

Mr Gavin Jones  
Director  
Competition Exemptions  
Australian Competition and Consumer Commission  
Level 27, 135 King Street  
Sydney NSW 2000

28 August 2023

Dear Gavin

**Application for Authorisation of the Aggregator Assurance Program: Response to ACCC request for further information dated 16 August 2023**

1. Thank you for your letter dated 16 August 2023 in respect of the Applicants' application dated 17 April 2023 for authorisation of the Aggregator Assurance Program (**AAP** or the **Program**) under the *Competition and Consumer Act 2010* (Cth) (**CCA**) (the **Application**).

1.1 This response may be included on the ACCC's public register, and the Applicants make no claims of confidentiality in respect of the following.

1.2 Capitalised terms used in this letter adopt the meaning as defined in the Application unless otherwise specified.

2. **Introductory observations**

***Broad Industry Participation***

2.1 The Applicants welcome the opportunity to provide further clarifications about the Program which we hope will assist the ACCC in further consideration of the Application.

2.2 Firstly, the Applicants observe that the Program has been designed on a voluntary opt-in basis for the benefit and broad participation of the mortgage lending industry as a whole, extending to any lenders or aggregators who wish to take advantage of the Program. This design principle is reflected in the Application (see for example, [2.6] - [2.7]) and in the Joint Venture Deed (**JV Deed**) (see *Background paragraph [D]*, clause 4 ('*Open Participation*') and the list of aggregators in Schedule 1).

2.3 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.

***Scope of the Application***

2.4 Secondly, the Applicants confirm they are seeking authorisation only to enter into and to give effect to the JV Deed on the terms as set out in Schedule 1 to the Application (which includes the proposed AAP Lender Deed as Schedule 3 thereto). Those documents form the framework or 'rules' for the establishment and implementation of the Program. There are no other 'rules' governing the Program, and any references to 'rules' in the Application were intended to refer to the Deeds submitted to the ACCC.

2.5 In the JV Deed the Applicants have set out the steps proposed to implement the Program once the JV Deed is signed by the Applicants. Implementation of, or 'giving effect to' the JV Deed will involve a staged process, with the Applicants entering into a number of other subsidiary or operational agreements over time. These will be as described in the JV Deed:-

(a) first, the RFP will be developed and issued to relevant firms in order to select and engage the ASP,

- (b) the ASP Engagement Letter will be agreed with the successful tenderer,
  - (c) the ASP Standing Offer Agreement will be developed with the appointed ASP, through discussions with the Operating Committee, and
  - (d) the Aggregator Agreement will be developed by the ASP through discussions with the Operating Committee and relevant aggregator and broker industry associations.
- 2.6 None of these subsidiary or operational agreements listed in (a) to (d) have yet been developed, for the reasons explained below. However, the core content and design principles for each of these documents have been outlined in some detail in the JV Deed.
- 2.7 From a transparency point of view, the Applicants therefore intend that the core nature and content of these proposed arrangements should be reasonably clear to all stakeholders as well as the ACCC, even if the final details are yet to be settled.
- 2.8 The Applicants have not yet drafted these subsidiary agreements because of their view that a degree of consultation with the relevant ASP (when appointed), and with participating aggregators will be necessary and desirable to finalise the operational aspects of these subsidiary agreements.
- 2.9 For example, as explained in the Applicants' response to the ACCC dated 20 June 2023, the ASP will be engaged by a tender process. One of the tender criteria will be to secure the best possible terms and scope for the provisions of reviews at a reasonable cost. The ASP will have its own views as to its terms of engagement through the Standing Offer, including for example what liability it may accept for the content of the reports provided to lenders.
- 2.10 Similarly, the detail of the Review Scope will be developed by the Operating Committee with the benefit of consultation with lenders and with relevant aggregator and broker industry associations.
- 2.11 The Applicants have sought to be transparent by describing the key terms of the operational arrangements in some detail in the JV Deed. The JV Deed requires that, when developed, these subsidiary agreements must be in a form which is consistent with the terms of the JV Deed and therefore consistent with the Application. The Applicants understand the consultation to date has not identified major concerns with the design of the Program, as set out in the JV Deed.
- 2.12 As previously noted, the Program's benefits are best achieved through wide industry participation from both aggregators and lenders.
- 2.13 The Applicants note that lenders or aggregators will not participate in the Program if its terms or design are unattractive or onerous. The Applicants intend to implement the Program in a way which encourages participation and which considers lender and aggregator input during consultation processes.
- 2.14 If helpful, the Applicants would be pleased to share these subsidiary agreements with the ACCC once they are developed. The Applicants however, do not envisage that these documents will be developed for some time, and not until the ASP is engaged, which (if authorisation is granted) will be some months away.
- 2.15 Authorisation is sought only for the JV Deed, which designs and describes those terms and will govern the final content of these operational arrangements as the Program is implemented.

***The Operating Committee role***

- 2.16 The Operating Committee is intended by the Applicants to have an important but limited role in overseeing the Program. The functions of the Operating Committee are intended to be largely administrative and operational.
- 2.17 The Program centers around hiring an assurance firm to complete Reviews of aggregators, to manage the Program on a day-to-day basis and to share those Reports with the relevant lenders. It is therefore expected that the assurance firm will be undertaking the key activities to deliver the objectives of the Program.
- 2.18 The Operating Committee will only meet as is required to set operational parameters and will not and cannot be involved in changing the nature or design of the Program. The operational aspects which the Operating Committee has responsibility for are limited to those necessary to execute an industry program of this nature, and include for example:
- (a) preparing and issuing an RFP to Prospective ASPs (see clause 6.1(b) of the JV Deed);
  - (b) appointing the ASP and negotiating its retainer and the Standing Offer;
  - (c) approving and updating the Review Scope from time to time;
  - (d) the approval of pricing payable to the ASP by Opt-In-Lenders for reviews in each Review Cycle (see clause 10.2(b) of the JV Deed); and
  - (e) approving the aggregator form of agreement to agree to Program reviews.
- 2.19 To further assist the ACCC, the Applicants provide the below responses to each of the ACCC's questions.
3. **Question 1(a)**
- 3.1 The Applicants confirm that the JV Deed, annexed as Schedule 1 to the Application, is the document referred to in [4.4(a)] of the Application as the 'UJV Agreement'. Any references to the UJV Agreement in the Application should be read as references to the JV Deed.
4. **Question 1(b)**
- 4.1 As outlined above, the Applicants are seeking authorisation only for the overall framework of the Program as set out in the JV Deed and the Application. The Applicants note that the implementation of the Program will involve making and giving effect to the described further subsidiary arrangements in a form which must be consistent with the JV Deed.
5. **Question 1(c)**
- 5.1 At the current time, the Applicants do not anticipate any amendments to the JV Deed or AAP Lender Deed. The Applicants are aware that, if in the future any material changes were to be proposed, consideration would need to be given to the scope of the Authorisation (if granted), which will be limited to the current form of the JV Deed and AAP Lender Deed, and whether authorisation for a variation might be required.

**6. Question 2(a)**

- 6.1 The reference to "Program terms" was intended only as a reference to the terms of the JV Deed, and as such there are no other 'terms' proposed nor any new documentation that the Applicants can provide, which has not already been provided to the ACCC.
- 6.2 The substantive elements of the process by which aggregators will be invited to consent to Reviews under the Program are outlined in general terms in clause 11 of the JV Deed. The Applicants envisage that there will be a simple consent document provided to the aggregator by which it will consent to grant access to the ASP to its records and files in order for the ASP to perform the Review and to provide Reports to relevant Lenders. The Applicants will necessarily need to settle the terms of that consent in conjunction with the ASP when engaged and after authorisation is granted.
- 6.3 The Applicants do not envisage there being any material terms of that consent which would differ from the description of the Program as provided in the JV Deed and Application.
- 6.4 As explained in the Application, the Applicants are very conscious that if authorisation is granted, it will be voluntary for any aggregator to join the Program. Therefore, the Applicants are naturally incentivised not to propose any onerous or complex requirements to aggregators when requesting their consent, other than competition and confidentiality requirements, which will be strict. To do otherwise could risk a reduction in aggregator participation and might compromise the success of the Program.

**7. Questions 2(b), (c) and (d)**

- 7.1 As noted above, the Applicants have applied for authorisation to make and give effect to the provisions of the JV Deed which sets out in some detail the overarching framework for entering into subsidiary agreements, but for the avoidance of doubt, authorisation is not sought separately for the detail of these subsidiary agreements (which are yet to be drafted).
- 7.2 Entry into the Aggregator Agreement, ASP Standing Offer Agreement, ASP Engagement Letter and RFP, will be required to implement the steps which are described in the JV Deed. The form of these will need to be settled within the JV Deed's framework. See in particular:
- (a) clause 6 in relation to the principles and process for the RFP;
  - (b) clause 7 in relation to the engagement of and responsibilities of the ASP;
  - (c) clauses 3.1, 5.1, 5.2 and 7.3 (b)(i) which outline the ASP Standing Offer terms and requirements; and
  - (d) clauses 7.3(b)(vi) (vii) (viii)(x)(xi) (xiii)(xiv) and 11 which set out in some detail the proposed terms and conditions of the Aggregator Agreement.
- 7.3 As noted, the documents listed above are all operational documents which are subsidiary to the JV Deed and must comply with the Deed's requirements.

**8. Question 2(e)**

- 8.1 The Applicants do not intend that the Applicants or the Operating Committee will have 'significant discretion' as to how the Program is to be structured, established or implemented in any material respect. They will be bound by the terms of the JV Deed when it is executed, which

defines the scope and operation of the Program. The Operating Committee cannot amend the JV Deed or depart from its requirements.

- 8.2 As such, it is only intended that the Operating Committee will have discretion to the extent it is needed to ensure the Program can be implemented in accordance with the principles outlined in the JV Deed.
- 8.3 The Applicants accept that the description in [4.4(d)] in the Application of the Operating Committee's powers to propose 'terms' of participation to aggregators was not clear.

The Applicants' intent is that the process of inviting aggregators to consent to Assurance Reviews being performed will be conducted in accordance with clauses 7.3 and 11 of the JV Deed which outline a number of requirements relevant to the rights of an aggregator such as:-

- (a) consent (7.3(b)(vi), 11.2(a)),
- (b) no charge being levied (7.3(b)(vii)),
- (c) avoiding conflicts (7.3(b)(viii)),
- (d) confidentiality and privacy (7.3(b)(x),(xi), and 11.2(d)),
- (e) access to reports (7.3(b) (xiii) and 11.2(c)),
- (f) limited disclosure to lenders (7.3(b)(xiv) and 11.2(b)), and
- (g) disputes (11.2(e)) and liability (11.2(a)).

Apart from the items in 8.3(a)-(g), the Applicants do not, at this stage, envisage any other issues where any discretion would be exercised by the Operating Committee in agreeing terms with aggregators. The Applicants would be happy for this statement to be noted by the ACCC on the public record.

- 8.4 Moreover, it is important to note that the Operating Committee is bound to comply with the JV Deed in how it exercises its role and discretions. The Background to the JV Deed at paragraph [C] sets out the objectives for reviews to be conducted *'in a more consistent and efficient manner and to streamline and remove duplication for multiple review programs for the benefit of Aggregators, lenders and the community'*.
- 8.5 Those objectives will be applicable to how the Operating Committee conducts its oversight of the Program and discretions.

#### **Other Matters**

- 8.6 The Applicants note the Commission's question as to the width of the statement made in [4.4(g)] of the Application and wish to withdraw that subparagraph from the Application, as it does not accurately characterise the Operating Committee's powers on those matters. This can be seen in the specific terms of the JV Deed and the AAP Lender Deed:-
- (a) The way in which reports from completed Assurance Reviews may be used is clearly outlined in clauses 1.7 and 2 of the AAP Lender Deed. The Operating Committee does not have the discretion to diverge from these conditions of participation in the Program.



- 8.7 Moreover, the Applicants confirm that [4.4(c) to (f)] and [4.4(h)] of the Application are only intended to implement the framework as proposed in the JV Deed, and these subparagraphs do not propose any steps or discretions beyond what is described in the JV Deed.
- 8.8 On operational matters, while the Operating Committee has some other limited discretions referred to in the JV Deed (see clauses 10.2, 10.3 and 11), these are submitted to be relatively confined and are reasonable for the oversight of an industry program of this nature. These discretions will not detract from the public benefits referred to in the Application.
- 8.9 The other discretions of the Operating Committee with regards to the operation of the Program are also constrained by both:
  - (a) the Applicants' incentive not to propose any onerous or complex requirements to lenders and aggregators, as described above at 6.4, which may risk a reduction in participation; and
  - (b) the terms of the JV Deed, see clause 10.1:

*The Operating Committee has full powers of management and control of any business activity of the Project Business, **upon and subject to the provisions of this deed** [emphasis added].*

- 8.10 The open nature of the Program to all industry participants is a core requirement as set out in the JV Deed under "Background" paragraph [D], and clause 4. There is very little or no discretion for the Operating Committee not to admit any party seeking to join the Program who is willing to comply with the JV Deed requirements and AAP Lender Deed provisions. Nor will the Operating Committee have any material discretion to remove a party from participation if the party has complied with its obligations (see clause 7 of the AAP Lender Deed).
- 8.11 If the Operating Committee acted outside of the requirements of the JV Deed, then it is understood such conduct would fall outside the scope of the authorisation and therefore the Applicants would be at risk of exposure to the terms of the CCA for any such conduct, depending on the nature of the conduct involved.
- 8.12 We would be pleased to further discuss or clarify any of the foregoing matters.

Yours sincerely



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