

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

Applicants: Australia and New Zealand Banking Group Limited and Suncorp Group Limited

DIRECTIONS

TRIBUNAL: Justice O'Bryan (President)

DATE: 29 August 2023

WHERE MADE: Melbourne

THE TRIBUNAL DIRECTS THAT:

1. The applications for review of each of the Applicants, each titled proceeding number ACT 1 of 2023, be case managed and heard together with evidence in respect of one application being evidence in the other application.
2. Pursuant to s 109(2) of the *Competition and Consumer Act 2010 (Cth) (CCA)*, Bendigo and Adelaide Bank Limited (**BABL**) be permitted to intervene in this proceeding.
3. Unless otherwise specified and subject to further order, any document required to be served by these orders must be served on:
 - (a) the Applicants;
 - (b) BABL; and
 - (c) the ACCC.

Extended review period

4. For the purpose of s 102(1AD) of the CCA, the Tribunal determines that this matter cannot be dealt with properly within the initial period because of its complexity and therefore an extended period applies for the review consisting of the initial period and a further period of 90 days (which ends on 20 February 2024).



Confidentiality

5. The confidentiality regime set out in the Annexure to these directions (**Confidentiality Regime**) is to apply until further order.

Material before the ACCC

6. Subject to any further direction, the Confidentiality Regime will apply to all documents filed and/or served by the ACCC in this proceeding that are identified as being subject to a claim for confidentiality.
7. On or before 30 August 2023 the ACCC serve on the external solicitors for the Applicants and BABL:
 - (a) Determination MA1000023 and the Reasons for Determination in which:
 - (i) any information which the ACCC has identified as being, or being derived from, Protected Information or Protected Documents within the meaning of s 56 of the *Australian Prudential Regulation Authority Act 1998* (Cth) is redacted; and
 - (ii) any information which the ACCC has identified as confidential to one of the Applicants or a non-party is marked as confidential; and
 - (b) transcripts of examinations conducted pursuant to s 155(1)(c) of the CCA, including the examination bundles prepared by the ACCC and any documents put to the examinees and marked as exhibits in those examinations.
8. On or before 1 September 2023, the ACCC notify any non-party who:
 - (a) furnished information, produced documents or gave evidence to the ACCC in connection with Determination MA1000023; and
 - (b) claimed confidentiality in respect of any part of such information, documents or evidence,
of the terms of the Confidentiality Regime and that the non-party may apply to the Tribunal for further directions to be made with respect to the non-party's confidential information on or before 12 September 2023.
9. On or before 7 September 2023, the ACCC file and serve a single chronological index (**Documentary Index**) of the following material, which identifies for each document whether any part of the document is subject to a claim for confidentiality and, if so, the party claiming confidentiality:
 - (a) the information furnished, documents produced or evidence given to the ACCC in connection with the making of Determination MA1000023; and



- (b) the information that was referred to in the ACCC's reasons for making Determination MA1000023.
10. Prior to 11 September 2023, the Applicants and BABL are to notify the ACCC of an external solicitor who is permitted to have unrestricted access to confidential information in accordance with paragraph 3 of the Confidentiality Regime.
11. Subject to paragraph 12, on or before 11 September 2023, the ACCC:
- (a) file with the Tribunal separate electronic bundles of:
 - (i) the documents referred to in the Documentary Index that are not identified as being subject to a claim for confidentiality; and
 - (ii) the documents referred to in the Documentary Index that are identified as being subject to a claim for confidentiality;
 - (b) serve on the external solicitors of the Applicants and BABL notified to the ACCC under paragraph 10 of these directions separate electronic bundles of:
 - (i) the documents referred to in the Documentary Index that are not identified as being subject to a claim for confidentiality; and
 - (ii) the documents referred to in the Documentary Index that are identified as being subject to a claim for confidentiality.
12. The ACCC is not required to serve on the Applicants and BABL any information which the ACCC has identified as being, or being derived from, Protected Information or Protected Documents within the meaning of s 56 of the *Australian Prudential Regulation Authority Act 1998* (Cth).

Statement of facts and issues in contention

13. On or before 8 September 2023, the Applicants are each to file and serve a concise statement of facts, issues and contentions limited to 20 pages.
14. On or before 22 September 2023, BABL is to file and serve a concise statement of facts, issues and contentions limited to 20 pages.
15. On or before 29 September 2023, the ACCC is to file and serve a concise statement of facts, issues and contentions limited to 20 pages.

Facts that are not contested

16. On or before 13 October 2023, the parties are to confer and file a joint document identifying all findings on factual matters set out in the ACCC's reasons for determination that are not contested by the parties on the review.

Hearing

17. The proceeding be listed for hearing on an estimate of 9 days commencing on a date to be determined by the Tribunal.

Hearing Book

18. By no later than 30 days prior to the hearing, the Applicants are to serve a draft Hearing Book Index listing all documents proposed to be relied upon at the hearing.
19. By no later than 25 days prior to the hearing, the ACCC and BABL are to serve an amended draft Hearing Book Index identifying any additional documents proposed to be relied upon at the hearing.
20. By no later than 21 days prior to the hearing, the Applicant must file and serve a copy of the Hearing Book in electronic form, which:
 - (a) is produced in a text-recognised PDF format;
 - (b) is paginated sequentially throughout;
 - (c) is divided into separate folders of documents such that each folder comprises a single PDF file and the file name of each PDF file is the folder number; and
 - (d) each folder (being a PDF file) contains electronic bookmarks to each document in that folder.

Other matters

21. The Applicants, BABL and the ACCC have liberty to apply for further directions.
22. The proceeding be listed for further directions at 10.15am on 20 October 2023.



[Handwritten signature]

REGISTRAR

Australian Competition Tribunal



ANNEXURE

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) **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'; 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;
 - (e) **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;
 - (f) **BABL** means Bendigo and Adelaide Bank Limited;
 - (g) **Proceeding** means ACT 1 of 2023 (including any appeals from a decision of the Tribunal in the Proceeding);
 - (h) **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;
 - (i) **ANZ** means Australia and New Zealand Banking Group Limited;
 - (j) **Suncorp** means Suncorp Group Limited;
 - (k) **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.
- 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 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 confidentiality claimant may object to the proposed disclosure of the Confidential Information in writing setting out details of the basis for the objection;
 - (c) if a confidentiality claimant objects in accordance with paragraph 4(b), the relevant party and the confidentiality claimant 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 on 3 business days’ notice.



General orders as to confidentiality

- 6 On 2 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 confidentiality claimant 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, BABL or any Intervener from having access to or otherwise dealing with their own Confidential Information;
 - (b) the ACCC 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';
 - 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.
 - (g) **Tribunal** means the Australian Competition Tribunal; and
- 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 who made the claim of confidentiality (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:
- (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 do not retain any 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:
- (a) use reasonable efforts to destroy the Confidential Information in my possession, custody or control; or
 - (b) 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.
- 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 the destruction 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: