



COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2023
Re: Applications by Australia and New Zealand Banking Group Limited and Suncorp Group Limited for review of Australian Competition and Consumer Commission Merger Authorisation Determination MA1000023
Applicant: Australia and New Zealand Banking Group Limited and Suncorp Group Limited

DIRECTIONS

TRIBUNAL: Justice O'Bryan (President)
DATE: 15 September 2023
WHERE MADE: Melbourne

THE TRIBUNAL NOTES THAT:

- A. Each of the entities listed in paragraph B:
- (i) furnished information, produced documents or gave evidence to the ACCC in connection with Determination MA1000023 and claimed confidentiality in respect of all or part of such information, documents or evidence; and
 - (ii) have applied to the Tribunal for additional directions to be made with respect to the entity's confidential information.
- B. The entities referred to in paragraph A are:
- (i) Commonwealth Bank of Australia;
 - (ii) Westpac Banking Corporation;
 - (iii) National Australia Bank Limited;
 - (iv) Macquarie Bank Limited;
 - (v) ING Bank (Australia) Limited;
 - (vi) Rabobank Australia Limited; and
 - (vii) Judo Bank Pty Ltd,
- and their related companies (collectively referred to as the **Non-party Banks**).

THE TRIBUNAL DIRECTS THAT:

1. Subject to paragraph 2 of these Directions, the Confidentiality Regime (which was set out in the Annexure to the Directions made on 29 August 2023) is amended as shown in Annexure 1 to these Directions.
2. The Applicants and Bendigo and Adelaide Bank Limited (**BABL**) are to comply with the additional confidentiality protections set out in Annexure 2 to these Directions (**Non-party Bank Confidentiality Protections**) with respect to all documents filed and/or served by the ACCC in this proceeding that are identified as being subject to a claim for confidentiality made by a Non-party Bank.
3. The Applicants and BABL are to notify the ACCC, as soon as they are able, of the name(s) of an external solicitor who has been approved by each Non-party Bank to receive the Non-party Bank's confidential information in accordance with the Non-party Bank Confidentiality Protections.
4. Subject to the Applicants and BABL having given a notification in accordance with direction 3 in respect of a Non-party Bank, by 19 September 2023 the ACCC is to serve on the approved external solicitor an electronic bundle of the documents referred to in the Documentary Index (as referred to in Direction 9 made on 29 August 2023) that are identified as being subject to a claim for confidentiality by the Non-party Bank.
5. The Applicants, BABL, the ACCC and the Non-party Banks have liberty to apply for further directions in relation to the Confidentiality Regime or the Non-party Bank Confidentiality Protections as they apply to the confidential information of Non-party Banks.



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Australian Competition Tribunal



ANNEXURE 1

AMENDED CONFIDENTIALITY REGIME

Definitions

- 1 The following defined terms apply for the purposes of this Confidentiality Regime:
- (a) **Act** means *Competition and Consumer Act 2010* (Cth);
 - (b) **Applicants** means ANZ and Suncorp;
 - (c) **Commission** means the Australian Competition and Consumer Commission;
 - (d) **Confidentiality Claimant** means a person (whether a party or non-party) who has claimed confidentiality in Confidential Information;
 - (e) **Confidential Information** means all information filed with the Tribunal, served or otherwise produced in the Proceeding:
 - i. in respect of which a claim of confidentiality has been made and has not been refused by the Tribunal;
 - ii. which has been marked 'Confidential' or otherwise notified to the Commission on production that it is confidential; and
 - iii. which is not in the public domain or is only in the public domain by reason of a breach by any person of a confidentiality undertaking in the Proceeding;
 - (f) **Confidentiality Undertaking** means the confidentiality undertaking in the form attached to this Confidentiality Regime;
 - (g) **Intervener** means a person or entity which:
 - i. has made an application for leave to intervene in the Proceeding which has not been refused by the Tribunal; or
 - ii. is permitted by the Tribunal pursuant to s 109(2) of the Act to intervene in the Proceeding;
 - (h) **BABL** means Bendigo and Adelaide Bank Limited;
 - (i) **Proceeding** means ACT 1 of 2023 (including any appeals from a decision of the Tribunal in the Proceeding);
 - (j) **Support Staff** means persons providing administrative assistance and includes secretaries, administrative assistants, graduates, paralegals, IT staff, print room staff and staff of external printing or technology vendors based in Australia;
 - (k) **ANZ** means Australia and New Zealand Banking Group Limited;
 - (l) **Suncorp** means Suncorp Group Limited;



(m) **Tribunal** means Australian Competition Tribunal.

Access to Confidential Information

- 2 The following persons have unrestricted access to the Confidential Information, provided such persons keep that material confidential and in accordance with this Confidentiality Regime:
- (a) the Tribunal, Tribunal staff and any other person assisting the Tribunal;
 - (b) the Commission, Commission staff and any other person assisting the Commission in relation to the Proceeding including the Commission's barristers and external solicitors;
 - (c) Support Staff of the persons listed in paragraphs 2(a)-(b) and paragraphs 3(a)-(c) of this Confidentiality Regime.
- 3 The following persons have unrestricted access to the Confidential Information, provided that such persons have signed the ~~confidentiality undertaking in the form attached and marked~~ "Confidentiality Undertaking" before receiving the Confidential Information and the Confidential Information is only used for the purpose of the Proceeding:
- (a) barristers and external solicitors retained by either of the Applicants or BABL who are directly involved in the Proceeding, such access with respect to external solicitors being subject to the following:
 - i. the party seeking access must notify the identity of the external solicitor proposed to have access to the other parties;
 - ii. any notified party may object in writing to access by that person within 2 business days of receiving notice;
 - iii. access for that person takes effect if no objection is received in accordance with sub-paragraph ii above;
 - iv. if any party objects in accordance with sub-paragraph ii above, the parties shall confer with a view to resolving the disagreement or otherwise having the matter listed for determination by the Tribunal;
 - (b) independent experts retained for the purposes of the Proceeding by either of the Applicants or BABL (including where retained by their external solicitors);
 - (c) independent experts and external consultants engaged for the purposes of the Proceeding by the Commission (but such experts and external consultants are only required to sign the ~~confidentiality undertaking in the form attached and marked~~



- “Confidentiality Undertaking” to access Confidential Information ~~not in their~~ control prior to the commencement of the Proceeding); and
- (d) any other person, with the prior written consent of the ~~person who made a claim of confidentiality in respect of that information~~ Confidentiality Claimant.
- 4 If access to the Confidential Information is proposed to be provided to internal legal counsel of the Applicants or BABL (as the case may be) who directly assist with the conduct of the Proceeding, including internal legal counsel responsible for providing instructions to external barristers and solicitors in respect of the Proceeding, then:
- (a) the party proposing to provide access to Confidential Information to its internal legal counsel must notify the Confidentiality Claimant ~~person who has claimed confidentiality in that Confidential Information (whether a party or non party) (confidentiality claimant)~~ of the identity, title and role of the internal legal counsel to whom disclosure is proposed no less than 5 business days prior to any such person accessing Confidential Information and the specific Confidential Information that is to be disclosed;
- (b) within 2 business days of receipt of the notice referred to in paragraph 4(a), the ~~e~~Confidentiality eClaimant may object to the proposed disclosure of the Confidential Information in writing setting out details of the basis for the objection;
- (c) if a ~~e~~Confidentiality eClaimant objects in accordance with paragraph 4(b), the relevant party and the ~~e~~Confidentiality eClaimant shall confer with a view to resolving the disagreement or otherwise having the matter listed for determination by the Tribunal;
- (d) if no objection is made, then the nominated person (and their Support Staff) may have access to the specified Confidential Information, provided that the nominated person and any Support Staff have signed the ~~confidentiality undertaking in the form attached and marked~~ “Confidentiality Undertaking” before receiving the Confidential Information and the Confidential Information is only used for the purpose of the Proceeding.
- 5 The Commission, the Applicants and BABL are each to keep a register of the persons within their organisation, or retained by their organisation, who have signed Confidentiality Undertakings pursuant to paragraphs 3 and 4 above, and of the external printing or technology vendors based in Australia who have been provided with any Confidential Information, which register can be inspected by ~~the other parties~~ any Confidentiality Claimant on 3 business days’ notice.



General orders as to confidentiality

- 6 On 2 business days' notice to the Commission, the Applicants and BABL, any Intervener has liberty to apply to the Tribunal for a direction seeking access to Confidential Information. The Applicants, BABL and the Commission will be provided with an opportunity to be heard before the Confidential Information is disclosed to any Intervener. If access is sought to a non-party's Confidential Information, the non-party eConfidentiality eClaimant will be provided with an opportunity to be heard before that Confidential Information is disclosed.
- 7 The Confidential Information must not be referred to orally during the hearing of the Proceeding unless the Tribunal has directed that the hearing is to take place in private pursuant to s 106(2) of the Act.
- 8 Until further order of the Tribunal, Confidential Information is not to appear in any transcript of the Proceeding before the Tribunal other than in a confidential copy of the transcript, which shall only be made available to the persons referenced in paragraphs 2 and 3 of this Confidentiality Regime and otherwise as permitted by this Confidentiality Regime.
- 9 For the avoidance of doubt, nothing in this regime prevents:
 - (a) one or more of the Applicants, the ACCC Commission, BABL or any Intervener from having access to or otherwise dealing with their own Confidential Information;
 - (b) the ACCC Commission having access to or otherwise dealing with Confidential Information of the Applicants, BABL or any Intervener that was in its control prior to the commencement of the Proceeding.



Attachment

CONFIDENTIALITY UNDERTAKING

I, [name], [occupation], of [address], on [date] hereby undertake as follows:

- 1 In this undertaking:
 - (a) **Applicants** means Australia and New Zealand Banking Group Limited and Suncorp Group Limited;
 - (b) **Commission** means the Australian Competition and Consumer Commission;
 - (c) **Confidential Information** means all information filed with the Tribunal, served or otherwise produced in the Proceeding:
 - i. in respect of which a claim of confidentiality has been made and has not been refused by the Tribunal;
 - ii. which has been marked 'Confidential' or otherwise notified to the Commission on production that it is confidential;
 - iii. which is not in the public domain or is only in the public domain by reason of a breach by any person of a confidentiality undertaking in the Proceeding;
 - (d) **BABL** means Bendigo and Adelaide Bank Limited;
 - (e) **Proceeding** means ACT 1 of 2023 (including any appeals from a decision of the Tribunal in the Proceeding);
 - (f) **Support Staff** means persons providing administrative assistance and includes secretaries, administrative assistants, graduates, paralegals, IT staff, print room staff and staff of external printing or technology vendors based in Australia; and
 - (g) **Tribunal** means the Australian Competition Tribunal.
- 2 I will not use the Confidential Information for any purpose other than my work in respect of the Proceeding.
- 3 I will keep the Confidential Information confidential and will not disclose the Confidential Information directly or indirectly to any person, other than persons who have signed this undertaking, or any other persons permitted to access such information pursuant to the Confidentiality Regime or any directions of the Tribunal in the Proceedings related to confidentiality.
- 4 To the extent that I possess the Confidential Information, I will:
 - (a) establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access or use;
 - (b) keep the Confidential Information under my effective control; and



- (c) immediately notify the Commission and the ~~party person~~ who made the claim of confidentiality in relation to it ~~(being one or more of the Applicants and/or BABL, as the case may be)~~ in writing of any suspected or actual unauthorised use, copying or disclosure of the Confidential Information, of which I become aware.
- 5 To the extent that I cause, or permit, any Support Staff to have access to the Confidential Information (in accordance with the Confidentiality Regime):
- (a) that will occur on the basis that the Confidential Information is treated in accordance with clause 4 above; and
- (b) I will ensure that any access given to external printing or technology vendors based in Australia is on the basis that those vendors:
- i. are informed that the Confidential Information is confidential and subject to the Confidentiality Regime in these Proceedings;
 - ii. agree to keep the Confidential Information confidential; and
 - iii. agree not to retain any physical or electronic copy of the Confidential Information after completion of their services.
- 6 Following the final determination of the Proceeding, subject to any professional obligations I have to retain any of the Confidential Information, I will use reasonable efforts to ensure that:
- (a) all physical copies of the Confidential Information that came into my possession, custody or control during the course of this Proceeding are destroyed; and use reasonable efforts to destroy the Confidential Information in my possession, custody or control; or
- (b) all electronic copies of the Confidential Information that came into my possession, custody or control during the course of this Proceeding are deleted from servers, document management systems and backup systems otherwise, in respect of any Confidential Information under my effective control and not destroyed in accordance with paragraph (a), deal with it only in accordance with this undertaking.
- For the avoidance of doubt, paragraph 6 of this undertaking does not require me to destroy or delete documents created solely for the purposes of the Proceeding which refer to information obtained from Confidential Information.
- 7 I acknowledge that my obligations in paragraphs 2, 3, 4, 5, 8 and 10 of this undertaking will continue after the final determination of the Proceeding (or such other period as the



Tribunal determines is appropriate) and after the destruction or deletion of the Confidential Information.

- 8 I acknowledge that damages may not be an adequate remedy for the breach of my obligations in this undertaking and that the person who made a claim of confidentiality in respect of that information may be entitled to equitable relief (including, without limitation, injunctive relief) in respect of any threatened or actual breach of my obligations in this undertaking.
- 9 Nothing in this undertaking shall impose an obligation upon me in respect of information:
 - (a) which is in the public domain; or
 - (b) which has been obtained by me otherwise than in relation to the Proceeding, provided that the information is not in the public domain and/or has not been obtained by me by reason of, or in circumstances which involve, any breach of confidentiality undertaking or a breach of any other obligation of confidence in favour of a person who made a claim of confidentiality in respect of that information or by any other unlawful means, of which I am aware.
- 10 I irrevocably submit to the jurisdiction of the Tribunal for the purposes of enforcing the terms of this undertaking, which are governed by the laws of the State of Victoria.

SIGNED by [**name**] in the presence of:

Signature of [**name**]

Signature of witness, whose name and address appears below:



ANNEXURE 2

NON-PARTY BANK CONFIDENTIALITY PROTECTIONS

Introduction

- 1 Terms defined in the Confidentiality Regime set out in Annexure 1 have the same meaning in this Annexure 2.
- 2 The following confidentiality requirements apply to the Confidential Information of each of:
 - (a) Commonwealth Bank of Australia;
 - (b) Westpac Banking Corporation;
 - (c) National Australia Bank Limited;
 - (d) Macquarie Bank Limited;
 - (e) ING Bank (Australia) Limited;
 - (f) Rabobank Australia Limited; and
 - (g) Judo Bank Pty Ltd,and their related companies (collectively referred to as the **Non-party Banks**).
- 3 The following confidentiality requirements are additional to the requirements contained in the Confidentiality Regime set out in Annexure 1 and, in the case of conflict, the requirements in this Annexure prevail.

External lawyers

- 4 Paragraph 3(a) of the Confidentiality Regime is varied such that barristers and external solicitors retained by either of the Applicants or BABL who are directly involved in the Proceeding, and their Support Staff, may have access to the Confidential Information subject to the following conditions:
 - (a) the party seeking access must notify the identity of the barrister and external solicitor proposed to have access to the Confidentiality Claimant;
 - (b) the Confidentiality Claimant may object in writing to access by that person within 2 business days of receiving notice;
 - (c) access for that person takes effect if no objection is received in accordance with sub-paragraph (b) above;
 - (d) if the Confidentiality Claimant objects in accordance with sub-paragraph (b) above, the party seeking access and the Confidentiality Claimant shall confer with a view



to resolving the disagreement or otherwise having the matter listed for determination by the Tribunal;

- (e) the identified barrister and external solicitor must sign the Confidentiality Undertaking before receiving the Confidential Information; and
- (f) the Confidential Information must only be used for the purpose of the Proceeding.

Independent experts

5 Paragraph 3(b) of the Confidentiality Regime is varied such that independent experts retained for the purposes of the Proceeding by either of the Applicants or BABL (including where retained by their external solicitors), and their Support Staff, may have access to the Confidential Information subject to the following conditions:

- (a) the party seeking access must notify the identity of the independent expert proposed to have access to the Confidentiality Claimant;
- (b) the Confidentiality Claimant may object in writing to access by that person within 2 business days of receiving notice;
- (c) access for that person takes effect if no objection is received in accordance with sub-paragraph (b) above;
- (d) if the Confidentiality Claimant objects in accordance with sub-paragraph (b) above, the party seeking access and the Confidentiality Claimant shall confer with a view to resolving the disagreement or otherwise having the matter listed for determination by the Tribunal;
- (e) the identified independent expert must sign the Confidentiality Undertaking before receiving the Confidential Information; and
- (f) the Confidential Information must only be used for the purpose of the Proceeding.