COMMONWEALTH OF AUSTRALIA

***Competition and Consumer Act 2010* (Cth)**

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No:	ACT 1 of 2023
Re:	Applications by Australia and New Zealand Banking Group Limited and Suncorp Group Limited for review of Australian Competition and Consumer Commission Merger Authorisation Determination MA1000023
Applicants:	Australia and New Zealand Banking Group Limited and Suncorp Group Limited
Intervenor:	Bendigo and Adelaide Bank Limited

SUMMARY OF REASONS FOR DETERMINATION

TRIBUNAL:	Justice Halley (Deputy President) Dr J Walker (Member) Ms D Eilert (Member)
DATE:	20 February 2024
WHERE MADE:	Sydney

1. In accordance with the practice of the Australian Competition Tribunal in cases of public interest, the Tribunal has prepared the following summary of its reasons for determination in this proceeding. The summary is not a complete statement of the reasons of the Tribunal. The only authoritative statement of the Tribunal's reasons is that contained in the published reasons for determination. The Tribunal's reasons for determination contain information that is confidential to the parties to the proceeding. Initially, the reasons will only be made available on a restricted basis to the parties' legal representatives to afford the parties an opportunity to apply to redact such confidential information. After that process has been completed, a redacted copy of the reasons for determination will be published on the Tribunal's website.

2. The Australian banking sector presently includes the four major banks: Australia and New Zealand Banking Group Limited (**ANZ**), Commonwealth Bank of Australia (**CBA**), National Australia Bank (**NAB**) and Westpac Banking Corporation (**Westpac**), (together, **Major Banks**), second-tier banks, and other authorised deposit taking

institutions (**ADIs**). The second-tier banks include banks at or around the size of Suncorp-Metway Limited (**Suncorp Bank**), Macquarie Bank (**Macquarie**), ING Bank Australia (**ING**), Bendigo and Adelaide Bank Limited (**Bendigo**), Bank of Queensland and HSBC Bank Australia (**HSBC**). All of the Major Banks and second-tier banks are ADIs.

3. The Major Banks collectively account for 72% of reported banking system assets in Australia. The second-tier banks each have a share of banking system assets greater than 1%, and collectively account for close to 14% of reported banking system assets, having increased their share of assets over the past decade. Other ADIs individually hold a share of banking system assets less than 0.7%, which includes foreign bank branches, who primarily target niche areas and credit unions and building societies. Non-ADI lenders account for around 5% of total financial system assets in Australia. Non-ADI lenders include smaller financial technology providers, which can be broadly described as "fintechs".

4. On 18 July 2022, ANZ and Suncorp Group Limited (**SGL**) entered into a share sale and purchase agreement providing for the purchase of Suncorp Bank by ANZ (**Proposed Acquisition**).

5. On 2 December 2022, ANZ applied to the Australian Competition and Consumer Commission (**ACCC**) for authorisation of the Proposed Acquisition under s 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

6. On 4 August 2023, the ACCC made a determination refusing the application for authorisation. The ACCC declined to authorise the Proposed Acquisition because it was not satisfied that the acquisition would not be likely to have the effect of substantially lessening competition in a national home loans market, and in local or regional banking markets in Queensland for agribusiness customers and small to medium enterprises (**SME**). The ACCC was also not satisfied that the Proposed Acquisition would be likely to result in benefits to the public that would outweigh detriments to the public from the Proposed Acquisition.

7. On 23 August 2023, each of ANZ and SGL applied to the Tribunal for a review of the ACCC's decision.

8. The application was opposed by Bendigo on the basis that the Proposed Acquisition

would be likely to substantially lessen competition in a national home loans market and in local or regional banking markets in Queensland for agribusiness customers. Bendigo contended that the Proposed Acquisition would further consolidate ANZ's market position and the structural advantages it enjoys as a Major Bank, without engaging in competition, to the substantial detriment of competition in the home loans and agribusiness markets.

9. It is common ground between the parties that the application for authorisation filed by the applicants with the Tribunal is a "merger authorisation" application within the meaning of s 4 of the CCA.

10. A review by the Tribunal of a merger authorisation differs from a review of other authorisations, in two material ways:

    (a) *first*, a review of a merger authorisation is required to be completed by the Tribunal within a statutory time period; and

    (b) *second*, restrictions are imposed on the information, documents and evidence to which the Tribunal may have regard in conducting its review.

11. The statutory time period for this review expires today. In broad terms, the Tribunal has been limited in its review to the information, documents and evidence given to the ACCC in connection with the making of its determination. Notwithstanding that limitation, a very substantial quantity of information, documents and evidence was placed before the Tribunal. The evidence included witness statements from senior executives of each of ANZ, Suncorp Bank and Bendigo, together with a significant number of economic and subject matter expert reports. The witness statements and expert reports comprised very detailed evidence concerning the supply of home loans, and both agribusiness and SME banking services.

12. The Tribunal may grant authorisation if one of the two conditions stated in s 90(7) of the CCA is fulfilled. The first condition is that the Tribunal is satisfied in all the circumstances that the conduct for which authorisation has been sought would not have the effect, or would not be likely to have the effect, of substantially lessening competition. The second condition is that the Tribunal is satisfied in all the circumstances that the conduct for which authorisation has been sought 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 result, or be likely to result, from the conduct. This is referred to as a net public benefits test.

13. The first condition requires the Tribunal to identify relevant markets that are potentially affected by the acquisition, and then undertake a comparison between the nature and extent of competition in those markets in a future assuming the acquisition proceeds, and in a future where the acquisition does not proceed. In order to determine the nature and extent of competition in a future without the acquisition, it is necessary to identify commercially realistic future possibilities that are typically referred to as counterfactuals.

14. The Tribunal has concluded that the relevant markets that are potentially affected by the Proposed Acquisition are a national home loans market and local and regional agribusiness banking and SME banking markets in Queensland. These are the markets in which ANZ and Suncorp Bank, currently, most closely overlap in providing banking services to their customers.

15. The Tribunal has also concluded that the two counterfactuals advanced by the ACCC and Bendigo, namely, a counterfactual where SGL retained ownership of Suncorp Bank (referred to as the **No Sale counterfactual**) and a counterfactual contemplating a merger between Bendigo and Suncorp Bank (referred to as the **Bendigo Merger counterfactua**l), are commercially realistic. The Tribunal, however, considers that the Bendigo Merger counterfactual is far from certain, and likely would face significant execution challenges, in particular, realising postulated synergies within a sufficiently short time period to make a merger value accretive for both Bendigo and SGL.

16. The ACCC and Bendigo advanced a coordinated effects theory of harm in the national home loans market in which they contended that the Proposed Acquisition would make it easier for the Major Banks to engage in successful coordination to suppress price and non-price competition for home loans.

17. The Tribunal is satisfied that the home loans market is conducive to coordination, not least because of the combined 72% share of banking system assets of the Major Banks. The conditions for coordination, however, have recently reduced, and are likely to continue to reduce in the foreseeable future due to the material asymmetry in the market shares of the Major Banks, the emergence of Macquarie as a “maverick” in the market, and the increasing use of brokers that has reduced consumer choice frictions, facilitating

greater customer switching. Nevertheless, material barriers to entry and, in particular, expansion, remain. These include access to a competitively priced source of funds, and the substantial investment needed to establish the necessary technology systems and platforms to be able to offer a competitive product in the home loans market.

18. The critical issue, however, is whether the Proposed Acquisition would be likely to have the effect of substantially lessening competition by increasing the likelihood of the Major Banks engaging in successful coordination in the home loans market, compared with the position in either the No Sale counterfactual, or the Bendigo Merger counterfactual.

19. The Tribunal has concluded that the small increase in the market share of ANZ, if the Proposed Acquisition proceeds, would not have a meaningful impact on the degree of likelihood of the Major Banks engaging in successful coordination. The Tribunal has also concluded that neither Suncorp Bank in the No Sale counterfactual, nor a merged Bendigo/Suncorp Bank in the Bendigo Merger counterfactual, would make any material difference to the risk of coordination by the Major Banks.

20. The Tribunal is satisfied that Suncorp Bank is not a particularly strong competitor in the home loans market.

21. The Tribunal is also satisfied that a merged Bendigo/Suncorp Bank would be unlikely to impose a materially greater constraint than the two banks operating independently, and by Macquarie and other regional and independent banks.

22. The Tribunal has concluded that a merged Bendigo/Suncorp Bank is unlikely to have any meaningful impact on the prospects for successful coordination by the Major Banks because of the uncertainties as to the execution of the merger, the likely significant delays in the realisation of synergies, and the absence of any compelling evidence that the merged entity would benefit from a lower cost of funds.

23. In addition, other recent significant changes to the home loans market around brokers, the increased use of technology, and consumer behaviour have reduced the risk of coordination.

24. The Tribunal has, therefore, concluded that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition in the home loans market.

25. The ACCC and Bendigo advanced a unilateral effects theory of harm in the Queensland

local and regional markets for agribusiness banking. They submitted that the Tribunal could not be satisfied that removing competition between ANZ and Suncorp Bank, after taking into account the likely response by other existing and potential market participants, would not be likely to have the effect of substantially lessening competition.

26. The Tribunal is satisfied that the Proposed Acquisition, when assessed against either the No Sale counterfactual or the Bendigo Merger counterfactual, is not likely to have the effect, of substantially lessening competition in agribusiness banking markets in Queensland.

27. The Tribunal is not satisfied that Suncorp Bank's existing offering to agribusiness customers is likely to be more competitive in the No Sale counterfactual. The evidence before the Tribunal suggests that Suncorp Bank will continue to provide the same, or potentially a reduced level of service, and has no plans to compete more aggressively or grow its agribusiness portfolio.

28. Nor is the Tribunal satisfied that a merged Bendigo/Suncorp Bank would impose a significantly greater constraint than that likely to be imposed by Suncorp Bank in the No Sale counterfactual. The addition of Bendigo's share (through Rural Bank) of agribusiness lending in Queensland, would only lead to a modest increase in the merged entity's share of local and regional markets for agribusiness lending in Queensland.

29. The Tribunal is satisfied, however, that ANZ will remain constrained by other competitors, in particular, NAB and Rabobank. Further, Suncorp Bank's agribusiness offering is not particularly unique, or unable to replicated by other competitors. Critically, the Tribunal is satisfied that barriers to expansion in agribusiness markets in Queensland are relatively low, and, therefore, following the removal of Suncorp Bank as an independent competitor, there will be other competitors, capable of exerting a material constraint on the merged ANZ/Suncorp Bank.

30. The ACCC also advanced a unilateral effects theory of harm in local and regional Queensland markets for SME banking.

31. The Tribunal is satisfied, however, that the Proposed Acquisition is not likely to have the effect of substantially lessening competition in SME banking markets in Queensland.

32. The Tribunal accepts that Suncorp Bank's SME offering currently exerts some competitive pressure on ANZ, particularly for certain customer segments, it is

differentiated from ANZ's offering, and in the No Sale counterfactual, it would remain an effective competitor.

33. These considerations, however, are outweighed by the following considerations:

(a) ANZ and Suncorp Bank are not particularly close competitors in the supply of banking products to SME customers in Queensland.

(b) The Suncorp Bank offering is not materially differentiated from other regional and second-tier banks, in particular, Bank of Queensland.

(c) Barriers to expansion for banks already offering SME banking services in Queensland are relatively low.

(d) If the Proposed Acquisition proceeds, ANZ would have strong incentives to compete to retain its increased number of SME customers.

34. The net public benefits test in the second condition, strictly only arises for determination, if the Tribunal is not satisfied that the Proposed Acquisition passes the competition test in the first condition. Nevertheless, given the extensive submissions made by the parties on the second condition for authorisation, the Tribunal has considered whether the Proposed Acquisition satisfies the net public benefits test.

35. Various alleged public benefits were advanced by the applicants to the Tribunal, including commitments given by ANZ and SGL to the State of Queensland.

36. The Tribunal is satisfied that the forecast integration and productive efficiencies from the Proposed Acquisition constitute real and tangible benefits to the public, represent a saving of real resources and are likely to be sustained. The Tribunal was otherwise satisfied that other alleged public benefits were either not public benefits or were not specific to the Proposed Acquisition.

37. The Tribunal is satisfied that the Proposed Acquisition represents a net public benefit because any detriments arising from any reduction in competition are unlikely to be sufficiently certain and significant to outweigh the more certain integration and productive efficiencies forecast to arise from the Proposed Acquisition.

38. Given these findings, the Tribunal has concluded that the determination of the ACCC declining to grant authorisation of the Proposed Acquisition under s 88(1) of the CCA is

to be set aside and, in its place, a determination is to be made pursuant to s 88(1) and s 102(1) of the CCA granting to ANZ unconditional merger authorisation for the Proposed Acquisition.