APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Urban Taskforce
2	General Electric
3	Eureka Funds Management Limited
4	Vision
5	AMP Capital Investors
6	Property Council of Australia
7	BIS Shrapnel
8	Master Builders Australia Inc
9	The Treasury
9a	The Treasury Supplementary Submission
10	Concept Economics
10a	Concept Economics Supplementary Submission
11	National Australia Bank (NAB)
12	Australia & New Zealand Banking Group Limited (ANZ)
13	Urban Development Institute of Australia (National)
14	Westpac
15	Commonwealth Bank
16	Investment & Financial Services Association Limited
17	Associate Professor Frank Zumbo

Additional Information Received

Answers to questions on Notice

Question on Notice 1

Impacts of ABIP on Competition (Senator Xenophon, Hansard p. 83-84)

Senator XENOPHON asked: Secondly, did Treasury do any modelling on ABIP's impact on competition?

Mr Martine – ah, we did modelling on employment issues and we did modelling on pricing. I wouldn't necessarily categorise it as competition.

Senator Xenophon –OK. I really want to get through these…

Mr Murray – …and certainly, did we see competition as a concern? Well we saw it as an issue but in terms of a short-term contingency and lender of last recourse, we're not there to stymie competition but we recognise that it was an issue.

Senator Xenophon –…Why was the section 51 exemption considered necessary?
And further what assessment of competition impacts should there be before granting section 51 exemptions in terms of Treasury's role? Why was the section 51 exemption used instead of the traditional authorisation route? Thirdly, what level of advice did Treasury seek from the ACCC on this whole issue of the exemption? Did you seek an assessment of the potential competition and consumer impact from the ACCC? Further, and will Treasury monitor the impact of that competition? Again, they're all on notice, I know you're busting to answer them…

Answer:

Treasury considered carefully the potential competition policy and Trade Practices Act issues in the development of the ABIP initiative (though no formal modelling was undertaken). These considerations led to the assessment that the use of the s.51 exemption was the most appropriate policy course in the circumstances. Firstly, there are a number of factors which limit any potential adverse effects on competition, namely:

- ABIP operates in a 'market gap' where other commercial providers are not able to provide finance due to the global financial crisis. Accordingly, ABIP is not taking business away from existing financiers. This is buttressed by ABIP's pricing policy which will be to charge at a small premium to the market.
- ABIP is a contingency measure – it may ultimately not write any loans at all.
- ABIP is temporary – it will only write loans during a period of up to two years.
- The Government is not subsidising ABIP, nor any of the four major banks which are co-shareholders.
- The Shareholders Agreement prevents ABIP directors passing confidential information back to their shareholders.

- ABIP would operate on commercial lines and hence is not taking on poorly performing assets to the benefit of other financiers.

In terms of the Trade Practices Act considerations, the judgement was made that in the absence of an exemption or authorisation, it was not possible to rule out a potential action against ABIP. It should be noted that action can be taken under the TPA not just by the ACCC, but third parties, and ultimately these would be matters determined by the courts.

A key objective of ABIP is to provide certainty to the commercial property sector that viable assets will be able to obtain refinancing. Clearly this objective would be undermined if there were legal doubts about the validity of ABIP financing on TPA grounds. Consequently, potential avenues of removing any such legal doubts were examined.

Consideration was given to the use of the authorisation process under the TPA. However, that process can take some months. Given the priority for ABIP to be operational as soon as possible, it was determined that the most appropriate option was a legislative exemption. This provides the combination of certainty and timeliness which are essential to ABIP's effectiveness.

In essence, the rationale for the legislative exemption is that the policy benefits of ABIP far outweigh the anti-competitive impacts (if any, noting the points made above). The TPA itself envisages that this judgement can appropriately be made by the Parliament.

It should be noted that the exemption from the TPA is limited in nature. For example, it does not permit collusion between ABIP and other financiers to fix interest rates for the commercial property sector. This is because such activity would not be being undertaken 'solely in furtherance of ABIP Limited's objectives…' or otherwise covered by clause 16(1).

As a part of the consideration process, Treasury discussed with the ACCC the features of the TPA at a fairly general level and the broad options available for addressing risks of actions against ABIP under the TPA. Given that the judgement was made to proceed with the legislative exemption for the reasons outlined, Treasury did not seek a comprehensive assessment from the ACCC on the competition and consumer impacts.

Post-implementation, Treasury will monitor the impact of ABIP on competition, along with ABIP's impact on the market more broadly.

Question on Notice 2

Moral hazard of triggering foreign bank withdrawal because of ABIP (Senator Xenophon, Hansard p. 84)

Senator XENOPHON asked: Has any work or any modelling or any assessment been done in relation to this moral hazard issue that even the Property Council acknowledged as a concern that there is a risk that, in the absence of other safeguards you could actually trigger foreign banks jumping out of the market by virtue of ABIP in terms of the perverse outcome?

Answer:

Considerable attention has been undertaken in designing ABIP to address potential 'moral hazard' issues.

There are a myriad of factors that may impact on the decision of foreign banks to exit the Australian market, including, for example, the fact that some banks are owned or controlled by foreign governments whose decisions may not be wholly influenced by the dynamics of the Australian market. Many foreign banks are facing difficult circumstances in their home economies, and have been under pressure to reduce their lending commitments and exposures generally, and in particular to pull liquidity back into their home markets.

One of the key factors driving the decision of foreign banks to enter a market is the stability and liquidity of that market. ABIP is designed to support and enhance stability and liquidity in the Australian financial system. Rather than supporting withdrawal, ABIP may therefore encourage foreign banks to stay in Australia.

ABIP will also provide an incentive for borrowers to encourage foreign lenders to remain in syndicates, as it will price at a small premium above the market. There will also be an incentive for the major Australian banks to discourage foreign banks from using ABIP as an ‘easy exit’ strategy from the Australian commercial property market, as their exposure would effectively be passed (in part) to the major banks via ABIP.

ABIP will be re-financing quality assets, not taking on poor credit risks. Hence, if a foreign bank withdraws from a borrowing that ABIP ultimately refinances, they will miss out on providing finance to a creditworthy borrower paying market price. In other words, they will withdraw on liquidity or strategic grounds, not risk or price.

Question on Notice 3

Taxpayer riskbearing and contribution to ABIP ***(Senator Xenophon, Hansard p. 84)***

Senator XENOPHON asked: There's a criticism or a concern that, in terms of risk, taxpayers bear more of a risk in terms of the contingent liability rather than the banks, that their (the banks) exposures are limited to their contribution. If you could take than on notice, as well whether it's disproportionate in terms of the risk to taxpayers as well as the benefits to taxpayers.

Answer:

While ABIP lending does not exceed $4 billion, all ABIP’s funds will come from its shareholders and all profits and losses will be shared proportionately between the shareholders, commensurate with the initial financing (i.e. the Government will receive 50% of ABIP’s profits and the four major banks will each receive 12.5%).

A decision for ABIP to raise debt from the capital markets will require unanimous agreement of all shareholders. Any debt raised from the markets will be guaranteed by the Government (for a fee), to facilitate ABIP raising sufficient funds to meet its needs. In addition, it is possible that a small proportion of the debt issued by ABIP will be subordinated (ranked lower than) the shareholder’s initial loan funding. This is to avoid adverse capital consequences for the major banks and a counterproductive reduction in their lending in other sectors of the economy. However, the financial structure of ABIP will ensure that the Government receives a commensurately higher expected return on this small portion of subordinated debt. It is important to note that the equity and debt contribution from the four major banks are still at risk beyond the issuing of the initial $4 billion, and will be called on to fund any losses before the majority of the Government guaranteed debt is called.

Question on Notice 4

Bank deposit guarantee (Senator Bushby, Hansard p. 84)

Senator BUSHBY asked: Firstly, with respect to the answer provided earlier about the effect of the bank deposit guarantee, it seems to me like you're proposing a potentially market-distorting policy measure to address the effects of a market-distorting measure that had consequences. I'd just appreciate your thoughts on that.

Answer:

ABIP is designed to allow normal market adjustments to occur, such as re-pricing of risk and a tightening of lending standards. ABIP is aimed at filling a market gap arising from the potential lack of liquidity in the market, and thus helping avoid adverse consequences where markets are failing to work properly.

Question on Notice 5

ABIP concept origination (Senator Bushby, Hansard p. 84)

Senator BUSHBY asked: In terms of the overall measure itself, who suggested it? Was it actually an initiative of the government or did Treasury actually propose this as a way of addressing the perceived issue?

Answer:

The Government first started working on this particular initiative late last year, as part of its broader efforts to support the Australian financial system. As part of those efforts, the Government has had a range of discussions with the major banks over the past few months regarding actions the Government may take to address potential liquidity problems that may emerge.

The National Australia Bank approached Government late last year with its views on commercial property financing issues. Subsequently, the Government discussed commercial property financing issues with all four major banks.

The final proposed terms of ABIP were subsequently developed with the active participation and contribution of Treasury and the four major banks.

Question on Notice 6

Developing ABIP Rules (Senator Bushby, Hansard p.84)

Senator BUSHBY asked: In terms of the Rules that we've heard discussed earlier today by Mr Fahour, will Treasury be involved in the development of the rules? Has it been involved in any of the rules so far?

Answer:

Treasury has been actively involved in the development of ABIP's lending criteria in consultation with the four major banks. ABIP's lending criteria have been outlined broadly in Appendix 2 of the Treasury's submission to the Senate Inquiry. Treasury will continue to be actively involved in the future development of the lending criteria.

Question on Notice 7

Enforcing ABIP Rules (Senator Bushby, Hansard p.84)

Senator BUSHBY asked: How enforceable will those rules be? And what degree of parliamentary scrutiny will there be over those rules? What ability does ABIP to change those rules without parliamentary scrutiny? Particularly under clause 7's expanded focus and the level of activity itself given that a lot of assurances have been given today that is really is only a contingency measure and that it will only be lending on very strict criteria?

Answer:

The draft Shareholders' Agreement provides that:

- an application to ABIP to provide financial accommodation to any person will be assessed by ABIP in accordance with the Lending Criteria in effect from time to time (clause 2.3a); and
- the ABIP board may only approve applications to ABIP as authorised by the Lending Criteria and otherwise in accordance with the *Australian Business Investment Partnership Act 2009* (clause 2.3b).

The Shareholders' Agreement is a contract between the Shareholders and is enforceable under contract law.

ABIP's board will be responsible for ensuring prudent lending decisions in accordance with the lending criteria, subject to unanimous agreement. However, the Board will have some flexibility, both to relax certain criteria and to demand more stringent criteria where applicable. It should be noted that ABIP's board is required to act in good faith and in the best interests of ABIP, and that these duties are enforceable under the *Corporations Act 2001*.
Appendix 2 of Treasury's submission provides a broad outline of the lending criteria.
The criteria are broadly consistent with those of the four major domestic banks. The lending criteria are still in draft form and remain subject to final approval by shareholders on a unanimous basis.
Any decision to expand the focus of ABIP beyond commercial property will require unanimous agreement by all shareholders. Any such decision will be made via an amendment to the Shareholders' Agreement and, as required by the ABIP Bill, will be made public as soon as practicable.

Question on Notice 8

ABIP Rules (Senator Bushby, Hansard p.84)

Senator BUSHBY asked: Typically is there any requirement for applicants for finance to have tried to get refinance from any of the big four before they actually come to ABIP?

Answer:

ABIP is a lender of 'last recourse' – that is, it will not operate where financing is available in the market. Before a loan can be made, the Board of ABIP will be required to assure itself that the commercial property assets are financially viable and that the market has failed. In particular, the Board will be required to assure itself for each creditworthy applicant that financing is not available from commercial providers, including the four major banks.

Further, borrowers from ABIP will have incentives to source alternative financing arrangements, given ABIP's loans will be priced at a small premium above the prevailing market.

Question on Notice 9

Emails between Treasury and ACCC (Senator Bushby, Hansard p. 84)

Senator BUSHBY asked: The communication between Mr Martine of Treasury and Mr Gregson of the ACCC are embodied in three emails.

Answer:

Please refer to the answer provided to Senator Brandis' Question on Notice on Hansard page E33 of the Senate Standing Committee on Economics of 26 February 2009.

Question on Notice 10

Exemptions under Trade Practises Act (Senator Bushby, Hansard p.84)

Senator BUSHBY asked: I'd also like to ask why in development of the legislation it was decided not to go for an exemption under the trade practices act that would have involved a public interest test, rather than the direct clause 16 exemption which was inserted into the bill which avoids the need for a public interest test?

Answer:

See the answer to Tsy No. 1.