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Part 1: Specific Objections Raised by OnMarket and Treasury's response

Summary Grounds of FOI Appeal	Treasury Response
1. CBA chairman assured disclosure of the Documents to 800,000 shareholders at Oct 2020 CBA AGM immediately prior to a shareholder vote to veto CBA's participation in the ABGF. FOI Guideline para 5.160 states that s45 exclusion from disclosure doesn't apply if it would cause a 'misdeed of public importance'	Treasury do not dispute that within 24 hours of assurances at the AGM (which was immediately before the veto vote) that the documents would be publicly released, CBA signed an NDA. Treasury confirm that CBA now seeks to enforce their contractual rights arising under that NDA. CBA's actions are a misdeed, and it is implausible to suggest that the other banks were not aware of the CBA AGM vote, or what was said, given the signing of the shareholders agreement had been delayed 12 months until the CBA shareholder was undertaken, and then signed the following day. Error of law: Response fails to address FOI Guideline para 5.160, *"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."*
2. Para 5.159 of the FOI Guidelines sets out 5 necessary elements, including harm resulting from disclosure, for the exemption to apply. Without competitors, there is no harm & exclusion in the FOI Act does not apply. To get $100m from taxpayers, Treasury argued a "funding gap"/no competitors of significance & rejected evidence of them.	Treasury does not address how it can rationally contradict its own argument to the Senate Inquiry that there is a "market gap". Treasury's argument at the Senate Committee was that $100m of taxpayer funding to the ABGF, and $4billion of APRA "special treatment" was needed to address this "market gap" and the competitive effect on the private-sector competitors is "exaggerated". In contrast, Treasury asserts mere disclosure of the terms that the Government has agreed with the banks will result in harm/unreasonable adverse effect on the ABGF. Errors of law: 1) Treasury breaches procedural fairness by referring to our competitive neutrality complaint (that govt-backed competition & regulatory advantage is unfair) as evidence that competitors exist. 2) Treasury's response is demonstrably biased. Error of law: Response fails to address Para 5.159 of the FOI Guidelines.
3. Para 6.12 of the FOI Guidelines requires "unreasonable adverse effect on disclosers" for disclosure exemption to apply. As ABGF is a fraction of the size (0.075%) of the shareholders ($650	Treasury has relied on the banks opinion of what constitutes "unreasonable adverse effect on disclosers. Treasury: *"I consider the [banks] are best placed to identify the existence and extent of any such effect."*

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billion), it is not possible that disclosure of the documents would cause 'unreasonable adverse effect'.	Error of law: Treasury abrogates its responsibility under the FOI Act by outsourcing assessment of FOI Act requirements to the banks. Treasury argues to substitute s47(1)(b) of FOI Act for s47G(1)(a) (addressed below)
4. Typically, NDAs contain clauses specifically permitting disclosure when 'required by law or a regulatory agency'. If this is the case, the Documents would lack "the necessary quality of confidentiality" required to satisfy section 45. Requested Treasury check.	Treasury refused to confirm or deny whether the specific provisions in the Documents explicitly permit disclosure. Error of Fact and Law.
5. 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."* There is a public interest knowing whether the $100m has been directed away from SMEs by raising the investment threshold to $10m because it was the Parliamentary intent that ABGF invest in 'small' business	Treasury says: *"While there might be public discussion about the threshold increase … the key documents do not speak to this issue."* Treasury does not address why there is no public interest in the redirection of $100m taxpayer funding from SMEs to large businesses (against the wishes of Parliament - incl 21 senators and MPs in their 2nd reading speeches). Its response is incomprehensible and does not address Para 6.18 of FOI Guidelines.
6. In addition to the public importance and effective oversight mentioned above, another interest of public importance (Para 6.18 of the FOI Guidelines) is whether APRA's Declaration, which says the "special treatment" will only apply if the "investment mandate" remains substantially unchanged. The APRA Declaration is uninterpretable without disclosure of the Documents.	Treasury concedes *"There may be a public interest in whether the increase in the ABGF's minimum revenue threshold constitutes a 'substantial change … [means APRA removes its 'special treatment']".* However, Treasury says that the Documents are "not going to inform any debate". This is incomprehensible and fails to address para 6.18 of the FOI Guidelines.
7. The documents reveal breach of the APRA Act	Treasury erroneously asserts: *"It is clear from caselaw that unlawful activity for the purposes of paragraph [6.13] of the FOI Guidelines requires a threat to public safety or serious criminality."* This is false: In fact, Para 6.13 states: *Likewise, where the documents reveal unlawful business activities the 47G(1)(a) conditional exemption cannot apply…"* If it were "clear from caselaw", as Treasury asserts, then Para 6.13 would refer to *Searle.* It does not. But, Para 6.13 does refer to "*Deputy President Forgie's discussions in Bell and Secretary, Department of Health (Freedom of information)*

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	[2015] AATA 494 particularly at [44]. The Information Commissioner has discussed and followed the 'Bell' approach in a number of recent IC review decisions, see for example Linton Besser and Department of Employment [2015] AICmr 67." Treasury has deliberately not applied the principles set out in Bell.
8. The documents reveal breach of Competitive Neutrality	Treasury have abused the AGCNCO process, by referring to the "draft report". AGCNCO has assured us that the draft report – in which we have identified errors of fact and law that should alter the draft conclusions – is only a 'discussion document' and does not indicate the final findings. Ironically, the draft findings have been prepared without analysing the Documents, which are fundamental to whether the competitive neutrality policy 1996 has been breached (and we have presented this to the AGCNCO).
9. The documents reveal breach of Competition and Consumer Act 2010	Treasury: "FOI Guidelines requires a threat to public safety or serious criminality. Your submissions do not raise issues of this kind." Treasury is stating that a cartel offence is not "serious criminality", even though it is a criminal offence, and carries up to a 10 years' jail for executives and managers!
11. There is no prejudice to the future supply of information to the Commonwealth	Treasury argues that disclosure will inhibit future provision of information. This ignores the fact that the Documents evidence the contractual relationships between the Government and the banks, rather than be information of proprietary value. The Documents for which disclosure is sought have no proprietary value to any singular bank (logically, this test must fail as the information is known to all six banks). Treasury is furthermore contradicted by para 6.123 FOI Guidelines: *"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."*
12. Request for refund because Treasury didn't do the work specified in the estimate	Treasury charged 2 minutes per page, over 167 pages. However, this ignores the fact that Treasury didn't look at every page.

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Part 2: Fatal Flaws Treasury's FOI Review

Section 45 – Material provided in confidence

Section 45 of the FOI Act provides that a document is an exempt document if its disclosure would give rise to an action, by a person (other than an agency or the Commonwealth), for a breach of confidence. To found an action for breach of confidence (which means section 45 would apply), each of the following five criteria must be satisfied in relation to the information: 1) it must be specifically identified; 2) it must have the necessary quality of confidentiality; 3) it must have been communicated and received on the basis of a mutual understanding of confidence; 4) it must have been disclosed or threatened to be disclosed, without authority; and 5) unauthorised disclosure of the information would, has, or will cause detriment.

Treasury says: *"[Section 5.171 says] the FOI Guidelines provide that detriment takes many forms, such as threat to health or safety, financial loss, embarrassment, exposure to ridicule or public criticism. It is sufficient that detriment in some form is a likely outcome to the party to whom the obligation of confidence is owed, as I have found. I therefore do not accept your argument that the comparatively small capital investment in the ABGF by the private sector shareholders as against their overall capitalisation means that there would be no real detriment to these organisations from disclosure of the relevant documents".*

Treasury **does not address** the necessary elements of s45, namely, they do not address:

1) How the banks can have a "mutual understanding of confidence", when the CBA Chairman publicly assured CBA shareholders, the day before signing the ABGF Shareholders Agreement, that the documents would be released
2) Whether the specific exclusions within the NDA clauses of the shareholders agreement allow for disclosure in these circumstances, which would:
   - prevent "an action under the general law for breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure" (in which case para 5.155 of the FOI Guidelines makes clear that section 45 exemption would not apply; and
   - mean that the information would be disclosed **with** authority. Para 5.168 of the FOI Guidelines states that *"The scope of the confidential relationship will often need to be considered to ascertain whether disclosure is authorised"* (Treasury has failed to consider the scope, by failing to consider whether disclosure is permitted under the specific NDA clauses of the shareholders agreement)
3) What evidence supports a conclusion that disclosing the documents would cause detriment (Treasury merely assert this)
4) Even if it is established (despite the reasons above) that:
   - there is a "mutual understanding of confidence"
   - disclosure would create an action under general law for breach of confidence against the Commonwealth
   - disclosure would cause detriment to the ABGF,

   Treasury have not established why para 5.160 does not prevent section 45 from applying (due to CBA's public assurances to shareholders, and their reliance on this to not veto CBA's participation in the ABGF), namely:
   "A breach of confidence will not arise, and the exemption 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."

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Section 47D – prejudice to commercial interests of the Commonwealth

Section 47D conditionally exempts documents where disclosure would have a substantial adverse effect on the financial or property interests of the Commonwealth or an agency.

Treasury says: *"the value of the intellectual property would be destroyed by public disclosure through FOI."* Treasury fails to give reasons to support this assertion, or show how disclosure will destroy its value.

"The disclosure of these documents would give competitors of the ABGF an insight into the structure and mechanics of the ABGF's operations which those competitors could use to their advantage in the capital funding marketplace to the detriment of, and diminished financial returns to, the ABGF and its shareholders"

Treasury's assertions fail on the following grounds:

- the non-existence of competitors has been formerly argued by Treasury (contradicting this claim)
- Treasury asserted at the Senate Inquiry that the ABGF would not crowd-out any investment by the private-sector competitors in SMEs. Now, it seeks to argue that, if the Documents are disclosed, the private-sector will crowd-out the ABGF. These two arguments are contradictory and incompatible.
- Treasury makes an error by equating 'giving competitors an insight' with detriment to the ABGF.

Treasury says: *"disclosure of the documents would also likely lead to a future reluctance by similar parties to consider being involved in joint ventures of this nature with the Commonwealth for fear of exposure of their confidential business information"*

This argument fails if there is no substantial commercial loss resulting from disclosure.

Section 11A(5) – Public Interest Test

Section 11A(5) of the FOI Act provides that conditionally exempt material must be released unless its disclosure would, on balance, be contrary to the public interest.

Treasury says: *"Against disclosure, I have considered the public interest in protecting taxpayers' money as used by the Commonwealth in its commercial joint ventures, both with the ABGF and in future projects."*

This is a perverse claim. Treasury knew, because of our FOI appeal letter, that the ABGF had been re-purposed by the shareholders to exclude small businesses (contrary to the use of taxpayer's money approved by Parliament). Treasury then breached the confidence of our appeal letter, by informing ABGF of its contents, so that the ABGF could change its website to avoid public scrutiny. Treasury now argues to maintain secrecy of the ABGF's investment criteria that would show whether the taxpayer's funds have been misused.

Treasury says: *"I have considered how the disclosure of these documents would put the ABGF at a competitive disadvantage."*

Treasury assertion is false because it **fails to address** the following necessary elements:

- how the ABGF is disadvantaged through disclosure of the Documents or how any party can use the Documents to the detriment of the ABGF
- how Treasury reconciles its former arguments that:
  - there is a market-gap in SME equity financing with its current arguments that there are competitors in the market
  - that the ABGF will not crowd-out the private-sector competitors, but private-sector competitors will, if the Documents are disclosed, crowd-out the ABGF
- in the unlikely alternative that it was established that:
  - the deal structuring and origination strategies, or assumptions have commercial value; and
  - the ABGF would suffer detriment if these were disclosed; and
  - disclosure would, on balance, be contrary to the public interest,

  why the specific sentences cannot be redacted, while disclosing the remainder of the Documents.

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<u>Section 47E(d) – Agency operations</u>

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its disclosure under the FOI Act would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

Treasury's argument is that it won't get information from industry if forced to disclose is a nonsense. The information requested has been shared between 6 banks that compete heavily in the lending market (but not the equity market). It is implausible that they have shared information between them that any bank genuinely considers to be proprietary and valuable. If they did share valuable proprietary information, this contravenes the laws prohibiting anti-competitive conduct.

Moreover, each bank signed the Shareholders Agreement knowing that the CBA chairman, only the day before, had assured 800,000 shareholders, the day before, that the information would be released. It is absurd for Treasury to argue that Australia's largest banks would discontinue supplying information to the Government because information about the contractual relationship between the Government and the banks had been disclosed under the FOI Act, when the Chairman of the largest bank in Australia had given assurances that the information would be released.

Treasury says: *"I note 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 is not true. Detail is lacking and parameters are apparently able to be overturned, as demonstrated by the ABGF advertising that the minimum required revenue was $10 million, not $2 million. Treasury has not disclosed whether the ABGF lifted the revenue threshold by 500% from $2m to $10m (excluding small business and going against the wishes of Parliament).

<u>Section 47(1)(b) – commercially valuable information</u>

Section 47(1)(b) provides that a document is exempt if it contains information with a commercial value that would, or could reasonably be expected to be, diminished or destroyed by disclosure.

Treasury has argued: *"this commercial value would be destroyed or diminished by disclosure by affording competitors of the ABGF an unfair insight into its business practices and strategies."*

Treasury's assertions do not satisfy the required test, because Treasury does not consider any of the following elements (all of which are necessary to satisfy s47(1)(b):

- Treasury does not distinguish between the Key Terms (which is likely to be only a few pages, prepared quickly before the ABGF was even formed) and the Shareholders Agreement (which sets out rights and obligations as between the parties, rather than secrets on how to commercialise, and which was prepared when the ABGF only had one employee)
- Treasury fails to recognise that these documents are largely concerned with the rights as between shareholders, and even if the documents contain:
  - an immaterial reference to deal structuring and origination strategies
  - assumptions underlying the ABGF's proposed investment model, return targets, internal risk assessments and key performance indicators.
- Rather than conduct an analysis, Treasury has given undue weight to the objections of the banks through statements such as *"I consider that this information has a commercial value to the ABGF shareholders, as indicated in their third-party consultation responses"*. Naturally, the banks will object to disclosures under the FOI Act if this transparency exposes wrongdoing. The fact that CBA is now willing to contradict its chairman's public assurances of disclosure and knowing that this means she has misled CBA shareholders suggests that the banks are aware that disclosure of the Documents will expose serious illegal activity.

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- Treasury argues that the Documents *"were drafted by each party's lawyers at cost to the shareholders".* This is a misrepresentation because:
  - We have been informed that only the ABGF was represented by external counsel (Gilbert & Tobin), and that the other bank shareholders did not have external counsel
  - The ABGF was funded by $100m of taxpayer funds. It would be perverse to argue that the use of public funds is a reason for non-disclosure
  - There is no evidence that any legal fees were paid other than by ABGF
  - Even if legal costs were borne by the bank shareholders, such costs will be immaterial to them given the $640 billion capitalisation of the banks, the $4 billion of "special treatment" concessions afforded by APRA, and the $100 million contributed by taxpayers to the joint venture
- Common-sense says that the following things are not of commercial value that could be destroyed/diminished through disclosure:
  - How could the disclosure of information about *"deal structuring"*, cause that information to be diminished – noting that the ABGF LinkedIn page already publicly discloses that deals will be structured as "exclusively minority (<49%) equity investments between $5-15m in profitable and growing Australian companies (c. $10–100m turnover)."
  - How could disclosure of *"origination strategies"* diminish their value? Obviously, the banks have lending operations servicing small business – this is no secret.
    - If the Government has promised to 'deliver deal-flow' to the ABGF – then this would be a breach of the Competitive Neutrality Policy 1996 (and cause for disclosure under the FOI Act)
    - If the banks have promised to 'deliver deal flow' – then this would be evidence of anti-competitive conduct (and cause for disclosure under the FOI Act)
  - How can disclosure of "*assumptions underlying the ABGF's proposed investment model, return targets, internal risk assessments and key performance indicators*" possibly diminish the value of those assumptions?
- None of the banks have any prior experience in equity raising for SMEs (apart from ANZ – who blew $300 million unsuccessfully investing in SMEs) – hence it is an implausible assertion that the banks have brought any valuable commercial information to the key documents
- Treasury does not explain how, if there are any secrets of *"commercial value that can be shown to be diminished or destroyed"*, why such specific information could not be redacted, while transparently disclosing the remainder of the documents concerning the contractual agreements between the Government and the banks.

Para 5.207 of the FOI Guidelines states:

"The second requirement of s 47(1)(b) — that it could reasonably be expected that disclosure of the information would destroy or diminish its value — ***<u>must be established separately by satisfactory evidence</u>****. It should not be assumed that confidential commercial information will necessarily lose some of its value if it becomes more widely known.*[1]*"* [Bold/underlining added]

Not only has Treasury failed to cite satisfactory evidence, but they have also ignored evidence that contradicts the proposition that disclosure would destroy or diminish the value of the information.

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[1] See for example 'D' and Civil Aviation Safety Authority [2013] AICmr 13.

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Lastly the following comment from Treasury is indicative of their view that the FOI Act lacks legitimacy:

"I also consider that is unfair to financial industry stakeholders to enable the public to be able to 'piggyback' via the FOI process to gain access to the products of expert confidential commercial legal advice those stakeholders have received and in which they maintain intellectual property rights."

To describe the public as "piggybacking" on the back of FOI demonstrates Treasury's contempt for both the FOI Act and the public's legitimate expectations and legal entitlement to access documents funded by $100 million of taxpayer's money that reveal the agreement between the Government and the banks.