

23 September 2016

Mr Stephen Sedgwick AO  
Independent Reviewer  
Retail Banking Remuneration Review

By email: [submissions@retailbankingremunerationreview.com.au](mailto:submissions@retailbankingremunerationreview.com.au)

Dear Mr Sedgwick

## Retail Banking Remuneration Review

The Australian Bankers' Association (**ABA**) welcomes the opportunity to provide this submission to the independent review of product sales commissions and product based payments in retail banking (**Retail Banking Remuneration Review**).

With the active participation of 25 member banks in Australia, the ABA provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services. The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.

The ABA notes that individual banks will be engaging directly through the independent review and providing you with information about their remuneration structures, including reward policies and governance, reward program payments and details, and details about recent changes and future plans. This information will be commercially sensitive and confidential.

The ABA is not able to provide detailed views on product sales commissions and product based payments due primarily to legal obligations and risks. The purpose of the ABA submission is, therefore, to provide high level views about the industry's reasons for establishing the independent review and the outcome the industry is ultimately aiming for, namely that product sales commissions and other product based payments which could lead to poor customer outcomes are identified and removed or changed and remuneration and incentives align better with customer outcomes.

Please find attached the ABA submission. The banking industry looks forward to supporting the Retail Banking Remuneration Review, and receiving the findings from the review. Your findings will provide an important basis for the industry to advocate and progress changes which are identified as strengthening the alignment of remuneration and incentives with customer outcomes, including seeking any regulatory approvals necessary for the banking industry to take action.

If you or your secretariat would like to discuss any of the matters raised in this submission, please contact either myself or Diane Tate, Executive Director – Retail Policy on (02) 8298 0410: [dtate@bankers.asn.au](mailto:dtate@bankers.asn.au).

Yours sincerely



Steven Münchenberg  
**Chief Executive Officer**  
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## Cover page

### Submission and contact details

- Australian Bankers' Association
- ABA submission is made on behalf of member banks
- Contact: Steven Münchenberg, Chief Executive Officer, Australian Bankers' Association  
[smunchenberg@bankers.asn.au](mailto:smunchenberg@bankers.asn.au)

### Key points made in the submission

- The banking industry recognises that customers and the wider community expect banks to make sure they have the right culture, the right practices, and the right behaviours.
- Making sure the remuneration structures of people selling our products align with customer outcomes is important for our customers and our businesses, and to support trust and confidence across the banking industry.
- Remuneration structures have been changing over recent years in banks and banking groups to ensure our employees are incentivised for good performance and outcomes.
- The banking industry intends to strengthen the alignment of remuneration and incentives and customer outcomes. We will work with the independent reviewer to make sure the findings of the review are evidence-based and any recommendations for action are clearly articulated. We will also work with regulators to implement changes and, where necessary, seek regulatory approval and legislative reform to allow the industry to take action.
- The banking industry is committed to improving their practices and continuing to meet customer needs and community expectations. We recognise that remuneration structures are an important part of setting the right culture, the right practices, and the right behaviours.



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## Introduction

The banking industry recognises that customers and the wider community expect banks to make sure they have the right culture, the right practices, and the right behaviours. Bank customers want to be confident that when they deal with their bank, the people they are dealing with are not paid in ways that encourage them to put their interests, or the bank's interests, ahead of the customer's interests.

Banks recognise they are an integral part of the economy and the community and are important to Australia. An overview of banks in Australia is outlined in Attachment A.

Banks are committed to improving their practices and continuing to meet customer needs and community expectations. Making sure the remuneration structures of people selling our products align with customer outcomes is important for our customers and our businesses, and to support trust and confidence across the banking industry.

The banking industry has established an independent review to examine existing remuneration structures in retail banking, and to identify options for altering these structures to better align with customer outcomes.

Specifically, as set out in the Terms of Reference, the objectives<sup>1</sup> of the independent review are to:

- Build on the Future of Financial Advice (**FOFA**) reforms by identifying and collating the existing product sales commissions and product based payments that apply in relation to the sale, offer and distribution of identified banking products to retail and small business customers.
- Assess whether and how product sales commissions and product based payments in retail banking could lead to poor customer outcomes, including identifying and collating examples as part of building a framework to assess whether the payment could result in poor customer outcomes.
- Identify and test options for strengthening the alignment of remuneration and incentives and customer outcomes by either removing or changing those product sales commissions and product based payments which could lead to poor customer outcomes.
- Identify options to guide potential responses for banks, including whether regulatory approvals or other actions are needed to enable banks to make any changes or take actions to address the relevant issues.

Remuneration structures have been changing over recent years in banks and banking groups to ensure our employees are incentivised for good performance and outcomes, including providing quality customer service and good banking practices; meeting compliance and behavioural expectations; driving productivity and efficiency benefits, including measures relating to products and/or advice; and, aligning with the strategic goals of the business. We are committed to continuing to reform our practices and remove or change payments that could lead to poor customer outcomes. We look forward to the independent reviewer identifying options for action by the banks.

## Purpose of the review

The banking industry recognises that people are worried that the way banks pay their staff and others involved in the sale, offer and distribution of retail banking products could encourage them to put their own interests, or the bank's interests, ahead of what is best for the customer. When a customer walks into a branch, or calls their bank, they want to know that the person they are speaking with wants to do the right thing by them, not just sell them a product simply to meet a sales target.

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<sup>1</sup> <http://www.betterbanking.net.au/wp-content/uploads/Terms-of-reference-Independent-review-on-remuneration-FINAL.pdf>



On 21 April 2016, the banking industry announced a series of initiatives to address conduct and culture concerns in banks (the ‘industry announcement’)<sup>2</sup>. An important initiative in this reform package is the remuneration initiative, with two measures aimed at improving remuneration structures across banks, being:

- Establishing an independent review of product sales commissions and product based payments with a view to removing or changing them where they could lead to poor customer outcomes, and
- Each bank committing to ensure it has overarching principles on remuneration and incentives to support good customer outcomes and sound banking practices.

The banking industry has appointed an independent reviewer to look at how banks pay their staff, and others who act on behalf of the bank, and to identify options for change that would better align remuneration and incentives with customer outcomes in retail banking. The scope of the review is broad, and will involve consideration of complex technical and legal matters across the retail banking market. We are conscious the retail banking market includes non-bank providers and businesses, which will need to be taken into account in the review.

The independent reviewer has also been asked to provide observations and insights from the review to assist the banks ensure they have overarching principles on remuneration and incentives to support good customer outcomes and sound banking practices, the scope of which is broader than retail banking. We expect that that the principles identified in the Retail Banking Remuneration Review will have benefits more generally for remuneration structures and systems and reflect the intention to have and demonstrate the right ethical behaviours, business practices and culture across the banking industry.

## Current remuneration structures

Remuneration structures have been continually evolving. Banks have been making changes to their remuneration structures due to a number of factors.

## Legislative reform

The banking industry strongly supported the original policy intent of the Future of Financial Advice (FOFA) reforms, the introduction of the best interests duty, and the ban on conflicted payments as important additions to the existing obligations on financial advisers.

Banks have demonstrated a strong commitment to improving conduct standards, phasing out potentially conflicted payments, and building professionalism in the financial advice industry. Banks and banking groups have made a significant investment into making the necessary changes to their compliance systems and processes to reflect the FOFA provisions. These changes focused on the provision of financial advice and have impacted on the adviser-client relationship. These reforms have changed, and will continue to change, the industry for the better with more transparency and engagement in the financial advice industry.

The FOFA provisions focused on financial advice, which means there are different rules for the offer, sale and distribution of retail banking products. There are exemptions from the ban on conflicted payments for retail banking products (defined as basic banking products, general insurance products and consumer credit insurance), recognising these products are simple and well understood and consumers want low-cost access to these products across different channels<sup>3</sup>.

<sup>2</sup> <http://www.bankers.asn.au/media/media-releases/media-release-2016/banks-act-to-strengthen-community-trust>

<sup>3</sup> Including sections 963B and section 963D of the Corporations Act, and associated regulations.



A modified best interests duty applies to basic banking products and general insurance products (noting the full best interests duty applies to personal advice on consumer credit insurance), ensuring the bank acts in the best interests of the customer but reflecting the transactional nature of the provider-customer relationship<sup>4</sup>. There are also restrictions on the way in which performance bonuses may be payable to bank financial advisers and bank employees<sup>5</sup>.

The FOFA provisions cover financial products, and therefore do not apply to credit products. Credit products are regulated under different laws with different legal obligations but comparable legal effect recognising the different types of these products, including ensuring a credit provider does not provide credit that is unsuitable to a borrower, and responsible lending obligations.

Implementation of the FOFA provisions have changed the way that bank financial advisers and bank employees are paid. The independent reviewer is being asked to build on the FOFA reforms and now examine remuneration structures for retail banking products, including fixed and at-risk payments as well as monetary and non-monetary rewards, and the different staff and roles in retail banking, including customer facing roles and non-customer facing roles, such as managers and supervisors who may influence staff behaviours.

## Commercial practices

The banking industry has been making changes to their remuneration structures like other professions and industries. Bank financial advisers and bank employees are generally paid a salary and a performance bonus. Other discretionary payments may also be made. Third parties such as brokers are paid through business payments, including product sales commissions paid by the bank to the broking business.

It is important to recognise and reward good performance – this is good for customers and for banks. Bank employees' remuneration and performance is typically captured in a 'balanced scorecard'. A balanced scorecard framework is a strategic planning and management system that is used extensively in business and industry, government, and non-profit organisations in Australia and overseas to align business activities to the strategic goals of the organisation, as well as to monitor organisational and individual performance and improve internal and external communications. The framework is a mix of financial and non-financial performance measures used to give a 'balanced' view of organisational and individual performance.

Typically, a balanced scorecard looks at organisational and individual performance through four perspectives: financial, customer, internal processes (including compliance, risk management and governance), and learning and growth (including competency). The adoption of the balanced scorecard reflects the acknowledgement by banks and others that a balanced view of performance is necessary, and bank performance is an aggregation of both financial and non-financial indicators and real drivers of long-term competitive performance.

Changes to remuneration structures to ensure the appropriate balance of financial and non-financial performance measures have changed the way performance bonuses are paid. Additionally, some banks have altered enterprise agreements to remove a link between sales targets and salary. Banks have also announced other changes to their agreements and continue to negotiate improvements to their remuneration structures through consultation with employees, their representatives and other stakeholders. The independent reviewer is being asked to analyse product sales commissions and other product based payments, and build a framework to assess whether a payment could result in poor customer outcomes.

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<sup>4</sup> Section 961B of the Corporations Act

<sup>5</sup> Corporations Regulations 7.7A.12EB relating to performance bonuses to individuals clarifies the payments which are not conflicted remuneration, where remuneration is for work done and the payment is low in proportion of total remuneration and the weighting is outweighed or balanced to other matters. This Regulation is consistent with the guidance issued by the Australian Securities and Investments Commission (ASIC) when the FOFA provisions were introduced (see *Regulatory Guide 246: Conflicted remuneration* [RG 246], pp34-39) but gives legal effect to the principles identified by ASIC.



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## Customer needs and preferences and community expectations

The banking industry has been making changes to their products and services to reflect the changing needs and preferences of their customers. Changes have been made not just in the way bank employees and third parties are paid by banks, but also in the way these payments are disclosed to customers.

Disclosure requirements have significantly changed over recent years, with much more prescriptive disclosures about fees and charges. The banking industry is conscious that disclosure can result in 'information overload' and banks have been finding innovative ways to assist customers make informed choices about products and services. For example, banks have implemented:

- More prominent disclosures for retail banking products. Banks have made changes to terms and conditions ('T&Cs') and account statements to make information about fees and charges more prominent and user-friendly. Additionally, banks provide online tools for customers to compare different products or accounts and interactive tools for customers to see how they are using their accounts and/or spending their money or using their credit card. This includes clear disclosures about fees and charges.
- Better disclosures for personal advice on other financial products. Banks have implemented changes to provide retail clients under an ongoing fee arrangement with a 'fee disclosure statement' outlining fees paid by them to the bank financial adviser.
- Product disclosure statements and periodic statements for other financial products and key fact sheets for credit products. Banks have implemented changes to comply with fee disclosures, including dollar disclosure, to ensure retail clients receive clear, concise and effective information about product fees and charges. Banks have also implemented changes to disclosure for credit products to make fee and interest charges more prominent.

Like many businesses and organisations across industry, government and non-profit sectors, details about individual employees' salary packages or individual contractual payments between businesses are not disclosed. We think this is appropriate, with regulated disclosures to customers focused on the fees and charges incurred by them in acquiring the product or service. That said, we believe that regulated disclosures can be improved, which is why banks support recommendation 23 to facilitate innovative disclosure made by the Financial System Inquiry ('Murray Inquiry'). Disclosures should be streamlined and modernised. Additionally, we believe that banks could better explain how they pay their employees. There appears to be significant misunderstanding about remuneration structures in retail banking.

Improved remuneration structures should be coupled with improved promotion of remuneration practices in the banking industry. However, the banking industry is also conscious that community expectations about good banking practices, including remuneration and incentives, are also changing. Customers expect banking and financial products and services from organisations they trust to meet their needs. Customers expect to be treated fairly, and that this is reflected in the culture of the bank. We believe that good customer outcomes should be, and can be, more prominently captured in performance measures and reward programs, systems and structures across the bank, and the strategic goals of the bank.

## Changes in the retail banking market

The banking industry has been undergoing significant changes in the way in which products and services are made available. Technology is driving many of these changes, but is not the only thing transforming the retail banking market.





Customer needs and preferences are clear; some customers want direct access with high levels of control and the ability to customise features, whereas some customers want simple transactional needs met through digital functionality and more complex products or decisions handled through assisted services. In reality, many customers will be somewhere in between, and change depending on the product or their financial and personal circumstances.

Most banks have adopted multi-channel business models and strategies. Some banks have adopted specialised business models and strategies to target particular customer needs and preferences. As customer needs and preferences are evolving, banks have responded by shifting their distribution approaches. For example, mortgage broking is an important channel for customers and access to mortgage products<sup>6</sup>. The amount of business written through mortgage brokers and third parties has increased substantially over the last decade, with almost half of major bank approvals now coming through these channels.

The professionalisation of financial advice has changed and will continue to drive changes in the banking and financial services sector. Banks strongly support new legislative requirements to lift professional, ethical and education standards for financial advisers. We believe a new professional standards framework will be important to improve the quality of financial advice and rebuild consumer trust and confidence. However, we also believe that the new framework should promote further development of education, ethical and professional standards over time, including across all financial services professionals, which would cover retail banking.

Changes in retail banking are reflecting customer needs and preferences, and in particular the availability of products and the provision of financial advice. The independent reviewer is being asked to give consideration to factors such as competition and customer choice in retail banking in Australia when building a framework to assess where payments could result in poor customer outcomes.

## Competition law and regulatory approvals

The way the banks remunerate their staff and the arrangements they enter with third parties are commercially sensitive and confidential. Additionally, banks have various legal obligations which they must meet, in particular, competition laws and privacy laws. This means two things:

- 1) Detailed information about remuneration structures cannot be disclosed to others, including the public. Confidentiality with the review is important because all stakeholders, including the banks, will be wanting to provide their views and this will involve commercially sensitive and confidential information.
- 2) Decisions cannot be taken by the banks to collectively agree to remove or change their remuneration structures without regulatory approval, whether legislative reform to require such changes and/or authorisation by the Australian Competition and Consumer Commission (**ACCC**) to allow such changes.

Prior to the industry announcement, the ABA was advised that implementing the options identified through the remuneration initiative could present issues under the *Competition and Consumer Act 2010*, and would be likely to require an authorisation from the ACCC or another form of regulatory authorisation or approval if the industry wished to work together to agree to and implement appropriate actions in the absence of legislative reform. A copy of the legal advice received from Gilbert + Tobin Lawyers is provided in Attachment B.

The independent review is necessary to ensure confidentiality of information and proper process. The independent reviewer has specifically been asked to identify options to guide potential responses for banks, including whether regulatory approvals or other actions are needed to enable banks to make any changes or take actions to address the relevant issues.

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<sup>6</sup> The retail banking remuneration review will run in parallel with the review into the mortgage broking industry being conducted by ASIC. As set out in the Terms of Reference, banks are committed to an outcome that takes into account the ASIC findings. Any findings and options relating to mortgage broking will, therefore, align with the ASIC review timeline and wait for the completion of the ASIC review.



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Changes could be implemented in the form of legislative reform, which would ensure that all banks and other participants in retail banking are subject to the same legislative requirements and standards. Alternatively, the banking industry could seek authorisation from the ACCC. In this case, a proposed approach and timings is set out in Attachment B. We look forward to the independent reviewer identifying options and recommendations for action by the banks, and also how banks would be able to take action to ensure competition in retail banking is not adversely impacted and banks are able to meet their various legal obligations, in particular competition laws.

## Conclusion

The banking industry intends to strengthen the alignment of remuneration and incentives and customer outcomes. To do so, we will work with the independent reviewer to make sure the findings of the review are evidence-based and any recommendations for action are clearly articulated. We will also work with regulators to implement changes and, where necessary, seek regulatory approval and legislative reform to allow the industry to take action.

The banking industry is committed to implementing the remuneration initiative, and taking genuine action towards achieving the overall objective of the industry announcement to protect consumer interests, increase transparency and accountability, and build trust and confidence in banks. We recognise that remuneration structures are an important part of setting the right culture, the right practices, and the right behaviours.





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## Attachment A: Overview of Banks in Australia

Australia's banks are an integral part of the economy and the community. Banks help drive economic activity, provide tens of thousands of jobs, and inject billions of dollars into the economy through interest payments, dividends and taxes.

Banks must balance the interests of three groups of stakeholders. Borrowers want the lowest interest rates on their loans. Depositors want the highest interest rates they can get. Shareholders want a solid and reliable return on their investment. The efficiency of banks improves all the time with a continued fall in costs relative to income. Greater efficiency means that banks take less as the 'middleman' and are able to pass greater benefits through to borrowers, investors and shareholders.

Australians hold a significant portion of their wealth in bank deposits. About 20 per cent of households' financial assets is held in deposits with banks. Older households and low income households have a strong preference for deposits. In 2015, households earned about \$73 billion in interest on their bank deposits and bonds.

Most Australians own shares in banks. Around 1.5 million hold shares directly, but almost every Australian would hold shares through superannuation accounts or managed funds. Australian households are the dominant owners of Australia's banks. Over three quarters of the four major banks' shares are owned by domestic investors with the remainder owned by overseas investors. Over \$24 billion in dividends was paid to shareholders in 2015.

Around 150,000 Australians are employed by banks. These jobs pay good wages, offer generous entitlements, provide flexible conditions and good opportunities, and are relatively stable. The finance industry more broadly (including insurance) employs more women than men. Banks provide jobs throughout Australia. Australia's retail banks paid out \$25 billion in wages in 2015.

Banks finance the houses we live in, the places we work, and the goods and services that we buy. Banks provide around 6 million loans to home purchasers and investors totalling over \$1.47 trillion. Banks approved 623,550 loans to help Australians to purchase their own home over the year to June 2016. Banks also provided over \$9 billion in finance for cars, \$800 million for travel and holidays and \$540 million for boats and caravans. Banks provide loans to just over 1 million small businesses with total loan outstandings of \$260 billion.

Banks provide significant community support. Banks make significant voluntary commitments in supporting community organisations and customers. In 2015, commitments to the community included over \$600 million in financial support and additional 'in-kind' support in management and staff time and resources.

The Australian banking industry pays a lot of tax and levies. Over \$14 billion in tax was paid to governments in 2015. The Australian banking industry pays the most tax of any industry in Australia. Australia's four major banks are among the biggest individual payers of income tax.

The profitability of Australia's major banks is solid but not exceptional. Australia's major banks make large profits because they are large companies. The profits that are made should be related to the investment that is required to generate the profits. The return on shareholders' funds is in line with that earned by similar banks in comparable countries (e.g. Canada), and in line with the average return for Australian listed businesses.

About 30 per cent of banks' profits goes to the Federal Government in income tax. A bit over half is paid out in dividends to shareholders. Just over \$24 billion was paid in dividends in 2015. About three quarters of the major banks' shares are owned by domestic shareholders. A bit under 20 per cent is reinvested to boost capital to make the bank stronger and facilitate further growth.



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## Attachment B: Memorandum of Advice

## Memorandum of advice



LAWYERS

### Sydney

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**18 April 2016**

**To** Steven Münchenberg  
Australian Bankers' Association

**From** Gina Cass-Gottlieb and Matt Rubinstein

**Matter No** 9999999

**Subject** **Banking industry reform and regulatory approval**

Dear Steven

Pursuant to your request for a legal opinion in writing, we understand that the Australian Bankers' Association (**ABA**) and its member banks are developing a banking industry reform proposal (**Reform Proposal**) to address concerns about the conduct and culture of the banking industry and promote good customer outcomes, sound banking practices and ethics and ethical behaviour.

The Reform Proposal includes a number of initiatives:

- 1 reviewing product sales commissions for employees and third-parties with a view to revising them where they conflict with good customer outcomes;
- 2 enhancing complaints handling processes, broadening external dispute resolution schemes and other initiatives to support customers when things go wrong ;
- 3 improving protections and support for whistleblowers;
- 4 ensuring that individuals including employees who have breached the law or codes of conduct can be identified to future potential employers to help prevent the recruitment of unsuitable individuals;
- 5 strengthening the industry's commitments to customers in the Code of Banking Practice; and
- 6 supporting the Australian Securities and Investments Commission (**ASIC**) as a strong regulator.

Many of these initiatives and actions will require the cooperation and consultation of regulators, such as ASIC and the Australian Prudential Regulation Authority (**APRA**), and may also require enabling legislation to modify, extend or replace existing regulatory frameworks.

Certain of these initiatives present a particular risk under the *Competition and Consumer Act 2010* (**CCA**), and would require an authorisation from the Australian Competition and Consumer Commission (**ACCC**) or another form of regulatory authorisation or approval if the industry wished to work together to agree to and implement appropriate actions in the absence of legislative reform.

## **Reviewing remuneration and incentives (First initiative)**

ABA members compete with each other in the acquisition of services from independent third parties, such as financial advisers and planners, insurance brokers, and mortgage brokers. ABA members also compete with each other in the hiring of qualified employees in similar roles.

An agreement, arrangement or understanding by ABA members with regards to payments made to third parties for their services, and remuneration, incentives and payments made to employees to provide services on behalf of the bank or its related entities may constitute a contravention of competition law.

Specifically, to the extent that ABA members are in competition with each other and are not exempt under a legislative exemption or regulatory approval or authorisation:

- (a) any agreement between them that has the purpose, effect or likely effect of fixing, controlling or maintaining the price of services they acquire in competition with each other will be considered price fixing and a cartel provision, which will be illegal *per se* under section 44ZZRD of the CCA and may give rise to both civil and criminal liability for individuals and corporations involved in the agreement; and
- (b) any agreement between them that has the purpose of preventing, limiting or restricting the acquisition of services from particular classes of persons on particular conditions will be considered an exclusionary provision under section 4D of the CCA, which will be illegal *per se* under section 45 of the CCA and may give rise to civil liability for individuals and corporations involved in the agreement.

Conduct of this nature would constitute the most serious category of contraventions under the CCA. ABA members take compliance with the CCA seriously and seek to put in place procedures and appropriate regulatory authorisations to allow any initiative on a multi-lateral industry basis to be fully compliant with law. Such regulatory processes allow interested parties to put their views and submissions as part of the formal regulatory approval process.

## **Identifying and removing rogue advisers for poor conduct (Fourth initiative)**

Given that ABA members compete with each other in recruitment any agreement, arrangement or understanding between them that has the purpose of preventing, limiting or restricting the acquisition of services from particular classes of persons on particular conditions may be considered an exclusionary provision or collective boycott under section 4D of the CCA.

Although there are clear public policy reasons for an initiative that seeks to prevent the recruitment of individuals that have breached the law or codes of conduct, boycotts between competitors are illegal *per se*, and authorisation or some other appropriate regulatory approval would be necessary to immunise this conduct from risk of contravening the law. We confirm that such a regulatory approval process would afford interested parties the opportunity to put their views as part of the formal regulatory approval process.

## **Other proposed reforms**

The other proposed initiatives identified are unlikely to present a competition law risk as they have been described to us, but we will provide updated advice as the proposed initiatives and particular actions are further developed. Since the industry initiatives are being developed by competitors it is essential that they continue to be evaluated carefully and either authorised or submitted for other appropriate regulatory approval wherever they risk breaching the competition law.

## **Process for ACCC authorisation**

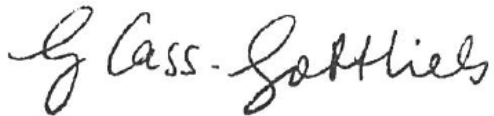
The process for seeking authorisation from the ACCC includes lodgement of an application, public consultation, initial determination, and further consultation with interested parties, before final ACCC determination. Authorisation is a public process, with the application and all submissions made

available online (subject to the ACCC accepting claims for confidentiality over commercially sensitive material).

### **Conclusion**

We therefore advise that ABA members should not proceed to agree to or to implement proposals as contemplated in the First and Fourth initiatives without an authorisation from the ACCC or another form of regulatory approval, in the absence of enabling legislative reform.

Yours sincerely

A handwritten signature in black ink that reads "Gina Cass-Gottlieb". The signature is written in a cursive, flowing style.

Gina Cass-Gottlieb  
T +61 2 9263 4006



## Attachment C: Summary of Authorisation Process

### Background

Where conduct risks breaching certain sections of the *Competition and Consumer Act 2010 (CCA)*, including the sections prohibiting cartel conduct and other agreements between competitors, parties proposing to engage in the conduct can apply to the Australian Competition and Consumer Commission (ACCC) for authorisation of that conduct.

The ACCC may authorise conduct if it is satisfied that the conduct would result in a benefit to the public that would outweigh any public detriment, including anti-competitive detriments. Authorisation confers immunity from both ACCC and third party legal action for the duration of the authorisation.

The process can take up to six months, though it is subject to regular milestones. The ACCC can grant interim authorisation to take effect until a final determination is made. Authorisation is a public process, with the application and all submissions made available online (subject to the ACCC accepting claims for confidentiality over commercially sensitive material).

### Outline of process and timing for the Banking Industry Reform Package

The ABA and its member banks developed the banking industry reform package to address concerns about conduct and culture in the banking industry and to promote good customer outcomes, sound banking practices, and ethics and ethical behaviour.

The following provides an outline of the steps with undertaking Initiative 1. The timeframe for the ACCC’s determinations are contingent on their internal processes, however, the ACCC must make a determination in relation to a new application for authorisation within 6 months of the application being validly lodged, unless the applicant agrees to an extension of up to 6 months.<sup>7</sup>

Description of steps	Timeframe
<ul style="list-style-type: none"> <li>ABA announces the Banking Industry Reform Package on behalf of the industry.</li> </ul>	21 April 2016
<ul style="list-style-type: none"> <li>Gilbert &amp; Tobin appointed. Governance arrangements to be put in place<sup>8</sup>. Mr Ian McPhee AO PSM appointed independent governance expert.</li> </ul>	Within 1 month from announcement (20 May 2016)
<ul style="list-style-type: none"> <li>Independent review is established (Initiative 1).</li> <li>Terms of Reference to be settled with the reviewer<sup>9</sup>.</li> <li>Review of certain remuneration, incentives and payments which do not align with good customer outcomes. Final report to identify options for further action.</li> </ul>	Within 3 months from announcement (mid August 2016)
<ul style="list-style-type: none"> <li>Issues paper released, setting out initial views and testing options.</li> </ul>	Within 3-4 months of review being established (late November/ early December 2016)
<ul style="list-style-type: none"> <li>Further targeted consultation with banks, stakeholders and interested parties.</li> </ul>	December 2016 – February 2017
<ul style="list-style-type: none"> <li>Final report provided to ABA, making observations and identifying options.</li> </ul>	By 31 March 2017

<sup>7</sup> <https://www.accc.gov.au/business/applying-for-exemptions/applying-for-an-authorisation>

<sup>8</sup> <http://www.bankers.asn.au/media/media-releases/media-release-2016/former-auditor-general-to-oversee-new-bank-measures>

<sup>9</sup> <http://www.bankers.asn.au/media/media-releases/media-release-2016/review-into-retail-banking-remuneration-begins>





<ul style="list-style-type: none"> <li>Banking industry decides next steps, including whether ACCC authorisation, other regulatory approval or legislative reform would deliver better customer outcomes.</li> </ul>	<p>Within 6 weeks from presentation of final report (mid May 2017)</p>
<ul style="list-style-type: none"> <li>If ACCC authorisation is chosen, ABA lodge authorisation application and submission on behalf of the industry. An application must be completed and lodged along with the applicable fee. An application must set out detailed legal, economic and industry analysis including:             <ul style="list-style-type: none"> <li>clear and complete description of the proposed conduct for which authorisation is sought;</li> <li>public benefit claims in support of the application;</li> <li>description of the markets likely to be affected;</li> <li>detriments to the public resulting or likely to result from the proposed conduct; and</li> <li>facts and evidence to support the public benefit and detriment claims.</li> </ul> </li> <li>Request that the ACCC make a decision regarding interim authorisation within 28 days.</li> </ul>	<p>As soon as finalised, however, it is expected that the application will take 1-2 months to prepare (30 June 2017)</p>
<ul style="list-style-type: none"> <li>ACCC assesses validity of application.</li> <li>Pending results of assessment, public consultation begins. Any person or organisation can make a submission on the merits, or otherwise, of the application.</li> </ul>	<p>Within 1 week from lodgement of application (7 June 2017)</p>
<ul style="list-style-type: none"> <li>ACCC makes decision on interim authorisation.</li> </ul>	<p>Within 28 days from lodgement (28 July 2017)</p>
<ul style="list-style-type: none"> <li>Closing date for submissions from interested parties (individual banks may make their own representations).</li> <li>Applicants typically respond to issues raised in consultation process with submissions of their own.</li> </ul>	<p>Submissions typically provided within a period of around 3 weeks after public consultation begins (18 August 2017)</p>
<ul style="list-style-type: none"> <li>Draft determination issued by ACCC.</li> </ul>	<p>Up to 3–4 months from lodgement</p>
<ul style="list-style-type: none"> <li>ACCC public consultation on draft determination (includes option to request a conference with ACCC).</li> </ul>	<p>Following publication of draft determination</p>
<ul style="list-style-type: none"> <li>Closing date for submissions following draft determination and any conference.</li> </ul>	<p>Within a few weeks of draft determination (or 30 days after any conference)</p>
<ul style="list-style-type: none"> <li>Final determination issued by the ACCC.</li> </ul>	<p>Up to 5–6 months from lodgement (by 31 December 2017)</p>