unassailable cost advantage over the rest of the private sector). i.e. This was false and misleading.

27 February 2020: the ABGF bill is returned to the Senate.

The AFR journal, Karen Maley writes a misleading article in the AFR. She informs me that she had been briefed by "representatives of the Govt and banks" in respect of amendments that proposed to make the ABGF first offer shares in any investee company to all Australians and only subscribe for

the shortfall. Instead, the amendment was described to her, as "put forward by the private equity industry asking the Government to guarantee returns to venture capital firms." This is nonsensical.

After explaining that the article was false and misleading, Maley promptly rewrote the online article, correcting her mistakes. After the online article was corrected, we were (informally) told that representatives of COSBOA, knowingly walked the incorrect printed version of the AFR into senators' offices in Parliament House. We can only assume that this was an attempt to mislead the vote about the nature of the proposed amendments. COSBOA also provided a misleading letter to the Senate Inquiry saying that the amendment was proposed by "private equity providers" – when demonstrably, we are the opposite of private equity (we are a platform for the public to invest in SMEs and we do not have a balance sheet for private investing).

Nothing in the proposed amendment could reasonably be construed, directly or indirectly, as guaranteeing returns to private equity firms.

The ABGF bill was 'spoken out' 3 times, over 3 hours of debate, as the Government could not answer simple questions from the cross-bench about how the ABGF would not crowd out the private sector, nor breach Australia's free trade agreements, amongst other things.

18 March 2020: I email Adam Clark, recognising the potential cash-flow disruption for SMEs from COVID-19, acknowledging differences of opinion on the implementation of the ABGF, and offering to work together. We outline a proposal that will not crowd out competition, and explaining other benefits: e.g. multiplier effect on private capital, avoid 'picking winners' curse, or cherry-picking only SMEs that would have been funded, and how it assists marginal SMEs. We offer use of our nationwide distribution infrastructure and provide examples of how the proposal will work.

We received no response.

19 March 2020: Follow up email to Adam, copying Josh Frydenberg, again offering to help with the use of OnMarket's decade of experience and nationwide infrastructure that links into multiple online broking accounts.

We received no response.

25 March 2020: Under the cover of COVID-19, with a reduced Senate sitting and without the cross-bench attending Parliament House due to interstate travel restrictions, the Government renamed the bill and passed it as part of the omnibus "Coronavirus Economic Response Package Act 2020". The bill did not include any measures to limit competitive impact.

The ABGF bill remained unchanged from the original bill which provided for 4-days of public consultation (apart from the name and the Commonwealth power under which the bill is purportedly passed).

The addition of a reference to the "nationhood" power in the amended bill implies that the Government received advice that the previously drafted reliance on s51(i) ('trade and commerce with other countries, and among the States') was not effective and sufficient. There is little authority to suggest that the Government can use its "nationhood power" to create laws that are otherwise beyond the scope of Commonwealth power. We reserve our right to challenge the premise of the constitutional authority on which the ABGF Act purports to rely.

The dishonesty of the Government's actions to define the ABGF as a COVID-19 response measure is self-evident:

- The ABGF was announced as liberal policy in 2018, a year before the 1st recorded case in China
- The ABGF will not even make its 1st investment until after the COVID vaccine is expected
- The ABGF is not temporary: the $540m of ordinary shares issued will exist into perpetuity

Despite the policy being announced 2 years prior, and the 1st reading of the bill having pre-dated COVID-19 by 4 months, the Prime Minister granted an exemption from Regulation Impact Statement requirements. And, even though the CBA Chairman stated at the CBA AGM her expectation that the Shareholders Agreement should be released publicly by the Government, the Government maintains secrecy on the basis it is "Commercial in Confidence". These are not the actions of an open and transparent Government.

B. <u>History of the banks' commitment/involvement</u>

A high-level history of the banks' involvement in the ABGF, are as follows:

April 2018 – the Treasurer employs ex-NAB General Manager, Adam Clark, as a Senior Adviser

November 2018 – the Government announces the ABGF election policy, with the support of Anthony Healy – then NAB Chief Customer Officer, Business and Private Banking (now inaugural ABGF CEO)

November 2018 - November 2019: the other banks continue to refusal to invest in the ABGF for more than 12 months after the Government's policy announcement

Feb 2019 – March 2020 (when ABGF bill passed unamended): OnMarket has had more than 30 correspondences, phone calls and face-to-face meetings with multiple NAB executives outlining concerns of the negative competitive impact of the ABGF, and how it will cherry-pick the best SMEs, reducing competition and funding for marginal SMEs.

15 October 2019: OnMarket meets with NAB. NAB Attendees: Nathan Goonan, Andrew Loveridge, Chris Venus. OnMarket Attendees: Ben Bucknell and Rosemary Kennedy. My contemporaneous file note records that we spent a large portion of the meeting discussing the negative impact of the ABGF, as constituted and offering an alternative structure. It includes the following:

We advised Nathan that we thought that the BGF would result in a substantial lessening of competition, and that it would not increase the overall equity available, but simply crowd-out existing investment. Nathan said that no work had been done by NAB on the question of the competitive dynamics of the market or of the impact of the BGF on competition. We expressed our disappointment and explained that we'd been raising these concerns with NAB directly since February 19…

Nathan said he was "entirely aware of the ACCC and issues around substantial lessening of competition."

In addition to discussing NAB's market power, and refusal to finance downstream competitors (i.e. misuse of market power), my 4-page file note concludes with the following:

My summary and thoughts:

- *NAB have not even considered the impact of the BGF on existing market participants*
- *Nathan, Andrew & Chris have been left in no doubt whatsoever that we had presented a case that the BGF would result in SLC* [substantial lessening of competition] *in the SME equity-raising market*
- *Nathan had not been made aware of our proposal despite the fact that we'd been talking with Andrew for 8 months. NAB aren't institutionally genuine – we should not trust them when they say in meetings that they are genuinely considering the issues that we have raised….it is all just talk, they will have meetings for show, but they have no intention of setting in train the organisational arrangements to follow their words with actions.*
- *NAB has given no consideration of our proposal that the BGF be structurally constrained to underwriting to ensure it doesn't crowdout private investment, let alone result in SLC – and deliver more finance to SMEs*
- *NAB has 3 choices:*
    - *Seek advance approval from ACCC for current structure for BGF*
    - *Amend the proposed structure of the BGF to avoid SLC by underwriting fund.*
    - *Deliberately and knowingly risk being found in breach of section 46 of the Competition and Consumer Act 2010 (and possibly cartel provisions)*

13 October 2020: A shareholders' resolution (lodged with CBA in August 2019) to prohibit CBA from investing in the ABGF unless it is an underwriting-only fund (i.e. not competing with small investors) is voted on at the CBA AGM. At the AGM immediately prior to the vote, the Chairman was asked:

> *Question: "Does the **BGF Shareholders' Agt or Investment Mandate** contain any material provisions which have not been disclosed to shareholders? If yes, pls explain how shareholders can cast an informed vote **without seeing it**. If no, will the board undertake to **lodge the BGF Shareholders Agt & Investment Mandate** with ASX when signed? If not, how does CBA reconcile this with its continuous disclosure obligations, in light of it being sufficiently material to shareholders to be the subject of a shareholders' resolution?"*
>
> The Chairman responded: *''Thank you Mr Bucknell. I think, as you know, the final arrangements of the Business Growth Fund have not yet been announced by the Government, and when they have been, I am sure **they will be public and available for shareholders to see, as well**"*

This was misleading as the question very specifically asked about public disclosure of the Shareholders Agreement, and:

- in February 2020, in Parliament the Government had stated that the Shareholders Agreement would be kept secret between it and the banks
- one week prior to the CBA, in response to a Question on Notice, Senator Corman wrote that the Shareholders Agreement would not be released because *"This document contains commercial-in-confidence information and will not be tabled."*
- 3 days after the AGM, CBA, the other banks and the Government gave media releases that they had signed the Shareholders Agreement. The document has not been publicly released.

Critically, CBA shareholders were misled on a material issue by the CBA Chairman, immediately prior to the shareholder vote.

It would be an extraordinary if CBA agreed to confidentiality provisions in the Shareholders Agreement only 3 days after the CBA Chairman assured shareholders at the AGM about the Shareholders Agreement that: "*they will be public and available for shareholders to see, as well*".

I have not sought leave of the court to order an EGM for the shareholder resolution to be subject of a new vote where shareholders are not misled about the secrecy of the Shareholders Agreement (and the material undisclosed provisions that it may contain). I have not exercised my rights as a shareholder under s247A of the Corporations Act. I reserve my shareholder rights.

I respectfully request that the AGCNCO exercise its extensive powers to investigate the circumstances in which the CBA s249N and s249P resolution was voted upon.

The chairman was also asked:

> Question: "*With the APRA concession allowing CBA to gear its investment to 75%, what return must BGF earn on its investments for CBA to meet CBA's shareholders' current return on equity? Will the BGF pass it's the lower cost of capital from the APRA treatment to SMEs in the form of paying higher prices to buy shares in SMEs, or will BGF retain benefits from its lower WACC to extract higher profits? Aust Govt said it expects the BGF to replicate the £2.5 billion UKBGF. What size does CBA expect the Aust BGF to grow?*"

- The Chairman did not answer the question regarding whether it would utilise the competitive advantage of the lower WACC in the form of paying higher prices to SMEs or making greater profits for the ABGF.
- The Chairman did not answer the question about what size CBA expected the ABGF to grow to, but instead only replied that CBA had committed $100m. The $100 commitment was already

public information, had been included in the notice of meeting and did not further inform shareholders or answer the question.

- 3 days later the Treasurer announced the shareholders' agreement had been signed, *"with the ambition to grow the fund to $1 billion as it matures. The BGF will operate commercially and make investment decisions independently of Government.*
- If the ABGF is independent of Government, as the Government has stated, then the ambition to almost double to $1billion must have been known to the bank shareholders (noting at the time, that the ABGF had not appointed its ex-NAB CEO). The options appear to either:
  - Chairman misled Shareholders by withholding this information
  - The Government is making misleading statements about the independence of the ABGF
- As shareholders were limited to only two questions on each resolution (of 550 characters), there was no opportunity to draw the Chairman's attention to the fact that shareholders had been misled by her statement, or that the key questions had not been answered.

16 October 2020 – Govt and Banks announced:

- Shareholders Agreement signed
- Ex NAB director Anthony Healy announced as CEO
- The Shareholders Agreement has not been disclosed to the public.

13 November 2020: media reports that ex-NAB employee, and ex-NSW Liberal state premier Mike Baird announced as Chairman (replacing Will Hodgman, former liberal party Premier of Tasmania).

From a review of their professional profiles on LinkedIn, none of these key individuals have any experience in SME equity investing (only debt financing).

The appointments of ex-NAB employees and liberal party apparatchiks to the plum roles of CEO and Chairman raise concerning questions about undeclared conflict of interest during the time that NAB was promoting the ABGF. Conflict of interest questions are magnified by the appointment of an ex-NAB employee in the Treasurer's office to the role of overseeing the Government's investment of $100m into the ABGF, and pressuring APRA to confer concessions of 2% of CET1 capital ($4billion) exclusively on the ABGF in exchange for the banks agreeing to invest in the Government proposed fund.

C. UK BGF – Payments to Directors

Year	Total Staff Costs (£)	Total Staff (incl NED)	# Non-executive directors	Employee Costs (ex NED) (£)	# Staff (ex NED)	Average Staff Cost (£)	Directors Remuneration (£)	Average Director's Remuneration (£)	Director's wages as % of total staff costs
2019	33,405,000	173	9	30,281,000	164	184,640	2,310,000	347,111	6.9%
2018	34,477,000	158	9	32,167,000	149	215,886	3,124,000	256,667	9.1%
2017	27,429,000	147	9	25,301,000	138	183,341	2,128,000	236,444	7.8%
2016	24,844,000	137	9	22,813,000	128	178,227	2,031,000	225,667	8.2%
2015	21,730,000	125	10	19,984,000	115	173,774	1,746,000	174,600	8.0%
2014	18,426,000	111	10	16,804,000	101	166,376	1,622,000	162,200	8.8%
2013	14,471,000	93	10	13,293,000	83	160,157	1,178,000	117,800	8.1%
2012	11,966,000	73	10	10,805,000	63	171,508	1,161,000	116,100	9.7%
2011	4,079,000	26	7	3,260,000	19	171,579	819,000	117,000	20.1%
Total	**£190,827,000**			**£174,708,000**			**£16,119,000**		**8.4%**

1 GBP to AUD = 1.81680 on 21 November 2020

Year	Total Staff Costs (AUD)	Total Staff (incl NED)	# Non-executive directors	Employee Costs (ex NED) (AUD)	# Staff (ex NED)	Average Staff Cost (AUD)	Directors remuneration (AUD)	Average Director's Remuneration (AUD)	Director's wages as % of total staff costs
2019	60,690,204	173	9	56,493,396	164	344,472	4,196,808	466,312	6.9%
2018	62,637,814	158	9	56,962,130	149	382,296	5,675,683	630,631	9.1%
2017	49,833,007	147	9	45,966,857	138	333,093	3,866,150	429,572	7.8%
2016	45,136,579	137	9	41,446,658	128	323,802	3,689,921	409,991	8.2%
2015	39,479,064	125	10	36,306,931	115	315,712	3,172,133	317,213	8.0%
2014	33,476,357	111	10	30,529,507	101	302,272	2,946,850	294,685	8.8%
2013	26,290,913	93	10	24,150,722	83	290,973	2,140,190	214,019	8.1%
2012	21,739,829	73	10	19,630,524	63	311,596	2,109,305	210,930	9.7%
2011	7,410,727	26	7	5,922,768	19	311,725	1,487,959	212,566	20.1%
Total	**$346,694,494**			**$317,409,494**			**$29,284,999**		**8.4%**

D. <u>Treasurer's Media Release dated 27 Nov 2019 announcing it had 'agreed terms' with the banks</u>

THE HON JOSH FRYDENBERG MP
Treasurer

SENATOR THE HON MICHAELIA CASH
Minister for Employment, Skills, Small and Family Business

MEDIA RELEASE

27 November 2019

AGREEMENT TO ESTABLISH THE $540 MILLION AUSTRALIAN BUSINESS GROWTH FUND

The Morrison Government has today announced that it has agreed to terms with the four major banks, HSBC and Macquarie Group to establish the Australian Business Growth Fund (BGF).

The BGF will provide equity funding for small and medium sized businesses helping them to grow and fulfil their potential.

Small and medium-sized businesses can often find it difficult to obtain finance other than on a secured basis – typically, against the family home. They also find it difficult to access additional funding, once they have pledged all of their real estate as collateral.

As it announced at the election, the Government is committing $100 million in funding to the BGF and partnering with other financial institutions to provide equity funding to SME's.

The major banks including ANZ, CBA, NAB, and Westpac have each agreed to commit $100 million to the BGF as a demonstration of their support of SMEs. HSBC and Macquarie Group will each contribute $20 million.

This will give the BGF an initial investment capacity of over $500 million, with the ambition to grow it to $1 billion as it matures.

Established Australian businesses will be eligible for long-term equity capital investments between $5 million and $15 million, where they have generated annual revenue between $2 million and $100 million.

The BGF's investment stake in SMEs will be between 10 and 40 per cent, allowing small business owners to maintain their controlling interest, while also allowing the BGF to have sufficient influence to encourage business growth.

The BGF will operate commercially and be independent of both the Government and the participating banks. A board and an independent management team will run the BGF.

The Government is looking forward to working with the banks and financial institutions to get capital flowing to hard-working entrepreneurs across Australia.

With more than 3 million small and medium-sized businesses employing around 7 million Australians, enhancing small business access to funding is part of the Coalition Government's plan for a stronger economy.

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Senator the Hon Michaelia Cash | Minister for Small and Family Business | PERTH