



Draft Determination

Application for authorisation

lodged by

Commonwealth Bank of Australia, Westpac Banking Corporation,
Australia and New Zealand Banking Group Limited, National Australia
Bank Limited and Macquarie Bank Limited

in respect of

establishing a mortgage aggregator assurance program

Authorisation number: AA1000640

18 September 2023

Commissioners: Keogh
Lowe
Brakey
Carver
Crone

Summary

The ACCC proposes to deny authorisation in respect of an application for authorisation for the Commonwealth Bank of Australia, Westpac Banking Corporation, Australia and New Zealand Banking Group Limited, National Australia Bank Limited and Macquarie Bank Limited (the Applicants) to establish a voluntary program for participating mortgage lenders to jointly procure assurance reviews of the compliance systems and standards of participating mortgage aggregators.

The ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public that would outweigh the detriment to the public that would be likely to result from the Proposed Conduct. The ACCC is not currently satisfied that the authorisation test is met.

Mortgage aggregators are an intermediary between mortgage brokers and lenders. Many lenders individually procure assurance reviews on the governance and oversight approach used by aggregators to manage the risk and compliance obligations of their broker network. The Aggregator Assurance Program (the Program) would allow multiple lenders to engage (and to share the cost of engaging) a single assurance firm to carry out a single assurance review of each relevant aggregator.

While the Program is intended to be open to all lenders, key decisions about the operation of the Program will be made by the Applicants. This includes decisions about the scope of assurance reviews, where the Applicants will have significant discretion. The ACCC is concerned that this discretion, in the context where other, particularly smaller lenders, will not have a role in making such decisions, may result in the assurance reviews being conducted in a manner that prioritises the Applicants' requirements, without giving equal consideration to the assurance review requirements of other lenders. The ACCC's assessment of the likely public benefits and detriments of the Proposed Conduct has been informed by this.

The Applicants have claimed that the Proposed Conduct will result in higher standards of assurance review in mortgage aggregator services. However, they have not provided the ACCC with material to satisfy us that this will be the case. The ACCC considers that whether the Proposed Conduct is likely to result in assurance reviews being conducted to a higher or lower standard is uncertain. The ACCC considers that the Proposed Conduct is likely to result in a public detriment due to the increased risk that assurance reviews under the Program will be performed to a lower standard. To the extent that assurance reviews are performed to a lower standard, this increases the risk of inappropriate lending practices.

The ACCC considers that this risk arises because:

- The Proposed Conduct is likely to lead to more homogenous assurance reviews being undertaken, including due to the proposed appointment of a single assurance service provider.
- Joint procurement is likely to lead to a common benchmark of aggregator assurance reviews and it is uncertain whether this benchmark is likely to be of a higher or lower standard than some lenders would adopt for themselves in the absence of the Program.
- The proposed scope of assurance reviews is very high-level, providing significant discretion about the nature and scope of assurance reports,

creating uncertainty about the extent to which assurance reviews will adequately address aggregator and broker compliance standards.

The ACCC also considers that, by increasing the frequency and points of interaction between the major bank lenders, the Proposed Conduct is likely to increase the risk of the market being more conducive to coordination. This risk is particularly relevant in relation to concentrated markets, such as that for home loans, where the major banks have a combined market share of around 75%.

The ACCC also considers that all lenders sharing the costs of assurance reviews they participate in equally, as is proposed, may favour large lenders over small lenders. While all lenders who participate appear to be likely to save on costs through joint assurance reviews, the cost saving to larger lenders under an equal cost sharing model, relative to the amount they currently spend on aggregator assurance reviews, are likely to be greater.

The ACCC considers that the Proposed Conduct is likely to result in some public benefit in the form of efficiencies and cost savings for aggregators and lenders who do participate in the Program, because fewer assurance reviews will need to be conducted, reducing the duplication of resources and information required to be reviewed.

However, the Applicants have not substantiated the extent of this public benefit. The extent of these efficiencies and cost savings is also dependent on take up of the Program amongst lenders. If some lenders do not participate in the Program because of the way it is structured and administered, the efficiencies and cost savings likely to be realised by aggregators and lenders as a result of the Program would also be lower.

The ACCC also notes that the realisation of these cost savings and efficiencies for aggregators does not appear to be dependent on a single Assurance Service Provider being appointed under the Program, which is relevant to the public detriment that may result from having a single Assurance Service Provider conduct all reviews under the Program, as discussed above.

On balance, while the ACCC considers that some public benefit is likely to arise from the Proposed Conduct, the ACCC is not satisfied in all the circumstances that the Proposed Conduct is likely to result in a public benefit that would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.

The ACCC considers that addressing the concerns about the structure and proposed operation of the Program identified in this draft determination, particularly in relation to:

- affording more representative lender input into decisions about the operation of the Program,**
- the single assurance service provider model**
- the Program's fee structure, and**
- the proposed scope of assurance reviews**

may mitigate to some extent the public detriment likely to result from the Proposed Conduct.

The ACCC invites submissions in relation to this draft determination, including in relation to these issues, by 3 October 2023, before making its final decision.

1. The application for authorisation

- 1.1. On 17 April 2023, the Commonwealth Bank of Australia, Westpac Banking Corporation, Australia and New Zealand Banking Group Limited, National Australia Bank Limited and Macquarie Bank Limited (the **Applicants**)¹ lodged application for authorisation AA1000640 with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for 5 years to make and give effect to agreements and arrangements, defined at paragraph 3.1 below, to establish a voluntary industry-wide program for mortgage lenders to jointly procure assurance reviews of participating mortgage aggregators' compliance systems and standards (the **Program**).
- 1.2. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions in Part IV of the Act in respect of the specified conduct. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would or is likely to result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).
- 1.3. The Applicants also requested interim authorisation to take certain preparatory steps to establish the Program while the ACCC is considering the substantive application. Because the ACCC's preliminary view is that it is not currently satisfied in all of the circumstances that the Proposed Conduct would be likely to result in a benefit to the public that would outweigh the detriment to the public that would be likely to result from the Proposed Conduct, the ACCC has decided not to grant interim authorisation at this time.

2. Background

The role of mortgage aggregators²

- 2.1. Home loans in Australia are distributed by lenders via either the direct channel (a consumer engaging directly with a lender) or via an intermediary, usually a mortgage broker. It is estimated that between July and September 2021, two-thirds of Australian home loans were facilitated by mortgage brokers.³
- 2.2. To facilitate the provision of their services to consumers, brokers use a mortgage aggregator. Aggregators operate as a single point of contact between large numbers of brokers and lenders. The Australian Securities and Investments Commission (**ASIC**) defines an aggregator as 'a business which provides aggregation services to a broker business or broker and with which a credit provider has a direct contractual relationship'.⁴ Aggregators assist brokers with access to a panel of lenders, customer

¹ Westpac Banking Corporation includes St. George Bank, Bank of Melbourne and Bank of South Australia. Commonwealth Bank of Australia includes BankWest.

² Unless otherwise noted, information in this section is taken from the Applicants' submission in support of the application for authorisation.

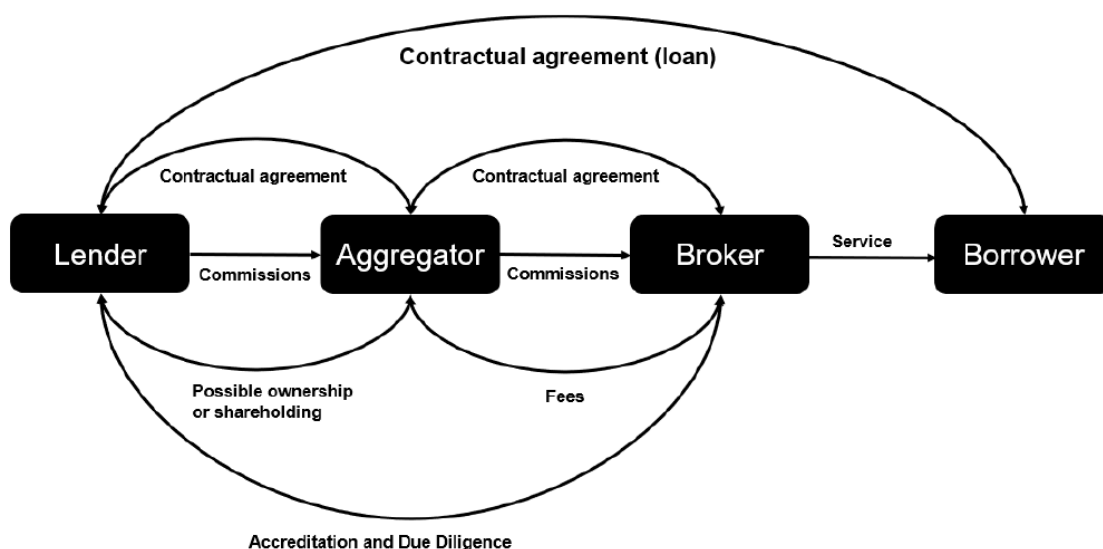
³ Mortgage & Finance Association of Australia, [Media release – More than two in three home loans written by mortgage brokers](#), Mortgage & Finance Association of Australia, 29 November 2021, accessed 29 August 2023.

⁴ Australian Securities and Investments Commission, [Regulatory Guide 273 – Mortgage brokers: Best interests duty](#), Commonwealth of Australia, 2020, p 49.

relationship management software and administrative support and training. Generally, a broker will be affiliated with one mortgage aggregator at a time, while lenders tend to engage with a number of mortgage aggregators.

- 2.3. The increased use of mortgage aggregators has developed over the past decade in conjunction with the growth of the mortgage broking industry. Home loan lenders enter into head agreements with mortgage aggregators rather than individual mortgage brokers, whereby they agree to allow member brokers of an aggregator the ability to submit loan applications subject to meeting various terms and conditions. These lender head agreements usually contain obligations on the aggregator to conduct initial checks of its members brokers and to supervise and monitor their activities on an ongoing basis.⁵
- 2.4. The Applicants provided the below figure to illustrate the intermediary supply chain for the distribution of residential and investment property loans:

Figure 1 – Indirect intermediary supply chain



^a This model outlines only business and contractual arrangements, and does not include the licensing regime outlined in the *National Consumer Credit Protection Act 2009* (Cth)

Current approaches of mortgage lenders to conducting assurance reviews of aggregators

- 2.5. Most lenders currently procure independent assurance reviews of the governance and oversight approaches taken by affiliated aggregators to manage risk and compliance obligations of their mortgage broker network, so that the lender is not exposed to undue regulatory risk from inappropriate practices in connection with the loan approval process. The Applicants submit that each lender is independently responsible for conducting or procuring its own assurance review of the compliance systems of each aggregator the lender deals with.
- 2.6. The ACCC understands that different lenders require varying levels of assurance depending on a number of factors including, but not limited to, the lenders' risk appetites and policy requirements. Although there are common themes that each

⁵ [Connective Credit Services Pty Ltd submission](#), 22 May 2023, p 1.

lender focuses on when procuring assurance reviews of the operational controls and compliance environment of an aggregator, lenders typically vary in their method and in their level of detail required to satisfy their requirements. The Applicants submit that assurance reviews are currently carried out differently and in an inconsistent manner across lenders, and do not believe there is currently a 'clear, uniform minimum standard' that all aggregators are required to satisfy.⁶

- 2.7. In submissions to the ACCC, aggregators provided context of the time and resources associated with current assurance reviews. In particular, REA Group Ltd (**REA Group**) highlighted the varying amount of time it can take to complete a review of an aggregator, noting that from 1 July 2021 to 31 March 2022, the 32 assurance reviews it participated in ranged from 5 to more than 200 hours, and the reviews remained open from 6 days to 218 days.⁷ Connective Credit Services Pty Ltd (**Connective**) highlighted the different types of assurance review approaches, submitting it completed reviews with 14 different lenders in 2022 which broadly fell into 2 categories:⁸
- a) Full audits: these required significant amounts of work, usually a combination of detailed questions (between 40-100) and control testing of sample loan files. Each audit can occupy up to a week of a senior member of Connective's compliance team time (usually a combination of the National Head, Risk & Compliance and the Group Legal Counsel). In 2022, Connective completed 8 lender reviews that fell into this category.
 - b) Attestations: these involved a shorter list of questions, requiring a shorter response or a more generic attestation, often with a request for supporting documentation. On average these take between 2-4 hours to complete. In 2022, Connective completed 6 lender attestations that fell into this category.
- 2.8. As many lenders deal with the same aggregators, and most lenders require a level of assurance, the need for assurance of an aggregator's systems can result in substantial duplication of assurance reviews (as discussed further below).

Royal Commission and other recent regulatory and industry changes

- 2.9. Following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the **Royal Commission**), and other reviews into the sector, new regulatory and industry changes were introduced to improve standards and impose new duties and obligations on mortgage brokers.⁹ Notably, mortgage brokers are now required to act in the best interests of the borrower and prioritise the interests of customers when providing credit assistance.¹⁰

⁶ [Applicants' response to ACCC request for further information](#), 2 August 2023, p 4.

⁷ [REA Group Ltd submission](#), 22 May 2023, p 2.

⁸ [Connective Credit Service Pty Ltd submission](#), 22 May 2023, p 2.

⁹ Australian Securities and Investments Commission, [Consultation Paper CP 327 – Implementing the Royal Commission recommendations: Mortgage brokers and the best interests duty](#), Commonwealth of Australia, 2020, pp 6-9.

¹⁰ *National Consumer Credit Protection Act 2009* (Cth), ss 158LA, s 158LE

These changes were borne out of Recommendation 1.2 of the Royal Commission's Final Report, see: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, [Final Report, – Volume 1](#), Commonwealth of Australia, 2019, p 20.

- 2.10. The Royal Commission report outlined that Australian financial services licence and Australian Credit Licence holders (such as banks, mortgage brokers and aggregators) have an obligation to 'do all things necessary to ensure' that their financial services or credit activities are provided 'efficiently, honestly and fairly'. They are also required to maintain their own competence to provide the licenced services and to ensure that their representatives are both adequately trained and competent to provide those services.¹¹
- 2.11. Responsible lending obligations apply to banks as lenders, including when using information provided by brokers. For example, ASIC Guide RG 209 states that lenders should have assurance processes in place to ensure the reliability of information collected through third parties such as brokers during applications and be reasonably satisfied that such intermediaries have 'robust compliance arrangements'.¹²
- 2.12. The Australian Prudential Regulation Authority (**APRA**) recently finalised prudential standard CPS 230 for operational risk management, which requires APRA-regulated entities (including banks) to monitor and report to senior management on material service provider arrangements (such as mortgage brokers), including their performance, effectiveness of controls to manage risks associated with the use of service providers and compliance of both parties with the service provider agreement.¹³
- 2.13. The Applicants note that aggregators have a large portion of their broker members as credit representatives under their Australian Credit Licence, and accordingly aggregators themselves must gain a level of assurance that these credit representatives are operating in a manner that complies with the aggregator's *National Consumer Credit Protection Act 2009* obligations.

Rationale for the Proposed Conduct

- 2.14. The Applicants submit that the Program is designed to be consistent across a multitude of lenders in a way that saves costs, achieves good regulatory outcomes, avoids duplication across lenders and reduces the level of intrusion and interference in the aggregators' business. The Applicants submit that the Program is intended to work in the public interest to support and report on better compliance with financial services regulation, as recommended by the recent Royal Commission and other recent regulatory and industry changes.
- 2.15. The Applicants submit that, given many lenders deal with the same aggregators, and most lenders will require some level of assurance, the need for assurance of an aggregator's systems can result in substantial duplication of assurance reviews, and consequently, increased cost and disruption to the aggregators concerned in meeting their lender requirements.
- 2.16. The Applicants submit that they have developed the Program to reduce this duplication by allowing multiple lenders to jointly procure (and to share the cost of procuring) an independent and appropriately qualified professional firm to carry out a single assurance review of any participating aggregator.

¹¹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, [Final Report – Volume 1](#), Commonwealth of Australia, 2019, pp 8-10.

¹² Australian Securities and Investments Commission, [Regulatory guide 209 – Credit licensing: Responsible lending conduct](#), Commonwealth of Australia, 2019, p 49.

¹³ [Deloitte Touche Tohmatsu submission](#), 22 May 2023, p 3.

- 2.17. Further, the Applicants submit that the mortgage lending industry is seeking to address the key risks of the mortgage origination and underwriting process by creating a consistent approach to the assurance process, monitoring and assuring broker activities (via the aggregators). This approach includes encouraging a well-informed credit risk assessment for the lenders and compliance with various regulatory obligations concerning the offering of financial services to consumers. The Applicants submit that the Program provides an avenue for both lenders and aggregators to proactively assess their practices, and their operational and compliance environment on a periodic basis to prevent incidents that could otherwise negatively impact consumers. By performing a single review and reducing the burden on aggregators to respond to individual lender reviews, the Applicants submit that the Program will enable aggregators to use more time and resources to proactively identify concerns relating to misconduct.
- 2.18. Further, the Applicants submit that the Program aims to provide a standardised process to reduce the burden on aggregators and to assist lenders to obtain an improved level of assurance. However, the Applicants note that the Program is not designed to be exhaustive or to prevent some lenders continuing to adopt individual requirements, as discussed further below.

3. The Proposed Conduct

- 3.1. The Applicants are seeking authorisation to permit the Applicants to make and give effect to the following agreements and arrangements:
- a) to establish the Program by an agreement between the Applicants in the form of the UJV Agreement as appears in Schedule 1 of the Application (**UJV Agreement**)
 - b) to invite lenders to join the Program voluntarily on the terms of the proposed AAP Lender Deed as appears at Schedule 3 of the UJV Agreement (**AAP Lender Deed**)
 - c) to seek proposals from, and engage, an assurance firm as the Assurance Service Provider to provide assurance reviews of aggregators' systems under the Program
 - d) to invite aggregators to consent to assurance reviews being conducted under the Program terms
 - e) to enable completed assurance reviews about the compliance systems of any particular aggregator to be shared with the aggregator and lenders who opt-in to participate in an assurance review cycle for the aggregator (**Opt-in Lenders**) who deal with the aggregator. Assurance reviews are to generally have a 6-monthly lender opt-in cycle with each aggregator being reviewed at least once every second financial year
 - f) to invite other lenders (through the support of industry bodies) and future aggregators to join the Program, and

- g) for the 'Operating Committee' to have the power to suspend / terminate the participation in the Program of a lender or an aggregator, in accordance with the UJV Agreement, which fails to comply with one or more rules of the Program and which fails to address or remediate that failure as required under the Program rules.

(the **Proposed Conduct**).

- 3.2. With respect to the Proposed Conduct described in paragraphs 3.1(c) to 3.1 (g) the Applicants state that they only intend to implement the framework as proposed in the UJV Agreement and these subparagraphs do not propose any new steps or discretions beyond what is described in the UJV Agreement.
- 3.3. The Applicants state that some of the subsidiary or operational agreements under the UJV Agreement have not yet been developed. The Applicants consider a degree of consultation with the relevant Assurance Service Provider (when appointed), and with participating aggregators will be necessary and desirable to finalise the operational aspects of these subsidiary agreements.¹⁴
- 3.4. Authorisation is sought on behalf of:
 - a) the Applicants
 - b) mortgage lenders who opt in to join the Program, including but not limited to those identified in the application as supporting the Program as well as those who elect to join the Program in the future
 - c) aggregators who elect to join the Program including but not limited to those identified in the application
 - d) the Assurance Service Provider appointed from time to time under the Program.
- 3.5. Authorisation is sought for 5 years. The Applicants submit that this period is appropriate due to the long-term nature of the Program and its associated public benefits.
- 3.6. The Applicants submit that the Program will be governed by the UJV Agreement and AAP Lender Deed, and the Applicants propose to oversee the management and delivery of the Program and Assurance Service Provider through a joint committee (the Operating Committee, discussed in more detail below). Lenders may participate in the Program by executing and delivering the proposed lender deed as appears at Schedule 3 of the UJV Agreement. A lender who agrees to join the Program (**AAP Lender**) can then choose to opt-in to participate in an assurance review cycle for any aggregator (therefore becoming an Opt-in Lender with respect to the assurance review of that aggregator).

The Aggregator Assurance Program

- 3.7. The Applicants submit the Program is intended to be open for the benefit of a broad cross spectrum of mortgage lenders in Australia who offer residential and property investment lending through mortgage aggregators and mortgage brokers. Participants can opt to enter and leave the Program whenever they wish (subject to satisfying basic obligations such as the payment of any outstanding fees).

¹⁴ [Applicants' clarification and amendment re the Proposed Conduct](#), 28 August 2023, p 2.

Participation is to be offered generally across the mortgage industry to any lender and aggregator who wishes to participate. Lenders may continue to contract for assurance reviews outside of the Program, or supplement the reviews conducted under the Program with their own separate review.

- 3.8. The Applicants will cover the costs of establishing the Program, while non-applicant lenders who participate in the Program will be required to pay their share of the cost of conducting the assurance reviews they elect to opt-in to.
- 3.9. The Applicants submit that they anticipate the assurance reports will address the following matters about an aggregator's systems:
 - a) Broker onboarding and accreditation processes (upfront)
 - b) Broker accreditation processes (ongoing)
 - c) Broker licensing and industry memberships
 - d) Broker development and ongoing training
 - e) Responsible Lending / Regulatory Management
 - f) Broker oversight and consequence Management
 - g) IT and System Access Controls
 - h) Data Security and Privacy
 - i) Outsourcing and Third Parties.
- 3.10. The Applicants provided a draft review scope to illustrate the proposed baseline standard for reviews which will be completed as part of the Program.¹⁵ The Applicants note that the review scope will continuously evolve to ensure there is adequate oversight and coverage of key prudential standards and regulations and ASIC's consumer credit legislation and regulations.

Review process

- 3.11. Assurance reviews are to be conducted at least once every 2 years for each aggregator. There will be a 6-month period preceding each review where lenders will be offered the opportunity to opt-in to the review of the aggregator. The Applicants note that it is intended that the Operating Committee will clearly communicate to all lenders (and aggregators) with significant lead time when a review will be commencing, to ensure that lenders have enough time to consider the prospect of their participation in any review cycle. The Program will have 2 types of reviews of aggregators:
 - 1) Deep dive reviews of aggregators' systems will take place every 24 months from as soon as practicable after the date the UJV Agreement is executed (unless otherwise determined by the Operating Committee).
 - 2) Targeted reviews will be offered and conducted generally the year after the deep dive reviews were conducted, primarily to review any material changes of the business of the aggregator, having regard to any applicable regulatory requirements and the implementation or progress of action plans by the aggregator arising from prior deep dive reviews.

¹⁵ [Draft Industry AAP Review Scope](#), 2 August 2023.

- 3.12. Opting-in to the review of a particular aggregator will oblige the lender to pay a share of the cost of the review and entitle the lender to receive the report from the review. The costs involved (namely, fees payable to the Assurance Service Provider) are to be divided equally between those Opt-in Lenders who request a review of the particular aggregator. Lenders will only be given access to assurance reports from assurance reviews for which the lender has met its share of the costs. Reports will be provided on terms prohibiting any lender communicating about the review to any other lenders.
- 3.13. Each review will result in a single compliance report concerning the aggregator's systems and compliance processes applicable to the brokers within that aggregator's network. Reviews are intended to report whether aggregators are meeting requirements under financial services regulations and benchmark compliance requirements satisfactory to Opt-in Lenders. The Operating Committee will determine the scope and content of reviews, subject to consultation with Opt-in Lenders. If reviews identify issues with aggregators' compliance systems, recommendations will be identified in reports provided to Opt-in Lenders.
- 3.14. The assurance reviews are not designed to reveal specific information about particular lenders' loan terms, lending policies or offers or other client information. Rather they will focus on the overall systems and processes used within aggregator networks to manage their compliance responsibilities.
- 3.15. Where an assurance report identifies that an aggregator has problems or weaknesses in its compliance systems or that remedial action is recommended, those recommendations will be identified to the Opt-in Lenders who receive the report. Any remedial action that may be recommended will be determined by the aggregator in conjunction with each Opt-in Lender. Remedial actions in response to a review fall outside the Program and will be a matter for each lender to independently determine and discuss with the aggregator. Participating aggregators will be able to access dispute resolution mechanisms as set out in their agreement with the Assurance Service Provider.¹⁶
- 3.16. The Program is intended to identify systemic issues or failures and is not intended to serve as a vehicle to identify to Opt-in Lenders any specific incidents of non-compliance by any identified aggregator or any remediation of any non-compliant conduct. Those matters are normally (and will continue to be) dealt with under contractual arrangements between the aggregator and each lender with an interest in that finding or conduct and as required by law.
- 3.17. Opt-in Lenders may also request the Assurance Service Provider, as part of the broader review being undertaken, undertake a review of additional specific elements of the aggregator's operations that may be of interest or relevance to the individual lender. Where this is the case, the lender will cover the full cost of these additional elements of the review and a report on these matters will only be provided to that lender.
- 3.18. Lenders will also remain free to undertake or procure assurance reviews of aggregators individually separate to the Program.
- 3.19. Lenders who do not opt-in to the review of a particular aggregator during the opt-in period will not be able to receive a copy of the review report at a later date. However, they can opt-in during the next review cycle. The Applicants submit that it would be operationally challenging to manage requests for late or subsequent lender access to

¹⁶ Clause 11.2(e) of the UJV Agreement.

previous review outputs, as fees for funding the review would have already been calculated, and charged, under the equal cost sharing model. Accepting late requests to access review outputs would require a complex retrospective assessment of the 'late lender's' share of the review costs and then providing for an abatement of part of the fees paid, to the original lenders, which will then result in a requirement for the Assurance Service Provider to process part-reimbursements to the original participating lenders.

Role of Operating Committee

- 3.20. Each of the Applicants will have one representative on the Operating Committee. The Operating Committee is responsible for determining and updating the quality standards for assurance reviews, the appointment, termination or renewal of an Assurance Service Provider that will conduct the aggregator assurance reviews, approving the Program's plan and budget, approving additional lenders and aggregators joining the Program, removing participants from the Program in the case of failure to comply with terms of participation, and a disputes process should disputes arise between the Applicants and other lenders.
- 3.21. With respect to approving other lenders joining the Program, the UJV Agreement provides that the intention is that the opportunity to join the Program will be open to any mortgage lender in Australia which:
- deals with one or more aggregators and wishes to obtain access to the Reviews on the terms on an AAP Lender Deed, and
 - executes and complies with the terms of the APP Lender Deed including obligations regarding the use of the reviews and reports.
- 3.22. With respect to suspension or termination of a mortgage lender's participation in the Program, the APP Lender Deed provides that this can occur if the lender:
- fails to rectify a breach of, or liability under the AAP Deed within a specified period of being issued with a 'Material Default Notice' from the Operating Committee requiring performance or rectification of the breach, or
 - is subject to an insolvency event.
- 3.23. The AAP Lender Deed also provides for a dispute resolution process, including referral to an expert to be appointed to determine the matter in accordance with the Resolution Institute Expert Determination Rules.
- 3.24. The Operating Committee will delegate operational matters of the Program to the engaged Assurance Service Provider. The intention of the Program is to engage an independent professional assurance firm with expertise to carry out reviews and other day-to-day tasks as part of the Program, such as recovering fees from Opt-in Lenders and distributing assurance reports from completed assurance reviews.

Assurance Service Provider appointment

- 3.25. Assurance reviews and assurance reports obtained under the Program are intended to be conducted by a single assurance review firm. The Applicants submit that the firm chosen as the Assurance Service Provider is to be selected by a competitive open tender process, including a public request for proposals, selection of a service provider is to be by unanimous consent of the Operating Committee, and is subject to negotiating the terms of (and entering into) the Assurance Service Provider agreement with the prospective Assurance Service Provider.
- 3.26. Twelve months after the Assurance Service Provider's appointment, the Operating Committee may review the Assurance Service Provider's performance. If the

Assurance Service Provider's performance is deemed to be inadequate or its appointment inappropriate for any reason, the Operating Committee may seek to appoint a new Assurance Service Provider by a competitive open tender.

Information sharing protocols

- 3.27. The Applicants submit that the Program is designed to limit the type of information shared between lenders to an appropriate level and to avoid any sharing of competitive sensitive information such as metrics about an aggregator's revenues, broker network or finance arranged and in any case, is subject to information sharing procedures and the 'competition protocol' in the AAP Lender Deed and UJV Agreement.
- 3.28. As per the competition protocol and information sharing provisions, a number of principles will apply around information sharing, including that:
- an assurance report may only be shared individually with the Opt-in Lenders who requested a review of a particular aggregator
 - details of assurance reviews and their outcomes will not be provided or disclosed to any other lender or party without the consent of the Opt-in Lenders and relevant aggregators
 - the Assurance Service Provider, lenders and aggregators will be required to not discuss or exchange any non-public or commercially sensitive information relating to the Program
 - the Assurance Service Provider will not provide specific information that could identify (to any lender) a broker, other lender or borrower relating to any conduct that does not comply with the terms of the AAP Lender Deed and/or UJV Agreement.
- 3.29. Additionally, the AAP Lender Deed and UJV Agreement provides that the information that cannot be disclosed to Opt-in Lenders, or other parties by the Assurance Service Provider includes sensitive information such as borrower/customer data, other lenders' views on the performance or compliance of particular brokers or aggregators, and other lenders' intentions, proposed actions or decision-making process regarding aggregators or brokers. The Assurance Service Provider will be required to ensure they have systems in place to ensure that it will not facilitate or assist any lender to discuss or communicate with any other lender what steps should or might be considered to be taken in response to an assurance report about an aggregator. Similarly, the AAP Lender Deed restricts lenders from discussing or communicating with any other lender about these issues. Each lender will separately receive a report about the aggregator and separately consider what, if any, action to take in respect of any issues identified in the report.

4. Consultation

- 4.1. The ACCC invited submissions from a range of potentially interested parties including major competitors, suppliers, customers, relevant industry associations or peak bodies, consumer groups, state and federal government and relevant regulatory bodies.
- 4.2. The ACCC received 15 submissions from interested parties in relation to the application.
- 4.3. Lenders, aggregators, assurance service providers and industry associations indicated support for the Proposed Conduct, but this support was in some cases

caveated. Namely, some interested parties raised issues around the design and scope of the Program, the proposed equal cost model, potential conflicts between aggregators and the Assurance Service Provider, data protection and privacy, information sharing and the Proposed Conduct's impact on competition in the assurance services market.

- 4.4. The Applicants responded to the issues raised in interested parties' submissions on 20 June 2023. These issues are discussed in further detail in the Assessment section below.
- 4.5. The Applicants provided further information on 2 August and 28 August 2023 in response to questions raised by the ACCC.
- 4.6. Public submissions by the Applicants and interested parties are on the [public register](#) for this matter.

5. ACCC assessment

- 5.1. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result.

Relevant areas of Competition

- 5.2. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 5.3. The ACCC is of the view that it is not necessary to precisely define relevant markets for the purpose of assessing this application for authorisation. The ACCC considers that the relevant areas of competition that could be affected by the Proposed Conduct are:
 - the supply of mortgage aggregation services to mortgage brokers in Australia
 - the supply of mortgage distribution services to lenders in Australia
 - the supply of assurance services in Australia, including the supply of those services to lenders, and
 - the supply of mortgage lending to consumers.

Future with and without the Proposed Conduct

- 5.4. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 5.5. The ACCC considers that, in the future without the Proposed Conduct, lenders would be likely to continue to individually undertake assurance processes concerning the compliance systems and standards of their aggregator and broker networks, themselves or through third-party assurance service providers appointed separately by individual lenders.

Public benefits

5.6. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*... we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*¹⁷

5.7. The Applicants submit there are a number of public benefits resulting from the Proposed Conduct, which broadly include efficiencies and savings for aggregators and lenders; improvement in, and more consistent, industry-wide assurance standards; competitive opportunities for the supply of assurance services; lower overall industry compliance costs; greater comfort in reporting governance and oversight of aggregators; and economies of scale.

5.8. A number of these claimed public benefits reflect a broader benefit from increased efficiencies and cost savings. The ACCC has considered these claimed public benefits under the following headings:

- increased efficiency and cost savings
- increased competition for assurance service providers, and
- improved compliance standards.

Increased efficiency and cost savings

For participating aggregators

5.9. The Applicants submit that one of the core public benefits of the Proposed Conduct is the efficiencies and savings for aggregators by reducing unnecessary duplication. This is because one assurance review for an aggregator can be conducted for a number of lenders, rather than each aggregator separately being subject to assurance reports for each lender.¹⁸

5.10. The Applicants also submit that the Program will generate savings and efficiencies for aggregators through review costs being shifted to lenders. The Applicants submit that, currently, aggregators bear a substantial proportion of the review costs due to the need to allocate internal resources to respond to multiple assurance reviews. The Applicants submit that, under the Program, the AAP Lenders will bear the cost of the Program, which will represent a substantial saving for each aggregator. Aggregators will not be required to pay the Assurance Service Provider any fees for their services, and will instead only cover the costs related to resourcing as needed to manage the Program's process on their end. The Applicants submit that this cost will be significantly lower than would be required if the aggregator was having to manage multiple lender reviews.¹⁹

¹⁷ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

¹⁸ [Applicants' submission in support of the application for authorisation](#), 17 April 2023, p 20.

¹⁹ [Applicants' submission in support of the application for authorisation](#), 17 April 2023, pp 6, 21-22.

5.11. The public benefit claim of increased efficiency and cost savings for aggregators was supported by interested parties, including aggregators themselves, industry associations and assurance service providers.²⁰ In summary, interested parties submit that:

- Individual lenders engage assessors each year to conduct assurance reviews of each aggregator. The reviews are resource intensive, time consuming and ultimately inefficient for all parties involved, and multiple reviews taking place simultaneously can cause fatigue and business disruption given the significant time investment required from aggregators.
- The Program will lessen the number of audits and assurance activities currently undertaken and experienced by industry participants, and the breadth of information requested by the participating lenders will be streamlined into one request. The Program will therefore increase efficiencies by reducing costs and duplication for aggregators as the reviews will be conducted in a more structured and efficient way.

5.12. The Applicants submit that, based on their knowledge, anticipated savings for aggregators cannot be quantified, however these savings are expected to be significant based on anecdotal evidence from aggregators.²¹ The ACCC received submissions from a number of aggregators who provided examples of the duplication that currently exists in assurance reviews, and which they consider would be reduced under the Program.²² For example, Astute Financial Management Pty Ltd (**Astute Financial**) submits it has been subject to separate assurance programs from many lenders over the past 3 years and has engaged with 3 different consultants from the Big 4 accounting firms, where the assurance programs they ran were very similar, where it had to provide near identical data for each review and explain its business and processes to each consultant. Astute Financial notes it has over 40 lenders on its lending panel, and it estimates the time taken for each assurance audit can be from 2 to 4 weeks.²³

5.13. The Applicants also submit that the Program will lead to greater consistency and clear expectations for aggregators' compliance systems by providing for assurance reviews of participating aggregators to be conducted and managed in a consistent manner for all relevant lenders with clear expectations set for aggregators. The Applicants submit that the Program seeks to introduce a minimum level of oversight which is anticipated to be more comprehensive than what some of the non-applicant lenders have presently.²⁴

5.14. Some interested parties also submit that the Program would provide for a greater degree of consistency of assurance standards, where the Program would provide

²⁰ [Astute Financial Management Pty Ltd submission](#), 22 May 2023, p 1; [Australian Finance Group Ltd submission](#), 22 May 2023, p 1; [BDO Audit Pty Ltd submission](#), 22 May 2023, pp 1-2; [Connective Credit Services Pty Ltd submission](#), 22 May 2023, p 2; [Customer Owned Banking Association submission](#), 22 May 2023, pp 1-2; [Deloitte Touche Tohmatsu submission](#), 22 May 2023, p 1; [Lendi Group submission](#), 22 May 2023, pp 1-2; [Loan Market Group Pty Ltd submission](#), 22 May 2023, p 1; [Mortgage & Finance Association of Australia submission](#), 22 May 2023, p 3; [REA Group Ltd submission](#), 22 May 2023, p 2.

²¹ [Applicants' submission in support of the application for authorisation](#), 17 April 2023, p 22.

²² [Astute Financial Management Pty Ltd submission](#), 22 May 2023, p 1; [Australian Finance Group Ltd submission](#), 22 May 2023, p 1; [Connective Credit Services Pty Ltd submission](#), 22 May 2023, p 2; [REA Group Ltd submission](#), 22 May 2023, p 2.

²³ [Astute Financial Management Pty Ltd submission](#), 22 May 2023, p 1.

²⁴ [Applicants' submission in support of the application for authorisation](#), 17 April 2023, pp 6 & 20.

standardised processes and thresholds, and consistent assurance standards will ensure that all aggregators are reviewed on the same basis.²⁵ Deloitte Touche Tohmatsu (**Deloitte**) submits that an agreed upon, standard assurance review will drive efficiency and standardisation across the industry, and will also yield better participation and investment from aggregators based on common agreement from all participants on the Program requirements.²⁶

- 5.15. The Finance Brokers Association of Australia (**FBAA**) submits that there is significant cost in terms of time, resources and dollars incurred by aggregators and lenders as a result of lenders undertaking regular reviews of the risk and compliance arrangements of aggregators. However, FBAA notes that it is important to consider whether the program is motivated to create a superior outcome for all involved, including end users and consumers, or whether it is motivated by a goal to improve profitability.²⁷
- 5.16. The ACCC considers a public benefit from increased efficiency and cost savings for participating aggregators is likely to result from the Proposed Conduct, as participating aggregators will likely be subject to fewer assurance reviews, reducing the duplication of resources and information currently required to separately demonstrate to lenders participating in the Program that they meet each lender's assurance standards.
- 5.17. However, the ACCC notes that the extent of these cost savings is dependent on the level of participation in the Program by mortgage lenders. The lower the number of mortgage lenders that participate in the Program, the smaller the efficiencies and cost savings to aggregators that are likely to be realised by the Program.
- 5.18. In this respect, the ACCC notes that, while the UJV Agreement includes a list of matters to be addressed in each assurance review report, the scope of assurance reviews has not yet been finalised and is likely to evolve over time. The Applicants provided a draft of the review scope and submit that the review scope will continuously evolve to ensure there is adequate oversight and coverage of key prudential standards and regulations.²⁸
- 5.19. The ACCC accepts the need for the review scope to be flexible and evolve over time. However, the ACCC is concerned that the decision-making power with respect to approving and updating the review scope rests solely with the Operating Committee made up of a representative of each of the 5 Applicants, being 5 of Australia's largest mortgage lenders. Other lenders, including smaller mortgage lenders as a cohort, have no role in this decision-making process. To the extent that there may be divergent interests and priorities in respect of assurance reviews between mortgage lenders, or types of mortgage lenders, this raises the possibility that the review scope terms could be set in a manner that prioritises the interests of the Applicants over other lenders.
- 5.20. Focusing on their own interests and having less regard to the interests of other mortgage lenders in setting review scope terms may reduce the level of participation in the scheme, thereby raising the cost of participation for those mortgage lenders

²⁵ [Australian Finance Group Ltd submission](#), 22 May 2023, p 1; [Auswide Bank Ltd submission](#), 23 May 2023, p 1; [Lendi Group submission](#), 22 May 2023, pp 1-2; [Loan Market Group Pty Ltd submission](#), 22 May 2023, p 1.

²⁶ [Deloitte Touche Tohmatsu submission](#), 22 May 2023, p 2.

²⁷ [Finance Brokers Association of Australia submission, 31 May 2023](#), p 1.

²⁸ [Draft Industry AAP Review Scope](#), 2 August 2023.

who do participate, including the Applicants. However, by virtue of non-participating lenders continuing to have to fully fund separate individually-commissioned assurance reviews, it would still be likely to provide the Applicants with a cost advantage over their competitors in obtaining aggregator assurance services.

- 5.21. For these reasons, the ACCC considers that there is likely to be some incentive for the Applicants to place priority on their own assurance review requirements, without necessarily giving equal consideration to the assurance review requirements of other mortgage lenders, in setting the review scope.
- 5.22. To the extent that this did occur, and it resulted in less take up of the Program by other mortgage lenders, the efficiencies and cost savings likely to be realised by aggregators as a result of the Program would also be lower. The ACCC notes that the Applicants submit the Program's benefits are best achieved through wide industry participation from both aggregators and lenders such that the Applicants are naturally incentivised to encourage broad participation from the industry.²⁹ However, the ACCC considers that the Program would still benefit the Applicants if there was a lower level of take up from other lenders.
- 5.23. The ACCC considers that a Program structure whereby other lenders, and in particular smaller lenders, were also able to participate in the decision-making process about the scope of reviews would mitigate the risk of the Program being developed in a manner that placed priority on the Applicants own assurance review requirements. A program structure of this sort would increase the likelihood of the Program terms being set in a manner that maximised the benefits of the Program, and the associated efficiencies and cost savings, for all potential participants.
- 5.24. The ACCC also considers the likely public benefit from increased efficiency and cost savings for participating aggregators will likely flow on to provide the additional benefit of a greater degree of consistency for aggregators' compliance systems and assurance reviews. The ACCC considers that the likely efficiencies created under the Program include the standardisation of assurance standards through the reduction of duplication via single assurance reviews of aggregators conducted for a number of lenders. A greater degree of consistency for aggregators' compliance systems and assurance reviews is in itself likely to result in further cost savings. Conversely, this is relevant to consideration of the public detriment that may result from consistency in compliance for aggregators' systems, discussed at paragraphs 5.83 to 5.85 below.
- 5.25. Further, as with the efficiencies and cost savings discussed above, the extent of these savings depends on the extent of take up of the Program by mortgage lenders. This will be determined, in part, by how the review scope is structured.
- 5.26. The ACCC also notes that the Applicants have not provided any evidence, details or estimates of the value of the cost savings that they expect that the Program will realise. While the Act does not require the ACCC to quantify the level of public benefits and detriments, quantification can provide guidance on the relative weight to be attributed to particular benefits and detriments in the ACCC's overall assessment. Accordingly, the ACCC encourages the Applicants to provide evidence or details for, and/or quantify, the size of the claimed public benefits and detriments.
- 5.27. The ACCC considers that, in the case of the efficiencies and cost savings claimed by the Applicants, quantification, at least in the form of estimates, of the value of these cost savings would be possible. For example, factual information about how much aggregators and lenders currently spend on acquiring assurance services and/or

²⁹ [Applicants' clarification and amendment re the Proposed Conduct](#), 28 August 2023, p 1.

participating in assurance reviews and the details of expected costs of doing so under the Program would assist the ACCC in deciding how much weight to attribute to this public benefit.

- 5.28. The ACCC also notes that the realisation of these cost savings and efficiencies for aggregators does not appear to be dependent on a single Assurance Review Provider being appointed under the Program. They appear to be dependent on having less assurance reviews conducted rather than on having the same Assurance Service Provider conduct all reviews. To the extent that this is the case, it would be expected that having a number of assurance review suppliers appointed to conduct reviews under the Program would still allow these cost savings and efficiencies to be realised. This is relevant to consideration of the public detriment that may result from having a single Assurance Service Provider conduct all reviews under the Program, as discussed at paragraph 5.90.
- 5.29. With respect to the Applicants' submission that the Program will result in cost savings for aggregators through participating lenders bearing the cost of the Program, the ACCC does not consider the mere shifting of costs, from one party to another, to be a public benefit, over and above the public benefit likely to result from the Program in the form of cost savings and efficiencies as identified above.
- 5.30. In summary, the ACCC considers that the Proposed Conduct is likely to result in some public benefit in the form of efficiencies and cost savings for aggregators, as a result of aggregators being subject to fewer assurance reviews, therefore reducing the duplication of resources and information currently required to separately demonstrate to each lender participating in the Program that the aggregator meets that lender's assurance standards. However, the materiality of this public benefit has not been substantiated. In addition, the extent of the benefit is dependent on take up of the Program by lenders. While it is clear the Applicants will participate, it is less clear the extent to which the rest of the industry will participate.

For participating lenders

- 5.31. The Applicants submit that the Proposed Conduct will provide non-applicant lenders an opportunity to reduce their costs on assurance reviews, by allowing the Applicants to incur the costs of establishing the Program, and then sharing the cost of reviews with Opt-in Lenders in the Program. The Applicants submit that, if the Proposed Conduct is authorised, there may be substantial overall industry wide savings, on the expectation the reviews required by most lenders can be procured under the Program at a significantly lower outlay.³⁰
- 5.32. Interested parties also supported the public benefit of cost savings for lenders resulting from the Proposed Conduct:
- Bendigo and Adelaide Bank Limited submits that the Program has the benefit of lowering the costs associated with meeting its numerous and complex assurance obligations.³¹
 - ING Bank (Australia) Limited (**ING Bank**) submits it is of the view that the Program can derive the core public benefits listed in the application for authorisation.³²

³⁰ [Applicants' submission in support of the application for authorisation](#), 17 April 2023, pp 21-22.

³¹ [Bendigo and Adelaide Bank Limited submission](#), 22 May 2023, p 1.

³² [ING Bank \(Australia\) Limited submission 23 May 2023](#), p 2.

- Auswide Bank Ltd (**Auswide Bank**) submits it supports the centralisation of an aggregator assurance program that adopts best practise and provides an industry standard approach.³³
 - Lendi Group and the Customer Owned Banking Association (**COBA**) submit that the Program would reduce time, labour, costs and duplication for both participating mortgage lenders and aggregators.³⁴
 - Assurance firm BDO Audit Pty Ltd (**BDO**) submits that the Program will increase efficiency and minimise duplication by reducing the number of reviews conducted for lenders.³⁵
- 5.33. The ACCC notes that some smaller lenders caveated their support for the Program in their submissions with concerns around the potential cost-prohibitive nature of the cost sharing model. This is discussed further in the public detriments section below in paragraph 5.63.
- 5.34. The ACCC considers that the Program will reduce the costs for lenders who participate as they can share the cost and resources of the reviews. The ACCC considers there is a public benefit from increased efficiency and cost savings as the shared costs of, and resources required to undertake these reviews will be lower for participating lenders than the current cost for each lender to do a separate review.
- 5.35. The extent of these efficiencies and cost savings, in aggregate across lenders, and for each individual lender, are dependent on the take up of the Program amongst lenders. A lower participation rate means lower total savings and also means that the costs incurred in obtaining assurance reviews under the Program are borne by fewer lenders.
- 5.36. As discussed above, the ACCC is concerned that the structure of the Program may make it a less attractive option for some types of lenders. This in turn means that the Program is less likely to result in as great a level of efficiencies and cost savings for lenders as would be the case if the Program was structured in a manner that provided all classes of mortgage lenders to have a say in determining the scope of proposed assurance reviews. As also discussed above, the Applicants have not attempted to quantify the value of these cost savings, which would assist the ACCC in deciding how much weight to attribute to this claimed public benefit.

For participating assurance service providers

- 5.37. As noted above, the Applicants submit that the Proposed Conduct will result in substantial overall industry-wide savings. The Applicants submit that there are clear efficiencies and cost savings in appointing one Assurance Service Provider under the Program, particularly in relation to managing the quality of deliverables and the methodology applied as well as oversight of and management of any potential conflicts of interest.³⁶ These efficiencies are also acknowledged by Deloitte, which submits that it will be beneficial for an Assurance Service Provider and aggregators to engage with one entity, being the Operating Committee, which will facilitate more

³³ [Auswide Bank submission, 23 May 2023](#), p 1.

³⁴ [Lendi Group submission](#), 22 May 2023, p 1.
[Customer Owned Banking Association submission](#), 22 May 2023, p 2.

³⁵ [BDO Audit Pty Ltd submission](#), 22 May 2023, p 1.

³⁶ [Applicants' submission in support of the application for authorisation](#), 17 April 2023, p 20.

efficient communication and engagement as opposed to liaising with multiple parties.³⁷

- 5.38. As with the aggregators and lenders, the ACCC considers that the Proposed Conduct is likely to result in a public benefit through reducing duplication and thereby freeing up assurance providers' resources for other uses. However, as with the efficiencies and cost savings likely to be realised by aggregators and lenders as discussed above, the extent of these efficiencies and cost savings is dependent on the level of take up of the Program, which is uncertain, given the potential for the scope of reviews to be structured in a way that focuses on the Applicants' interests, with less regard to the interests of other mortgage lenders.
- 5.39. As also discussed above, the Applicants have not attempted to quantify the value of these cost savings, which would assist the ACCC in deciding how much weight to attribute to this claimed public benefit.

Increased competition for assurance service providers

- 5.40. The Applicants submit that the Proposed Conduct will provide a competitive opportunity for the supply of assurance services by firms competing in the tender process. The Applicants submit that, as the initial appointment of the Assurance Service Provider is for a period of 12 months, with a chance to extend, there would be regular opportunities for other assurance service providers to compete for subsequent appointments and the tender process will give the Applicants insight into other potential providers for consideration in the future.³⁸
- 5.41. Assurance firm BDO also noted the benefits of 'the competitive opportunity for the supply of the assurance services by firms competing in the tender process...' in its submission to the ACCC.³⁹
- 5.42. Information received through the public consultation process, including through submissions provided by assurance service providers, indicates that there is currently strong competition between assurance service providers.⁴⁰ The ACCC has not been presented with any information that would indicate that this is not the case.
- 5.43. Accordingly, the ACCC is not satisfied that the Proposed Conduct is likely to result in a material public benefit in the form of an increase in competition for assurance service providers. Aggregating participating lenders' assurance service requirements into a single contract is likely to be more attractive to potential assurance service providers, and tender responses would be expected to reflect this. However, given there currently appears to be strong competition for the supply of these services, the ACCC considers there is not sufficient evidence to support the submission that the Proposed Conduct would result in a material public benefit through increased competition for assurance services. The ACCC welcomes further submissions on this claimed public benefit.

³⁷ [Deloitte Touche Tohmatsu submission](#), 22 May 2023, p 2.

³⁸ [Applicants' submission in support of the application for authorisation](#), 17 April 2023, pp 20-21.

³⁹ [BDO Audit Pty Ltd submission](#), 22 May 2023, p 2.

⁴⁰ [BDO Audit Pty Ltd response to ACCC request for further information](#), 3 August 2023, pp 1 & 3. [Applicants' response to interested party submissions](#), 20 June 2023, p 8.

Improved compliance standards

5.44. The Applicants submit that the Proposed Conduct aims to improve overall compliance standards with financial services regulations across the mortgage lending industry, and thereby generate substantial public benefits. The Applicants submit that this is particularly the case for new entrant lenders who can obtain assurance reports more easily if they join the Program, as they can share the cost and administrative burden with other participating lenders.⁴¹ Interested parties submitted:

- The Program will help drive improvements in the quality of assurance standards across the industry by making available high-quality reviews to more lenders (COBA).⁴²
- The move to the joint assurance program will remove one of the impediments to adding a new lender to aggregators' lender panels, ensuring that aggregators can continue to offer a wide choice of products to help meet its best interest duty to consumers. An independent third party will remove any potential bias from the relevant lender's perspective (REA Group).⁴³
- The Program is expected to uplift the assurance standards and oversight for some non-applicant lenders, particularly where the Assurance Service Provider has a high level of independence, and aggregators are more likely to implement the better recommended practices under the Proposed Conduct, knowing that most lenders require and agree on the recommended uplifts and there will be a structured approach to the review of the issue rectification (BDO and Deloitte).⁴⁴
- Smaller lenders may not have the capacity or in-house skills to perform these types of reviews across aggregators, typically using remote compliance or monitoring functions to assess brokers and aggregators. Under the recently introduced CPS 230 (described in paragraph 2.12 above), lenders who perform less rigorous work and oversight now will likely need to increase monitoring and testing of aggregators. The Program will benefit these smaller lenders in the industry through consistent and robust aggregator and mortgage broker monitoring and compliance (Deloitte).⁴⁵

5.45. The ACCC does not accept that the Proposed Conduct is likely to lead to a public benefit in the form of improved compliance standards. As discussed below in paragraphs 5.79 to 5.92, the ACCC considers it is uncertain whether the Program is likely to result in a higher, or lower, level of compliance standards.

Public detriments

5.46. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

⁴¹ [Applicants' submission in support of the application for authorisation](#), 17 April 2023, p 21.

⁴² [Customer Owned Banking Association submission](#), 22 May 2023, p 2.

⁴³ [REA Group Ltd submission](#), 22 May 2023, p 2.

⁴⁴ [BDO Audit Pty Ltd submission](#), 22 May 2023, p 2.
[Deloitte Touche Tohmatsu submission](#), 22 May 2023, pp 2-3.

⁴⁵ [Deloitte Touche Tohmatsu submission](#), 22 May 2023, p 2-3.

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*⁴⁶

5.47. The ACCC has considered the following public detriments:

- coordinated behaviour among Program participants
- reduced competition in the supply of mortgage lending to consumers
- risk of reduced compliance standards
- potential for reduced competition for the supply of assurance services.

Coordinated behaviour among Program participants

Information sharing between lenders

5.48. The Applicants submit that the Program is designed to limit the type of information shared between lenders to an appropriate level to avoid the sharing of any commercially sensitive information and is subject to information sharing procedures and a 'competition protocol' in the AAP Lender Deed and UJV Agreement.⁴⁷ The Applicants note that, under clause 7.2 of the AAP Lender Deed, a lender may be removed from the Program if it is in breach of the confidentiality protocols. These protocols are summarised in paragraphs 3.27 to 3.29 above.

5.49. The Applicants state that assurance reviews are not designed to reveal specific information about particular lenders' loan terms, lending policies or offers or other client information. Rather, they will focus on the overall systems and processes used within aggregator networks to manage their compliance responsibilities.⁴⁸

5.50. Interested parties submit that, given the potential for coordinated behaviour through information sharing amongst participants, the Applicants would need to ensure there were sufficient safeguards to protect privacy and ensure information was not shared improperly so that it may give rise to coordinated behaviour. In particular:

- Connective submits that lenders would need to ensure appropriate levels of privacy and data protection, particularly with regard to loan files, where it is critical that these are de-personalised and appropriate protections put in place.⁴⁹
- FBAA submits that while the deed includes restrictions on sharing of information and strict requirements that in theory should address concerns, these in practice can be difficult to police and large institutions have a history of sharing information in official and unofficial channels. FBAA states that there should be full examination of how ACCC authorisation could be exploited to 'give a group of powerful organisations complete authority to exchange market-sensitive information'. FBAA further submits that bank behaviour around interest rate rises and other practices indicate that large financial institutions move in close connection with each other, and while some of this may

⁴⁶ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

⁴⁷ [Applicants' submission in support of the application for authorisation, 17 April 2023](#), p.14.

⁴⁸ [Applicants' submission in support of the application for authorisation, 17 April 2023](#), p 15.

⁴⁹ [Connective Credit Services Pty Ltd submission](#), 22 May 2023, p 3.

constitute 'copycat behaviour', it may also involve structured conduct (involving information sharing).⁵⁰

- 5.51. The ACCC notes that the terms of the Program provide that lenders may discuss and share relevant information for the purposes of establishing and conducting the Program. The competition protocol provides that lenders will not share any information that may be regarded as commercially sensitive or which relates to the competitive market activities on any of the lenders. This includes any fee, cost or price-related matters.
- 5.52. Information provided for the purpose of assurance reviews is provided directly to the Assurance Service Provider by each lender and is not shared between lenders. The report prepared by the Assurance Service Provider is then provided separately to each participating lender. Any discussions, or actions, a lender chooses to take based on the review is a matter for the lender and the aggregator the subject of the review. Discussions or sharing of information between lenders about a review or any action a lender proposes to take in response to a review is also prohibited.
- 5.53. More generally, the assurance reviews will address matters in relation to the aggregator's systems and processes, such as broker onboarding and accreditation, responsible lending, IT systems and data security. The reviews are not intended to deal with commercial aspects of the aggregator's operations in relation to its dealings with lenders.⁵¹
- 5.54. However, the risk of coordinated behaviour is particularly relevant in relation to concentrated markets, such as that for home loans where, at a national level, major banks make up the vast majority of the market share of home loans (according to APRA statistics, the major banks make up approximately 75% of home loans nationally and only 12 authorised deposit taking institutions have more than a 1% share).⁵² The Proposed Conduct would allow the major banks to work together to endeavour to lower the costs of one input to the operation of their businesses and also provides another point of contact between the major banks and increases the frequency of interaction between major bank lenders. The ACCC is not satisfied that the Proposed Conduct, including the information sharing protocol proposed by the Applicants, will not raise the risk of a propensity to coordinate in relation to other aspects of the supply chain. Accordingly, the ACCC has concluded it is likely that the Proposed Conduct will result in a public detriment of an increased risk that the home loans market becomes more conducive to coordination between major bank lenders.

Information sharing by the Assurance Service Provider

- 5.55. Interested parties raised concerns around the possibility that the appointed Assurance Service Provider could have a conflict of interest based on any existing relationship with Program participants. Australian Financial Group Ltd notes that the entities expected to bid for the role of Assurance Service Provider may have existing commercial relationships, including as auditors, with Program participants. It therefore submits that the Program ought to be designed to allow potential Assurance Service Providers to demonstrate adequate information security arrangements to

⁵⁰ [Finance Brokers Association of Australia submission, 31 May 2023](#), p 3.

⁵¹ [Applicants' submission in support of the application for authorisation, 17 April 2023](#), p 7.

⁵² Australian Competition and Consumer Commission, [Reasons for Determination - Application for merger authorisation MA1000023 lodged by Australian and New Zealand Banking Group Limited](#), Commonwealth of Australia, 4 August 2023, paragraph 6.46.

avoid actual or perceived conflict between separate services provided to participants.⁵³

- 5.56. REA Group submits that the Assurance Service Provider will need to ensure it has robust data segregation and information exchange protocols in place to ensure information uncovered or reported through a review is not disseminated to other aggregators, internally within the Assurance Service Provider or its other clients.⁵⁴
- 5.57. In response, the Applicants submit that they intend to impose strict conflict requirements on the Assurance Service Provider to protect the participants' interests in the 'Master Services Agreement' between aggregators and the Assurance Service Provider, which will be signed prior to the completion of any assurance review. The Applicants submit that this will be necessary to ensure that aggregators are supportive of the Program.⁵⁵
- 5.58. The Applicants state that their current intention is to require providers who bid on the Assurance Service Provider role to implement adequate arrangements to ensure no conflict, actual or perceived, may arise between their assurance team and other personnel in that firm who may have relationships, including as auditors with other participating lenders, or with aggregators.⁵⁶ It is proposed that the Assurance Service Provider will be required to establish adequate information security arrangements including, for example, systems controls on access to files/information, clean team separation measures so that personnel are not involved in other client work for lenders or aggregators, personal signed confidentiality undertakings, and audit rights as are appropriate.⁵⁷
- 5.59. The ACCC notes that the risk of an assurance provider sharing information with other clients with which it has relationships exists both with and without the Proposed Conduct. Absent the Proposed Conduct, lenders are likely to continue to engage third party assurance service providers to undertake assurance reviews of their aggregator networks.
- 5.60. The ACCC considers that appointing a single Assurance Service Provider, as is proposed under the Program, does increase this risk compared to the future without the Proposed Conduct. Individual mortgage lenders seeking to engage an assurance service provider have a range of potential suppliers to choose from, making it easier to avoid contracting with a supplier that may have existing relationships with a competitor or competitors of the lender. Under the Program, with a single appointed Assurance Service Provider, the risk of the appointed supplier sharing information with other clients with which it has a relationship would need to be managed rather than avoided. The ACCC considers that appointing more than one Assurance Service Provider would provide greater options to avoid this risk.
- 5.61. Notwithstanding this, the ACCC considers that the process that the Applicants propose to undertake is likely to be adequate to manage this risk, particularly in the context where lenders and aggregators will require a sufficient level of assurance as to the manner in which this risk is managed in order to agree to participate in the Program.

⁵³ [Australian Finance Group Ltd submission, 22 May 2023](#), p 2.

⁵⁴ [REA Group Ltd submission, 22 May 2023](#), p 3.

⁵⁵ [Applicants' response to interested party submissions, 20 June 2023](#), p 6.

⁵⁶ [Applicants' response to interested party submissions, 20 June 2023](#), p 6.

⁵⁷ [Applicants' response to interested party submissions, 20 June 2023](#), p 7.

Reduced competition for supply of mortgage lending to consumers

Costs of acquiring aggregator assurance services

- 5.62. Some interested parties raise concerns that certain elements of the Proposed Conduct may give rise to public detriment in the form of reduced competition for supply of mortgage lending services, specifically:
- the Applicants' proposed equal cost model for the sharing of costs between lenders for each review, and
 - the terms on which lenders participate in the Program.
- 5.63. Interested parties submit that while they support the Program in principle, the equal cost model may be unfair or cost prohibitive for smaller lenders:
- COBA submits that the funding model could create barriers to entry for smaller lenders and price out some potential participants. Larger lenders have a greater capacity to pay for reviews than smaller lenders and receive greater commercial benefits. While the Program reduces the fixed costs of assurance services as a whole, the equal split model embeds the existing scale advantage of the larger lenders. COBA instead suggests that the Program should include a proportional funding model that would make the scheme more easily accessible.⁵⁸
 - Australian Finance Group Ltd and ING Bank submit that, while participation is voluntary, the equal share costs model may be cost prohibitive to smaller lenders, and lenders would have to decide whether the benefits of participation outweigh any disproportionate cost allocation.⁵⁹ However, ING Bank notes that it does not see a public detriment resulting from this, as smaller lenders would remain able to perform their own reviews.⁶⁰
 - Auswide Bank similarly submits that smaller lenders may find access to the Program to be cost prohibitive and potentially lead to an anti-competitive outcome.⁶¹
- 5.64. The Applicants submit that the cost structure has been chosen due to being operationally simple to manage, and the costs of a review are anticipated to be significantly less than the costs of each lender arranging its own review.⁶² The Applicants submit that applying a tiered cost structure to funding reviews based on factors such as lender size, market share or value of business with an aggregator generates a range of complexities. The Applicants submit it could lead to the possibility of inappropriate information disclosure between lenders as to their relevant size of loan book, their relationship with an aggregator, or subjectivity in the interpretation or application of the tiered structure, leading to prolonged and costly disputes.
- 5.65. The Applicants also submit that managing a tiered cost structure would likely involve significant additional expense as the Applicants may be required to engage a third-

⁵⁸ [Customer Owned Banking Association submission, 22 May 2023](#), p 2.

⁵⁹ [Australian Finance Group Ltd submission, 22 May 2023](#), p.2-3; [ING Bank \(Australia\) Limited submission 23 May 2023](#), p 1.

⁶⁰ [ING Bank \(Australia\) Limited submission, 23 May 2023](#), p 1.

⁶¹ [Auswide Bank submission, 23 May 2023](#), p 1.

⁶² [Applicants' response to interested party submissions, 20 June 2023](#), p 3.

party consultant to oversee and manage the fees payable under a tiered structure to avoid the sharing of commercially sensitive and confidential information between lenders. It is possible that disputes could arise as to the application of the criteria.⁶³

- 5.66. The ACCC notes that there is no charge for joining the Program. However, all lenders who opt-in to participate in the review of an individual aggregator will, regardless of size or the extent to which they use a particular aggregator, share the costs of the review of that aggregator equally.⁶⁴
- 5.67. The ACCC considers that all participating lenders, including smaller lenders, appear likely to have the opportunity to realise cost savings in absolute terms under the Program. However, the cost savings to smaller lenders under an equal cost sharing model, relative to the amount they currently spend on aggregator assurance reviews, are likely to be smaller.
- 5.68. The ACCC notes the Applicants' submissions about adopting a tiered fee structure, both in terms of the cost involved and managing potentially commercially sensitive information that may be necessary to apply such a fee structure. The ACCC does accept that this would introduce additional complexities to the Program and likely result in additional costs being borne in managing the Program. However, the ACCC considers that steps could be taken to appropriately manage any such concerns, to ensure that smaller lenders are not placed at a relative cost disadvantage to larger lenders in obtaining joint aggregator assurance reviews.
- 5.69. This in turn is likely to have some impact on the ability of smaller lenders to compete in the supply of mortgage lending to consumers, which the ACCC considers to be a public detriment.

Approval process for lenders to join the Program

- 5.70. With respect to the Operating Committee consisting of representatives of each of the Applicants being the decision maker in relation to allowing other lenders to join the Program and the suspension or termination of any lender from the Program, the Applicants submit that they do not anticipate the Operating Committee would decline any lender's application, if that lender agrees to the Program's terms and conditions.⁶⁵
- 5.71. The Applicants submit that the open nature of the Program to all industry participants is a core requirement as set out in the UJV Agreement. They submit that there is very little or no discretion for the Operating Committee to not admit a lender who is willing to comply with the UJV Agreement requirements and the AAP Lender Deed provisions. Nor will the Operating Committee have any material discretion to remove a party if the party has complied with its obligations as set out in the UJV Agreement requirements and the AAP Lender Deed.⁶⁶
- 5.72. The Applicants submit that if the Operating Committee acted outside of the UJV Agreement, then it is understood such conduct would fall outside the scope of the

⁶³ [Applicants' response to interested party submissions, 20 June 2023](#), p 3.

⁶⁴ As noted at paragraph 3.17, if a lender requests the Assurance Service Provider, as part of the broader review being undertaken, undertake a review of additional specific elements of the aggregators operations that may be of interest or relevance to the individual lender the lender will cover the full cost of these additional elements of the review and a report on these matters will only be provided to that lender.

⁶⁵ [Applicants' response to ACCC request for further information](#), 2 August 2023, p 3.

⁶⁶ [Applicants' clarification and amendment re the Proposed Conduct](#), 28 August 2023, p 6.

authorisation and therefore the Applicants would be at risk of exposure to the terms of the Act for any such conduct.⁶⁷

- 5.73. Although not a concern expressly raised by interested parties, the ACCC has considered risks associated with the Applicants being the decision maker in relation to allowing other lenders to join the Program.
- 5.74. The ACCC notes that exclusion from the Program would be likely to increase the relative costs of the excluded lender in obtaining assurances reviews of aggregators with which it deals (i.e. costs incurred by the excluded lender compared to costs incurred by lenders who did participate in the Program). While participating lenders are likely to be able to obtain aggregator assurance services at lower cost, and have to expend less resources on doing so, an excluded lender would have to continue to make its own, individual, arrangements. Therefore, the ACCC considers that exclusion from the Program would be likely to have an adverse effect on the lender concerned by increasing its cost of obtaining aggregator assurance services relative to that of the lenders it competes with in supplying mortgage lending services.
- 5.75. In this respect, the ACCC notes that it is other lenders, specifically representatives of each of the Applicants, that will make up the Operating Committee that decides on the participation by, and removal or suspension of, lenders from the Program. The unanimous agreement of the Operating Committee is required for all such decisions. The ACCC would be concerned if having this decision-making power vested with the Applicants would lead to it being used in a way that denied other lenders the opportunity to access the anticipated benefits of the Program.
- 5.76. However, the ACCC notes that under the UJV Agreement, participation in the Program is intended to be open to all lenders. In order to participate, lenders need only agree to comply with the terms of the AAP Lender Deed, including obligations regarding the use of reviews and reports and then have their participation approved by the Operating Committee. These terms are straightforward, they are not onerous, and there is no cost involved.
- 5.77. The AAP Lender Deed provides that a lender's participation in the Program can be suspended or terminated if a 'Material Default Event' occurs. A Material Default Event is defined as a failure to rectify any breach or liability under the AAP Lender Deed within 14 days, or such longer period as permitted, of receiving a 'Material Default Notice'.⁶⁸ The AAP Lender Deed also includes a dispute resolution process which includes referral to an expert to determine the matter in accordance with the Resolution Institute Expert Determination Rules.⁶⁹
- 5.78. However, notwithstanding this, decisions about a lender's participation in the Program will be made by some of their competitors. While the ACCC does not consider that this risk is likely to be high, the ACCC does consider that if decisions were made that increased the costs of, or made it more difficult for, a lender or lenders to obtain assurance review services relative to their competitors, through their exclusion from the Program, this would be likely to result in a material public detriment.

⁶⁷ [Applicants' clarification and amendment re the Proposed Conduct](#), 28 August 2023, p 6.

⁶⁸ AAP Lender Deed, 7.1(a).

⁶⁹ AAP Lender Deed, 5.2(c)

Risk of reduced compliance standards

- 5.79. As discussed at paragraph 5.44, the Applicants submit that the Proposed Conduct aims to improve overall compliance standards with financial services regulations across the mortgage lending industry and that there is no current 'clear, uniform minimum standard'.⁷⁰
- 5.80. The ACCC considers that whether the Program is likely to result in assurance reviews being conducted to a higher or lower standard is uncertain. In this respect, the ACCC considers that there is likely to be an increased risk that the Proposed Conduct would result in a public detriment in the form of assurance reviews being performed to a lower standard. To the extent that assurance reviews are performed to a lower standard, this increases the risk of inappropriate lending practices.
- 5.81. The ACCC considers that there is uncertainty about whether the Proposed Conduct will lead to higher or lower standards of assurance reviews for 3 reasons:
- The Proposed Conduct is likely to lead to more homogenous assurance reviews.
 - The Proposed Conduct is likely to lead to a common benchmark of aggregator assurance reviews, and it is uncertain whether this benchmark is likely to be of a higher or lower standard than some lenders would adopt themselves in the absence of the program.
 - The current proposed scope of assurance reviews is very high level, providing significant discretion about the nature and scope of assurance reports, creating uncertainty about the extent to which assurance reviews will adequately address aggregator and broker compliance standards.
- 5.82. Each of these issues is discussed below.

Homogeneity of assurance review

- 5.83. The ACCC notes that while lenders obtaining a single assurance report jointly, as proposed under the Program, appears likely to make it cheaper and easier for participating lenders to obtain such reports, it will also reduce the scope for each lender to obtain assurance reviews specific to their particular needs. Each participating lender will be able to request that the Assurance Service Provider undertake a review of additional specific elements of the aggregator's operations that may be of interest or relevance to the individual lender, at their own cost. However, with respect to the key matters to be addressed in each review report, all lenders will receive the same report based on a review scope set by the Applicants. Setting aside any concerns noted above that the review scope could be set in a manner that prioritises the interests of the Applicants over other lenders, the review scope would be expected to be set having regard to the overall interests of the group as a whole, rather than the needs of individual lender participants.
- 5.84. This is likely to lead to more homogenous assurance reviews being undertaken. The ACCC considers that there is a risk that more homogeneous assurance reviews would not address the interests of individual lenders at the same level that individually commissioned reviews, where each lender controls the scope of the review, would.

⁷⁰ [Applicants' response to ACCC request for further information](#), 2 August 2023, p 4.

Benchmark of aggregator assurance reviews

- 5.85. The ACCC is also concerned that the Proposed Conduct may lead to a lower common benchmark of aggregator assurance reviews. The ACCC considers that it is more likely that individual lenders may choose to accept a lower standard of assurance reviews if, through jointly obtaining assurance reviews, the lender is aware that other lenders are adopting this approach.

Proposed scope of assurance reviews

- 5.86. With respect to the review scope, the ACCC notes that assurance reports will address the matters stated in Schedule 2 of the UJV Agreement as described in paragraph 3.9 above. The ACCC considers this list of matters to be addressed in assurance reports is at a very high level, providing significant discretion about the nature and scope of assurance reports. As noted in paragraph 5.19 above, the ACCC considers that the Program's review scope needs to be able to evolve over time to ensure there is adequate oversight and coverage of new and updated standards and regulations. However, the ACCC considers that the manner in which the Program is currently structured, and in particular, the significant discretion around the nature and scope of assurance reviews, creates uncertainty about the extent to which assurance reviews will adequately address aggregator and broker compliance standards.
- 5.87. The Applicants provided a draft review scope to provide an indication of the proposed baseline standard for reviews.⁷¹ The ACCC is concerned that the focus of reviews provided for in the indicative draft review scope appears to be primarily on the systems regarding the interactions between aggregators and brokers, with less regard to the key elements of any assurance review, compliance with responsible lending requirements in brokers' dealings with consumers. The ACCC considers that this is particularly important in circumstances where, while a significant objective under the Program is the realisation of savings and efficiencies for industry participants, the cost of poor practices engaged in is borne by consumers.
- 5.88. For example, the ACCC considers the draft scope of review lacks sufficient detail in relation to areas including best interests duty obligations, responsible lending obligations and conflicted remuneration. Specifically, in respect of some issues in relation to best interest duties and suitability of loans:
- Aggregators would only be required to confirm that their brokers have a clear understanding of their obligations and comply with the relevant obligations, and/or that aggregators have processes in place to ensure that brokers have this understanding. There is no requirement to establish that aggregators have systems in place to test if and how brokers comply with these obligations.
 - In some cases, the systems checking that will occur is by self-declaration. For example, the aggregator must confirm certain matters, rather than the assurance review service provider testing them.
- 5.89. With respect to conflicted remuneration, the focus is on testing that the aggregator 'has adequate controls in place for brokers to identify, report and manage any potential conflicts of interest'. There is no acknowledgement of the inherent conflict of interest between a mortgage broker's duties to the customer and being paid a commission by the mortgage lender/aggregator. Nor is there any requirement for assurance service providers to review the systems the aggregator has in place to check whether brokers are in fact managing this conflict of interest. The ACCC

⁷¹ [Draft Industry AAP Review Scope](#), 2 August 2023.

considers that a Program directed at providing assurance services in relation to aggregators should explicitly recognise this conflict of interest and include a requirement to review how aggregators manage this conflict, and ensure that their brokers do likewise.

- 5.90. The ACCC also considers that appointing a single Assurance Service Provider could result in a lower level of assurance standards reviews than if a number of assurance service providers were engaged to conduct these reviews. While a single provider affords opportunities for the provider to develop relationships and gain a deeper understanding of the requirements of mortgage lenders, and lower the cost of the assurance reviews, it also risks a single, homogeneous, process being adopted in undertaking reviews. Further, over time, a single provider may be more inclined to rely on established practices with less consideration of developing and evolving practices and systems for the conducting of reviews.

Conclusion

- 5.91. In conclusion, the ACCC accepts that, by allowing the cost and expertise of conducting assurance reviews to be shared, the Program may provide an opportunity for improvement in the standard of assurance reviews conducted by some lenders. However, the ACCC considers that the structure of the Program also raises the risk that assurance reviews may be conducted to a lower standard. The ACCC considers that the details about the draft proposed scope of assurance reviews provided by the Applicants reinforces, rather than ameliorates, these concerns.
- 5.92. Accordingly, for the reasons outlined above, the ACCC considers that the Proposed Conduct is likely to result in a public detriment in that there is an increased risk that assurance reviews will be performed to a lower standard. To the extent that assurance reviews are performed to a lower standard, this increases the risk of inappropriate lending practices.

Potential for reduced competition for the supply of assurance services

- 5.93. The FBAA submits that the creation of the Program is likely to stifle the opportunity for competition among assurance service providers.⁷² It submits that it may become extremely difficult for an incumbent to be dislodged. FBAA suggests that the Program could include a requirement to change the Assurance Service Provider at set periods if a change has not occurred sooner through the annual tender process. This would also address a risk of capture and interdependence between the participants and the Assurance Service Provider – namely, that the Assurance Service Provider could entrench itself as the clear choice for reviews conducted under the Program and become an obvious choice for a renewal of its contract.⁷³
- 5.94. In response, the Applicants submit that assurance reviews are one specific service provided by assurance service providers, who offer many other assurance services to many clients and industries in their portfolio.⁷⁴ The Applicants further submit that the competitive tender process facilitated by the Program would increase competition and drive greater efficiencies and note similar submissions provided by assurance providers which supports this.

⁷² [Finance Brokers Association of Australia submission 31 May 2023](#), pp 2-3.

⁷³ [Finance Brokers Association of Australia submission, 31 May 2023](#), p 2.

⁷⁴ [Applicants' response to interested party submissions, 20 June 2023](#), p 8.

- 5.95. The Applicants also state that currently it is proposed that the performance of the Assurance Service Provider will be reviewed every 12 months, however the current design of the Program does not include a requirement to re-tender for the Assurance Service Provider position at specific intervals. The Applicants are considering whether introducing a requirement to regularly review the Assurance Service Provider position and offer periodic re-tenders may be beneficial. However, the Applicants also wish to balance this consideration with the value that aggregators ascribe to consistency and note that regularly changing the Assurance Service Provider may bring inefficiency to the assurance review process.⁷⁵
- 5.96. The ACCC has considered whether the Program may reduce competition for the provision of assurance services, to lenders, or more generally by aggregating demand for aggregator assurance services, across potentially a wide range of lenders, into one contract to be serviced by a single assurance service provider. This means it is likely that a range of assurance service providers who are not successful in the tender process will have fewer opportunities to compete to supply these services. The ACCC has also considered whether the Applicants would be able to exercise enhanced buyer power in the procurement of aggregator assurance services.
- 5.97. The ACCC notes that assurance service providers have not raised any concerns in this respect. Submissions from assurance service providers, and market inquiries undertaken by the ACCC, indicate that, while the provision of aggregator assurance services is an important component of their work, it is not a large component of their work. Further, there do not appear to be significant barriers to entry in providing these services. The ACCC understands that providing aggregator assurance services does not require significant specialist skills that would preclude businesses that supply audit or assurance services in other industries from competing to supply aggregator assurance services in the future.
- 5.98. With respect to competition to supply aggregator assurance services to the lenders participating in the Program, the ACCC also notes that the Applicants have a detailed understanding of, and considerable experience in, acquiring these services. It would not be in their interest to implement an arrangement that risks lessening competition for the supply of these services to them in the future.
- 5.99. For these reasons, the ACCC considers that the Proposed Conduct is unlikely to result in a public detriment in the form of reduced competition for the supply of aggregator assurance services or assurance services more generally. Having regard to the range of other work opportunities available to assurance service providers, the ACCC also considers that the Proposed Conduct is unlikely to enable the Applicants to exercise enhanced buyer power in the procurement of aggregator assurance services.

Balance of public benefit and detriment

- 5.100. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of efficiencies and cost savings. Under the Program, fewer assurance reviews will be conducted, reducing the current duplication of resources and information required for each participating aggregator to separately demonstrate to each participating lender with which it deals that the aggregator meets the lenders' assurance standards. However, the Applicants have not attempted to quantify the

⁷⁵ [Applicants' response to interested party submissions, 20 June 2023](#), p 9.

value of these cost savings, which would assist the ACCC in deciding how much weight to attribute to this claimed public benefit.

- 5.101. Further, the extent of these efficiencies and cost savings is dependent on take up of the Program amongst lenders. In this respect, the ACCC is concerned that the structure of the Program, whereby the scope of reviews will be decided exclusively by 5 of Australia's largest mortgage lenders, may mean that priority in setting the scope of reviews may be placed on their own assurance review requirements, without necessarily giving equal consideration to the assurance review requirements of other, particularly smaller, lenders.
- 5.102. To the extent that this did occur, and it resulted in less take up of the Program by other mortgage lenders, the efficiencies and cost savings likely to be realised by aggregators as a result of the Program would also be lower.
- 5.103. The ACCC considers the Proposed Conduct is likely to result in a public detriment in the form of increasing the risk that the home loan market becomes more conducive to coordination between the major bank lenders.
- 5.104. The ACCC considers that whether the Proposed Conduct is likely to result in assurance reviews being conducted to a higher or lower standard is uncertain. Therefore, the ACCC considers that the Proposed Conduct is likely to result in a public detriment in the form of an increased risk of assurance reviews being performed to a lower standard. To the extent that assurance reviews are performed to a lower standard, this increases the risk of inappropriate lending practices.
- 5.105. The ACCC considers that this public detriment arises because the Proposed Conduct:
- is likely to lead to more homogenous assurance reviews being undertaken that do not address the interests of individual lenders at the same level that individually commissioned reviews would, where each lender controls the scope of the review
 - is likely to lead to a common benchmark of aggregator assurance reviews, and it is uncertain whether this benchmark is likely to be of a higher or lower standard than some lenders would adopt themselves in the absence of the program, and
 - the current proposed scope of assurance reviews is very high level, providing significant discretion about the nature and scope of assurance reports, creating uncertainty about the extent to which assurance reviews will adequately address aggregator and broker compliance standards. The ACCC considers that the draft review scope provided by the Applicants lacks sufficient detail in relation to areas including best interests duty obligations, responsible lending obligations and conflicted remuneration, to be confident that assurance reviews will adequately test aggregators' and brokers' systems with respect to these crucial aspects of their responsible lending obligations.
- 5.106. The ACCC also considers that the equal cost sharing model is likely to provide a cost advantage in procuring assurance review services to the Applicants, and potentially other larger lenders, over some smaller lenders. The cost savings to smaller lenders under an equal cost sharing model, relative to the amount they currently spend on aggregator assurance reviews, are likely to be smaller than for larger lenders. This in turn is likely to impact the ability of these lenders to compete in the supply of mortgage lending to consumers, which the ACCC considers to be a public detriment.
- 5.107. In summary, the ACCC considers that the Program is likely to result in a public benefit in the form of efficiencies and cost savings. However, the extent of this public

benefit is unclear. The ACCC also considers that the Program is likely to result in a number of public detriments, which, taken together are likely to outweigh the public benefit.

- 5.108. Therefore, for the reasons outlined in this draft determination, the ACCC is not satisfied that the Proposed Conduct is likely to result in a public benefit that would outweigh any likely detriment to the public from the Proposed Conduct.

6. Draft determination

The application

- 6.1. On 17 April 2023, the Applicants lodged application AA1000640 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 6.2. The Applicants seek authorisation for the Proposed Conduct defined at paragraph 3.1.
- 6.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 6.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 6.5. For the reasons outlined in this draft determination, the ACCC is not satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 6.6. Accordingly, the ACCC proposes not to grant authorisation.
- 6.7. This draft determination is made on 18 September 2023.

7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination, by 3 October 2023. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.