On-Market BookBuilds Pty Ltd
ABN – 31 140 632 024
AFSL – 421 535
Level 31, Tower 2, 200 Barangaroo Ave
Sydney, NSW, 2000
OMB@onmarket.com.au
+61 2 8598 8559

24 August 2021

Commonwealth Competitive Neutrality Complaints Office
Locked Bag 3353
Belconnen
ACT 2617

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

Dear Stephen, Ralph, Stewart and Matthew

We refer to APRA's letter to the Commonwealth Competitive Neutrality Complaints Office (***AGCNCO***) dated 5 August and emailed to us by AGCNCO on 11 August 2021. As discussed in our phone call of 11 August, this letter sets out our response to APRA's letter and also contains new evidence that the AGCNCO was not aware of at the time of preparing its Draft Findings (which directly contradicts APRA's *belief* when it made the statements on which the draft findings rely).

On the following day, 12 August, we lodged two Freedom of Information (FOI) requests with APRA to see the primary documents referred to in that letter. These documents would have needed to be sighted by APRA to inform its letter of 5 August and ensure it was not misleading, and therefore should be readily available. Additionally, the FOI Act requires a response within 30 days however, APRA may seek an extension in certain circumstances.

We respectfully seek an extension of time (of 14 days beyond the time that APRA provides us with the information requested) to respond to the AGCNCO's Draft Findings dated 2 July 2021.

Executive summary
This letter is arranged in the following sections:

Section 1 – APRA's statement(s) – misplaced reliance that certain conditions had been satisfied
The AGCNCO Draft Findings rely on a statement at the Senate Inquiry that "it [Government Ownership] certainly wasn't a requirement". This section provides new evidence that explains why reliance by the AGCNCO on APRA's statement with respect to its Competitive Neutrality findings is misplaced.

The conclusion is not reliant on calling into question the speaker's honest *belief* at the time.

Section 2 – Errors and omissions in material presented to AGCNCO, and context
Every APRA correspondence to the AGCNCO, the Senate Inquiry and its responses to the Senate Inquiry's later questions contains errors or omissions. This section:
- sets out each of the errors or omissions, and how they relate to competitive neutrality
- sets out the context for those misstatements, which explains why APRA's statements cannot be relied upon for the purpose of the competitive neutrality decision by the AGCNCO.

Section 3 – Evidence that contradicts the counterfactual
This section sets out the facts that contradict the counterfactual argument that the ***exclusive*** prudential concessions would have been granted to the ABGF if it was a purely private-sector entity.

Section 4 – Application of the Competitive Neutrality Policy 1996 in today's context
This section explains why a failure to read the Competitive Neutrality Policy 1996 in light of the 2017 legislative amendments to the Consumer and Competition Act 2010 results in an unintended distortion of the policy that runs counter to the legislative intent and the intent of its authors. It also sets out a framework that ensures that the spirit of the policy is not contravened in its application.

Section 5 – Ultra vires matters within Draft Findings
This section respectfully submits that AGCNCO's findings pertaining to the APRA Act are ultra vires, and therefore should be removed from the report.

Section 6 – Abuse of process by misuse of AGCNCO's Draft Findings and breaches of the FOI Act
Treasury has misused AGCNCO's draft findings & our competitive neutrality complaint. The findings were marked as draft & provided to Treasury for the purpose of informing AGCNCO's final opinion.

This section sets out Treasury's abuse of process and the clear breaches of the FOI Act by Treasury. We respectfully seek that AGCNCO use its extensive powers to access and analyse to the ABGF Key Terms and ABGF Shareholders Agreement, as these documents contain the terms agreed between Government and the banks, and a finding of no competitive neutrality breach would be incomplete without examining these documents.

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Each section respectfully contains recommendations in respect of the Draft Findings. In particular, we would like to draw your attention to our request that the AGCNCO findings address:

- firstly, whether the "special treatment" by APRA means that ABGF enjoys a competitive advantage over the rest of the private sector, noting that our original complaint contains extensive analysis showing the advantage and how to calculate its monetary value
- secondly, whether it is reasonable for AGCNCO's findings to rely on APRA's statements, which have been shown to be premised on reliance on Government's mis-representations (now proven as false), is reasonable
- thirdly, in assessing the counterfactual to determine if the ABGF's competitive advantage exists by virtue of public sector ownership, whether it is more reasonable:
    A. to hypothesize that APRA would have relied in blind faith on assurances of market-failure from the private-sector in the way that it did accept assurances from the Government; or
    B. to conclude that, had APRA known that none of the so-called market-failures existed, that APRA would not have given exclusive "special treatment" to a singular fund with the effect that no ADIs could compete with the fund (and contrary to the UK and Canadian approach).
- fourthly, if the AGCNCO does not examine the ABGF Key Terms and the ABGF Shareholders Agreement, then why the AGCNCO has chosen not to exercise its powers to obtain and review these documents in order to make an informed assessment of whether the agreements between the Government, the other shareholders and the ABGF, convey a competitive advantage on the ABGF in breach of the Competitive Neutrality Policy 1996.

Section 1 – APRA's statement(s) – misplaced reliance that certain conditions had been satisfied

a) APRA relied on the ABGF being established to invest in SMEs, however ABGF since "re-purposed"

Throughout the period during which APRA conceptualised and formalised its "special treatment", Treasury's 4-days of public consultation, and the Parliamentary debate (including a Senate Inquiry) and APRA's responses to the AGCNCO's inquiries – the ABGF was proposed as a fund to invest in SMEs with a revenue between $2 million - $100 million.

As late as July 2021, even the AGCNCO draft findings set out the following statement:
"The ABGF will invest in established SMEs with annual revenue between $2 million and $100 million and three consecutive years of revenue growth and profitability (Frydenberg 2020)."

Despite Frydenberg being accurately quoted, a web-tracked history of the Australian Business Growth Fund website (Annexure 1) and the Australian Business Growth Fund LinkedIn page (Annexure 2), and an interview with the ABGF's CEO show that the ABGF, at least until 11 July 2021, set a minimum revenue requirement of $10 million.

"We require: $10–100m revenue". (www.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 BGF | LinkedIn)

"Businesses must have annual revenue between $10 million and $100 million" (interview 4 June 2021)

It is not plausible that the $10 million minimum revenue requirement was an oversight. The following facts bear out that it was deliberately set to $10m:

1) the website is new, only 1-page, and the figure is in bold, enlarged eye-catching font, and must have had significant management attention before being made public;
2) the $10 million is repeated on their LinkedIn page, which every employee sees and links to; and
3) the media interview was with the ABGF CEO and explicitly referenced the $10 million revenue requirement.

The number of SMEs within the universe of the ABGF investment criteria at $2 million was grossly inflated by the Ombudsman and Treasury (see our submission to the Senate Inquiry – pages 6 and 7 of Annexure 8), because they did not factor in all three investment criteria (only revenue, not profit and growth). But, a $10 million minimum revenue requirement totally excluded all small businesses. Only 23% of the businesses that have revenue above $2 million, also have revenue above $10 million. That is, 77% of the businesses that APRA believed were within the investment universe do not satisfy the higher $10 million revenue threshold.

It appears that the banks/ABGF management decided it would be more profitable at lower risk to invest in large businesses, rather than the SMEs. This breaches the Government's reasons for investing $100 million of taxpayer funding, and the reasons for lobbying APRA for prudential "special treatment" and APRA's understanding of it.

b) ABGF website recently changed to avoid scrutiny

Our letter to Treasury dated 20 July 2021 appealing the rejection of our FOI request (Annexure 4) exposed the misappropriate of public funds through excluding small business. The $10m revenue threshold was/is clearly contrary to the Parliamentary purpose in investing $100 million. Annexure 5 lists 21 Ministers who specifically referred to small business as being eligible for the fund in their Parliamentary speeches concerning the appropriation of $100 million. Treasury has rejected our FOI appeal (Annexure 6) and

appears to admit that the threshold has (or had) been increased, that there is a public interest in this, but still (or perhaps, more accurately, *because of* the public interest) refuses to disclose the documents:

*"There may be a public interest in whether the increase in the ABGF's minimum revenue threshold constitutes a 'substantial change' to the ABGF's purpose and investment mandate sufficient to warrant reconsideration by the Australian Prudential Regulation Authority (**APRA**) of its permission to the banks to invest up to 2% of their respective CET1 capital in the ABGF."* (Treasury, Annexure 6, p3)

Rather than use it for the purpose that it was sent, Treasury breached the confidentiality of our FOI appeal by informing the ABGF of its contents. This enabled them to change the website. Consequently, AGCNCO cannot see the live website as it was. We annex a web-tracked version as showed continuously since launch.

Changing the website only in response to our threat to expose the deception of Parliament, while refusing to publicly disclose the investment mandate, or explain why they thought it appropriate to increase the minimum revenue requirement is disingenuous. The original website revealed that the *actual* investment criteria, irrespective of whether the investment mandate is wider, excludes small businesses (as defined by the ATO, and ABS). It is evident that if the ABGF has already lifted the revenue threshold to $10 million, then ostensibly dropped it to $2m to avoid scrutiny, then it appears that there are no constraints on the ABGF lifting the threshold up again to whatever it pleases, after the AGCNCO finishes its investigation. Changing the website to avoid scrutiny does not prevent management from excluding companies with $2-$10 million, and their actions reveal this to be their intent.

c) Demonstrable lack of the controls expected by APRA

The ABGF's decision and capacity to lift the revenue threshold to $10 million demonstrates that there were not sufficient controls put in place by the Government to ensure that the ABGF is used, and continues to be used, to invest in small business.

John Lonsdale's letter to the Senate Economics Legislation Committee dated 17 March 2021 shows that the APRA treatment *assumed* that Government has properly established the need for a fund, and design features would put in place controls to ensure the fund continued to address the properly identified need, as well as not negatively impact competition:

"the Australian Business Growth Fund was a joint initiative between the Australian Government and financial investors to address a gap in equity funding for small and medium-sized enterprises (SMEs) in Australia. The corporate structure and operating model of the fund were established by these founding shareholders. As Ms Richards indicated in evidence, the structure and approach of the fund were matters for Government. APRA understand that the Treasury has provided advice to the Committee on these matters."

These points are re-iterated in John Lonsdale's letter to the Senate Economics Legislation Committee dated 24 March 2021 stating: *"As per Ms Richards' evidence on 13 February 2020, competitive neutrality considerations related to the design of the fund itself, including the Government's decision to invest, were outside APRA's remit".*

d) APRA's misplaced reliance on Government to satisfy pre-conditions

It is very clear from the facts outlined above, and all APRA's other evidence that their capital treatment was ***formed in reliance upon*** (perhaps not unreasonably), that **the Government**:

- had undertaken studies to identify the alleged "market gap" in equity funding of SMEs
- the number of companies that would be eligible for investment;
- controls to ensure that the ABGF would invest in small businesses, and not exclude, or be substantially weighted towards larger businesses
- controls on competitive impact.

It has been established that APRA's reliance, up to and including the time of the hearing (February 2020), was unjustified in the following ways:

- ***none*** of the things that APRA relied upon the Government to do (above) had *in fact*, been done, or would be done prior to the establishment of the ABGF; and
- Treasury erroneously asserted:
  - the RBA had identified a funding gap (p16 of Hansard of Senate Inquiry)
  - they relied on an RBA recommendation and studies by the RBA and Ombudsman (Hansard p16)

  Neither of these statements were true (see Correspondence from RBA, Annexure 7, confirming the RBA has only researched access to credit, not equity): "we [RBA] have not made any formal recommendations for a business growth fund to the government". This was publicly exposed in one of our 6 further submissions to the Senate Inquiry (Annexure 8 and Annexure 9).

In its responses to questions on notice to the Senate Inquiry dated 19 February 2020, Treasury erroneously stated: *"the ABGF has been designed to minimise potential detrimental effects on competition in a manner consistent with achieving competitive neutrality as much as possible".*

This statement was false. In fact, there are no design features of the fund to ameliorate the effect on *competition*. Treasury attempted to misdirect the question by referring to design features that (corresponding to each bullet point of their letter):

- limited the effect of the ABGF on the bank's own business *lending* operations
- *ignored* the competitive advantage of allowing the banks to borrow 75% of their investment (vs zero for others investing equity in minority positions)

disingenuously asserting that the $4 billion limit of the ABGF's exclusive prudential concessions is a constraint (when this dwarfs all other competitors!)

- stated that "APRA noted that the inclusion of the Australian Government as a founding shareholder in the ABGF supports this treatment [prudential concessions]" (revealing that Treasury doesn't understand the concept of competitive neutrality)
- other banks can join the ABGF (indicating that Treasury fails to grasp the meaning of competition)
- repeating the falsehood that APRA's approach is similar to UK and Canada (like others, this duplicity ignores the fact that the ABGF has ***exclusively*** been given the prudential concessions)

Not only did the Ombudsman, like Treasury, erroneously claim reliance on the non-existent RBA recommendation and studies, but also that their study had "identified a huge funding gap" in the market for SME equity. However, the report (Annexure 10), in fact, only literally contains **12 words** in relation to SME equity finance: *"SMEs are… 30 per cent more likely to be rejected for equity finance."* For the reasons set out in our further submission of the Senate Inquiry, this is evidence of an efficient market. There was nothing in the Ombudsman's report that remotely investigated, let alone analysed, the market gap in ***equity*** for SMEs. As previously stated, we believe that the Ombudsman conflated the credit market with the equity market.

When Ms Squires stated "it [Government investment] was certainly not a requirement", it's is fair to say that her statement was premised on APRA's (understandable but misplaced) confidence that the Government had satisfied all these conditions. In light of this new evidence, a proper counterfactual must be expressed as:

"Would APRA have granted the *exclusive* prudential concessions to a group of banks (minus Government ownership), if APRA:

- **Did not sight proof that the fund had controls that prevent the banks from increasing the minimum investment criteria, such that they can limit investments into whatever minimum (up to $100m) revenue they choose (and exclude small business)**
- **Knew there was no evidence of a "market gap" in the equity market for SMEs (i.e., NO analysis undertaken by the RBA, Treasury or the Ombudsman or any other party)**
- **Knew that Treasury was arguing that there are such substantial competitors to the ABGF that publicly releasing the Shareholder Documents, or even just the key terms, could damage the $540 million ABGF (p4 of Annexure 4 and p3 of Annexure 6)**
- **Knew there were no studies undertaken into whether there was a market failure (i.e., NO analysis undertaken by the Ombudsman)**
- **Knew that the true number of companies that satisfy the investment criteria was not identified, (i.e., NO analysis by either the ATO or the ABS, having confirmed in writing that - contrary to Treasury's claim they obtained the data from ATO - they do not collect cross-sectional data of companies that meet the 3 investment criteria of minimum revenue, profitability, and growth)**
- **Knew that the fund had no design features to ameliorate the impact on competition; AND**
- **Knew the fund had a $10 million minimum revenue requirement, rather than $2 million (reducing the number of businesses that meet the investment criteria by 77%)?"**

It is clear that Ms Squires statement that "it [Government investment] was certainly not a requirement" was referring to its treatment of a hypothetical fund with the features purported by the Government, rather than a fund that does not have (and never has had) the justification for its formation, the controls or targeting required to ensure the funds are invested in small business.

Questions put to other APRA representatives about how they "would have acted" in the counterfactual need to include these conditions to draw out answers relevant to the question at hand. Otherwise, such line of questioning leaves open, or encourages, the respondent to answer based on a presumption that such conditions would have also been met if the ABGF was solely a private-sector initiative.

It is reasonable to assume that while APRA may have had (misplaced) trust in the Government, it would not have accepted these specific assurances from the private-sector on blind faith. It is more reasonable to assume that APRA would have required evidence of the quoted analysis and proof of appropriate controls before granting any "special treatment".

Section 2 – Errors and omissions in material presented to AGCNCO, and context

APRA's Determination Letter of 9 December 2021 is unequivocal with respect to exclusivity. There is zero room for interpreting that any equity investment by any ADI in any entity other than the ABGF will receive the concessional treatment. This exclusivity provides the ABGF with its competitive advantage over the rest of the private sector. This competitive advantage means that no ADI, including the ABGF shareholders, can economically justify investing equity in competition to the ABGF (whether directly or indirectly).

This tying of "special treatment" (words used in APRA's Determination) of prudential concessions to a singular beneficiary is unique in the Australian context. The only other feature of the ABGF which is unique is the Government investment of $100 million. That is, there is no other instance in Australia, where APRA has given concessions based on the identity of the entity, rather than on the features of the investment.

We are perplexed as to why the AGCNCO's draft findings do not address why the "special treatment" has been given to a singular entity, as this is fundamental to the question of competitive advantage and the reason why it would not be rational for any ADI to attempt to compete, directly or indirectly, with the ABGF. This is in addition to the advantage that such ADIs would enjoy (if they joined with, rather than competed against, the ABGF) over non-ADIs that compete in the market to supply equity to SMEs.

The uniqueness of a regulatory approach to single out one entity for 'special treatment' and the effect of preventing the formation of competitors and the explicit reference to the Government shareholding in the Determination as a factor provides an extremely strong basis for the rebuttable presumption that APRA's "special treatment" is *by virtue of* Government ownership. Such rebuttal would need to expound why APRA did not take its usual approach to prudential regulation of applying a treatment based on the underlying financial product, rather than the identification of the entity. We believe that a competitive neutrality ruling cannot be adequate without addressing this question.

APRA's responses to the Senate Inquiry's requests for information, and to the AGCNCO's requests for information, needs to be read in light of the requests being asked to demonstrate that it had not breached Section 8 of the APRA Act and it's (natural) predisposal to shield its employees from rebuke.

Every subsequent APRA correspondence has been shown below to contain errors, omissions, or misleading statements. We have made the AGCNCO aware of these mistakes. APRA has been inconsistent with the Senate Committee and has provided contradictory, incomplete, or false responses to the AGCNCO's inquiries. In light of this, in our view, it would be negligent to rely on APRA's subsequent statements rather than relying on primary material and forming an impartial view.

At the Senate Committee, APRA said: *"I think it [competitive neutrality] is outside of our remit."*

versus

In a written response 1 year later, only after their obligations under the APRA Act were pointed out to them, APRA wrote to the Senate Committee: *"APRA considered competitive neutrality"*

An FOI asking for documents considering competitive neutrality proved this assertion to be false – with APRA providing a response to the FOI that "documents do not exist".

In the Determination Letter of 9 December 2019:
"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."

versus

In response to the AGCNCO queries on 25 June 2021:
"APRA did note that Government involvement was a factor that contributed to the uniqueness of the fund."

This statement is false. It is clear that the statement made in APRA's Determination Letter (extracted above) does not say this and this is a disingenuous attempt to re-write the historical truth of what APRA said, and the reasons for giving 'special treatment' as set out in its Determination.

In response to AGCNCO on 5 August 2021, that its corporate governance committee noted that:
"APRA would not commit itself or announce before the ABGF was established."

versus

APRA announced the prudential concessions on 9 Dec 2019 (after the Government announcement), even though the ABGF was not incorporated until almost a year later, 24 Sept 2020.

APRA's response of 5 August deliberately misleads the AGCNCO by omitting to mention that APRA changed its stance as to the conditionality of its relief; demonstrating that it was capable of making changes, and its internal workings in Nov 18 were not a "determination" as has been referred to in the draft findings.

In response to the AGCNCO queries on 25 June 2021, APRA stated: *"that there had been no changes to the ABGF* [between 27 November 2018 and 28 October 2019]"

This statement is patently false and disingenuous. APRA knows that the Government had agreed to invest $100 million of taxpayer funds to become a shareholder during this time, and intentionally omitted this fact in its response to the AGCNCO.

In response to the AGCNCO queries on 25 June 2021, APRA stated:

"The capital treatment for ADI equity investment in the ABGF is broadly consistent with the capital treatment applied by those jurisdictions. APRA is not aware of government participation in the UK or Canadian Business Growth Funds."

This statement is patently false and disingenuous. We have provided to the AGCNCO (on 24/06/2021) and (22/06/2021) written confirmation from the UK Prudential Regulation Authority and the Canadian Office of the Superintendent of Financial Institutions emails that confirm that their respective prudential concessions in relation to equity investments by ADIs is not exclusive to investing in one intermediary.

In response to the Senate Committee on 24 March 2021, APRA wrote:

> *"APRA's objectives are set out in an Information Paper, published on 11 November 2019. This paper notes that: "APRA's prudential objectives are clear: the financial safety of institutions and the stability of the Australian financial system. In meeting these objectives, however, APRA has a number of supplementary considerations – efficiency,* ***competition, contestability and competitive neutrality…*** *"APRA had regard to all these objectives."*

Despite it being obvious that that the purpose and effect of the change to the prudential treatment was to *"improve[d] the commercial return to institutions participating in the fund"*[1], (and that these benefits only

[1] Letter from Senate Economics Legislation Committee to APRA Chair dated 5 March 2021

extended to shareholders in the fund), APRA stated: *"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."*

By providing concessional treatment of investments exclusively to the ABGF, APRA has enabled and created a singular entity in the market for SME equity. For the reasons set out on pages 5 -12 of our initial complaint letter to the AGCNCO dated 21 December 2020, the APRA treatment means that no private-sector participant can compete against the ABGF (for taking minority stakes in SMEs), due to their much higher costs of capital. The explosive growth of the UK BGF is testament to this (though at least in the UK, unlike Australia, there is no regulatory impediment to other ADI's forming a competitor).

It is indisputable that no ADI can economically compete directly or indirectly against the ABGF – because the comparative prudential treatment means setting aside 4x the capital. There is no opportunity for contestability, because APRA has made the prudential concessions exclusive to the BGF.

It is very clear that APRA's revised statement – contradicting its evidence at the Senate Inquiry - that it considered competition and contestability is false and misleading. The facts demonstrate that APRA had zero consideration for competition in setting its determination. If it had, it could not have made the prudential concessions exclusive to the ABGF and would not have *explicitly* said that the Government shareholding in the ABGF "supported" the "special treatment".

⇨ (**Recommendation 1**) if finding no breach of Competitive Neutrality relies on a hypothetical provision of prudential concessions to joint ventures between other banks, AGCNCO's Findings must provide an alternative, sound reason why APRA's prudential concessions are *exclusive* to the ABGF.

In its draft findings, the AGCNCO notes:
"There is therefore limited public information concerning the fund's investment mandate, operation, management and governance, and the shareholder agreement made in establishing the fund has not been published (Senate Economics Legislation Committee 2020a, p. 30)."

However, the Productivity Commission has considerable powers. We believe that leaving it to us to expend considerable resources, to exercise our (limited) rights under the FOI Act does not facilitate access to justice. We believe that failure of the Productivity Commission to obtain these critically important documents does not recognise the power imbalance between a singular entity comprising six of the largest banks in Australia and the Government and us (as a small business).

We note that Treasury has refused our FOI appeal for disclosure of the shareholder documents and in the reasons given:
1) quoted the AGCNCO's Draft Findings (page 4) as one of its reasons to decline to disclose the BGF Key Terms and the BGF Shareholders Agreement under the FOI Act.
2) used our complaint with the AGCNCO to argue that we are a competitor, while ignoring Treasury's past arguments that there were no competitors, and to argue that therefore disclosure to us would do detriment to the $540 million Government-backed ABGF.
In our opinion, these arguments are a gross abuse of process by Treasury. It is also disturbing that Treasury breached the confidence of our FOI appeal by notifying ABGF, without our consent, of its contents.

⇨ (**Recommendation 2**) As APRA submissions at the Senate Inquiry (concerning competitive neutrality) and every subsequent correspondence to the AGCNCO has been shown to contain at least one error, misrepresentation, or omission, we respectfully recommend that AGCNCO cannot fulfill its obligations by relying on APRA statements, but must exercise its powers to inspect the following documents:

- the BGF Key Terms; and
- the BGF Shareholders Agreement.

Section 3 – Evidence that contradicts the counterfactual

The draft findings present a counterfactual argument that:

- the private sector may have formed a business growth fund without receiving $100 million of Government funding; and, if such a hypothetical fund existed, APRA may have provided equivalent hypothetical prudential concessions to it; and
- if such hypothetical fund enjoyed such hypothetical prudential concessions, then the ABGF would not enjoy a regulatory advantage over it.

This speculation ignores the following facts:

a) The Australian Business Growth Fund has always, from the outset, been a Government invention.

The Government – not the banks – announced the proposal to establish a "business growth fund", on 13 Nov 2019, and made it clear that it was an initiative led by the Government – and that they had ***already*** spoken with APRA. This was then repeated at multiple events:

*"The Government is also working with financial institutions (**including APRA and the major banks**) on establishing an Australian Business Growth Fund that would provide longer term equity funding to small businesses." [Address - Northern Territory Chamber of Commerce - 16 Nov 2018]*

"We're also working to establish with the banks the Australian Business Growth Fund modelled on the UK experience" [Australian Chamber of Commerce and Industry Annual Dinner 28 Nov 2018]

APRA has admitted that its earliest considerations (27 Nov 2018) of the BGF treatment was ***after*** the Government set the agenda for the formation of the BGF, and it is apparent that APRA's considerations were in response to the Government requesting the change of prudential requirement by APRA.

In the AGCNCO's competitive neutrality findings on Australian Hearing, the promotion of the service on Government website and press releases, and some (minor) financial benefits from workers compensation were considered a competitive advantage. If these minor advantages are considered to breach the competitive neutrality policy, it seems inconsistent to ignore the Government petitioning of APRA, when this resulted in a comparative advantage outweighing a few mentions on a website or press releases by an order of magnitude.

⇨ (**Recommendation 3**) The AGCNCO findings should address how it is that the Government's petitioning of APRA, which has resulted in a permanent, insurmountable, and exclusive cost-of-capital advantage to a Government-owned business, is not a breach of competitive neutrality (when mere mentioning in a press-release or website was considered a breach in earlier AGCNCO rulings).

b) Even though the UK BGF had been established in 2011, there is no evidence that Australian banks had shown ***any*** interest in entering into a joint venture with other banks to invest in the equity of SMEs. If they had tried, it is unlikely the ACCC would have approved it, because:
   - it results in a substantial lessening of competition between the banks. Even today, no reason has been given why the banks should be permitted to collude in relation to investing equity in SMEs. And, there are no other examples where six banks have been permitted to create a joint venture in respect of a financial investment product.
   - If those banks had said they were going to provide "patient capital" – i.e., capital at a lower rate of return than the market, no matter what that return is – then this is a clear case of predatory pricing, which has long been prohibited under our competition laws

- Furthermore, APRA admits – in its letter of 26 June 2021 - that it did not give more than "preliminary consideration" to providing concessional prudential relief when approached by the private sector in 2015 about the potential for an Australian business growth fund modelled on the UK (i.e., without Government investment).

⇨ (**Recommendation 4**) if finding no breach of Competitive Neutrality relies on a hypothetical formation of a business growth fund without receiving $100 million of Government funding, then the AGCNCO Findings should address:

- why a BGF was not formed in the decade prior to the Government intervention
- why a competing BGF has not been formed in the 3 years since APRA's Determination
- why it believes that the ACCC would not prohibit six banks from acting in concert/entering into a joint venture – when there are no other examples of banks being permitted to do this in respect of a financial product under Australia's competition laws (without the cover of a significant Government shareholding) since the Trade Practices Act 1974 was established or under the Consumer and Competition Act 2010
- why APRA gave no more than 'preliminary consideration' to changing the prudential requirements in 2015 when approached by the private-sector
- why APRA would wait for a private-sector approach to release appropriate prudential treatment
- why it is reasonable to believe that APRA would have given exclusive concessions to a private-sector entity (without Government shareholding) if it believed that the risk-assessment was appropriate; and
- why having more than one bank invested in the ABGF (but no Government) reduces the risk-profile of the underlying SME equity investment, and if not, why is "special treatment" warranted (versus a bank investing equity directly in SMEs) – noting that the "special treatment" could still be constrained to 2% of CET1 capital??

c) Between the time the Government announced that it would form a BGF (13 Nov 2018) and when it publicly announced (23 April 2019) it would invest $100 million to become a shareholder in the ABGF, a simple google search reveals multiple media articles revealing that ANZ, Westpac, and Commonwealth Bank were not willing participants in the ABGF. This is not surprising, given the banks have no expertise or experience in investing in equities (other than ANZ losing $300 million between 2007 and 2013 unsuccessfully investing equity in SMEs).

The only private-sector participants who provided unqualified commitments to the BGF prior to the Government announcing its intention to invest $100 million were NAB (led by Anthony Healy who gained a high-profile job of CEO when the BGF was formed), and HSBC. No-one has suggested that APRA would provide its "special treatment" to a joint-venture comprising of only two banks.

⇨ (**Recommendation 5**) if finding no breach of Competitive Neutrality relies on a hypothetical formation of a business growth fund without receiving $100 million of Government funding, then the AGCNCO Findings must set out why it has ignored the reporting in the media that the banks were disinterested in forming a BGF, before the Government announcement that it would be become a shareholder (but after APRA made its 'decision' on 27 November 2018).

d) APRA admits, in its letter of 5 August 2021, that it will not publicly announce any relief until "the ABGF is established". Because the ABGF is a Government invention, this is indistinguishable from saying that it will not announce its relief until the ABGF is established on terms set by the Government: which proved to be that the Government became a $100 million shareholder in the ABGF.

⇨ (**Recommendation 6**) if finding no breach of Competitive Neutrality relies on an argument, in part, that APRA would have granted the relief without Government being a shareholder, the AGCNCO Findings must set out the alternative credible reasons why:

- there has been no public statement by APRA that provides for, or even alludes to the possibility of granting prudential concessions for another fund, despite 3 years passing since it purportedly made its 'decision';
- APRA made its prudential relief conditional on the Government's ABGF being announced, as opposed to ***any*** BGF; and
- why the determination of prudential relief for the ABGF was different to every other prudential standard set by APRA in the following ways:
  - prudential standards which are not conditional on the private sector setting out the structure of its proposal, including ownership
  - "special treatment", which is exclusive to one entity,

  before the regulator makes a public determination.

e) The Australian Government invested $100 million of taxpayer funds. If this wasn't necessary for the ABGF to be formed, then why did they do it?

⇨ (**Recommendation 7**) if finding no breach of Competitive Neutrality relies on creating a counterfactual, namely that a hypothetical, purely private-sector led BGF would have arisen anyway, then then the AGCNCO Findings must set out another reason, and provide supporting evidence, why the Government invested $100 million of taxpayer funding (if not because the ABGF would not have otherwise come into existence), and why that reason is more compelling than the conclusion that is was because the ABGF would not have been formed without Government investment of $100 million of taxpayer funding?

f) That only two Business Growth Funds globally (i.e., two instances of the major banks colluding to form a venture capital fund) is not suggestive that the AGBF would have been formed in Australia without Government investment. It is indicative of the contrary. There are 192 countries in the world that do not have a BGF. Suggesting that UK BGF and Canadian BGF's are evidence that it is likely, probable, or reasonable to believe that one would be established in Australia (without Government as a shareholder), is as compelling as saying that because the UK and Canada often are blanketed in snow at Christmas, we can expect the same in Australia.

⇨ (**Recommendation 8**) if finding no breach of Competitive Neutrality relies on creating a counterfactual, namely that hypothetical, purely private-sector led BGF would have arisen anyway, then the AGCNCO Findings must explain why it formed the view that it is more reasonable to consider that Australian banks will follow the precedent set in 2 countries, rather than the precedent of the other 192 countries.

g) APRA has failed to explain why an equity venture capital fund should be treated any differently from any other financial instrument, namely; it has given exclusive financial concessions in relation to an investment in a specific financial vehicle (the ABGF). For example, why isn't APRA giving special prudential treatment to:

   a. A "credit card" fund – where all the banks tip in together, rather than compete
   b. A "personal loans" fund – where all the banks tip in together, rather than compete
   c. A "business loans" fund – where all the banks tip in together, rather than compete
   d. A 'home mortgage" fund – where all the banks tip in together, rather than compete

   In no other instance does APRA consider that the financial risk of loss on the underlying exposure be dependent on the other investors in an intermediary vehicle. Nor, any other instance, does APRA give exclusive prudential concessions to invest in only one particular entity (the ABGF). The only distinguishing feature of the current scenario is that the Government is an investor.

⇨ (**Recommendation 9**) if finding no breach of Competitive Neutrality relies on APRA assertions that it would have granted the ***exclusive*** prudential concessions to a single entity (ABGF), even if it didn't have a government shareholding, then AGCNCO must present documentary evidence from APRA of reasons why it deviated from all of its other approaches to prudential treatment of all other financial instruments.

h) APRA provided one – **and only one** - reason in its Determination why the ABGF should enjoy *exclusive* prudential concessions versus over other equity investments by ADIs:
"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." *[Prudential concessions letter dated 9 December 2019]*

⇨ (**Recommendation 10**) If no competitive neutrality breach is found due to a hypothetical extension of the prudential concessions to purely-private competing BGFs, the AGCNCO findings should directly address how it forms this view, despite:

- APRA's Determination (9 Dec 19) that explicitly sets out the Government shareholding as a factor for providing "special treatment".
- APRA's Determination (9 Dec 19) that explicitly is exclusive to ***the*** Australian Business Growth Fund
- there has been no public statement by APRA that provides for, or even alludes to the possibility of granting prudential concessions for another fund, despite 3 years passing since it purportedly made its 'decision'.

Counterfactuals - In summary

The argument that a counterfactual could exist relies on using UK and Canada BGF's as examples of what *might have* happened in Australia, is unsound because it requires the AGCNCO to ignore the following actual **facts**:

- for 10 years (post UK BGF) the Aust banks did not attempt to collude in a BGF-like joint venture
- 192 (UN recognised) countries that do not have a BGF-like fund
- legal prohibitions, namely long-standing competition laws, in Australia that prohibit the banks from forming a BGF of this type (for the reasons set out above, it is highly likely that the ACCC would have investigated had the banks tried this without Government investment providing 'cover', and prohibited the conduct)
- unlike the UK and Canada, the ABGF was not considering investing in SMEs (its $10m minimum revenue requirement is 2x Canada's, and 5x the UKs, and 5x what was approved by Parliament in the BGF appropriation bill) – and its recent about-face on its website is a disingenuous attempt to conceal its true investment policy
- those two jurisdictions do ***not*** give exclusive prudential concessions to their (private-sector funded) BGFs
- This is the ***only*** instance where APRA has given exclusive prudential concessions based on the vehicle rather than the underlying exposure
- APRA stated – unequivocally - in its determination of 9 December 2019, that the Government investment was a reason for the relief. We do not believe that sufficient weight has been given to the fact that this was the sole reason for "special treatment" set out in its Determination letter, while other hypothetical suppositions have been afforded greater weight than they deserve in light of the facts.

The AGCNCO accepting a counter-factual argument, where there has been every opportunity for the counterfactual to occur, but it has not, is akin to a court accepting self-defence where a victim didn't attack a murderer, but a murderer makes an argument that even though this didn't happen, in the counterfactual - if a victim had attacked, then the murderer would have killed them in self-defence anyway.

If the AGCNCO intends to accept the counterfactual (i.e., that APRA would have provided exclusive prudential relief to a private-sector entity, even though it did not prior, and has not in the 3 years since):

- ⇨ (**Recommendation 11**) then the Draft Findings should point to a precedent where counterfactuals have been used before to render the Competitive Neutrality Policy 1996 ineffective. And, the AGCNCO should note that it is prepared to accept all future implausible counterfactuals (on the basis of a mere assertion, without supporting evidence, by a Government department) as a defence.
- (**Recommendation 12**) we respectfully ask that you publish this letter on the AGCNCO website, so that all future AGCNCO complainants have the opportunity to understand how any Competitive Neutrality complaint can be overcome by the Government department presenting a counterfactual defence, irrespective of how implausible it is.

Section 4 – Application of the Competitive Neutrality Policy 1996 in today's context

As you are aware, in 2017 legislative amendments were made to the Consumer and Competition Act 2010 to expand prohibited anti-competitive conduct to include conduct that has not just the "purpose", but also the "effect", of substantially lessening competition.

Policy by its intrinsic nature evolves and responds to the external world around it. In 1996, the Government did not adopt a static document. They adopted a policy.

It is well-accepted that the interpretation of law and policy by courts, tribunals and other decision-making entities evolves, and stasis would result in the denial of justice. 'This principle is deeply embedded in our legal system and is well expressed in 'Common Law Statutes in Judicial Legislation: Statute Interpretation as Common Law Process' (2011) 37(2) Monash University Law Review.

Further, the common law will be developed by the courts even after the time of the enactment of a statute. Therefore, it may well be that statutes will be interpreted by the courts in light of common law principles of interpretation as those principles exist not simply at the time of enactment but also at the time of application

It is clear that the core tenet of the Competitive Neutrality Policy 1996 was that *"Competitive neutrality requires that governments should not use their legislative or fiscal powers to advantage their own businesses over the private sector."*

We have provided pages of extensive analysis of the commercial advantages in our initial complaint letter of 20 December 2020. We do not believe that there is anything unclear about this. We note that the Senate Inquiry's secretariat letter of 5 March 2021 to Mr Wayne Byrnes, Chair of APRA, stated: "In effect, the reduction in risk weighting allowed participating institutions to treat high-risk equity investments made through the fund as ***loan and improved the commercial return to institutions participating in the fund***" [bold/italics added]

⇨ (**Recommendation 13**) The AGCNCO draft findings currently fail to address whether the "special treatment" afforded to the ABGF by APRA has *the effect* of conveying a competitive commercial advantage on it. We respectfully seek that the AGCNCO findings should firstly address whether a comparative commercial advantage has been given to the ABGF via APRA's ***exclusive*** prudential concessions.

We believe this disclosure is fundamental to transparent public discourse concerning competition and the analysis of the Competitive Neutrality Policy 1996.

"Competitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership."

It is clear that if the expression "by virtue of Government ownership" in the Competitive Neutrality Policy 1996 is interpreted very narrowly, ignoring the fact that the anti-competitive constraints on the private sector have been expanded to the "effects test", then this increases the *systemic* competitive advantages – even in the manner that they are tested - that the Government enjoys over the private sector. Clearly, this is contrary to the intent of the legislators that adopted the Competitive Neutrality Policy 1996 and contravenes the *spirit of the policy.*

APRA has confirmed that its prudential concessions were conditional on ***the*** ABGF being established. The establishment of ***the*** ABGF was conditional on the Government becoming a ($100 million) shareholder in the ABGF. It is a matter of indisputable logic that if "A" is conditional on "B" and "B" is conditional on "C", then "A" is also conditional on "C".

⇨ (**Recommendation 14**) The AGCNCO findings directly address:

- As a matter of law, whether "by virtue of" can be interpreted so narrowly that the competitive neutrality policy 1996 can be evaded by ensuring that the benefit that the Government entity receives is subject to an intervening conditionality; or
- As a matter of fact, how its examination of the ABGF Key Terms and ABGF Shareholder's Agreement, and APRA's Governance Committee minutes, shows that APRA's exclusive prudential concessions were not conditional on matters (such as the formation of the ABGF, or other matters) that necessitated the Government becoming a shareholder.

With respect, we note that each of AGCNCO's questions to APRA of 18 June 2021 are all leading questions, which may appear to a casual observer to be written to elicit answers that would lead to a 'no breach' finding.

⇨ (**Recommendation 15**) to avoid the perception of bias, that when seeking information from Government departments, we respectfully suggest that the AGCNCO does not use leading questions that could be interpreted as setting out a roadmap to a 'no breach' outcome.

⇨ (**Recommendation 16**) we note that the Draft Findings do not refer to the Competitive Neutrality Policy 1996 requirements regarding Government legislation regarding a commercial rate of return. We ask that this be addressed in the Draft Findings (possibly by recommending that the ABGF investment mandate, and any changes made to it since inception, be made public)

Section 5 – Ultra vires matters within Draft Findings

As noted in section 1, Treasury has already used the AGCNCO Draft Findings in its letter rejecting our appeal for transparent, public disclosure of the ABGF Key Terms and the ABGF Shareholders Agreement.

We do not agree with the analysis or conclusions reached in the draft findings titled: "Did APRA comply with its legislative requirement to balance competitive neutrality?" We note that the structure itself suggests that the AGCNCO has relied heavily on APRA's own explanation of why it did not breach the APRA Act, rather than undertake, or seek, independent legal advice. For example, the paragraph beginning: "APRA clearly considers that its obligations are consistent with…" is followed by the next paragraph, "Accordingly, the AGCNCO's assessment is that APRA's role was to consider any competitive neutrality issues that arose from its revised capital adequacy tests for those to whom the tests applied, which were ADIs alone."

We believe it is a complex legal question as to whether it can be *implied* that APRA's obligation to consider competitive neutrality is constrained to *only* to ADIs. We note that the APRA Act does not narrow the scope of APRA's obligations explicitly, and that there are multiple instances in the Act referring to APRA's obligations in relation to "financial stability in Australia". Narrowing APRA's obligations to only ADIs, would render many references in the APRA Act meaningless.

We note that the Draft Findings state:
"This concern [the APRA Act] has no bearing on any finding on compliance with competitive neutrality policy, but is relevant to the general understanding of the allocation of responsibilities for competitive neutrality"

We respectfully submit that AGCNCO's findings pertaining to the APRA Act are ultra vires, and therefore should be removed from the report.

We respectfully submit that for the same reasons as the AGCNCO declined to make observations on the application of the Consumer and Competition Act 2010, the AGCNCO should remove its commentary regarding the APRA Act. We fear that, in the same way Treasury has used the Draft Findings to as part of its reasoning to deny transparency and public disclosure of the ABGF Key Documents and ABGF Shareholders Agreement, that commentary by the AGCNCO on the APRA Act may be prejudicial to any future action we may take with respect to the APRA Act.

Section 6 – Abuse of process through misuse of AGCNCO's Draft Findings and breaches of the FOI Act

As you know, we have we have long expressed our view that that the ABGF Key Terms and ABGF Shareholders Agreement need to be analysed to provide an informed finding on whether the competitive neutrality policy 1996 has been breached.

Treasury's initial refusal to disclose cited FOI Act s45, s47G(1)(a) and (b), and s11(B)(4) as reasons to exempt the Documents from disclosure. We respectfully sought review on the following ten *independent* grounds:

1) CBA Chairman promised 800,000 shareholders that the Documents would be disclosed before veto vote[2]
2) Treasury evidence to Senate Economics Committee that there are no competitors to the ABGF[3]
3) No unreasonable adverse effect on disclosers, as ABGF is a fraction of the size of the shareholders[4]
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[5]
6) 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[6]
8) Documents set out shareholder activities that are an unlawful breach of Consumer and Competition Act[7]
9) Documents contain evidence of unlawful breach of the APRA Act[6]
10) The above facts *independently* mean there is no *reasonable* prejudice to future supply of information

It is ironic that Treasury is using the AGCNCO draft report (which has not examined these documents, despite having the power to request them) as reasons to not release the ABGF Key Terms and ABGF Shareholders Agreement under the FOI Act. We are caught in a "catch-22" of not being able to inform AGCNCO's draft findings of how the content of these documents demonstrates the competitive neutrality breach, and the draft findings being used to deny us access under the FOI Act.

Treasury is treating the AGCNCO with contempt by abusing the AGCNCO's process of releasing its draft report for discussion:

> *"I note the recent findings of the AGCNCO draft report regarding your company's competitive neutrality complaint that the ABGF has not breached the Commonwealth Competitive Neutrality Policy 1996."*
>
> Treasury, p4, FOI response, Annexure 6

This lends weight to our earlier-expressed concerns that the draft findings could not/would not be changed, even if we provided new information and compelling arguments of a competitive neutrality breach. Treasury clearly has the view that the outcome of the AGCNCO's investigation has already been determined.

Treasury further uses our complaint to the AGCNCO as a reason for its rejection of our FOI appeal:

> *"In addition, the complaint in December 2020 by a private equity funder* [this is another deliberate falsehood: Treasury knows we are a publicly-open platform, that is free to all "Mum and Dad" investors, and that we do not have a balance sheet to be a PE funder] *your own company, OnMarket BookBuilds Pty Ltd, to the Australian Government Competitive Neutrality Complaints Office (AGCNCO) alleging breach of the Commonwealth competitive neutrality indicates the possibility of at least one competitor."*
>
> Treasury, p2, FOI response, Annexure 6

[2] Para 5.160 FOI Guidelines, redressing a wrong or misdeed; s45 exemption does not apply
[3] Para 5.159 FOI Guidelines, the 5th element of "detriment" not demonstrated; s45 exemption does not apply
[4] Para 6.12 FOI Guidelines, unreasonableness threshold of adverse effect not met; s47G(1)(a) requirements not satisfied
[5] 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)
[6] Para 6.123 FOI Guidelines "unlawful activities or inefficiencies" s47G(1)(b) does not apply
[7] Paras 6.13 and 5.160 FOI Guidelines "documents reveal crime, civil wrong"; s45, s47G(1)(a) and (b) do not apply

Treasury's main, and implausible, argument for non-disclosure is that by revealing the terms that the Government has agreed with the banks, competitors such as OnMarket could cause 'significant detriment' to the $540 million ABGF (backed by shareholders with a market capitalisation of $640 billion). Treasury has not addressed how the competitors that it regarded as either so insignificant, or non-existent - in its submissions to the Senate Committee to obtain the $100m and $4 billion of concessions - can now be so large as to cause detriment to the ABGF just by knowing what terms the Government has agreed with the banks. They use this as a reason for not being transparent and to conceal the Key Terms and ABGF Shareholders agreement from public scrutiny.

The AGCNCO knows that Treasury presented to APRA that there was a market gap and market-failure, which can only be the case if there are no significant competitors servicing the market for equity-raising by SMEs. Yet, now Treasury relies on the presence of significant competitors to deny transparency around the ABGF Key Terms and ABGF Shareholders Agreement under the FOI Act.

In order to maintain secrecy of the ABGF Key Terms and ABGF Shareholders Agreement, the Government has resorted to blatantly breaching the legal requirements of the FOI Act. Each of our ten independent grounds of objection cited the relevant paragraph of the FOI Guidelines. However, Treasury's response to each of the ten grounds for objection did not address the grounds in the context of the FOI Guidelines, as required under the FOI Act. The ABGF shareholders know that the AGCNCO is currently undertaking the competitive neutrality assessment, and their strong, and invalid, objections to disclosure suggest that they are aware that the documents contain evidence of a breach of the Competitive Neutrality Policy 1996.

We attach a short summary (Annexure 11) setting out the breaches of the FOI Act. This lack of transparency, and Treasury's abuse of AGCNCO's process through misusing AGCNCO's draft findings provide a strong reason for AGCNCO to seek to review the contractual arrangements between the Government and the banks to make its assessment of whether the Competitive Neutrality Policy 1996 has been breached.

Abuse of process – in summary

Is it any wonder that the public lacks faith in Government agencies when:

- Treasury and the Ombudsman were shown to have made false and misleading statements to the Senate Inquiry, yet its recommendation remained unchanged
- The assertions by the APRA deputy chairman that they "conducted a competitive neutrality analysis" go unchallenged despite contradictory evidence of:
  - FOI responses showing "no documents exist" in relation to any such analysis
  - APRA executives more-contemporaneous submissions to a Senate Inquiry that they believed it was "outside our remit"
- Treasury allows $100m of Government funding which was (in our view naively and incorrectly) meant to 'support' small business, be re-directed by the banks to be used for a PE fund for large businesses (and to the exclusion of small business)
- A draft finding reliant on a hypothetical counterfactual is issued only 6 days after an undisclosed reply (containing unquestioned errors), to leading questions, from a person that was not even employed in the division that made the initial decision
- A counterfactual is based on the false evidence of Treasury and the Ombudsman being perpetuated, then accepted without question, by APRA
- We are assured that such draft finding will not prejudice the analysis of new material and arguments, then find it is used as a basis for denying access under the FOI Act to documents, that are essential (but not examined) to the findings concerning competitive neutrality
- Six banks have never been allowed before by ACCC to "get together", but ACCC doesn't investigate (presumably because Government is a shareholder as well), then Treasury uses this as a reason not to transparently release documents under the FOI Act
- Treasury blatantly abrogates its legal obligations under the FOI Act in order to suppress evidence of breach of the Competitive Neutrality Policy 1996 (Annexure 11) and conceal other legal contraventions from the public?

We respectfully ask that the AGCNCO restore our faith by demonstrating that Government departments can be fearless in their pursuit of transparency, openness, and impartiality.

Yours sincerely

Ben Bucknell, CEO