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20 July 2021

Freedom of Information Officer
Treasury
Langton Crescent
PARKES, ACT, 2800

By email: foi@treasury.gov.au

Re: Appeal FOI ref 2933

Dear Sir/Madam

We are writing to respectfully seek review of the decision to refuse to supply the following information sought under the *Freedom of Information Act* (under application reference 2933):

A. the Australian Business Growth Fund (***ABGF***) Key Terms; and
B. the ABGF Shareholders Agreement,

agreed between the Government and the big banks (the "***Documents***").

Executive Summary

The decision cites s45, s47G(1)(a) and (b), and s11(B)(4) as reasons to exempt the Documents from disclosure. We respectfully seek review of the decision on the following ten, *independent* grounds:

1) CBA Chairman promised 800,000 shareholders that the Documents would be disclosed before veto vote[1]
2) Treasury evidence to Senate Economics Committee that there are no competitors to the ABGF[2]
3) No unreasonable adverse effect on disclosers, as ABGF is a fraction of the size of the shareholders[3]
4) Each of the Documents confidentiality clauses have not been examined for permitted disclosures
5) ABGF's change to investment mandate denies Parliamentary intent that ABGF invest in 'small' business[4]
6) The APRA declaration references contents of the Documents[4] so regulatory transparency requires disclosure
7) Documents contain evidence of a breach of the Competitive Neutrality Policy 1996[5]
8) Documents set out shareholder activities that are an unlawful breach of Consumer and Competition Act[6]
9) Documents contain evidence of unlawful breach of the APRA Act[6]
10) Each of the above facts *independently* mean there is no *reasonable* prejudice to future supply of information

Furthermore, Treasury estimated 23.13 hours of work to review 167 pages of Documents and provide redactions. It appears from the decision that the 167 pages were not reviewed. The decision only refers to the existence of a confidentiality provision in the Documents. It does not provide, as requested, any analysis of the standard exclusions that such confidentiality provisions in shareholder agreements typically contain. We respectfully request a refund of our costs paid to Treasury.

[1] Para 5.160 FOI Guidelines, redressing a wrong or misdeed; s45 exemption does not apply
[2] Para 5.159 FOI Guidelines, the 5th element of "detriment" not demonstrated; s45 exemption does not apply
[3] Para 6.12 FOI Guidelines, unreasonableness threshold of adverse effect not met; s47G(1)(a) requirements not satisfied
[4] Para 6.17-18 FOI Guidelines "matter of public importance, and promote effective oversight of public expenditure"; factors favouring disclosure, not fully taken into account under s11(B)(3)
[5] Para 6.123 FOI Guidelines "unlawful activities or inefficiencies" s47G(1)(b) does not apply
[6] Paras 6.13 and 5.160 FOI Guidelines "documents reveal crime, civil wrong"; s45, s47G(1)(a) and (b) do not apply

1) Reliance by 800,000 shareholders on representation by CBA Chairman that Documents would be disclosed

Paragraph 5.160 of the FOI Guidelines states that section 45 exemption will not apply in a number of circumstances, including the following (which applies in the current case):

> *"A breach of confidence will not arise, and the exemption [in section 45] will not apply, if the information to be disclosed is an 'iniquity' in the sense of a crime, civil wrong, or serious misdeed of public importance which ought to be disclosed to a third party with a real and direct interest in redressing such crime, wrong, or misdeed."*

A shareholders' resolution (see attached) was put to the Commonwealth Bank of Australia 2020 Annual General Meeting, held on 13 October 2020, to prevent the CBA from investing the ABGF. The shareholder resolution was circulated to ~800,000 CBA shareholders to vote upon at the AGM.

Immediately prior to the vote, the Chairman of the Commonwealth Bank of Australia was asked whether the Documents would be made public. The Chairman gave assurances to shareholders that the BGF Shareholder Documents (including the Investment Mandate) would be made public *by the Government*. CBA AGM Transcript (See at 1.42.37 of the CBA AGM video):

Shareholder Question*: "Does the BGF Shareholders' Agreement 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 Agreement & 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?*

Catherine Livingstone: "*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****. [bold/underlining added]"*

This assurance, no doubt, was given for the purpose of influencing the voting intentions of many shareholders.

Less than 72 hours after the AGM, CBA and the other banks announced that they had signed the BGF Shareholders Agreement. Each of the banks will have been acutely aware of the circumstances of the CBA AGM, as they had delayed signing of the Agreement for more than 6 months because the CBA shareholders' resolution had not yet been voted upon.

It is unconscionable for the banks or the Government to argue that they should be permitted to hide behind a confidentiality clause in an agreement signed after the CBA Chairman gave assurances to 800,000 shareholders, and, additionally, which was relied on by those shareholders in voting whether to approve their investment in the ABGF. The signing of the ABGF Shareholders Document had been delayed 6-9 months to occur after the vote of the CBA Annual General Meeting. The ABGF shareholders are the biggest banks in Australia and have substantial human resources. Wilful blindness is the only reason why all the ABGF shareholders would not be aware of the undertaking to disclose the Documents. s45 requires a *mutual understanding of confidence,* the parties should not be permitted to maintain wilful blindness in order to assert this. If CBA disingenuously signed a confidentiality agreement giving rights to bank shareholders to block disclosure, only 72 hours after giving an assurance that the *Government* would release the documents, then the responsibility for breach of confidence is not the *Government's,* but rather lies with CBA.

We note that the initial decision did not examine the confidentiality provisions within the Documents, despite being requested to do so in the FOI request. Most commercial arrangements permit disclosure under a request from a government agency (i.e., the Office of the Australian Information Commissioner).

We also note that the initial FOI decision stated that *"the Government has made public a substantial amount of information about the operation of the ABGF and the Government's participation in it".* This can be refuted by the fact that much of the information released was incorrect! In its media release of 27 November 2021, the Government stated that "*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."* However, as can be seen from the ABGF website, https://www.bgfaustralia.com.au/, the minimum revenue requirement is not $2 million, but rather $10 million.

2) Prior Evidence Given by Treasury of no competition

Paragraph 5.159 of the FOI Guidelines sets out 5 elements that must be satisfied for s45 to apply.

That the Government now argues that the ABGF ***because it has competitors*** should not have to be transparent about its documents is an extraordinary ***contradiction*** of the evidence that Treasury, APRA, and the Ombudsman provided to the Senate Economics Inquiry hearing (13 February 2020) in a multitude of places that the ABGF would ***"have no competitive impact"*** and its purpose was to "***fill a market gap***". "Market gap" was referred to no less than 19 times in the Senate Economics Inquiry hearing by Treasury and the Ombudsman. See attached extracts from Senate Economics Inquiry.

In recommending the ABGF to the Senate, the Senate Economics Committee Inquiry report (page 29) quoted Treasury's answers to questions on notice, 13 February 2020, received 17 February 2020, pp. 3–5, setting out why the ABGF would not be competitive against the private sector:

> *"… concerns about 'cherry picking' or 'crowding out' have an implicit assumption that … a new entrant like the ABGF [the Fund] will displace other investors or leave those investors access to a limited number of SMEs … The starting point in Australia is one of a general funding gap for SMEs, a predominance of debt funding, limited access to equity funding …"* [Treasury,]

If there is a "market gap", then there can be no competitors, or at the very least, no competitors that could have a material adverse effect on the ABGF's commercial interests through knowing either the ABGF Key Terms or the ABGF Shareholders Agreement. Treasury cannot argue simultaneously, without contradicting itself, that there are no meaningful competitors (and therefore the Government needs to commit $100m of shareholder funding and provide $5 billion of prudential concessions) but that those non-existent, irrelevant competitors will somehow damage the $540m ABGF if they know the terms on which the Government invested.

Alternatively, if Treasury's arguments put to the Senate were not true, and there are competitors that are sufficiently capable of "causing detriment" to the $540 million ABGF, the exemption should not apply due to the reasons set out in 5.160. That is, the premise on which the ABGF was publicly funded was false. Treasury should not be permitted to maintain contradictory arguments to prevent public disclosure, and if this is the case, then we must seek that the Senate Economics Committee be made aware that it has been misled by Treasury and recommend appropriate sanctions against the persons responsible.

3) <u>"Unreasonable adverse effect" test not satisfied</u>

Para 6.12 of the FOI Guidelines states that the "unreasonable" adverse effect requirement of s47G(1)(a) should be considered in light of the banks' market capitalisation. The proposed disclosure could not have an "unreasonable" adverse effect on the shareholders given their investment in the BGF is immaterial in size compared to their businesses.

The banks have agreed to invest (collectively) $540 million in the ABGF (but according to an ASIC search have invested $25 million to date). The banks' market capitalisations are as follows:

ANZ Bank	$79 billion
National Australia Bank	$86 billion
Westpac Banking Corporation	$93 billion
Commonwealth Bank of Australia	$174 billion
Macquarie Group	$57 billion
HSBC PLC	£85 billion (~ $158 billion)
Total	**$650 billion**

Paragraph 6.12 of the FOI Guidelines – conditional exemptions – states:

> *"These criteria require more than simply asserting that a third party's business affairs would be adversely affected by disclosure. The effect would need to be unreasonable."*

The entire investment by the banks (even when fully invested in 5 years' time) in the ABGF represents 0.075% of their market value, and the implications of sharing the information must be a tiny fraction of that. No percentage change, even a 100% change, in the value of the ABGF due to sharing the information would be material to the banks.

The ABGF Key Terms and the ABGF Shareholder documents are agreements. They do not contain trade secrets. It is not plausible that generic information set out in term sheets or shareholders agreements, such as deal structuring and origination strategies, assumptions underlying the ABGF's proposed investment model, return targets internal risk assessments and KPIs could have an 'unreasonable' impact on the big bank shareholders.

4) <u>Confidentiality clauses of each of the Documents have not been examined for permitted disclosures</u>

Typically, confidentiality arrangements within Key Terms or a shareholders' agreement would carve out a number of "permitted disclosures". Those permitted disclosures would generally include, amongst other things, a lawful request by a Government agency or 'as required by law' (i.e. this would include disclosure under the *Freedom of Information Act*).

The original FOI decision did not purport to examine the confidentiality clauses in each of the Documents for permitted disclosures. If the Documents contain such relevant exclusions, then the Documents would not have "the necessary quality of confidentiality" required to satisfy section 45 (see 5.159 of the FOI Guidelines).

We respectfully request that each of the confidentiality clauses in each of the ABGF Key Terms and the ABGF Shareholders Agreement be independently examined to determine if the permitted disclosures allow the documents to be disclosed under the *Freedom of Information Act.*

5) <u>Change of Scope and Purpose of the Australian Business Growth Fund from that approved by Parliament</u>

Para 6.18 of the FOI Guidelines identifies the factors in favour of disclosure are those that *"inform debate on a matter of public importance, and promote effective oversight of public expenditure."*

The Senate Economics Committee Inquiry report states that small businesses may be eligible for investment if they have (amongst other things) annual revenue between **$2 million** and $100 million. See at para 2.44 (page 26), paras 2.46 and 2.48 and 2.50 (page 27), para 2.62 (page 29) and 2.67 (at page 31).

The **$2 million** minimum threshold was also explicitly referred to in the Second Reading Speeches of:

1) Senator Watt,
2) Anne Webster MP,
3) James Stephens MP,
4) Vince Connolly MP,
5) Dr Jim Chalmers MP
6) Bert Van Malen MP
7) Matt Thistlethwaite MP

The following Second Reading Speeches made reference to the fact that "**small**" businesses would be eligible to receive funding from the (taxpayer funded) ABGF, and by implication or explicitly mentioned, the number of businesses that would be eligible for investment:

8) Brockman, Sen Slade (LP)
9) McDonald, Sen Susan (Nats)
10) Hume, Sen Jane (LP
11) Rennick, Sen Gerard (LP)
12) Seselja, Sen Zed (LP)
13) McIntosh, Melissa, MP (LP)
14) Whish-Wilson, Sen Peter (AG)
15) Keogh, Matt, MP (ALP)
16) Webster, Anne, MP (Nats)
17) Patrick, Sen Rex (CA)
18) Stevens, James, MP (LP)
19) Husic, Ed, MP (ALP)
20) Andrews, Karen, MP (LNP)
21) Kelly, Craig, MP (LP)
22) Falinski, Jason, MP (LP)
23) Frydenberg, Josh, MP (LP)

The Australian Business Growth Fund has not yet made an investment, and already **increased** the **minimum** revenue requirement for businesses **from $2 million to $10 million:**

- *"We require: $10–100m revenue".* (Australian Business Growth Fund (ABGF) (bgfaustralia.com.au))
- *"We will be building a portfolio of exclusively minority (<49%) equity investments between $5-15m in profitable and growing Australian companies (c. $10–100m turnover)"* (Australian Business Growth Fund: About | LinkedIn)

(both websites cited on 11 July 2021).

According to Australian Bureau of Statistics[7], 166,798 businesses have more than $2 million in revenue, but only 37,898 of those have more than $10 million in revenue. Changing the minimum revenue requirement from $2 million to $10 million means that 128,900 businesses will not meet the new revenue threshold (considered by Parliament when they approved $100 million of taxpayer funding). This is a decrease of 77%.

[7] https://www.abs.gov.au/articles/experimental-turnover-data-counts-australian-businesses-entries-and-exits

There is a very strong public interest in understanding whether our lawmakers were misled (ABGF Key Terms) or whether the ABGF Shareholders Agreement was so negligently drafted that their intentions have been ignored by the big banks in pursuit of profits.

6) APRA Declaration unintelligible without disclosure

On 9 December 2019, APRA provided exclusive, special, concessionary prudential treatment (see attached) for Authorised Deposit Taking Institutions (i.e. the banks) with respect to their investment in the Australian Business Growth Fund. That concession enables the banks to invest up to 2% of their CET1 capital (approximately $4 billion) into the ABGF. However, relief is subject to the important proviso that:

> *"This treatment will apply provided the purpose of the fund and its investment mandate remains substantially unchanged."*

It is impossible to determine if the banks are in compliance or breach of this regulatory condition without disclosure of the Documents, which set out the purpose and investment mandate of the ABGF. As noted above, since APRA provided its declaratory relief, the ABGF has lifted (contrary to Parliament's stated intention), the minimum revenue threshold for investee companies (i.e. its investment mandate) from $2 million to $10 million.

It is in the public interest to know whether the banks have breached the terms on which they were given up to $4 billion in special prudential treatment.

7) - 10) Unlawful Activities

Paragraph 6.123 of the FOI regulations states:
The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

Furthermore, paragraph 6.13 of the FOI Guidelines states that "*where the documents reveal unlawful business activities the 47G(1)(a) conditional exemption cannot apply".* The Documents reveal **unlawful business** in the following ways:

A. The Australian Prudential Regulation Authority Act 1998 requires APRA to consider *competitive neutrality* when exercising its functions and powers:

   *Section 8: 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]

   At the Senate Economics Committee hearing on 13 February 2000, Ms Richards (the APRA executive responsible for the ABGF prudential concessions) stated:

   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.

B. The Government Competitive Neutrality Policy 1996.

   The use of regulatory power to confer a commercial advantage on a Government business contravenes the Competitive Neutrality Policy. If the ABGF Key Terms or the ABGF Shareholders Agreement evidence the Government using its regulatory power in favour of the ABGF, this will contravene the Policy.

C. The ABGF Key Terms and the ABGF Shareholders Agreement raise concerning questions about breaches of Part IV of the Competition and Consumer Act 2010 (Cth) (CCA), by the shareholders and the ABGF.

The ABGF shareholders include the 6 largest banks in Australia. No ACCC approval was sought for the agreement. This raises concerning questions about contraventions of the CAA, including:

i. ss 45AF/45AG (the prohibition on cartels),
ii. s45 (prohibiting giving effect to arrangements for the purpose or effect of substantially lessening competition), and
iii. s46 (prohibition on misuse of market power).

Neither s45 nor the conditional exemptions apply where the documents contain evidence of unlawful activities. We note that ACCC has noted that "c*artels usually involve secrecy and deception*". Consequently, penalties are substantially increased where the participants seek to keep the arrangements secret.

11) <u>No Prejudice to Future Supply of Information, given specificity of circumstances</u>

The requirements of section 47G(1)(b) are not met in light of the factual circumstances of this case. There are multiple elements of public interest and valid and unique reasons why the material should not be excluded from the FOI regulations.

<u>Costs Reimbursement</u>

We respectfully seek reimbursement of the fees that we paid. While we believed the estimate to be fair, in light of the decision, it appears that the work specified in Treasury's estimate of time has not been undertaken.

Treasury's estimate of costs provisioned for 23.13 hours of work (in addition to 3 hours for search and retrieval of the two documents) for the following tasks:

- examination of 167 pages
  - This does not appear to have been undertaken. We requested that the confidentiality clauses be reviewed for the typical exclusions from confidentiality that appear in commercial documents (such as provision of the document to a Government agency). However, it appears that documents were only reviewed for the *existence* of a confidentiality provision, which – at most, would only be 1-2 pages at most, and possibly the table of contents of the documents)
- making of necessary redactions
  - No redactions were made as no part of the Documents were supplied
- preparation of a decision letter
  - We believe this should have been able to be produced within 5 hours (included free time).

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Please do not hesitate to contact me if I can be of assistance in any way to your determination.

Yours sincerely,

Ben Bucknell

CEO