

## COMPETITION SPOTLIGHT ON AUSTRALIA'S FINANCIAL SECTOR.

As part of its 2017-18 Budget, the Australian Government announced a range of measures impacting Australia's financial sector. Most controversially, the Government will impose a "major bank levy" on Australia's five major domestic banks, which will raise approximately \$6.2 billion over four years. The Government is also proposing a new dispute resolution framework, including the establishment of the Australian Financial Complaints Authority and a new legislative Banking Executive Accountability regime which will give the Australian Prudential Regulation Authority greater powers regarding the appointment of senior executives and directors to banks and provide it with new powers to impose civil penalties for a failure to manage banks consistently with good prudential outcomes.

In the area of competition, the Government will implement an open banking regime to give consumers greater control over their banking data. It has tasked the Productivity Commission (**PC**) to undertake an inquiry into the state of competition in the financial system and will provide the Australian Competition and Consumer Commission (**ACCC**) with an additional \$13.2 million to undertake regular in-depth inquiries into financial system competition issues. The ACCC will also examine mortgage pricing decisions made by the major banks as a result of the introduction of the new bank levy. This briefing examines implications of some of the announced competition measures. Further briefings will be issued considering the competition implications of other measures.

### INTRODUCTION

As part of its 2017-18 Budget, the Australian Government announced a number of measures impacting Australia's financial sector. This briefing considers the competition implications of the following financial sector proposals:

#### Key issues

- The Productivity Commission has been directed by the Australian Government to undertake an inquiry into competition in Australia's financial system.
- As the outcomes of the Productivity Commission inquiry may shape future Government policies affecting Australia's financial system, interested parties should seek to engage with that inquiry to ensure that balanced and well-informed views are presented for consideration.
- The Australian Competition and Consumer Commission has also been directed by the Australian Government to carry out an inquiry into the pricing of residential mortgage products by the major domestic banks which will be liable for the new major bank levy.
- As the Australian Competition and Consumer Commission inquiry is required to have regard to the Government's view that banks need to fully and transparently account for their decisions and how the interests of different stakeholders are balanced, the major banks will need to carefully consider how the major bank levy is passed on in residential mortgage costs, if at all.

- Tasking the PC to conduct a 12 month inquiry into competition in Australia's financial sector.
- Directing the ACCC to undertake an inquiry into residential mortgage product prices charged by banks affected by the new major bank levy.

Interestingly, the Government direction to the ACCC was that the "Inquiry is not to be held in relation to the supply of goods or services by a particular person". [ACCC Ministerial Direction](#)

Later briefings will consider the competition implications of the following Budget proposals:

- The introduction of an open banking regime, providing customers with access to and control over their banking data. As a first step, the Government will commission an independent review to recommend the best approach to implement this regime. The review is intended to be complete by the end of 2017.
- Providing the ACCC with an additional \$13.2 million in funding over four years to establish a dedicated banking unit responsible for undertaking in-depth inquiries into competition issues affecting Australia's financial system.

Australia's banking and financial sectors, and particularly Australia's major domestic banks, are under continued and increasing scrutiny in other areas as well. For example, the PC is undertaking an inquiry into the superannuation system and has recently finalised an inquiry into the use and availability of consumer data, which had a particular focus on Australia's financial sector.

## **EXAMINATION OF COMPETITION IN AUSTRALIA'S BANKING AND FINANCIAL SYSTEM**

Many of the financial sector proposals announced in the recent Budget reflect, or have been inspired by, the outcomes of the Financial System Inquiry, chaired by Mr David Murray AO (Murray Inquiry). That inquiry was asked to make recommendations that would position the financial system to best meet Australia's evolving needs and, importantly, support economic growth.

The final report of the Murray Inquiry was released on 7 December 2014. The report concluded that, although Australia's banking sector is relatively concentrated by international standards, on balance it is competitive. However, the Murray Inquiry noted that the high concentration in some parts of the Australian financial sector, creates risks for both the stability and level of competition in the sector.

The recommendations of the Murray Inquiry focussed on 5 themes, increasing financial system resilience, lifting the value of the superannuation system and retirement incomes, driving growth and productivity through innovation, creating an environment in which financial firms treat customers fairly and enhancing regulator independence and accountability, while minimising the need for future regulation.

The Government response to the Murray Inquiry largely supported the five themes outlined above.

## **PRODUCTIVITY COMMISSION INQUIRY**

On 8 May 2017 the Treasurer formally requested the PC undertake a 12 month inquiry into competition in Australia's financial system, with a view to

improving consumer outcomes, the productivity and international competitiveness of the financial system and economy more broadly and supporting ongoing financial system innovation, while balancing financial stability objectives (PC Review). The terms of reference for the PC Review require that the PC examines:

- The level of contestability and concentration in key segments of the financial system, with a focus on vertical and horizontal integration.
- The level of competition in the provision of personal deposit accounts and mortgages for households and of credit and financial services for SMEs.
- The competitiveness and productivity of Australia's financial system, as compared to other comparable jurisdictions.
- Barriers to, and enablers of, innovation and competition in Australia's financial sector.
- Potential policy changes, with reference to existing policies that the Government is committed to or considering.

The PC will commence its review on 1 July 2017 and is required to provide its final report to the Government by 30 June 2018.

The PC has yet to release a consultation paper for its review, but has kick started its processes with roundtable hearings with regulators, regional banks and consumer groups on 29 June 2017.

The inquiry process requires that the PC publishes an issues paper and requests written submissions on that paper. It may also hold public hearings or other forums at the issues paper stage. Following that consultation process, the PC will release a draft report and undertake a further round of consultation before finalising the report, which will be tabled by the Australian Treasurer in Parliament.

The Australian Government will consider the recommendations of the PC's final report in progressing its reforms of the Australian financial sector. Although the Government is not obliged to accept the recommendations of the PC, historically, Government's do typically accept a large proportion of the recommendations made by the PC. Therefore, the recommendations of the PC Review may ultimately have significant structural and commercial implications for participants in the sector.

## **INITIAL ACCC INQUIRY**

On 9 May 2017 the Treasurer directed the ACCC to undertake an inquiry into prices charged or proposed to be charged for residential mortgage products by banks affected by the major bank levy during the period 9 May 2017 to 30 June 2018 (ACCC Inquiry). In undertaking the inquiry, the ACCC is to have regard to the Government's view that banks need to fully and transparently account for their decisions and how the interests of different stakeholders are balanced.

The ACCC is equipped with wide-ranging statutory powers that allow it to request large amounts of information from market participants in connection with this inquiry, which will be undertaken under Part VII of the Competition and Consumer Act 2010 (Cth) (CCA). Specifically, the ACCC will be able to demand the disclosure of information in a number of ways including by:

- summoning witnesses to answer questions before the ACCC; and

- issuing notices to compel the production of documents and information under section 95ZK of the CCA.

Unlike ACCC enforcement investigations into conduct that may have contravened the competition provisions of the CCA, there is no requirement here for the ACCC to have a reasonable belief that one of the relevant banks has contravened the CCA in order to issue a request for information or documents. Instead, it will be open to the ACCC to request these banks provide any information relating to the pricing of residential mortgage products and any representations that are made by the banks in relation to such pricing and the impact of the major bank levy as the ACCC determines is relevant.

Although a number of commentators have expressed the view that the ACCC Inquiry will limit the ability of the impacted banks to pass on the major bank levy, the inquiry will not expressly provide for this and, of course, passing on the levy will not necessarily, of itself, be anti-competitive conduct for the purposes of the CCA.

*What the ACCC Inquiry does mean is that the banks must be able to demonstrate that they have taken into account the interests of their different stakeholders and clearly justify and explain to their customers any increases in residential mortgage pricing as a result of the new levy. If the ACCC determines that the banks have failed to do this, those banks risk further regulation being imposed by Government.*

## **COMPETITION IMPLICATIONS OF THE PC AND ACCC INQUIRIES**

### **PC Inquiry: stakeholders should engage constructively**

The PC Review will inevitably form the basis of, or shape, policies affecting Australia's financial and banking sector moving forward.

Accordingly, banks and financial institutions (and indeed all entities that have an interest in Australia's financial system) should ensure that they make considered submissions responding both to the initial issues paper and the draft report so that their views are considered by the PC.

### **ACCC Inquiry: Impacts on pricing?**

The Government's decision to initiate the ACCC Inquiry has drawn criticism from some, including from the former chairman of the Murray Inquiry, that it is a throwback to a 1950's style of pricing regulation, which has the potential to weaken the capital positions of the impacted banks. Given the requirement for the ACCC to take into account the Government's views on particular issues, it is also thought that the ACCC Inquiry may risk politicising the ACCC's role as an independent statutory agency.

Notwithstanding such criticisms, the ACCC is required to complete the Inquiry meaning, again, constructive engagement with the ACCC by the impacted banks will be key. Of course, the fact that the Inquiry is being held means that the impacted banks must also consider carefully what (if any) portion of their increased costs arising from the new levy are passed on in the form of increased residential mortgage costs and how this is explained to consumers. At least the banks have been clearly alerted to the Government's concerns in this area.

## **CONCLUSION**

There is no doubt that Australia's financial sector is under a political spotlight and that spotlight has been shone partly based on the Governments' view that there is insufficient competition in this sector at this time. Accordingly, it is anticipated that this spotlight and focus is likely to continue for a considerable period of time.

The proposals announced by the Australian Government as part of the 2017-18 Budget, including the inquiries discussed in this briefing, are likely to have long term impacts on the sector. As a result, banks and other financial services providers will need to engage in the proposed consultation processes to ensure their voices are heard as reforms are developed and implemented.

Many of the competition issues and reform proposals that the Government has asked the PC to consider have been considered in the United Kingdom. If you would like assistance in responding to the various Government inquiries please contact your relevant Clifford Chance contact.

## CONTACTS

**Dave Poddar**  
Partner

**T** +61 2 8922 8033  
**E** dave.poddar  
@cliffordchance.com

**Mark Grime**  
Senior Associate

**T** +61 2 8922 8072  
**E** mark.grime  
@cliffordchance.com

**Elizabeth Hersey**  
Senior Associate

**T** +61 2 8922 8025  
**E** elizabeth.hersey  
@cliffordchance.com

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Clifford Chance, Level 16, No. 1 O'Connell Street,

Sydney, NSW 2000, Australia

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