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Lodgment and Details

Document Lodged:	Outline of submissions
File Number:	ACT 1 of 2023
File Title:	APPLICATIONS BY AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED AND SUNCORP GROUP LIMITED

COMMONWEALTH OF AUSTRALIA
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REGISTRAR

Dated: 30/11/2023 2:52 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

H COMMONWEALTH OF AUSTRALIA

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

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2023

Re: Application by Australia and New Zealand Banking Group Limited and Suncorp Group Limited for review of Australian Competition and Consumer ACCC Merger Authorisation Determination MA1000023-1

Applicant: Australia and New Zealand Banking Group Limited and Suncorp Group Limited

OUTLINE OF REPLY SUBMISSIONS FOR ANZ

This document contains confidential information which is indicated as follows:

[Confidential to ANZ] […] for Australia and New Zealand Banking Group Limited.

[Confidential to Suncorp] […] for Suncorp Group Limited and its related bodies.

[Confidential to Bendigo] […] for Bendigo and Adelaide Bank Limited and its related bodies.

[Confidential to a third party] […] for a non-party.

[APRA Confidential] […] for protected information within the meaning of s 56 of the *Australian Prudential Regulation Authority Act 1998* (Cth).

A. INTRODUCTION

1. The ACCC submissions (**AS**) repeatedly encourage consideration of the four major banks as a collective, in the banking industry as a whole: e.g., AS [1], [53]. That assumes away material differences between their competitive positions [1] and involves analytical error. The proposed acquisition should not be conceptualised as a "proposal whereby one of [the] major banks, ANZ, will acquire one of its smaller competitors, further consolidating the dominant position of the four major banks": AS [1]. It could as easily (and more accurately) be described as the acquisition of the ninth largest bank by the fourth largest bank; or a reduction in the number of first and second tier banks from 10 to 9. It is ultimately necessary to analyse the detail. At that point, much is just uncontroversial. First, as the ACCC accepts, ANZ and Suncorp Bank are not particularly close competitors.[2] Second, as the ACCC accepts, Suncorp Bank is no more vigorous or effective than any other competitor.[3] Third, the evidence does not support the proposition that the proposed acquisition involves the consolidation of the dominant position of the "four major banks". ANZ does not hold a dominant position in any market. The proposed acquisition results in a de minimis increase in ANZ's market share in home loans,[4] and is not likely to have a meaningful competitive effect in respect of SME or agribusiness banking, having regard to the fact that, in the future with the proposed acquisition, ANZ will remain constrained by other competitors.

B.1 Statutory test

2. AS [10] submits that "the conclusion that a substantial lessening of competition is not likely does not necessarily follow from an absence of proof that it is likely." ANZ did not submit that it necessarily would. But it may. It will depend on the facts, the context and which limb of s 90(7) is being considered. The Tribunal must be satisfied of the preconditions in s 90(7)(a). If it is not, it cannot grant authorisation.[5] The Tribunal is nonetheless tasked with reaching a decision, on a vast evidentiary basis, about commercial matters, under conditions of uncertainty. Mere possibilities have no place in that analysis (under either limb): cf AS [115]–[117], [121]–[122], [146]. If the Tribunal concludes that the applicants' hypothesis against any likely substantial lessening of competition is more probable than (any) reasonable hypotheses, that will properly ground a definite conclusion in the applicants' favour.[6]

3. A similar issue arises in respect of the ACCC's exhortation, at AS [43], that the Tribunal should take into account its finding, in the Decision, that there was "likely to be some, but not a substantial, lessening of competition arising from unilateral effects of the proposed acquisition".[7] It is not apparent how the Tribunal could factor some unquantified, insubstantial anticompetitive effects into the analysis under s 90(7)(a). In any event, if a suggested lessening of competition is not (or cannot be) quantified, but is qualitatively accepted to be insubstantial, it cannot meaningfully, and should not, be taken into account under s 90(7)(a).

B.2 Home loans

4. ***Unilateral effects***: The ACCC's finding that "there was likely to be some, but not a substantial, lessening of competition arising from the unilateral effects of the proposed acquisition" is disputed, but still significant. It reveals that the ACCC considers that incorporating Suncorp Bank into ANZ, irrespective of the counterfactual, will not result in a lessening of competition that is "real or of substance" based on

1 See ABG.5001.0413.1472 (ANZ's submissions in chief) (**ANZS**) at [1] [HB 4/21/3].
2 71925.047.001.1814 (ACCC Decision) at [6.571] [HB 3/16/276], [6.538]-[6.540]; see also 71925.040.001.0171 (First Starks report) at [9.264] [HB 16/578/1483]; 71925.002.001.0596 (ANZ Application) at [7.198]-[7.199], [7.143] [HB 17/592/334, 354, 355]; 71925.002.001.9102 (Rankin statement) at [102]-[104] [HB 12/419/25].
3 See ANZS at [50]-[59], [67]-[78] [HB 4/21/19-21, 24-28].
4 See ANZS at [37] [HB 4/21/14].
5 *Telstra TPG No 2* at [111]-[119].
6 *Australian Gas Light Co v Australian Competition and Consumer Competition (ACCC) (No 3)* (2003) 137 FCR 317 at [356].
7 71925.047.001.1814 (ACCC Decision) at [6.172] [HB 3/16/196].

unilateral effects. That is, ANZ does not have, and will not acquire, market power as a result of the proposed acquisition, and Suncorp Bank, whether it continues as a standalone bank or merges with another bank, is not especially important to competition. That conclusion supplies important context when the Tribunal comes to consider coordinated effects.

5. ***Coordinated effects—No present coordination:*** The Bendigo submissions (**BS**) assert that major banks are <u>currently</u> engaging in coordinated conduct in the home loans market: Section D1. The only evidence Bendigo relies on in support of this assertion is the 2018 Productivity Commission Report (**PC Report**) and the ACCC Residential Mortgage Price Inquiry, and Professor King's conclusions which in turn are based on those reports: BS [65]-[69]. As the ACCC observed in its decision,[8] neither report concluded that the major banks had engaged in coordinated conduct in the past. Neither report is evidence of the current state of competition. It is telling that Bendigo gives more weight to those half-decade old reports, than to the evidence before the Tribunal of the current state of competition in the market: BS [70].

6. **The conclusion that there is present coordination should be rejected for three reasons. First**, Professor King's conclusion that the major banks are currently engaged in coordination sits against all the other expert evidence before the Tribunal. No other expert concluded there was any evidence of current coordination in the market.[9] The ACCC did not find that there was: it found that the major banks are currently engaging in intense price competition.[10] As to non-price competition, not only (as Ms Starks found) is there <u>no</u> evidence "indicative of coordinated conduct in turnaround times, service quality, or investment in their technology platforms, which are other key parameters of competition in the home loans market";[11] but there is ample positive evidence of competition on those parameters: ANZS [19], [35], [37].

7. **Second***,* current competition is not temporary, but reflects longer term trends: ANZS [16], [28]-[33]. Bendigo relies on Ms Starks' hypothesis that recent price competition is a temporary break from coordination: BS [71]. But that hypothesis is not supported by the evidence before the Tribunal. Ms Starks fairly accepted that she could not determine whether past or present pricing reflected competition or collusion but assumed that recent price competition "is at least consistent with more coordinated conduct in the past".[12] Yet recent pricing is not just competitive, but hyper-competitive, with [Confidential to ANZ] (ANZS [27]), as Bendigo points to in its submissions: BS [73]. It is wrong to reason backwards from hyper-competitive pricing to conclude earlier pricing was not competitive, let alone collusive. Ms Starks identified an alternative plausible hypothesis: that recent price competition reflected a more permanent shift in competitive dynamics.[13] Ms Starks accepted there were material structural and behavioural changes in the market which made coordination structurally harder to maintain[14] (see ANZS [31]) . She accepted there was a longer term trend of declining profits <u>since 2018</u>. Those findings are more consistent with the hypothesis of increasing competition reflecting structural and behavioural changes in the market, than a "temporary breakdown in coordination" in response to increased demand since 2021.[15]

8. **Third***,* Bendigo submits that, even if there is no apparent coordination, the market is nevertheless structurally *conducive* to coordination: BS [72]. It is not, for the reasons outlined in ANZ's submissions (D1).

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8 71925.047.001.1814 (ACCC Decision) at [6.186] [HB 3/16/196].

9 71925.040.001.0171 (First Starks report) at [9.77] [HB 16/578/1417]; 71925.043.001.0464 (Second Starks report) at [8.3] [HB 16/580/1787]; 71925.035.001.0155 (Second Williams report) at [94] to [101] [HB 16/566/560-562]; 71925.043.001.0255 (Third Smith report) at [65] [HB 16/571/859].

10 71925.047.001.1814 (ACCC Decision) at [6.115], [6.125], [6.141], [6.152], [6.153], [6.259], [6.266] [HB 3/16/184, 186, 190, 192, 211, 266].

11 71925.040.001.0171 (First Starks report) at [9.67] [HB 16/578/1408].

12 71925.040.001.0171 (First Starks report) at [9.71] [HB 16/578/1409].

13 71925.040.001.0171 (First Starks report) at [9.79]-[9.81] [HB 16/578/1418].

14 71925.040.001.0171 (First Starks report) at [9.79]-[9.81] [HB 16/578/1418].

15 C.f 71925.043.001.0464 (Second Starks report) at [9.11] [HB 16/580/1790].

But in any event, that theoretical assessment should be given less weight than the evidence of ongoing competition, and the absence of any evidence of coordination.

9. ***Coordinated Effects—Home loans market is not concentrated***: The Tribunal should reject the ACCC's contention that the home loans market is concentrated: AS [48]. The post-merger HHI does not exceed the ACCC's merger guidelines thresholds, and the two factors that the ACCC's merger guidelines refer to as indicating potential concentration concerns even if the HHIs are below the thresholds — the parties are particularly close competitors, and the target has grown market share quickly or driven innovation —are not present here.[16] The ACCC further contends that the market shares of the major banks are not "dynamic" because they have only declined by 1% per year for 10 years (even taking account of CBA's and Westpac's acquisition of BankWest and St George, respectively). However, 10% is a material decline, particularly given the decline occurred in circumstances where the major banks have had to compete fiercely in an effort to retain and grow share. Further, each major bank's loss of market share has been to a different extent, with ANZ falling behind NAB in that period.[17] As to the ACCC's submissions in respect of Macquarie (AS [50]), the difference in share is plainly material: even if Macquarie's share of new loans is 6.8% (based on a 20 firm sample), that is materially larger than its average overall market share of 4.4% (November 2021 to October 2022). The difference exceeds Suncorp's existing share of the market and, importantly, is more than the 5.2% market share the ACCC contends would make a merged Bendigo/ Suncorp a materially effective competitor.

10. ***Coordinated Effects - Symmetry and alignment***: The ACCC acknowledges asymmetries between the major banks (AS [52]), but seeks to minimise them by emphasising the importance of scale in the home loans market, and what it contends are structural impediments to competition that arise from the major banks' scale advantage: AS [53]. It suggests that the asymmetries between ANZ and the other major banks will be reduced by its acquisition of Suncorp Bank, because the increase in ANZ's retail and commercial earnings will make it more like the other banks: AS [83]. That contention is unsupported by evidence. To the contrary, the total earnings of each of the major banks represented by retail and commercial earnings highlights the major difference between ANZ and the other banks and the de minimis difference the acquisition of Suncorp Bank will make. Based on their most recent financial reports, the average proportion of total earnings of each of the other major banks represented by retail and commercial earnings is 74%. For ANZ the proportion of its total earnings represented by retail and commercial earnings is 43%, which the acquisition of Suncorp Bank will increase to 46%.[18] The "22% increase" in deposits relied upon by the ACCC is the wrong metric (in fact, the data relied upon by the ACCC shows that the proposed acquisition has little impact on ANZ's deposit to lending and retail to commercial ratios). Further it bears no relationship to the matters Mr Elliot relied upon in describing ANZ's funding base as "very different".

11. It is otherwise uncontroversial that larger banks have a competitive advantage from greater scale. That competitive advantage facilitates competition, not coordination. However, it does not follow that the major banks are symmetrical. There is a lack of symmetry and alignment between the major banks in the significant respects described in ANZ's submissions, notwithstanding any scale advantages they enjoy.[19] As to accommodative pricing strategies (AS [54]), ANZ rejects the proposition that a strategy to "price mid-market […] and deliver predictability of policy and process" amounts to accommodative pricing: a

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[16] 71925.047.001.1814 (ACCC Decision) at [6.47] [HB 3/16/167].

[17] See Table 1 at [3.20] of 71925.035.001.0184 (ANZ response to SOPV) for a summary of market share [HB 17/598/774-775].

[18] See the financial results published by CBA (https://www.commbank.com.au/content/dam/commbank-assets/investors/docs/results/fy23/CBA-FY23-Profit-Announcement.pdf), Westpac (https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/ic/2023-full-year-key-financial-information.xls), NAB (2023 Full Year Results Investor Presentation (nab.com.au)) and ANZ (https://www.anz.com/content/dam/anzcom/shareholder/ANZGHL-full-year-2023-consolidated-financial-report-dividend-announcement-and-appendix-4E.pdf).

[19] See ANZS at [19] [HB 4/21/8].

mid-market price is a competitive price, and price is only one aspect of competition. The Tribunal should also not uncritically accept the ACCC's reliance upon Macquarie's and BOQ's assertions that they are "price takers". ANZ similarly considers itself to be a "price taker" rather than a "price maker" in home loans.[20] Internal documents of banks refer to second-tier and non-bank lenders setting aggressive prices.[21] Moreover, the pricing strategy of each competitor at any one time will be different and, as Ms Starks found, there is no consistent pattern of price setting across the market.[22] Finally, the additional evidence the ACCC points to as "evidence of symmetry" (AS [55]) takes matters no further. Many of the factors identified are applicable to smaller banks in addition to major banks (e.g., most pursue similar business models, many benefit from brand recognition) and so are not indicative of the symmetry between the major banks.

12. ***Coordinated Effects—Price transparency***: The ACCC accepts that price transparency is "less than perfect", but contends that the banks are motivated and able to identify discretionary discounts offered by their competitors, and to respond accordingly: AS [62]. While banks are motivated to identify prices and respond to price competition, actual prices are not transparent. On the ACCC's own assessment, banks' understanding of competitor pricing is so opaque that the discount that might be offered to an individual customer by a competitor bank "can only be guessed at".[23] The Tribunal could not conclude, in those circumstances, that there is any real ability for the major banks to coordinate or punish deviation on price.

13. ***Coordinated Effects—Consumer choice and frictions***: ANZ does not understand the ACCC's criticism of the Australian Bureau of Statistics refinancing data at AS [66]. That data shows refinancing as a proportion of new lending each month, which reveals an increasing proportion of competition for customers is competition for customers to switch, rather than competition to win new loans. The ACCC also misunderstands the import of the attrition data: each year, ANZ's loan book reduces by [Confidential to ANZ] (ANZS [22]). It has an incentive to replace this reduction with new lending, because, if it does not, it will lose market share. The ACCC's submissions do not reflect Ms Starks' evidence or the future state of the market. Ms Starks was the only economist to consider this question in detail. She concluded that: barriers to switching were clearly declining and rates of switching or internal refinancing (which she explained reflected those customers who were willing and able to switch) were clearly increasing over time; competitive conditions had changed since the PC Report; and the main focus of the competitive assessment of the impact of the merger is those customers who are potential customers for new loans by reason of being able and willing to switch.

14. ***Coordinated Effects—Competition and barriers to entry***: The ACCC overstates the advantages scale confers on major banks: AS [68]. As much is demonstrated by Macquarie's success in the home loans market. Contrary to AS [69], Macquarie's recent growth has been rapid. On Ms Starks' estimate (based on APRA data) Macquarie has increased its market share by 3.22% since 2017 (a 179.84% increase) while larger banks experienced negative or minimal growth,[24] and is growing increasingly quickly [Confidential to third party].[25] Referring to Macquarie's growth over a 10-year period (AS [69]) mischaracterises the trajectory of its success, particularly in circumstances where [Confidential to third party].[26] The internal

20 [Confidential to ANZ][HB 14/502/371-372] and ABG.5001.0087.4960 (JC-08) at p 2 [HB 14/513/513].

21 [Confidential to third party][HB 21/775/131]; [Confidential to third party][HB 21/801/1244]; [Confidential to Suncorp] [HB 7/44/327].

22 71925.040.001.0171 (First Starks report) at [9.73] [HB 16/578/1411].

23 ANZS at [20] [HB 4/21/8-9]; 71925.047.001.1814 (ACCC Decision) at [6.227] [HB 3/16/206].

24 [Confidential to third party] [HB 28/1148/2126, 2128].

25 [Confidential to third party] [HB 28/1148/2126, 2128].

26 [Confidential to third party] [HB 19/0729/267].

documents of the major banks show them [Confidential to third party].[27] The internal documents of major and second tier banks show that [Confidential to third party].[28]

15. ***Current increased competition***: While the ACCC acknowledges evidence of recent price competition in the home loans market (AS [72]), it emphasises "a long history of muted competition in this market" and that recent price competition "has occurred in a macroeconomic context that is most unusual" such that it "cannot be presumed that recent levels of competition will endure: AS [73]. That assertion ought be rejected in light of data showing that Westpac, NAB and ANZ have lost market share over time, while their ROE and NIM have progressively declined since 2000.[29] The ACCC's contention that a reduction in ROE is the result of changes in regulatory requirements in 2016 (AS [74]) does not explain the broader declining trend. And, the attempt to explain the long-term trend of reducing NIM by reference to the declining cash rate does not engage with the internal documents of various banks specifically attributing reducing NIM to competitive intensity.[30]

16. The ACCC also contends (AS [75], [76]) that "the preferred metric to assess longer-term trends in the level of competition in the home loans market is the lending spread". However, there is a disconformity between what the cited RBA paper says, and the ACCC's submission. The RBA paper cited by the ACCC shows major bank lending spreads have actually fallen from 2010-2022 (see graph 14 of the paper), during a period of interest rate reductions. This is directly inconsistent with the submission at AS [76], that lending spreads have "remained roughly the same or increased from 2010 to 2020, and only narrowing in 2021 and 2022".

17. A number of banks released their financial year or half-year results over the last 6 weeks. These show that the benefits to banks of rising interest rates continue to be offset by home loan competition and deposit switching and competition. **CBA** announced that competition in domestic home loans, deposit switching, increased deposit price competition and higher wholesale funding costs, more than offset benefits to CBA of rising rates, with domestic home loans competition the single biggest factor.[31] **ANZ's** Australia Retail NIM declined compared to last year, despite increasing in the first half of 2023.[32] **NAB** identified home loan competition as a drag on NIM, and that competition headwinds are expected to continue.[33] **Westpac's** consumer business NIM fell 24 basis points, with competition being identified as the reason.[34] **Macquarie** has continued to grow, increasing its home loan portfolio by 6% compared to March 2023 and now representing about 5.1% of the Australian market.[35] **Bendigo** identified that intense competition and use of cashbacks limits its ability to write business above the cost of capital in 1H23, but strong digital growth, and competition was a downward factor on NIM.[36] **Bank of Queensland** reported that a housing book decline, which it attributed to prioritising economic return over volume growth in a highly

[27] [Confidential to third party] [HB 21/801/1244]; [Confidential to third party] [HB 19/768/421]; [Confidential to third party] [HB 21/802/1356].

[28] [Confidential to third party], 458, 485 [HB 21/775/80, 184, 185,131, 152, 168, 504, 531]; [Confidential to third party] [HB 21/801/1244]; [Confidential to Suncorp][HB 7/44/327].

[29] See ANZS at [32] [HB 4/21/12].

[30] See for example [Confidential to third party] [HB 28/1133/1009]; [Confidential to third party] [HB 21/775/112-114]; [Confidential to third party] [HB 20/770/60]; [Confidential to third party] [HB 15/548/470], [Confidential to third party] [HB 37/1486/1603], [Confidential to third party] [HB 21/787/730], [Confidential to third party] [HB 28/1153/2277]; [Confidential to third party] [HB 21/803/1384]; [Confidential to third party] [HB 32/1389/1881]; 71925.034.001.1659 (SCE-8) [HB 11/399].

[31] https://www.commbank.com.au/content/dam/commbank-assets/investors/docs/results/fy23/CBA-FY23-Results-Presentation.pdf at p 27.

[32] https://www.anz.com/content/dam/anzcom/shareholder/ANZGHL-full-year-2023-results-investor-discussion-pack.pdf at p 57.

[33] 2023 Full Year Results Investor Presentation (nab.com.au) at p 21.

[34] https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/ic/Full-year-2023-presentation-and-IDP.pdf at p 107.

[35] https://cdn2.app.viostream.com/d15364e6-f778-4dda-8112-a7c3007efd31/assets/68446ba8-3d14-4a28-b6b8-6862c6064b08.pdf at p 15.

[36] https://www.bendigoadelaide.com.au/globalassets/documents/bendigoadelaide/investorcentre/results-and-reporting/investor-presentations/full-year-results-presentation-2023.pdf at pp 22, 24.

competitive market, and that funding cost benefits from rising interest rates were offset by retention discounting and competition.[37]

18. ***The proposed acquisition is not likely to increase coordinated conduct:*** Three of the four experts concluded that the proposed acquisition would <u>not</u> increase the likelihood of coordinated effects compared with the status quo counterfactual.[38] Bendigo relies on the only expert to conclude otherwise, Professor King, whose thesis is that the proposed acquisition will "significantly reduce the market share dispersion" of the major banks and thereby "stabilise" existing coordinated conduct by increasing ANZ's incentives to maintain, rather than deviate from, current coordinated conduct.[39] That is wrong. The evidence does not establish any current coordinated conduct to be stabilised (or deviated from) (see paragraphs 15 to 17 above and ANZS, [27]-[33]) and the proposed acquisition does <u>not</u> significantly change the symmetry in market shares between the major banks: ANZS, [19], [37]. Bendigo accepts that ANZ's size relative to CBA and Westpac currently incentivises ANZ to compete: BS [75]. The incremental increase in market share ANZ will gain from the proposed acquisition does not materially change its size relative to CBA or Westpac: ANZS, [37]. ANZ will remain approximately as close in size to CBA as it is to Macquarie. Bendigo accepts both that Macquarie is a significant competitor in the home loans market that has expanded its market share at the expense of the major banks (BS [78]) *and* that any steady decrease in the market share of major banks will undermine their ability to coordinate: BS [82]. But it does not explain how coordination could be sustained in the face of competition from Macquarie in the factual. Neither Bendigo nor the ACCC explains why, during a period in which they allege major banks have either coordinated or the market has been conducive to coordination, ANZ has not been incentivised to coordinate (despite losing market share) or why ANZ would have more incentive to coordinate to maintain the market share it gains from the proposed acquisition than the incentive it might have had to halt the decline in its market share.

B.3 Agribusiness

19. ***No separate agribusiness market:*** There is no separate market for agribusiness banking: cf AS [86]. As the ACCC accepts, the same lending, savings account and business deposit products are supplied to agribusiness customers and other types of customers: AS [88]. The fact that the products offered to agribusiness and other banking customers are largely the same points strongly against a discrete agribusiness market. A vice in the ACCC's reasoning is that it asserts material differences between agribusinesses and other businesses, but does not examine how products are supplied to the other businesses.

20. It is common ground that relationships are an important aspect of competition for some agribusiness customers. But other business banking is also relationship based (cf AS [90]), and competition for other business occurs on price and non-price factors (cf AS [91]). Many agribusiness customers at ANZ and elsewhere, particularly smaller customers, are not served by agribusiness specialists at all: ANZS [13]. The ACCC's contention at AS [92] assumes that relationship managers who provide services to customers in other industries do not equally require specialised knowledge of those industries, or that a banker cannot have specialised knowledge in more than one industry. Neither of those assumptions is sound.

21. Bendigo misrepresents ANZ's evidence: BS [98]. Mark Bennett's evidence is <u>not</u> that agribusiness customers require a tailored set of banking products and services. His evidence is that agribusiness customers "have access to the same products as other ANZ commercial customers".[40] Bendigo's evidence

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[37] https://www.boq.com.au/content/dam/boq/microsites/annual-reports/2023/investor-materials-fy23.pdf at pp 10, 50.

[38] 71925.040.001.0171 (First Starks report) at [9.197] [HB 16/578/1457]; 71925.035.001.0155 (Second Williams report) at [94] to [101] [HB 16/566/560-562]; 71925.043.001.0255 (Third Smith report) at [65] [HB 16/571/859].

[39] 71925.020.001.6300 (First King report) at [118] [HB 16/573/997].

[40] 71925.002.001.9551 (First Bennett statement) at [33] [HB 12/428/123].

to the ACCC was that the banking products offered to agribusiness customers "are largely very similar in design to [Bendigo's] general business banking products" and "don't differ significantly".[41]

22. ***The agribusiness market is part of a national market for business banking customers:*** Competition for business banking customers, including agribusiness and SME customers, is national, for the reasons given at ANZS [14] (cf AS [95]-[99]). The ACCC's submission at AS [96] to the effect that the specialised knowledge required of agribusiness bankers "is local in nature" is not established by the cited evidence, which merely refers to understanding a particular customer and their industry. There is no indication that this knowledge cannot be obtained and held by bankers in more central locations. Further, the contention at AS [97] to the effect that different pricing and risk appetites for customers based on geography supports a local/regional market ought be rejected. To the contrary, differential pricing and risk appetites support wider geographic boundaries, because lenders in one area are likely to lend to customers in other areas if there are more favourable conditions in those areas. There is no realistic prospect that a competitor could lend in a single location or industry without substantial risk. The point made in BOQ's submission was that geographic locations can play an indirect part in price setting for both SME banking and agribusiness banking, when overlayed with associated location risk (e.g., drought prone agricultural areas and higher risk regional areas).[42] Judo Bank's first submission is to the effect that product *pricing* and *choice* considerations for agribusiness would be tailored to and selected by the particular customer.[43] Neither supports a local or regional market. Finally, in AS [99], the ACCC contends that ANZ's reliance upon the fact that agribusiness products are supplied nationally under common bank policies and frameworks is contradicted by ANZ's evidence that agribusiness banking is typically priced on a customer-by-customer basis. Yet, home loans discounting is, as the ACCC accepted, typically determined on a customer-by-customer basis under national frameworks in a national market. Such pricing is not inconsistent with a national market in those circumstances. The ACCC's reliance upon Mr Bennett's evidence that agribusiness customers require at least a regional presence in AS [99] ignores Mr Bennett's evidence that it is not commercially viable for a banker to operate in a single local area, because there are often simply not enough customers.[44]

23. ***Supply is not concentrated***: Contrary to AS [102]-[105], even if the Tribunal finds a discrete market for agribusiness banking in Queensland (which ANZ denies), that market is not, and will not be, significantly concentrated post-acquisition. Based on the APRA agribusiness lending figures relied upon by the ACCC, the proposed acquisition will lead to some concentration in Queensland post-merger, but not significant concentration. The ACCC's submission at AS [104] that, post-acquisition, "[t]he [APRA Confidential] largest Queensland agribusiness lenders will account for almost [APRA Confidential] of agribusiness lending in that State" is significantly affected by NAB's position, which accounts for [APRA Confidential] of agribusiness lending in Queensland (with a similar national share). In those circumstances, it is not apparent that supply is materially more concentrated by reason of the proposed acquisition. Indeed a merged ANZ / Suncorp Bank may be a more effective competitor to NAB in the factual than in the status quo. Finally, the Tribunal would not accept BMAgBiz's claim that there will be a "significant reduction in the already limited options" post-acquisition. There will remain, post-merger, five banks with a share of lending greater than [APRA Confidential].[45] BMAgBiz is an agribusiness broker, and on the ACCC's own account is less likely to be exposed to competition across all banks in agribusiness (AS [114]) [Confidential to Suncorp] ([Confidential to Suncorp] and [Confidential to ANZ]).[46]

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[41] [Confidential to third party] [HB 19/721/242].
[42] [Confidential to third party] [HB 19/747/325].
[43] 71925.010.001.0267 (Submission of Judo Bank dated 7 February 2023) at [.0269] [HB 18/615/92].
[44] 71925.002.001.9551 (First Bennett statement) at [110] [HB 12/428/137].
[45] 71925.047.001.1814 (ACCC Decision) at 6.670 [HB 3/16/296] citing ACCC analysis of [APRA Confidential].
[46] [Confidential to Suncorp] [HB 19/707/129]; [Confidential to ANZ] [HB 19/688/18].

24. ***Suncorp Bank's offering is not differentiated and competitive***: In support of its contention that Suncorp Bank's offering is differentiated and competitive, the ACCC relies upon [Confidential to Suncorp] to the effect that Suncorp Bank differentiates itself from the major banks on [Confidential to Suncorp]: AS [106]. [Confidential to Suncorp].[47] None of these matters differentiates Suncorp Bank. ANZ does each of these things.[48] The extent to which Suncorp Bank relationship-manages its agribusiness customers is not a factor which differentiates Suncorp Bank's services.[49] The percentage figures on which the ACCC relies (AS [106]) obscure underlying differences between banks as to who constitutes an "agribusiness customer" and what is "relationship management". Further, to the extent there is any material difference between ANZ and other larger banks when comparing like with like, there is no such difference with the second largest lender Rabobank, which offers that model to 100% of its lending customers (as, according to the ACCC, do Bendigo and BOQ).[50] Further, the ACCC's reliance at AS [106] on Suncorp Bank's present strategic plan as a basis for differentiating Suncorp Bank is misplaced. [Confidential to Suncorp] ([Confidential to ANZ]).

25. ***Constraint imposed by the threat of entry or expansion***: The success of Rabobank and Judo Bank demonstrate the absence of any material barriers to entry and expansion in agribusiness banking. Contrary to AS [113], Judo Bank cannot be dismissed in this context as a small competitor. Judo's entry into agribusiness is very recent and its strategy for entry and expansion in the short term demonstrates the barriers relied upon by the ACCC are inflated (*cf* AS [113]).

26. ***Bendigo's further submissions:*** Bendigo's assertions in respect of the agribusiness market misrepresent the expert evidence before the Tribunal. Ms Starks did <u>not</u> agree the proposed acquisition is likely to lead to a substantial lessening of competition in the agribusiness markets compared to either the status quo or Bendigo counterfactual: cf BS [87], [90]. In her second report, Ms Starks was <u>not</u> persuaded that the evidence as a whole demonstrates a real commercial likelihood of a substantial lessening of competition, however the relevant market was defined.[51] She revised her opinion on the likelihood of a substantial lessening of competition in individual towns: having regard to further evidence of drive times of agribusiness relationship managers, she concluded it was <u>less likely</u> that there would be any real chance of a substantial lessening of competition in either of Ayr or Chinchilla/ Miles.[52] As Ms Starks found, those towns are within reasonable driving distance (1-1.5 hours) of other towns with at least three other competitors able to pose a competitive constraint (including Rabobank and two or more of CBA, Westpac and NAB).[53] The only other town Ms Starks specifically identified in her first report — Cairns (in which Rabobank is not present) — is also within a reasonable driving distance of a Rabobank branch: ANZS [71].

27. Bendigo overstates the significance of Suncorp Bank's offering: BS [86]. **First**, none of the evidence relied on by Bendigo establishes that Suncorp Bank's offering is differentiated on price factors: cf. BS [86]. **Second**, the evidence that Bendigo relies upon to conclude ANZ is "more focussed on high-volume traditional agribusiness lending" consists of no more than an assertion by a Suncorp Bank customer that its own experience is that this is the case with larger banks generally;[54] equally flimsy is the evidence that Suncorp Bank has a "more flexible and dynamic approach to lending", which consists of no more than that submission from the broker BMAgBiz asserting Suncorp Bank takes a "flexible and dynamic approach

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[47] [Confidential to Suncorp] [HB 14/530/1113].

[48] 71925.002.001.9551 (First Bennett statement) at [92] re proactive calling [HB 12/428/134], at [108] re sitting at the kitchen table for customers [HB 12/428/136]; at [93] re deferring customer's repayments in the case of floods [HB 12/428/134]; 71925.034.001.1613 (Second Bennett statement) at [38] re supporting customers through disasters [HB 12/428/134].

[49] SML.0004.0001.0033 (First van Horen statement) at [95] [HB 9/206/563].

[50] 71925.047.001.1814 (ACCC Decision) at [6.646] [HB 3/16/227].

[51] 71925.043.001.0464 (Second Starks report) at [7.45] [HB 16/580/1786].

[52] 71925.043.001.0464 (Second Starks report) at [5.15], [7.27] [HB 16/580/1764, 1782].

[53] 71925.040.001.0171 (First Starks report) at [9.229], [9.240.2] [HB 16/578/1467, 1469].

[54] 71925.030.001.0176 (Cowbank submission) at [.0176] and [.0177] [HB 18/661/1794-1795].

to lending" (while also observing that both "ANZ and Suncorp are strong competitors particularly as it relates to growing, innovative, small and new agribusinesses").[55] **Third**, Bendigo ignores Ms Starks' conclusion in her second report that Suncorp Bank's relationship model is not unique and is replicable.[56] **Fourth,** Bendigo's assertion that ANZ has little incentive to maintain Suncorp Bank's approach relies only on ANZ's description in its application of a general trend toward digital banking. Those trends are largely not in dispute.[57] They are general trends,[58] not specifically directed at agribusiness, and cannot be conflated with a move away from relationship banking in agribusiness. ANZ's own evidence confirms the importance of maintaining relationships with agribusiness customers, which is a key reason ANZ will be incentivised to maintain services that are attractive to Suncorp customers: ANZS, [77]. Further, Bendigo ignores Ms Starks' conclusion that "since relationships are a key aspect of agribusiness banking, I would not expect ANZ to do away with Suncorp's relationship-based business model altogether".[59]

28. Bendigo has not referred the Tribunal to any evidence to support the proposition that its own agribusiness model is differentiated in any material way such that it is likely to impose a greater constraint. There is no evidence before the Tribunal that Bendigo's lending is more "bespoke": cf. BS [89]. Nor is there evidence that Bendigo's model focuses more on relationships than the model likely to be offered by a merged ANZ/ Suncorp: BS [89]. Bendigo's evidence is that, like ANZ, it does not offer smaller agribusiness customers dedicated specialist agribusiness managers: BS [101]. Further, given Bendigo relies upon digital and technological innovation in explaining how it considers it will be more competitive in the Bendigo-merger counterfactual (BS [52]), its own reasoning suggests it is equally as likely as ANZ to be incentivised to align Suncorp Bank's relationship offerings with its own digital and technological offerings in that counterfactual. Ms Starks appears to have concluded as much in her second report.[60] The only basis on which Bendigo's expert concluded a combined Bendigo/ Suncorp may be able to compete more effectively, aside from size, was by "leveraging" the Rural Bank brand:[61] BS, [89]. In that case, the Suncorp brand, which the ACCC found was an important aspect of its competitiveness,[62] will exit the market and be replaced by a brand which has little geographic presence or customer loyalty,[63] which is more likely to *reduce* the competitive constraint.

29. ***Evaluating the evidence:*** The ACCC at AS [121] says that Ms Starks ultimately could not say if there was a real chance of a substantial lessening of competition in agribusiness in Queensland.[64] In fact, she said she could not say *that* there was a real chance.[65] She was persuaded that the evidence does not demonstrate a real commercial likelihood of a substantial lessening of competition.[66] The ACCC also ignores the fact that Ms Starks opined that there was less likely to be a real chance of a substantial lessening of competition in local / regional agribusiness markets.[67] Ms Starks and Professor King also do not engage with the loss of competition *between* Suncorp Bank and Bendigo on the Bendigo merger counterfactual. That loss of competition needs to be brought to account in comparing the counterfactuals with and without the proposed acquisition. The ACCC also ignores the evidence of Dr Williams on this topic. The evidence

[55] 71925.007.001.0037 (BMAgBiz submission) at [.0038] [HB 18/627/141].
[56] 71925.043.001.0464 (Second Starks report) at [7.33] [HB 16/580/1784].
[57] See for instance 71925.047.001.1814 (ACCC Decision) at [4.122]-[4.123], [4.125]-[4.131] [HB 3/16/123-125].
[58] 71925.002.001.0596 (ANZ Application) at Executive Summary [27]-[29] [HB 17/592/167-168].
[59] 71925.043.001.0464 (Second Starks report) at [7.32]-[7.33] [HB 16/580/1783, 1784].
[60] 71925.043.001.0464 (Second Starks report) at [7.17] [HB 16/580/1780].
[61] 71925.020.001.6300 (First King report) at [180] [HB 16/573/1012-1013].
[62] 71925.047.001.1814 (ACCC Decision) at [6.709]-[6.713] [HB 3/16/304].
[63] See 71925.047.001.1814 (ACCC Decision) at [6.658] [HB 3/16/294].
[64] 71925.043.001.0464 (Second Starks report) at [7.35] [HB 16/580 at 1784] 71925.043.001.0464; See 71925.040.001.0171 (First Starks report) at [9.240.1] to [9.240.5] [HB 16/578/1469].
[65] 71925.043.001.0464 (Second Starks report) at [7.35] [HB 16/580 at 1784] 71925.043.001.0464; See 71925.040.001.0171 (First Starks report) at [9.240.1] to [9.240.5] [HB 16/578 at 1469].
[66] 71925.043.001.0464 (Second Starks report) at [7.45]
[67] 71925.043.001.0464 (Second Starks report) at [7.41] [HB 16/580 at 1784].

does not, therefore, support the ACCC's assertion in AS [122] that the Tribunal could not be satisfied that the proposed acquisition will not, and will not likely, substantially lessen competition in the market for agribusiness banking in Queensland (assuming there is such a market). The competition test does not involve consideration of whether the Tribunal can "rule out" a possibility of a substantial lessening of competition.

B.4 SME Banking

30. ***SME Banking is not a separate market***: The contention at AS [125]-[126] that the fact that there are banking products designed for SME customers, and that banks adopt strategies or "value propositions" to target and service those customers, is consistent with them being an "identifiable customer cohort", is a simplistic analysis. There are many "identifiable customer cohorts with distinct demands" within markets. In the national market for home loans, there are first home buyers, investors and others, all of whom are identifiable customer cohorts with distinct demands. That does not produce separate markets for each group. So too in respect of SME banking.

31. ***Suncorp is not an effective competitor***: The ACCC's contention at AS [137] that Suncorp Bank is presently an effective competitor in markets for the supply of SME customers in Queensland is not supported by the cited evidence. At AS [140], the ACCC relies upon ANZ's internal research on the Suncorp Bank brand. As the ACCC acknowledges in a footnote, the document on which it relies does not specifically refer to SME customers. Upon examination, the analysis relied upon is a survey of home loan customers, rather than SME customers.[68] The ACCC's contention at AS [141] that Suncorp Bank's relationship model compares favourably to ANZ's once again mis-states the evidence. The Suncorp Bank document on which the ACCC relies at footnote 237 describes Suncorp Bank's ratio for those customers as 1:45 customer groups on average (with some customer groups 1:65 and the remaining groups expected to increase to a ratio of 1:50 in 2024 and 1: 55 by 2026). The document does not support the proposition that Suncorp Bank provides a relationship manager and a team of assistant relationship managers for every 45 *customers*.[69]

32. ***Barriers to entry***: Contrary to the ACCC's submission at AS [144], competition from new entrants is an existing feature of the market, as the entry of Judo Bank in 2019 demonstrates, and potential barriers to expansion are not significant.[70] At AS [145], the ACCC contends that Judo Bank's success "should not be exaggerated" in this context, as it has "primarily grown in supplying unsecured SME loans and has made less headway in other types of SME loans." But Judo Bank's 2022 annual report indicates that over 56% of Judo Bank's SME loans are fully secured, and 30% are partially secured.[71] The Tribunal should conclude that Judo Bank's success in SME banking demonstrates that barriers to entry are not significant.

33. ***Evidence overall***: The ACCC ultimately contends at AS [146] that the Tribunal could properly conclude that it is not satisfied that the proposed acquisition would not, or would not likely, substantially lessen competition in the market(s) for SME banking in Queensland. For the reasons ANZ has given in chief, and the further reasons elaborated above, that contention should be rejected.

B.5 Public Benefits

34. At AS [168] the ACCC contends that it would be an error to rely upon the commitments ANZ has made to the State of Queensland under the Implementation Agreements, on the basis that "no authorisation is sought" for the Implementation Agreements. The ACCC submits that the applicants and the State of

[68] See ABG.5001.0411.0590 (ANZ-Suncorp Bank: Emerging perspective on brand and distribution) at [.0009] [HB 26/1044 at 1256].
[69] SML.0013.0177.8290 (Project Parker: Business Bank Target Operating Model Playbook) at [.8300]-[.8301] [HB 26/1087 at 2770-1]; see at [.8301] and [.8304].
[70] ANZS at [54]-[55] [HB 4/21/20].
[71] [Confidential to third party] [HB 32/1391 at 0272]. Further [Confidential to third party] [HB 21/791/941].

Queensland would be free to vary the Implementation Agreements without imperilling their authorisation of the proposed acquisition, and "consequently, to authorise the proposed acquisition due to benefits said to arise from the Implementation Agreements would be to adopt a flawed approach". This proposition is said to be supported by *Telstra TPG (No 2)* at [157]. This submission moves from an unstated and false premise, namely that the Implementation Agreements "are coincident with", but not causally related to, the proposed acquisition. The Tribunal in *Telstra TPG (No 2)* at [145] held that the statutory test is directed to "the effects of the conduct for which authorisation is sought, not the effects of conduct that is coincident with, but not causally related to, the conduct for which authorisation is sought". It is entirely proper to have regard to the effects of conduct which is causally related to the conduct for which authorisation is sought. The statutory preconditions for authorisation in s 90(7) require the Tribunal to assess the likely competitive effects of, and the public benefits and detriments likely to result from that conduct.

35. The Implementation Agreements are not merely coincident with, but are causally related to the proposed acquisition. They are a necessary and likely consequence of that conduct and therefore "results from" the conduct for which the Applicants seek authorisation. This is demonstrated by the fact that the Implementation Agreement was entered into after the SSPA was executed on 18 July 2022, as contemplated in the SSPA for the purposes of satisfying the condition precedent in the SSPA by bringing about the State of Queensland's commitment to amend the Metway Merger Act.[72] The Implementation Agreement is conditional on the proposed acquisition completing. If it does, it cannot be terminated by ANZ or Suncorp Group. The ACCC does not offer any argument to the contrary; it simply asserts at AS [168] that the Implementation Agreements "are coincident with the Proposed Acquisition".

36. The ACCC takes a static approach to competition in assessing public detriments. It assumes there is no prospect of other banks entering into the relevant markets and expanding and become attractive acquisition targets in their own right in a future with the proposed acquisition. The ACCC also ignores the prospect of mergers between smaller banks such as BOQ, Bendigo and/or ING. Once these possibilities are accounted for, the ACCC's complaint at AS [172] that the acquisition of Suncorp Bank involves a substantial public detriment in the form of the loss of an attractive acquisition target falls away.

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Date: 29 November 2023

[72] SSPA, cl. 2.1(c), cl. 2.6, Sch. 17 (Part A); 71925.043.001.0582 (Fourth Johnston statement) at [7]-[16] [HB 9/196/480-482]; 71925.034.001.1622 (Second Elliott statement) at [113] [HB 11/390/439].