NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged:	Application to Tribunal for Review
File Number:	ACT 1 of 2023
File Title:	APPLICATIONS BY AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED AND SUNCORP GROUP LIMITED

REGISTRAR

Dated: 25/08/2023 3:02 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.

Form I

(subregulation 20(1))

APPLICATION TO TRIBUNAL FOR REVIEW

ANZ APPLICATION FOR REVIEW OF AUSTRALIAN COMPETITION AND CONSUMER COMMISSION MERGER AUTHORISATION DECISION MA1000023-1

1. Australia and New Zealand Banking Group Limited (**ANZ**) applies to the Australian Competition Tribunal (**Tribunal**) pursuant to s 101 of the Competition and Consumer Act 2010 (Cth) (**CCA**) for review of the Determination of the Australian Competition and Consumer Commission (the **Commission**) dated 4 August 2023 (Commission file no. MA1000023-1) (**Determination**).

2. ANZ was the applicant for the authorisation to which the Determination relates.

The Application

3. On 2 December 2022, pursuant to s 88(1) of the CCA, ANZ applied for merger authorisation (the **Application**) relating to commercially negotiated agreements between ANZ and Suncorp Group Limited (**Suncorp Group**) for ANZ to acquire 100 per cent of the issued share capital in SBGH Limited (which in turn owns 100 per cent of the shares of Suncorp-Metway Limited (**Suncorp Bank**) from Suncorp Group, and the transfer of real estate and intellectual and other property rights held by other Suncorp Group entities to facilitate the operation of Suncorp Bank (the **proposed acquisition**).

The Determination

4. ANZ is dissatisfied with the Determination in the following respects:

   (a) the Determination was not the objectively correct or preferable decision;

   (b) in particular, the Determination incorrectly concluded that authorisation should not be granted on the basis that the Commission could not be satisfied that the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition;

   (c) further, the Determination incorrectly concluded that authorisation should not be granted on the basis that the Commission could not be satisfied that the proposed acquisition would result, or would be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition;

   (d) in the premises of (b) and (c) (or either one of them), upon a proper application of the applicable statutory criteria in s 90(7) of the CCA, the objectively correct or preferable decision is that:

      (i) the statutory test for authorisation is satisfied in respect of the proposed acquisition; and

      (ii) the merger authorisation sought in the Application should be granted.

5. The determination that ANZ is seeking from the Tribunal is as follows:

   (a) under s 102(1) of the CCA, the Determination be set aside; and

(b) under s 88(1) and 102(1) of the CCA, a determination granting to ANZ unconditional merger authorisation for the proposed acquisition, as contemplated by the Application.

6. Particulars of the facts and contentions upon which ANZ intends to rely on in support of the application for review, and a statement of the issues, are attached at **Attachment A**.

7. A list of certain documents submitted by ANZ and Suncorp Group to the Commission in connection with the Application on which ANZ intends to rely is at **Attachment B**.

8. ANZ's address for service for the purpose of regulation 21 of the Competition and Consumer Regulations 2010 is:

c/o Justin Jones
Ashurst
South Tower, Level 16/80 Collins St, Melbourne VIC 3000

Dated this 25th day of August 2023.

Signed on behalf of the applicant, ANZ

……………………………………………………………..

Justin Jones
Ashurst
Solicitors for the applicant, ANZ

History

Form I amended by SR No 330 of 1995, reg 10.1 and 10.2, effective 6 November 1995; SR No 20 of 1996, reg 10.2, effective 31 January 1996; SR No 280 of 2010, Sch 1, effective 1 January 2011 (as amended by SR No 337 of 2010).

ATTACHMENT A

FACTS AND CONTENTIONS IN SUPPORT OF THE APPLICATION

PART A: THE APPLICATION AND DETERMINATION ON REVIEW

1. ANZ submitted the Application on 2 December 2022. The authorisation process before the Commission lasted approximately 245 days and included extensive public consultations, the exercise of the Commission's statutory powers of examination and to compel production of information and documents, and the provision of multiple expert reports on behalf of the Commission. Before lodging the Application, ANZ provided the Commission with a draft version of the Application for preliminary review and feedback.

2. On 4 August 2023, the Commission made the Determination. The Commission determined not to grant merger authorisation because it could not be satisfied, in all the circumstances, that the proposed acquisition would not be likely to substantially lessen competition, or that it would be likely to result in a benefit to the public that would outweigh the public detriments from the proposed acquisition.

3. On 7 August 2023, the Commission issued its reasons for the Determination (**Decision**). Parts of the Decision, which appear to be important to the Commission's analysis, are apparently based on confidential evidence and submissions. In the version of the Decision, which the Commission has been disclosed to ANZ, these parts of the analysis and the materials on which they are apparently based have been redacted. Accordingly, ANZ will seek orders for access to a complete version of the Decision and the relevant materials which have not been disclosed to it. It may, after considering the Decision and the undisclosed materials, be necessary for ANZ to amend or supplement this review application.

4. In the Decision, the Commission correctly concluded that the proposed acquisition is not likely to have the effect of substantially lessening competition in the following markets:

   (a) the national market for home loans as a result of unilateral effects;[1]

   (b) the national market for retail deposits as a result of unilateral or coordinated effects;[2] and

   (c) markets for the supply of banking products and services to small to medium sized enterprises (**SME**) and agribusiness as a result of coordinated effects.

5. The Commission's conclusions in each of those respects are supported by evidence submitted by ANZ and Suncorp Group and by the expert evidence before the Commission (including the Commission's own expert evidence).

6. The Commission also concluded that the proposed acquisition was likely to result in some public benefits, including allowing Suncorp Group more efficiently and effectively to operate its insurance business,[3] accruing cost savings and lower funding costs for ANZ and Suncorp Bank,[4] and generating lower wholesale funding costs for Suncorp Bank,[5] though it wrongly concluded

[1] Decision [6.164]-[6.171].

[2] Decision [6.396].

[3] Decision [7.31].

[4] Decision [7.59].

[5] Decision [7.81].

that the magnitude of those benefits was small. The Commission further accepted that increased contributions to the major bank levy could be a public benefit.[6]

7. The Commission nevertheless dismissed the Application, on the bases that:

(a) it was not satisfied that the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition:

(i) in the national market for home loans, on the basis that "the Proposed Acquisition is likely to increase the incentives of the major banks to engage in coordination, materially increasing the likelihood of coordination being initiated and/or sustained by the major banks";[7]

(ii) in a Queensland market (as a proxy for local/ regional markets) for SME banking products, on the basis that "removing Suncorp Bank's differentiated offering is likely to reduce customer choice and competition in Queensland and that the constraint imposed by remaining competitors is insufficient to ameliorate those concerns";[8] and

(iii) in a Queensland market (as a proxy for local/ regional markets) for agribusiness banking products, on the basis that the proposed acquisition will "result in the loss of a strong regional bank with a differentiated service-focused offering, reducing competition in what is an already concentrated market";[9] and

(b) it was not satisfied that the proposed acquisition would result, or be likely to result, in a benefit to the public that would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition, including because of "detriments arising from enduring changes that may further entrench an oligopoly market structure that arise from materially reducing the prospects of a stronger and more effective competitive fringe in the second tier cohort".[10]

8. For the reasons outlined below, those conclusions are wrong and are contradicted by the evidence before the Tribunal (and before the Commission). The Tribunal should be satisfied in all of the circumstances that the proposed acquisition:

(a) would not have the effect, and would not be likely to have the effect of substantially lessening competition; and/or

(b) would result, or be likely to result, in a benefit to the public, and the benefit would outweigh any detriments to the public that would result, or be likely to result, from the proposed acquisition.

9. Although it is for the Tribunal to be satisfied of the statutory tests in respect of the whole of the conduct (the subject of the Application), it is appropriate for the Tribunal to focus on the matters in issue on the review, as set out in Part C below. In particular, ANZ submits it is not necessary for the Tribunal to review the Commission's findings described in paragraph 3 above on the

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[6] Decision [7.90].

[7] Decision [6.276].

[8] Decision [6.578].

[9] Decision [6.751].

[10] Decision [7.152]-[7.155].

basis that the conclusion that the proposed acquisition would not have the effect, and would not be likely to have the effect, of substantially lessening competition in respect of those markets is supported by the submissions and evidence in support of the Application (and before the Tribunal). ANZ does not address those findings in this application for review. However, the position in respect of those markets is addressed extensively in the submissions and evidence that ANZ relies on in connection with this application for review.

PART B: KEY FACTS

10. The key facts relevant to the matters in issue on the review are summarised below and described in further detail in the Application and ANZ's submissions to the Commission listed in Part A of Attachment B, and the lay and expert evidence listed in Part C of Attachment B.

The parties

11. ANZ is an ASX listed financial services group that provides banking services to retail and business customers in Australia and New Zealand, and to institutional customers internationally. ANZ is headquartered in Victoria. [redacted].[11]

12. Suncorp Group is an ASX listed provider of insurance and banking services, the latter offered through Suncorp Bank. Suncorp Group is, and is currently required by the *State Financial Institutions and Metway Merger Act 1996* (Qld) (the **Metway Merger Act**) to be, headquartered in Queensland. [redacted][12]

The proposed acquisition

13. Pursuant to the share sale purchase agreement (**SSPA**) between ANZ and Suncorp Group:

    (a) ANZ proposes to acquire all of the issued share capital in SBGH Limited (which is the immediate holding entity for Suncorp Bank);

    (b) ANZ proposes to acquire certain "Property Assets" (including leases and plant and equipment) held by other Suncorp Group entities, to facilitate the operation of Suncorp Bank; and

    (c) among other things, Suncorp Group must procure Suncorp Bank and Suncorp Corporate Services Pty Ltd to execute a Transitional Trade Mark Licence Deed at least one business day prior to completion.

14. The proposed acquisition is subject to three conditions precedent:

    (a) approval by the Federal Treasurer under the *Financial Sector (Shareholdings) Act 1998* (Cth);

    (b) a final determination by the Commission or Tribunal to authorise the proposed acquisition, or a declaration made by the Federal Court of Australia that the proposed acquisition

[11] Application [2.6].

[12] Application [2.7]-[2.9].

would not contravene s 50 of the CCA (and subject to there being no lodgement of a relevant application for review of the declaration or a notice of appeal); and

(c) the Metway Merger Act being either repealed or amended such that it does not apply to any holding company of Suncorp Bank or ANZ or its related bodies corporate, but any amendments may reflect certain Agreed Commitments set out in Schedule 17 to the SSPA.

15. ANZ’s rationale for the proposed acquisition is that it will deliver the following benefits to ANZ, and to the customers of ANZ and Suncorp Bank:

(a) increasing ANZ's exposure to Queensland, which has had higher annual growth than the rest of Australia over the past two decades and is Australia's largest interstate migration destination;

(b) increasing ANZ's Queensland retail customer base from approximately 1.1 million to approximately 1.8 million customers and the Queensland proportion of ANZ's total lending from 14% to 19% of ANZ's total lending (measured by gross loans and advances as at 1 May 2022) based on Suncorp Bank’s geographically complementary lending portfolio, bringing ANZ's Australian business into better balance. In this respect, greater geographic diversity provides lower risk and exposure to economic downturns and other events that impact particular geographies;

(c) increased scale in Australian retail and business banking that will enable ANZ to more efficiently make investments required for meeting customer expectations in digital capability and ongoing regulatory change; and

(d) substantial cost synergies phased in over four to six years with a net present value of approximately [redacted].

16. Suncorp Group’s rationale for the proposed acquisition is set out in paragraph 9 of Attachment A, Particulars of Facts and Intentions and Statement of Issues, to Suncorp Group's application to the Tribunal for review (the **Suncorp Review Application**).

17. If the proposed acquisition proceeds then (among other things):

(a) The increase in scale from the proposed acquisition will enable ANZ to defray the costs of its digital transformation over a larger customer base, improving its ability to compete effectively.[13]

(b) Suncorp Group will operate as a dedicated insurance business.[14]

The Queensland Commitments

18. ANZ and Suncorp Group have made the following commitments to the State of Queensland (together, the **Queensland Commitments**):

(a) [redacted] in order to satisfy a condition precedent relating to the Metway Merger Act, ANZ entered into an Implementation Agreement with the State of

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[13] Application [3.8].

[14] Application [3.36]; First Johnston statement [35]-[41], [92].

Queensland under which it committed to do the following upon completion of the proposed acquisition:

[redacted]

[redacted]

(iii) establish a tech hub in Brisbane (**Tech Hub**) for technology specialists in digital, cloud and data, and hire or place 700 individuals into the Tech Hub over five years;

(iv) establish partnerships with two Queensland universities to support development of technology skills in banking and finance [redacted];

(b) [redacted], in order to satisfy a condition precedent relating to the Metway Merger Act, Suncorp Group entered into an Implementation Agreement with the State of Queensland under which it committed to do the following upon completion of the proposed acquisition:

(i) [redacted]

(ii) [redacted] and

(iii) make various investments in Queensland including developing a disaster response centre of excellence in Brisbane employing more than 100 persons, spending $12 million on an event control centre platform, maintain and grow its Disaster Response Team by 20 full-time positions valued at $3 million, develop a Suncorp Regional Hub in Townsville and contribute at least $3 million to community or educational initiatives specified by the State.

Overlap banking products and services

19. ANZ and Suncorp Bank relevantly overlap in the supply of the following banking products and services:

(a) the supply of home loans, which includes loans to finance purchasing residential property or refinancing, and includes investment property loans and new loans or refinancing to undertake renovations;

(b) the supply of retail deposit products, which includes transaction accounts, savings accounts and term deposits;

(c) the supply of banking products and services to SME and agribusiness customers, including deposit products, commercial lending products, risk management products, and commercial cards (but Suncorp Bank only distributes commercial cards issued by NAB under its white label agreement).

20. ANZ and Suncorp Bank compete with a range of banks, as well as non-bank lenders, in relation to the supply of these banking products and services. For convenience, this application refers to competitors as "banks", but this expression is intended to include both authorised-deposit taking institutions and non-bank lenders.

21. The markets relating to the supply of home loans, and banking products and services to SME and agribusiness customers, are the relevant markets in relation to which the Commission determined it could not be satisfied that the proposed acquisition would not substantially lessen competition. The key facts about those markets are set out below.

Home loans

22. The Commission concluded that the proposed acquisition would not have the effect, and would not be likely to have the effect, of substantially lessening competition through unilateral effects. This conclusion was based on, among other things, the following facts:

(a) the increase in market share (2.4%) is *de minimis*;

(b) Suncorp Bank is not a particularly vigorous competitor in the pricing of home loans;

(c) ANZ and Suncorp Bank are not especially close competitors; and

(d) there will continue to be competitive constraint imposed, particularly from Macquarie Bank as well as the second tier banks, Bendigo and Adelaide Bank (**Bendigo**) and Bank of Queensland (**BOQ**).[15]

23. Despite those facts and the conclusion, the Commission was not satisfied that the proposed acquisition would not have the effect, and would not be likely to have the effect, of substantially lessening competition on the basis of coordinated effects. In particular, the Commission considered that:

(a) the proposed acquisition is likely to materially increase the likelihood of coordination being initiated and/or sustained by the major banks in relation to home loans by increasing the symmetry between ANZ, the Commonwealth Bank, NAB and Westpac; and

(b) a combined Bendigo/ Suncorp Bank is likely to attenuate the ability and incentive of the major banks to engage in or sustain coordination more effectively than either Bendigo or Suncorp Bank alone.

24. The following key facts support the conclusion that the proposed acquisition would also not have the effect, or be likely to have the effect, of substantially lessening competition in the national market for home loans:

(a) The proposed acquisition is by the fourth largest bank, of the ninth largest bank by home loans[16] and by banking assets generally.[17]

(b) The incremental change in ANZ's market share is 2.4%.

[15] Decision [6.165]-[6.166].

[16] Decision [6.45].

[17] Decision [4.7].

(c) The market is not highly concentrated: it does not exceed the Commission's merger guidelines thresholds[18] and the proposed acquisition will result in a *de minimis* increase in concentration and market share of 2.4% for ANZ (roughly equivalent to the amount of market share it has lost over the preceding five years).[19] The proposed acquisition will not change the number of potentially coordinating banks.[20]

(d) Suncorp Bank is "no more vigorous or effective a competitor than other competitors in the market for the supply of home loans in Australia, and has not been a key driver of pricing, innovation, or product development".[21]

(e) The Commission does not find as part of the Determination or Decision that the major banks have engaged in coordinated pricing or non-pricing conduct in the past. Similarly, neither the Productivity Commission nor the Commission make such a finding in their previous inquiries.[22]

(f) The Commission does not identify any evidence showing that there are coordinated effects in respect of the major banks now. To the contrary:

(i) There is effective competition in the market, particularly among the major banks and Macquarie Bank, as well as other second tier banks[23] which manifests itself in both price and non-price competition. This is reflected in extensive evidence given by ANZ and Suncorp Bank executives, including evidence about banks competing through discounting, which has increased substantially, as well as by offering material cash and non-cash incentives for switching.[24] While there has been a recent reduction in cashback offers by some banks, this not demonstrative of a lack of competition or that competition is short lived. Offering cashbacks is only one of a number of ways in which banks compete, and banks which have withdrawn their cashback offers continue to compete vigorously on other aspects of their offering.[25]

(ii) The competition between the banks, including the major banks, is recently manifest in intense price competition in relation to home loans.[26] This increase in competition is consistent with longer-term trends and not only the result of a temporary period of higher demand.[27]

(iii) The effect of competition is reflected in data showing that major banks, including Westpac and ANZ, have lost market share over time[28] and their return on equity

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[18] See First Williams report [42].

[19] Third Smith report [71]-[75]; Second Williams report [100]; see also Decision [6.257] and [6.44]-[6.48].

[20] See subparagraph 24(a) above.

[21] Decision [6.156].

[22] Second Williams report [77]-[84]; see also Decision [6.185]-[6.186].

[23] First Campbell statement [52]; Second Campbell statement [19]-[26]; Second Smith Report [29]-[31], [42]-[46]; see also Starks report [9.43.3] and Decision [6.166].

[24] Decision [6.124].

[25] Third van Horen statement [51]; see also Decision [6.61]-[6.63].

[26] First Campbell statement [84]-[90]; Second Campbell statement [40]-[45]; Second Elliott statement [18]-[19], [23], [27]-[33]; see also Decision [6.119] and [6.141].

[27] Third Smith report [63]-[69].

[28] See second Smith report [29]-[30]; Second Elliott statement [26]; see also Decision [6.50].

(**ROE**) and net interest margin (**NIM**) have progressively declined since 2000.[29] The Commission has wrongly discounted that data because it has misinterpreted analysis by the Reserve Bank of Australia (**RBA**) to conclude that the reduction in major banks' NIMs from 2016 to 2020 can be explained, for the most part, by the increase in banks' equity ratios in response to APRA's tighter capital standards since 2015, and reductions in the cash rate target up to May 2022.[30] The RBA analysis (and specifically the equation on page 13 of that analysis) shows that NIM should *increase* with higher capital requirements, not decrease it.[31] The fact that NIM has decreased despite higher capital requirements, contrary to the Commission's findings, reinforces the fact that competition has compressed ROE and NIM.

(g) There is little symmetry and alignment among the major banks and the proposed acquisition does not materially increase the symmetry between the major banks, for reasons that include the following:

(i) The market shares of the four major banks are not symmetrical: ANZ is presently the smallest in market share of the four major banks; CBA and Westpac are, and will continue to be, materially larger than ANZ and NAB.[32] Any increase in symmetry from the proposed acquisition is not material: the proposed acquisition will increase ANZ’s market share from 13% to 15.4%, compared with 25.8% for CBA, 21.5% for Westpac and 14.9% for NAB.[33] Those shares reflect historic loans; Macquarie Bank’s share of new loans is approximately 12%.[34]

(ii) The major banks are differentiated in other attributes, such as turnaround times which are very important to customers.[35]

(iii) There is a lack of symmetry among the major banks in their funding base, product and geographical diversity: banks focus on different customer segments and the relative size of their retail and business portfolios, including their source of deposit funding, varies.[36] The proposed acquisition does not materially alter ANZ’s funding base or focus; nor is it likely to materially increase the degree of symmetry in the major banks’ cost structures.

(h) The major banks are constrained by each other, as well as Macquarie Bank and other smaller banks, and the removal of Suncorp Bank is not likely to increase the likelihood of coordination.[37] Suncorp Bank is not a particularly vigorous or effective competitor and has not been a key driver of pricing, innovation or product development.[38] There is no

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[29] Application [5.72]-[5.757]; First Johnston statement [29]-[33]; Second Johnston statement [41]; Second van Horen statement [17(a)].

[30] Decision [4.71] and [4.72] citing RBA, The Consequences of Low Interest Rates for the Australian Banking Sector – Research Discussion Paper – RDP 2022-08, December 2022.

[31] RBA, The Consequences of Low Interest Rates for the Australian Banking Sector – Research Discussion Paper – RDP 2022-08, December 2022.

[32] Third Smith report [77]; see also Starks report [9.99]; see also Decision [4.7] and [4.8].

[33] Third Smith report [77]-[79].

[34] Second Williams report [76].

[35] Third Smith report [80]; Starks report [9.78].

[36] Decision [6.210]; see also [4.12], [4.15], [4.16], [4.17].

[37] Third Smith report [81].

[38] Decision [6.157], [6.165]; see also Application [7.28]-[7.30].

evidence to support the proposition that a combined Bendigo/ Suncorp Bank is likely to materially increase the competitive constraint on the major banks engaging in any potential coordination.[39]

(i) The threat of new entry and expansion is also likely to constrain the major banks:

(i) Barriers to entry and expansion are surmountable and are likely to continue to decline: in particular, regulatory requirements are not insurmountable[40] and branches are no longer necessary for entry or expansion.[41] Macquarie Bank's meaningful and recent rapid growth, without relying on a branch network, demonstrates the ability of new entrants to enter and expand.[42]

(ii) Barriers to switching are not high: the prevalence of mortgage brokers, aggregators and comparison websites has reduced search and switching costs;[43] customer switching is evidenced by increased refinancing and repricing;[44] a significant proportion of customers have their home loan with a lender that is not their main financial institution;[45] regulatory reform has made switching easier,[46] and banks have encouraged switching through streamlined switching processes, cashback offers and introductory rate pricing.[47]

(iii) Brokers are an important driver of competition in the home loans market: brokers account for a large and increasing share of customer acquisition (over half of the total market, including [redacted] for ANZ, [redacted] for Suncorp and an estimated 90-95% for Macquarie Bank);[48] increasingly refer customers to non-major banks;[49] reduce search and switching costs for customers,[50] and are required to prioritise the best interests of customers.[51]

(iv) These kinds of structural changes to the market make coordination even less likely in the future.[52]

(j) Although there is multi-market contact among major banks across the home loans market and other markets, there is no evidence of coordination in any of these markets and the proposed acquisition will not change this. ANZ is already present in the product and geographic markets where Suncorp Bank is present.[53]

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[39] Third Smith report [51]-[59]; Second Williams report [102]-[108].

[40] First Campbell statement [57]; Starks report [9.35].

[41] Starks report [9.37]-[9.38].

[42] Application [7.45]; First Campbell statement [52(d)]; Second Campbell statement [9]-[12].

[43] First Campbell statement [74]-[75], [79]; Second Campbell statement [29(b) and(c)]; Starks report [3.31]-[3.34].

[44] First Campbell statement [76]-[83]; Second Campbell statement [27]-[28], [36]-[39], [63].

[45] First Campbell statement [81]; Second Campbell statement [29(a)].

[46] Second Campbell statement [33]; see also Decision [4.111].

[47] Second Campbell statement [30], [34]-[35]; Second van Horen statement [17(d)].

[48] First Campbell statement [61]-[66]; First van Horen statement [47]; Second van Horen statement [17(b)]; Third van Horen statement [52]; see also Decision [6.75]-[6.79].

[49] Application [7.7(c)]; Starks report [3.32], [9.38]; see Decision [6.76]-[6.78].

[50] First Campbell statement [67]-[69], [75]; See also Decision [4.132]-[4.134].

[51] First Campbell statement [70]; Second Campbell statement [25]; Third van Horen statement [52]; see also Decision [6.78].

[52] See for example Supplementary Starks report [9.81].

[53] Third Smith report [85].

(k) The proposed acquisition would not create opportunities to communicate pricing intentions or focal points on which to coordinate.[54]

(l) Pricing of home loans is not transparent among the major banks[55] and the proposed acquisition will not increase price transparency.[56] Banks' "opaque pricing" is a key reason why coordinated conduct is unlikely to occur.[57]

(m) Consumer choice frictions are not currently substantial and the proposed acquisition will not increase consumer choice frictions.[58] Conversely, customers will continue to benefit from price transparency through brokers, who have an awareness of what rates banks are offering.

(n) Having regard to the facts in subparagraphs (a) to (i) above, the market is not presently conducive to coordination, nor is the proposed acquisition likely to increase the likelihood of coordination. On the contrary, the evidence establishes that the major banks compete on price and non-price aspects, and consistently invest in technology and innovation to reduce their costs and improve their overall competitive proposition for customers.

SME banking

25. The following key facts support the conclusion that the proposed acquisition is not likely to result in a substantial lessening of competition for SME banking.

(a) The opinion of the Commission's expert, Ms Starks, is that there is no real chance that the proposed acquisition would substantially lessen competition for SME banking in Queensland.[59]

(b) While there is no precise definition for what constitutes an SME business customer,[60] the data available to ANZ does not indicate that the market is concentrated nationally or in Queensland, with an HHI that does not exceed the Commission's threshold following the proposed acquisition.[61]

(c) ANZ faces effective competition from a range of competitors supplying SME customers nationally and in Queensland, including major banks, BOQ, Bendigo and Judo Bank.[62] There is no town in Queensland which will have fewer than four alternative bank branches to the combined ANZ/ Suncorp Bank (noting that having a bank branch is not necessary to compete for or supply banking products and services to SME customers in any town[63]).[64]

(d) [redacted]

[54] Third Smith report [87].

[55] Third Smith report [89]; First Campbell statement [23]-[27]; Second Campbell statement [51]-[55]; see also Decision [6.125].

[56] Third Smith Report [90].

[57] Second Williams report [88].

[58] Third Smith report [93]-[94]; see also paragraph 24(m) above.

[59] Supplementary Starks report [7.45].

[60] First Williams report [52].

[61] Application [7.109]-[7.112].

[62] Rankin statement [93]; Mendelson statement [71]; Lane statement [25]-[28].

[63] Starks report [6.13]-[6.14].

[64] Starks report [9.266], table 26.

[redacted][65] Suncorp Bank's customer service offering is not sufficient to establish Suncorp Bank as a material competitive constraint on ANZ.

(e) Suncorp Bank and ANZ are not particularly close competitors.[66] There is little overlap in the industry segments in which Suncorp Bank and ANZ compete for SME customers, and they have different geographic presence and capabilities to serve medium and larger business customers.[67]

(f) ANZ is and will be constrained by the threat of expansion and new entry:

(i) Barriers to entry and expansion are not significant, particularly for SME lending and particularly for expansion by Bendigo and BOQ.[68] The regulatory environment is conducive to competition and supports new entry.[69] Branch presence is not a barrier.[70] Judo Bank demonstrates successful new entry and expansion is achievable without a physical network.[71]

(ii) Brokers play an increasing role in driving competition, are critical for new entry and expansion, and originate a significant proportion of new SME loans ([redacted] for ANZ and [redacted] for Suncorp Bank).[72]

(iii) SME customers can and do switch and multi-bank, and levels of switching and multi-banking have increased.[73]

(iv) Banks may compete both to attract customers as their main financial institution, or to compete and constrain ANZ in respect of specific unbundled products and services.[74]

(g) Suncorp Bank's relationship management model is not unique.[75] Both Suncorp Bank and ANZ use a relationship management model for some small business customers:

(i) [redacted] ANZ's small business banking customers are mostly served and managed by a group of generalist bankers, with approximately [redacted] (those with total business limits typically between [redacted]) served by generalist relationship managers typically serving [redacted] customers or remote managers managing [redacted] customers.[76] ANZ's business banking customers (those with total business limits typically between [redacted]) have dedicated relationship managers typically serving [redacted] customers.[77]

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[65] Application [7.141]-[7.148]; Rankin statement [102]-[104].; First van Horen statement [88], [71]-[75]; see also Decision [6.518].

[66] Application [7.198]-[7.199], [7.143]; Rankin statement [102]-[104].

[67] Application [7.205]-[7.206].

[68] Application [7.152]; Rankin statement [95]; see also Starks report [9.272].

[69] Application [7.152].

[70] Starks report [9.272].

[71] Application [7.150].

[72] Application [6.124]; Rankin statement [46]-[58], [94]; van Horen statement [83].

[73] Application [6.123], [7.128]-[7.129]; Rankin statement [96]-[97].

[74] Application [6.132]; Decision [6.569].

[75] See Starks report [9.216].

[76] Rankin statement [24]-[25].

[77] Rankin statement [15] and [34]; Lane statement [14]; Lane statement [25].

(ii) A focus on customer numbers per banker is misleading. ANZ provides a higher touch approach to managing its business customers than its competitors.[78] ANZ is also undertaking automation and digitisation to reduce manual work and thus increase time for customer engagement.[79] Automation and digitisation improves speed and quality of service and frees up staff capacity to perform higher-value work conducive to better customer experiences and cost reduction.[80] [redacted] By comparison, [redacted][81]

(iii) Relationship managers do not need to be based locally.[82]

(h) A combined Bendigo/ Suncorp Bank is unlikely to be a more vigorous and effective competitor than either Bendigo or Suncorp Bank alone.[83]

Agribusiness banking

26. The following key facts support the conclusion that the proposed acquisition is not likely to result in a substantial lessening of competition for agribusiness banking.

(a) The Commission's expert, Ms Starks, concludes there is no real chance the proposed acquisition would substantially lessen competition for agribusiness banking in Queensland.[84]

(b) Dr Williams also concludes that the proposed acquisition is unlikely to substantially lessen competition in the supply of agribusiness banking in Queensland.[85]

(c) The data available to ANZ indicates that the market is not concentrated nationally, with an HHI that does not exceed the Commission's threshold following the proposed acquisition.[86] The proposed acquisition is likely to result in a moderate increase in concentration in Queensland, where Suncorp Bank has a greater presence, but the market will remain relatively unconcentrated with an HHI slightly in excess of the Commission's threshold.[87] NAB and Rabobank will remain the largest agribusiness suppliers in Queensland.[88]

(d) Competition is vigorous nationally and in Queensland.[89] ANZ faces effective competition from a range of agribusiness banks and lenders nationally and in Queensland, including major banks (especially NAB), Rabobank and BOQ.[90] In each of the 11 towns in which

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[78] Lane statement [11]-[16].

[79] Lane statement [15]-[17].

[80] Decision [6.473].

[81] First van Horen statement [66], [71]-[75], [85]-[88]; see also Decision [6.517].

[82] Lane statement [29].

[83] Lane statement [33]-[34].

[84] Starks report [7.35].

[85] First Williams report [120].

[86] Application [7.165]-[7.169].

[87] First Williams report [16]; Second Williams report [59], [62]-[63].

[88] First Bennett statement [209].

[89] First Bennett statement [115]-[116]; Rabobank submission p 2 [5].

[90] First Bennett statement [156]-[190].

ANZ and Suncorp Bank each have an agribusiness based at that town, there are at least three other banks (one or more of CBA, NAB, Westpac or Rabobank) providing agribusiness services based in that town.[91] The Commission's expert provided evidence that only two of those towns will not have a regional or second-tier bank based in that town following the proposed acquisition. Both of these are within reasonable drive times of other towns with more competitors who can readily compete and supply banking products and services to customers in those towns.[92]

(e) Suncorp Bank is not a particularly vigorous or effective competitor.[93] ANZ and Suncorp Bank compete in Queensland, but are not each other's closest competitor. In particular, ANZ faces a greater competitive constraint from NAB and Rabobank than Suncorp Bank.[94] Further, ANZ and Suncorp Bank have complementary propositions for supplying business banking products and services to agribusiness customers and are likely to diverge further in a status quo counterfactual. [redacted][96] Unlike ANZ, Suncorp Bank does not have the same capacity to service [redacted]

(f) ANZ is and will be constrained by the threat of new entry and particularly expansion:

(i) Barriers to entry are not insurmountable as demonstrated by Judo Bank's recent entry and acquisition of agribusiness bankers from ANZ.[97] Barriers to expansion are not high, as demonstrated by Rabobank's successful growth; barriers to expansion are likely to be particularly low for existing smaller banks.[98]

(ii) Brokers drive material amounts of lending for agribusiness customers.[99]

(iii) Agribusiness customers can and do switch banks.[100]

(g) ANZ, Suncorp Bank and other banks use a relationship management model for certain agribusiness customers and banks compete to develop and maintain relationships with agribusiness customers.[101] Suncorp Bank's approach to managing agribusiness customers is similar to ANZ's;[102] it is not unique and is (and is able to be) replicated by other banks:[103]

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[91] Decision [6.678]; Starks report [9.228]-[9.229].

[92] Supplementary Starks reports [7.26]-[7.27].

[93] Second Williams report [55]-[58]; see also First van Horen statement [97].

[94] First Williams report [16]; Second Williams report [59], [110]-[111]; Starks report [9.222]-[9.223]; see also First Bennett statement [169]-[171]; Third Bennett statement [25].

[95] First van Horen statement [93], [100].

[96] Suncorp Group response to Commission request for information 28 June 2023, pp 3-4.

[97] First Bennett statement [179]-[180]; see also Starks report [9.234]

[98] First Williams report [112]; Second Williams report [44]-[47]; Second Elliott statement [45]; see also Starks report [9.222]-[9.223], [9.272].

[99] First Bennett statement [147]-[155]; First van Horen statement [103]; Third Bennett statement [24].

[100] Second Williams report [51]; First Bennett statement [98]-[107]; Second Bennett statement [23]-[25].

[101] First Bennett statement [119]-[122].

[102] Third Bennett statement [24].

[103] First van Horen statement [95].

(i) [redacted] Consistently with its approach to all business customers, ANZ provides a relationship managed service for agribusiness customers with lending requirements of [redacted].[104] Customers with total business limits of under [redacted] are typically serviced by relationship managers each allocated approximately [redacted] commercial customers; with a two-person specialised remote team allocated to approximately [redacted] customers; customers with total business limits of over [redacted] are generally serviced by managers allocated [redacted] customers, and customers over [redacted] are typically serviced by managers allocated [redacted] customers.[105] [redacted] ANZ's head of agribusiness has observed that the number of small agribusinesses is continuing to decrease[106] [redacted], and such customers are able to access relationship managers remotely and in person.[107]

(ii) [redacted] Suncorp Bank similarly offers a relationship management model where customers are allocated to managers, each serving approximately [redacted] customers.[108] [redacted][110]

(h) A combined Bendigo/ Suncorp Bank is not likely to be a more vigorous or effective competitor than Bendigo or Suncorp Bank alone. Bendigo is not a significant competitor in the locations in which ANZ and Suncorp Bank overlap and in those locations an acquisition by Bendigo would simply mean that Suncorp Bank has a different owner.[111]

PART C: ISSUES ON THE REVIEW

27. The following matters are not in issue:

(a) There is no real chance that the proposed acquisition would have the effect, or would have the likely effect, of substantially lessening competition in relation to home loans on the basis of unilateral effects.

(b) There is no real chance that the proposed acquisition would have the effect, or would have the likely effect, of substantially lessening competition in relation to retail deposits.

(c) There is no real chance that the proposed acquisition would have the effect, or would have the likely effect, of substantially lessening competition in relation to the supply of banking products and services to SME or agribusiness customers.

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[104] Third Bennett statement [10].

[105] First Bennett statement [55], [59], [60].

[106] First Bennett statement [52], [81].

[107] Third Bennett statement [14].

[108] First van Horen statement [90].

[109] First van Horen statement [93].

[110] See paragraph 16.

[111] Third Bennett statement [25(c)].

28. ANZ considers the key issues arising on the review of the Determination are the following.

29. What are the relevant markets for the purposes of analysing whether the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition within the meaning of s 90(7)(a) of the CCA?

30. What counterfactual(s) appropriately should be considered in assessing whether the criteria in s 90(7)(a) of the CCA is satisfied? In particular, in the future without the proposed acquisition:

(a) is an acquisition by Bendigo of Suncorp Bank commercially realistic?

(b) if such an acquisition is commercially realistic, is a combined Bendigo/ Suncorp Bank likely to be any more effective a competitor in the market for home loans that it would disrupt any attempt by the major banks to engage in coordinated conduct, or be a more vigorous and effective competitor in respect of SME and agribusiness banking, than Bendigo or Suncorp Bank alone?

31. Having regard to the appropriate counterfactual(s), would the proposed acquisition have the effect or likely effect of substantially lessening competition in any of the relevant markets within the meaning of s 90(7)(a) of the CCA? This raises the following sub-issues:

(a) Is the proposed acquisition likely to result in a substantial lessening of competition by reason of coordinated effects in the national market for home loans? This issue raises the following further sub-issues:

(i) Is the market currently conducive to coordination?

(ii) Is the proposed acquisition likely to materially increase the likelihood of coordination being initiated and/or sustained by the major banks and lead to a substantial lessening of competition?

(b) Is the proposed acquisition likely to result in a substantial lessening of competition in a market for SME banking products (including agribusiness)? This issue raises the following further sub-issues:

(i) Should the effects of the proposed acquisition be assessed by reference to a national market for business banking or State or local/ regional markets for SME banking products?

(ii) Is Suncorp Bank an effective constraint in SME banking?

(iii) Are existing competitors and the threat of expansion and entry sufficient to replace the loss of any competitive constraint imposed by Suncorp Bank?

(c) To the extent the Tribunal considers that the market for the supply of banking products and services to agribusiness customers is separate to the market for the supply of banking products and services to SME customers, is the proposed acquisition likely to result in a substantial lessening of competition in a market for agribusiness banking? This issue raises the following sub-issues:

(i) Should the effects of the proposed acquisition be assessed by reference to a national market for business banking or State or local/ regional markets for the agribusiness banking?

(ii) Is Suncorp Bank an effective constraint in agribusiness banking?

(iii) Are existing competitors and the threat of entry or expansion sufficient to replace the loss of any competitive constraint imposed by Suncorp Bank?

32. Having regard to the appropriate counterfactual(s), would the proposed acquisition result, or be likely to result, in a benefit to the public that would outweigh any identified detriment to the public that would result, or be likely to result, from the proposed acquisition for the purposes of s 90(7)(b) of the CCA? This raises the following sub-issues:

(a) Would the ability of Suncorp to have a singular insurance focus if the proposed acquisition proceeds be a substantial, merger-specific benefit?

(b) Are the estimated cost synergies set out in the Application substantial, sufficiently certain and merger-specific?

(c) Are the increased prudential safety benefits set out in the Application substantial, sufficiently certain and merger-specific?

(d) Are the lower funding costs that Suncorp Bank would enjoy if the proposed acquisition proceeds substantial, sufficiently certain and merger-specific?

(e) Do the Queensland Commitments result from the proposed acquisition, and if so, would they generate benefits that are substantial, sufficiently certain and merger-specific?

(f) Should the Tribunal have regard to the alleged competitive detriments in the Australian banking industry more broadly being detriments that do not appear to be connected with an assessment of competition in any specific market or markets?

33. Is the Tribunal satisfied, in all the circumstances, that the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition?

34. Is the Tribunal satisfied, in all the circumstances that the proposed acquisition would result, or be likely to result, in a benefit to the public that outweighs the detriment to the public that would result, or be likely to result from the proposed acquisition?

PART D: ANZ'S CONTENTIONS ON REVIEW

Preliminary matters

35. The Decision does not indicate that the Commission has made a positive finding that the proposed acquisition would be likely to substantially lessen competition in any market. Instead, the Commission concluded that there exists some degree of potential loss of competition that meets an undefined threshold, from which the Commission cannot be satisfied that there will not be a substantial lessening of competition.

36. ANZ contends that, when set against the weight of the evidence, the Tribunal should be positively satisfied that the proposed acquisition would not have the effect, and would not be likely to have the effect, of substantially lessening competition in circumstances where:

(a) the proposed acquisition is by the 4^{th} largest bank, of the 9^{th} largest bank;

(b) the Commission considers that Suncorp Bank is "no more vigorous or effective a competitor than other competitors in the market for the supply of home loans in Australia, and has not been a key driver of pricing, innovation, or product development";[112]

(c) the Commission does not claim that coordination amongst major banks has actually occurred or is actually occurring,[113] and to the contrary considers that ANZ is currently "incentivised to compete harder than the other major banks";[114]

(d) any change to competitive dynamics is necessarily at the margins, with 7 other banks larger than Suncorp continuing to compete;

(e) forward-looking market shares are significantly different to backwards-looking shares, disrupting the foundation for any concerns on symmetry of the "major banks" over the timeframe in which competition effects would arise; and

(f) it is not a realistic commercial likelihood that Bendigo would acquire Suncorp Bank, and even it there was, the likelihood that it would provide meaningfully greater competition is low.

The relevant markets

37. The markets identified by ANZ in which ANZ and Suncorp Bank as relevant to the issues raised in this review are:

(a) a national market for home loans; and

(b) a national market for business banking products and services (including for SME and agribusiness).[115]

38. The Commission assesses the competitive effects of the proposed acquisition by reference to separate State (as a proxy for local/ regional) markets for SME and agribusiness banking products.

39. SME and agribusiness banking are part of a national market for business banking products and services for reasons that include:[116]

(a) The products and services supplied to SME and agribusiness customers are the same as other business banking products (with the exception of Farm Management Deposit accounts for agribusiness customers).[117] SME and agribusiness customers are generally managed in the same way as other business customers (with agribusiness customers

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[112] Decision [6.156].

[113] Decision [6.186].

[114] Decision [6.259].

[115] As mentioned at paragraph 27(b), ANZ and Suncorp Bank also overlap in the national market for retail deposit products, but the Commission was satisfied that the proposed acquisition would not have the effect and would not be likely to have the effect of substantially lessening competition in that market. This conclusion is consistent with the submissions and evidence before the Tribunal, and ANZ does not make further submissions in this application for review about that market in the interests of narrowing the issues for consideration.

[116] Second Williams report [30]-[39].

[117] Mendelson statement [60]-[63]; First Rankin statement [60]-[62]; First Bennett statement [32]-[33], [55]; Third Bennett statement [10].

having access to relationship managers specialised in agribusiness if their business limits exceed a certain level and/or due to the complexity of their banking needs).[118]

(b) The products and services supplied to SME and agribusiness customers are supplied nationally and pricing and policy is determined at a national level.[119] Structural changes, including digitisation, have reduced the importance of having a local presence. Although agribusiness customers value a personal relationship with a relationship manager, that manager does not need to be based locally, and agribusiness customers largely conduct banking remotely.[120]

The counterfactual

40. If the proposed acquisition does not proceed, based on the evidence the only commercially realistic counterfactual is one in which Suncorp Group continues to operate Suncorp Bank (referred to as the **no-sale** or **status quo counterfactual**).[121] In this counterfactual, Suncorp Group will continue to operate Suncorp Bank in accordance with the approved business plan for Suncorp Bank. [redacted][122]

41. An alternative counterfactual, in which Bendigo and Suncorp Bank merge (the **Bendigo merger counterfactual**) is not commercially realistic:

(a) Any offer by Bendigo to acquire Suncorp Bank likely would be comprised wholly or mostly of Bendigo scrip, and, as a result:

(i) Suncorp Group's board would need to consider the likely value of the merged Bendigo and Suncorp Bank before it could approve or recommend the sale; and

(ii) Bendigo's shareholders would be required to approve the acquisition and would need to be provided with all of the information relevant to making that decision.

(b) The value of a combined Bendigo/ Suncorp Bank likely would be adversely affected by significant funding cost dis-synergies (the S&P Global credit rating applied to Suncorp Bank would fall from A+ to [redacted] under Bendigo ownership).

(c) Realising any synergies would be difficult, and more difficult than suggested by analyses prior to the current year, including because of difficulties in closing branches, reducing offices, or reducing headcount. In that regard, Bendigo likely would need to give the Queensland Government a commitment [redacted] and make other commitments to the Queensland Government equivalent to those provided by ANZ and Suncorp Group.

(d) Suncorp Group's board would not approve or recommend a sale to Bendigo unless the consideration offered exceeded Suncorp Bank's current value based on its present organic plan before factoring in the benefit from unwinding any conglomerate discount that presently applies to Suncorp Group's share price. [redacted]

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[118] First Bennett statement [55], [59]; Third Bennett statement [10].

[119] Application [6.135]-[6.136]; Rankin statement [64]; First Bennett statement [70], [74]; First van Horen statement [80].

[120] First Bennett statement [108]-[110]; Third Bennett statement [10]-[12].

[121] First Johnston statement [70]; Second Johnston statement [14]; Fourth Johnston statement [18].

[122] First Johnston statement [72]; Second Johnston statement [126].

[redacted].

(e) [redacted].

(f) In any event, Bendigo acquiring Suncorp Bank would be earnings dilutive for Bendigo shareholders if Suncorp Bank were sold at the multiples at which Bendigo trades. For a combined Bendigo-Suncorp bank to achieve earnings neutrality within the next 2 years, Suncorp Bank would need to be sold to Bendigo at a value which is significantly below this level, being significantly less than the value which would be delivered by way of the proposed acquisition or the value generated by way of Suncorp Group continuing to operate Suncorp Bank. An offer by Bendigo to acquire Suncorp Bank with a consideration that is equal to or exceeds Suncorp Bank's current value (calculated by reference to its present organic plan) would likely be significantly value dilutive for Bendigo's current shareholders, who would therefore be unlikely to approve the acquisition.

(g) In addition, any potential acquisition of Suncorp Bank by Bendigo would face substantial, and likely insurmountable, execution risks both before and (if it proceeded that far) after completion. Such risks would include:

(i) the need to obtain shareholder approval from Bendigo and possibly Suncorp Group shareholders;

(ii) the need to immediately procure replacement wholesale funding of approximately [redacted] due to Suncorp Bank's lower credit rating once Suncorp Bank is no longer considered a core business of the Suncorp Group / under Bendigo ownership;

(iii) the ongoing higher funding costs that Suncorp Bank would face due to Suncorp Bank's lower credit rating under Bendigo ownership [redacted];

(iv) the need for Bendigo to undertake a [redacted] equity capital raising to cover total integration costs and ensure sufficient capital in the combined entity (and more if any of the consideration for acquiring Suncorp Bank were to be paid in cash);

(v) the difficulty, complexity and cost of integrating the different technology platforms presently operated by Bendigo and Suncorp Bank, and integrating the businesses more generally; and

(vi) the complexity associated with negotiating a repeal of, or amendment to, the Metway Merger Act. This legislation requires that Suncorp Bank (and any holding company and subsidiary of it) locate its head office in Queensland and that its managing director be ordinarily resident in Queensland. A resolution purporting to change the articles of Suncorp Bank (and any holding company and subsidiary of it) which is inconsistent with the Act has no effect. The Queensland Treasurer can also seek injunctive relief for relevant contraventions of the Act. As a consequence, unless an acquirer could negotiate the *Metway Merger Act* being relevantly repealed or amended, any proposed acquirer of Suncorp Bank would need to have its head office and its principal operational offices in Queensland, or relocate its offices to Queensland.

These execution risks also would need to be taken into account by Suncorp Group's board and likely would weigh heavily against approving or recommending the sale.

42. However, even if a Bendigo/ Suncorp Bank merger occurred (which is speculative and commercially unlikely) a combined Bendigo/ Suncorp Bank is not likely to be a more vigorous and effective competitive constraint than Bendigo or Suncorp Bank alone in any relevant market, including because:

(a) Neither Bendigo nor Suncorp Bank is a particularly strong competitor and neither have market leading positions or offerings in any relevant market in the factual and there is no evidence to suggest that combining them would create a more effective competitor.

(b) A merger of Bendigo and Suncorp Bank is likely to present technological and customer integration and cultural alignment challenges, which will likely hinder the merged entity's ability to integrate and compete effectively, and that will not be faced by ANZ (at all or to the same degree).[123]

(c) A combined Bendigo/ Suncorp Bank is not likely to benefit from lower funding costs, cost synergies, or achieve significant scale benefits. In particular:

(i) A combined Bendigo/ Suncorp Bank is not likely to benefit from an improved credit rating and reduced wholesale funding costs, compared with Bendigo's current position and would have a worse credit rating than Suncorp Bank's existing position.[124]

(ii) A combined Bendigo/ Suncorp Bank is not likely to extract significant cost synergies, including because it would be required to pay the major bank levy.[125]

(iii) A combined Bendigo/ Suncorp Bank is not more likely to achieve advanced IRB accreditation (or at all), and not more likely than Bendigo would in the factual or Suncorp Bank would in the status quo counterfactual.[126] Even if a merged Bendigo/ Suncorp Bank achieved advanced IRB accreditation, that is not likely to lead to any capital benefit and more competitive pricing (and in any event not in the near term).[127]

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[123] First Johnston statement [64]- [69]; Second Johnston statement [73]-[81]; Second van Horen statement [31]; Third van Horen statement [53]-[66]; Higgins statement [97]; second Elliott statement [92].

[124] Third Smith report [46]-[47]; First Johnston statement [57]-[72]; Third van Horen statement [45]-[49]; Second Ali report [146]; Howell report [17]-[21]; see also Starks report [6.4].

[125] First Johnston statement [62]-[63]; Third van Horen statement [37].

[126] Third Smith report [33]-[34]; Third van Horen statement [11]-[26]; Second Ali report [35]-[37].

[127] Third Smith report [35]-[36]; Third van Horen statement [27]-[28]; see also Decision [5.152].

(iv) The scale of a combined Bendigo/ Suncorp Bank will be insufficient to change either bank's existing competitive position.[128]

(d) A combined Bendigo/ Suncorp Bank would continue to be very small compared to the major banks. A merged Bendigo/ Suncorp Bank is not likely to be able to compete more effectively on price than either bank alone.[129]

43. These conclusions are further supported by:

(a) Dr Williams' expert evidence that, if Suncorp Bank were acquired by Bendigo, it is unlikely to create a second-tier challenger bank in home loans;[130]

(b) Patrick Smith's expert opinion that a merged Bendigo/ Suncorp Bank is unlikely to become a more vigorous and effective competitor than either Bendigo or Suncorp Bank alone to the major banks in home loans;[131] and

(c) in the case of business banking, the evidence of ANZ's experienced SME and agribusiness bankers that a combined Bendigo/ Suncorp Bank is unlikely to result in a stronger or even equally strong competitor to Bendigo or Suncorp Bank alone.[132]

The proposed acquisition is not likely to substantially lessen competition

44. The evidence establishes that the proposed acquisition would not have the effect, and would not be likely to have the effect, of substantially lessening competition, including in the national market for home loans or in any market in which SME and agribusiness banking products and services are supplied.

45. ANZ's key contentions are as follows.

The alternative buyer counterfactual is not commercially realistic

46. For the reasons set out in paragraphs 40 and 41, ANZ contends that the no-sale counterfactual is the only commercially realistic counterfactual. In summary:

(a) The Commission wrongly concluded that, in the future without the proposed acquisition, there is a realistic commercial possibility that Bendigo will acquire Suncorp Bank. This speculative counterfactual, and the assumptions made regarding its possible impact, are based on unsubstantiated assertions by Bendigo and point in time internal Suncorp Group analysis that was preliminary in nature.

(b) Suncorp Group and Suncorp Bank executives have provided evidence that establishes that they do not consider a Bendigo/ Suncorp Bank merger to be a realistic commercial possibility. That assessment takes into account both the earlier consideration given by Suncorp Group to the possibility of a merger with Bendigo and Suncorp Group's more recent assessment of that possibility. The most recent and complete analysis of the benefits of a Bendigo merger should be preferred to earlier and preliminary assessments

[128] Third Smith report [52]; Second Elliott statement [91]; Second van Horen statement [23], [56], [65], [66]; Third van Horen statement [29]-[44]; Third Smith report [21], [52].

[129] See Decision [5.155]-[5.156].

[130] Second Williams report [106]-[107].

[131] Third Smith report [21].

[132] Third Bennett statement [25]; Lane statement [33]-[34].

(both with respect to the likelihood of, and risks involved in, such a merger).[133] Further, the comprehensive evidence of very experienced executives including the Suncorp Group Chief Executive Officer, Suncorp Bank Chief Executive Officer and Suncorp Group Chief Information Officer should be preferred to Bendigo's assertions in this respect. In light of that evidence, the Commission's conclusion that a Bendigo merger is a real possibility should be disregarded as speculative and inconsistent with the weight of evidence that is before the Tribunal.

47. Consequently, to the extent that the Tribunal has regard to the Bendigo merger counterfactual at all, it should accord less weight to any competitive detriments said to arise in that counterfactual, having regard to the degree of likelihood of that counterfactual occurring.[134]

A merged Bendigo/ Suncorp Bank would not be a more effective competitor

48. Even if there were a commercial realistic counterfactual in which Bendigo acquires Suncorp Bank, the evidence does not establish that a combined Bendigo/ Suncorp Bank is likely to be a materially more effective competitor, including in the home loans market, and in supplying business products and services for the reasons set out in paragraphs 42 and 43.

49. In the light of those key facts, supported by the submissions and evidence:

(a) The Commission's conclusions that a combined Bendigo/ Suncorp Bank would be a materially more effective competitor are speculative and significantly overstate the effect of increased scale on Bendigo's ability to compete effectively.

(b) The Commission's view was that it was "not clear" how significant the scale advantage would be to Bendigo, but that it "could" result in a "meaningful 'step change' in scale".[135] However, even if there are scale advantages, the Commission correctly concluded that increased scale resulting from the proposed acquisition will not have a sufficiently material impact on a merged Bendigo/ Suncorp Bank's ability to compete with the major banks on price.[136] Rather, the Commission concluded that a merged Bendigo/ Suncorp Bank will only likely be able to more effectively compete with the major banks on non-price aspects of competition.[137] There is no basis beyond speculation for the Tribunal to conclude that there would be an increase in non-price competition at all, or that such an increase in non-price competition will pose a materially greater competitive constraint on ANZ compared with the factual. It is inconsistent with the Commission's own conclusion, that to effectively challenge the major banks, smaller banks arguably need to be able to compete on both price and non-price factors.[138]

(c) Notably, the Commission did not quantify any improvement in funding position for a merged Bendigo/ Suncorp Bank: its conclusions rose no higher than that the merged entity's credit rating was likely to be "equal or higher" to Bendigo's (which in the former case, would be a rating reduction for Suncorp Bank), that this "may" result in an improved wholesale funding position, and that the merged entity "could potentially" achieve IRB

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[133] c.f. Decision [5.25], [5.75]; [5.133].

[134] *ACCC v Pacific National* [2020] FCAFC 77 (Middleton, Perram and O'Bryan JJ) (***Pacific National***) at [246].

[135] Decision [7.132].

[136] Decision [5.155].

[137] Decision [5.150]-[5.151]; see also [7.132].

[138] Decision [4.97].

accreditation independently or together (the benefits of which would not be realised in the near term).[139] Nor does the evidence available to ANZ establish that Bendigo could cut a proportionately higher share of the merged entity's costs compared with ANZ in the factual.[140]

(d) Further, in concluding that scale could materially enhance Bendigo's competitive position, the Commission did not account for Bendigo's current and likely future investments in technology or the challenges that they would face in integration.[141] By contrast, the Commission discounted the effect of increased scale on ANZ's ability to invest in technology on the basis that it is likely to make that investment in the status quo counterfactual.[142]

50. In the speculative Bendigo merger counterfactual, the competitive constraint from having two regional banks (Suncorp Bank and Bendigo, which are likely closer competitors than ANZ and Suncorp Bank) would be removed, and replaced by a larger bank that lacks the scale to compete more effectively and exercise a greater constraint on the major banks than they would independently.

No likelihood of coordinated effects in the home loans market

51. The proposed acquisition involves the fourth largest bank acquiring the ninth largest bank, resulting in an incremental increase in market share of 2.4%. The Commission found that the proposed acquisition would not result in a substantial lessening of competition on the basis of unilateral effects. The Commission wrongly concluded that it could not be satisfied that the proposed acquisition would not be likely to result in a substantial lessening of competition by reason of coordinated effects in the national market for home loans. ANZ contends as follows.

52. *First,* the Commission's approach goes beyond a prudent and cautious application of the authorisation test and sets the bar on being "satisfied" unrealistically high: not in the way the Commission expressed the test (requiring an "affirmative belief"),[143] but in the way the Commission applied it.

53. The Commission's approach is premised on the application of a theoretical framework at the expense of the evidence:

(a) The Commission considered whether the proposed acquisition would result in a substantial lessening of competition on the basis of coordinated effects. The Commission did not conclude that a substantial lessening of competition was likely to result, but did find that "is not persuaded that the Proposed Acquisition is not likely to result in a substantial lessening of competition.[144]

(b) To reach this conclusion, the Commission engaged Professor Nicolas de Roos to provide a framework on assessing coordinated effects. Professor de Roos's report sets out a theoretical framework, but does not seek to apply that framework to the evidence. The Commission also engaged Mary Starks, who did apply that framework. This framework

[139] Decision [5.152]-[5.153].

[140] c.f. Decision [5.147].

[141] Decision [5.145].

[142] Decision [5.30]-[5.35] and [6.163].

[143] Decision [2.9].

[144] Decision [6.276].

identified 10 key attributes, which "raise or lower the likelihood, extent, severity or sustainability of coordination between firms"[145] or are the factors "affecting how conducive a market is to coordination."[146]

(c) The Commission then considered the application of evidence to those 10 attributes, from which it concludes that one — the symmetry of the four largest banks — is expressly identified by the Commission as "likely to change" as a result of the acquisition. It is significantly on this basis that the Commission concludes that the proposed acquisition would be "likely to increase the incentives of the major banks to engage in coordination, materially increasing the likelihood of coordination being initiated and/or sustained by the major banks".[147]

54. The Commission's application of this theoretical approach is incorrect for the following reasons.

(a) Nine of the other 10 attributes identified by Professor de Roos will be largely unaffected by the proposed acquisition (seven expressly so, two implicitly so). Addressing each of these other nine factors in turn:

(i) (**Market structure**) The market is not concentrated[148] and the proposed acquisition will not change the market structure: "[the] number of coordinating firms will not change, meaning that features such as market structure and frequency of interaction remain unaltered."[149]

(ii) (**Multi-market contact**) The proposition that multi-market contact between the major banks makes the market more conducive to coordination does not rise above the level of theory: there is no evidence that multi-market coordination occurs or how multi-market contact in otherwise competitive markets would make coordination more likely in the home loans market.[150] The Commission did not find coordination in any other markets that it considered in its determination.

(iii) (**Communication devices**) The proposed acquisition will not change any communication devices in any market.[151]

(iv) (**Price transparency**) There is limited ability for the major banks to coordinate on price, given the prevalence of discretionary discounts (what the Commission describes as "opaque pricing").[152] The degree to which banks have an understanding of competitor pricing is (as the Commission recognised) delayed, imperfect, indirect and inferential[153] and the discount that might be offered to an individual customer by a competitor bank "can only be guessed at".[154] The Commission's conclusion that there is nevertheless a relatively high degree of

[145] Decision [6.193].

[146] Decision [6.194].

[147] Decision [6.276].

[148] See paragraph 24(c).

[149] Decision [6.257].

[150] Decision [6.217].

[151] Decision [6.257].

[152] See paragraph 24(l).

[153] Decision [6.225].

[154] Decision [6.226].

price transparency[155] is wrong and contradicted by the weight of that evidence. The proposed acquisition would not affect price transparency – in particular, there is no evidence supporting the hypothetical in Professor De Roos' report that "the [proposed acquisition] may improve price transparency" if "the major firms in the market are less familiar with the regime of discounts that the Target offers to customers and potential customers (when compared with the Acquirer)".[156]

(v) (**Consumer choice frictions**) Barriers to switching are not high, having regard to the facts set out in paragraph 24(i)(ii) and (iii) above. The Commission wrongly based its conclusion that barriers to switching are high on the assumption that consumers face high search costs as a result of opaque pricing that "may contribute to a perception that they will not save much by switching".[157] To the contrary (as the Commission correctly accepted) brokers have contributed to reducing certain barriers to switching, by reducing search and switching costs, and facilitated price competition (by facilitating price transparency for consumers, repricing and refinancing).[158] The Commission also wrongly discounted the relevance of ANZ's data on attrition rates:[159] even where attrition includes sales and repayment, that creates a gap or churn in ANZ's home loans book, which must be met through winning new customers so as not to lose market share. Further, the Commission did not identify how the proposed acquisition would increase customer choice frictions – this is because it will not have this effect.

(vi) (**Innovation**) The evidence establishes that major banks lead innovation in home loans and respond to innovation by other banks and fintechs in an increasingly digital market.[160] The Commission's conclusion to the contrary depends on it wrongly discounting major banks' technology investments as "defensive" responses to competition,[161] when the very fact of a defensive response to competition supports the absence of coordination. Given the market structure and the number of coordinating firms would not be changed by the proposed acquisition, and Suncorp Bank does not lead innovation in this market,[162] the proposed would not reduce the incentives of the major banks to innovate and respond to innovation.

(vii) (**Market stability**) The proposed acquisition will not have any impact on market stability. There are regular periods of market instability that are driven by external events, recently including COVID-19 and the rapid changes in the cash rate.

(viii) (**Barriers to entry and expansion**) There are effective competitive constraints imposed by Macquarie Bank and other smaller banks, which increasingly capture market share from major banks.[163] Barriers to entry and expansion are

[155] Decision [6.228].

[156] Expert report of Professor Nicolas de Roos, p 8.

[157] Decision [6.231].

[158] See paragraph 24(f)(iii); see also Decision [6.111].

[159] Decision [6.108].

[160] Second Campbell statement [22]; Second Elliott statement [41] and [47].

[161] Decision [6.236], [6.238].

[162] Decision [6.156].

[163] See paragraph 24(f); see Decision [6.249], referring to Starks report 16 June 2023 [9.102].

surmountable and decreasing.[164] The Commission's conclusions to the contrary[165] are unsupported by the weight of the evidence and understate the competitive success of Macquarie Bank (which has more than doubled its market share in the past 5 years). To the extent that competitors like Macquarie Bank may seek to target particular customer segments, rather than competing across all customer types, that does not demonstrate a lack of competitive constraint or potential to expand:[166] as the Commission elsewhere observed, smaller banks typically target specific market segments in order to compete effectively. The proposed acquisition will not increase any barriers to entry or expansion that may still exist or prevent them from continuing to decline.

(ix) (**Frequency of interaction**) The proposed acquisition will not change the extent to which the major banks (or any other banks) will interact.

(b) It is not apparent from the Commission's experts that a material change in one attribute alone would have a corresponding material effect on the overall likelihood, extent, severity or sustainability of coordination. Instead, using symmetry as an example, Professor de Roos says "if the [proposed acquisition] leads to a more symmetric distribution of market shares, then this could also make coordination easier to achieve and more sustainable."[167] Professor de Roos presents this as a hypothetical possibility only.

(c) The Commission does not explain why the other three banks, two of which are significantly larger, would have any incentive to accommodate a slightly enlarged ANZ as a result of the proposed acquisition.

(d) The Commission appears to have placed significant weight on "various industry characteristics and trends" that lead it to conclude that "the retail banking sector remains highly concentrated amongst the four major banks and that structural barriers across the sector remain high", which results in "muted competition across the retail banking sector, which the [Commission] does not consider is likely to be disrupted, at least not in the medium-term (say, the next 5-7 years), by timely and sufficient entry or expansion".[168] These contextual matters do not place appropriate weight on the submissions and evidence before the Commission about the state of competition in each market and, importantly, ANZ and Suncorp Bank's role in it.

55. *Second,* the Commission's conclusion that the proposed acquisition materially increases the symmetry among the major banks, so as to materially increase their incentives to coordinate, is not supported by the evidence.

(a) The Commission correctly accepted that the four major banks are asymmetrical in many respects, but nonetheless considered there was a level of symmetry likely to make coordination "feasible".[169]

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[164] See paragraph 24(i); see Decision [6.251]; see also [4.111].

[165] Decision [6.252]-[6.253]; see also [6.93].

[166] c.f. Decision [6.95].

[167] Expert report of Professor Nicolas de Roos, page 8.

[168] Decision [4.141].

[169] Decision [6.215].

(b) The proposed acquisition results in a *de minimis* increase in ANZ's market share and does not materially increase the symmetry in market shares between the smaller and larger of the major banks.[170] A small increase in market share gives ANZ no more incentive to coordinate whether it is the third or fourth largest bank.[171] The Commission's conclusions to the contrary are inconsistent with the weight of the expert evidence.[172]

(c) There is no evidence that changes in the relative proportions of the components of ANZ's funding base as a result of the proposed acquisition are material or that this will have any material effect on ANZ's incentives or strategies to compete. The Commission's conclusions to the contrary are entirely speculative and unsupported by the evidence.[173]

(d) There is no evidence that an increase in ANZ's Australian-sourced income of 2-3% will make its income and profits materially more dependent on market conditions in Australia so as to increase its incentive to coordinate.[174]

(e) The Commission's assessment wrongly assesses the degree of symmetry of the major banks relative to other banks,[175] rather than as among the group of potential coordinators (or competitors). It accordingly overstates the degree of symmetry between the major banks.

56. The Commission's conclusion on increased symmetry is a forward looking one: it is based on increased symmetry in the future in which ANZ acquires Suncorp bank. However, the inputs are backwards-looking data on the nature of that symmetry. The market shares for home loans that the Commission uses in coming to its conclusions on increased symmetry are the shares for existing loans. Those shares are significantly different to the shares for new loans, which will necessarily make up an increasing portion of banks' overall assets as older loans expire. By way of illustration, Macquarie Bank accounts for approximately 12% of new loans.

57. The Commission has not attempted to assess the likelihood of coordination based on increased symmetry (the only attribute identified to be affected by the proposed acquisition) where market shares for new loans are the inputs, or even a meaningful proportion of the inputs given they will, over the timeframe that the merger could have competitive effects, take up an increasing proportion of overall loans.

58. Further, the Commission found that Suncorp Bank does not appear to be a particularly vigorous competitor in pricing of home loans and that ANZ and Suncorp Bank are not especially close competitors.[176] The Commission does not explain how removing a competitor with those characteristics would therefore lead to ANZ having an incentive to coordinate.

59. *Third,* within the Commission's conclusion on coordinated effects is the statement that in the absence of the proposed acquisition "ANZ would likely seek to continue to grow organically, and in doing so, would likely continue to be incentivised to compete harder than the other major

[170] Paragraph 22(a).

[171] c.f. Decision [6.259].

[172] See Starks report 16 June 2023 [8.54]; Supplementary Williams report [89]-[101].

[173] See Decision [6.259].

[174] c.f. Decision [6.259].

[175] Decision [6.214].

[176] Decision [6.166].

banks to grow its domestic market share".[177] There is no substantiation of the implication that ANZ will not be incentivised to compete to grow its domestic market share in the future with the proposed acquisition. The fact that the proposed acquisition is "the equivalent of many years of organic system growth" cannot be used to raise a concern that ANZ's incentives to compete will reduce.

60. *Fourth,* the evidence establishes that ANZ will need to continue to compete vigorously to retain Suncorp Bank's customers, and that the proposed acquisition will not reduce ANZ's incentives to continue to compete.[178] As the Commission correctly observed, ANZ presently has strong incentives to win new home loan customers.[179] Those incentives —given its size relative to CBA and Westpac with or without the proposed acquisition — are not materially affected by the proposed acquisition. ANZ will be equally incentivised to retain the Suncorp Bank customers it obtains (who could easily refinance away from ANZ) and to continue to win new customers.

61. *Fifth,* the Commission's reasoning is internally inconsistent and as a result, is not a proper or robust basis on which to come to conclusions on competition effects.

(a) The Commission considers that the market is currently conducive to coordination between the major banks.[180]

(b) However, the Commission considers that ANZ is currently "incentivised to compete harder than the other major banks" (i.e., it is not incentivised to coordinate). [181]

(c) To address this inconsistency, the Commission considers that the marginal increase in ANZ's market share, change to its funding base or domestic focus would cause it to cross some threshold such that coordination rather than competition is in its interests, making "ANZ's income and profits more dependent on market conditions in Australia, and its incentive to coordinate on home loans correspondingly greater".[182]

(d) However, the Commission is ***not*** concerned that ANZ crossing that threshold through "organic" growth would result in coordination concerns — instead, it considers that reaching that threshold "organically" would be reflective of "competing harder".[183]

62. *Sixth,* as described in paragraph 54, even if other features of the home loans market make it conducive to coordination (which is not accepted), none of those features are affected by the proposed acquisition (as the Commission correctly found).[184]

63. *Seventh,* the evidence does not establish (and the Commission does not conclude) that there is past or present coordination in the market.[185] The very fact that past coordination is not established, makes less likely the prospect of future coordination. The evidence establishes that major banks are competing vigorously on price (as the Commission correctly found) as well as

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[177] Decision [6.259].

[178] See Decision [6.166], referring to Starks report [9.43.2].

[179] Decision [6.266]; Second Elliott statement [68].

[180] Decision [6.255].

[181] Decision 6.259.

[182] Decision [6.259].

[183] Decision [6.259].

[184] Decision [6.256].

[185] See paragraph 24(f); Decision [6.181]-[6.185].

non-price matters.[186] This is consistent with a longer-term trend of increasing competition supported by the structural and behavioural changes in the market described in paragraph 21 above.[187] The Commission concluded that the macroeconomic environment was likely to be a significant contributing factor, but concluded that it could not pinpoint the precise cause.[188] The Tribunal should be satisfied that, even if macroeconomic changes contributed to increased intensity in competition, and even if competition reduces in intensity compared with its present state, that does not indicate a lack of effective competition previously or in the future. None of the factors on which the Commission relies to conclude recent intense price competition is temporary supports that conclusion.[189] The intensity of competition ebbs and flows in any market, but the long term trend demonstrates that competition has steadily increased as a result of, among other factors, regulatory changes promoting competition, intense scrutiny of the banking industry, changes in technology and consumer preferences that make switching easier, and the rapidly growing influence of brokers for both home loans and business banking.

64. *Eighth,* contrary to the Commission's conclusions, a merged Bendigo/ Suncorp Bank is unlikely either to increase ANZ's incentives to compete or constrain any coordination in the market.[190] Even if a Bendigo/ Suncorp Bank merger occurred (which is speculative and commercially unlikely for the reasons outlined in paragraph 46 above), the evidence does not support a conclusion that a merged Bendigo/ Suncorp Bank will be a more effective competitor in home loans at all (for the reasons explained in paragraph 48 above), let alone a strong enough price competitor to result in a material loss of market share sufficient to disrupt coordinated pricing conduct that could not be disrupted by existing effective competition from Macquarie Bank. Even if a merged Bendigo/ Suncorp Bank offered a "different business model" or targeted "different niches in the competitive fringe"[191] (concepts that do not rise above the level of theoretical better service), that provides no basis to conclude that such non-price competition will constrain major banks in relation to price. There is no evidence that major banks have or are likely to coordinate on non-price aspects of competition.[192]

65. *Ninth,* the mere theoretical possibility of a combined Bendigo/ Suncorp Bank exercising a competitive constraint on major banks sufficient to disrupt coordination, in an already unlikely counterfactual, should be given little weight in the Tribunal's single evaluative inquiry. That is particularly so having regard to the Commission's conclusions that there is no real chance of substantially lessening competition in the home loans market based on unilateral effects. According appropriate weight to the likelihood of that outcome, the Tribunal should conclude there is no real chance that the proposed acquisition will have the effect of substantially lessening competition in the home loans market.

66. Finally, in concluding that the likelihood of major banks engaging in coordinated conduct is a substantial lessening of competition, the Commission wrongly reasons backwards from its effect on consumers.[193] Although any lessening of competition is likely to have an effect on consumers, the question of whether a lessening of competition is substantial is properly

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[186] See paragraph 24(f) and 24(h); Decision [6.114], [6.140].

[187] See also Third Smith report [65]-[69].

[188] Decision [6.137].

[189] Decision [6.32], [6.149].

[190] c.f. Decision [6.267]-[6.270].

[191] Decision [6.269], by reference to Starks report [9.113.5]; see also Decision [6.169].

[192] Decision [6.180] and [6.181].

[193] Decision [6.272]-[6.273].

considered by reference to the extent or degree to which competition is lessened. The extent or degree of consumer harm does not increase the likelihood of coordinated effects.

No substantial lessening of competition in respect of SME banking

67. The key facts about the supply of banking products and services to SME customers are set out at paragraph 25 above. The Commission wrongly assessed the proposed acquisition by reference to a Queensland market as a proxy for local/ regional markets for SME banking. The proper market for assessment is a national market for the supply of business banking products and services (including to SME and agribusiness customers) having regard to the product and geographic features described in paragraph 39 above.

68. Even accepting the Commission's market definition, the Tribunal should be satisfied that the proposed acquisition will not have the effect of substantially lessening competition having regard to the weight of the evidence before the Tribunal, including the expert evidence (and the Commission's own expert who concluded there was no real chance of a substantial lessening of competition in this market).[194] In particular, the Commission wrongly concluded that other competitors would pose an insufficient constraint in the factual (a conclusion the Commission conceded was "finely balanced").[195] That conclusion is wrong, for the following reasons.

69. *First,* the Commission was incorrect to conclude that the market is concentrated (despite acknowledging the significant limitations in data that prevented it from calculating concentration with a reasonable degree of precision).[196] The absence of reliable data underscores ANZ's contention that SME banking should not be considered separately from broader business banking including agribusiness. The data does not distinguish between SME and agribusiness customers or otherwise adopt a consistent definition of what constitutes an SME business.[197] Properly analysed the market is not concentrated.[198]

70. *Second,* Suncorp Bank is not a particularly vigorous or effective competitor.[199] The Commission did not conclude that it is a vigorous competitor, only that as a competitor it is a "realistic alternative" to the major banks.[200]

(a) As the Commission correctly accepted, Suncorp Bank is not a price leader.[201]

(b) As the Commission also correctly accepted, many other banks use a relationship model.[202] The evidence does not establish that Suncorp Bank's model is different to, let alone better than, other regional banks (including BOQ or Bendigo).[203] Nor does the evidence establish that Suncorp Bank's model is better than ANZ's.[204] The Commission's conclusion that Suncorp Bank's customer service is "apparently" better than the major banks, is based on a speculative inference from the number of customers allocated to

[194] See paragraph 25.

[195] Decision [6.577].

[196] Decision [6.495]-[6.497].

[197] Decision [6.491]-[6.492]

[198] See paragraph 25(b).

[199] See paragraph 25(d).

[200] Decision [6.534].

[201] Decision (Suncorp) [6.523], [6.527].

[202] Decision [6.530].

[203] See for example, Decision [6.530] and Starks report [9.257].

[204] See paragraph 25(g).

each managers (which the Commission itself accepted is an imperfect proxy).[205] ANZ and Suncorp Bank have equivalent ratios for medium-sized businesses.[206] That ANZ has a higher ratio of customers to relationship managers for smaller business banking customers is at least in part a function of ANZ's investment in automation which allows its relationship managers to focus on customer engagement. As the Commission accepted, smaller banks may not have the capacity to invest in automation; whereas larger banks can do so to free up staff capacity to perform higher value work, which improves customer experience and reduces cost.[207]

(c) The Commission wrongly concluded that Suncorp Bank's brand recognition, branch network and customer relationships are sufficient to exert a strong competitive constraint.[208] While brand recognition and presence helps Suncorp Bank win customers in Queensland, this does not pose a particularly strong competitive constraint on ANZ. As the Commission recognised, major banks such as ANZ similarly benefit from brand recognition (indeed, more so than smaller banks).[209]

71. *Third,* as the Commission correctly accepted, Suncorp Bank and ANZ are not each other's closest competitors, given the differences in their strategic focus and customer cohorts, geographic presence and capabilities to serve medium to large business customers.[210] This is evidenced by very limited refinancing between ANZ and Suncorp Bank.[211] The Commission's conclusion that ANZ and Suncorp Bank may compete more closely in the future because ANZ will target small business customers with home loans[212] is speculative and unsupported by the evidence. In particular, ANZ already targets business customers with home loan needs[213] and there is no evidence that Suncorp Bank similarly seeks to target this segment (or that they would be competitive in doing so, having regard to their competitive positioning in home loans).

72. *Fourth*, as the Commission also correctly accepted, other competitors will continue to impose a competitive constraint, including the major banks and BOQ (with a scale, physical presence and product range similar to Suncorp Bank) as well as Judo Bank and Bendigo.[214] The Commission correctly accepted that competition in SME lending is strong[215] and that second tier banks compete strongly for smaller SME customers.[216] The Commission also correctly accepted that business brokers play an increasing role in driving competition in SME lending and originate a significant proportion of new SME loans.[217]

73. *Fifth,* despite identifying competition in SME as occurring on a local/ regional basis, the Commission did not identify any local or regional areas likely to be affected by the proposed acquisition. If the proposed acquisition proceeds, the Commission's expert provided evidence

[205] Decision [6.530].

[206] See paragraph 25(e).

[207] Decision [6.473], [6.475].

[208] Decision [6.533]; [6.566]-[6.568].

[209] Decision [4.113]-[4.119].

[210] See paragraph 25(e); Decision [6.571], [6.537]-[6.540].

[211] Decision [6.539].

[212] Decision [6.542].

[213] Decision [6.483]-[6.486].

[214] See paragraph 25(c); Decision [6.572]-[6.573].

[215] Decision [6.502].

[216] Decision [6.502].

[217] Decision [6.510]-[6.514].

that there is no town in Queensland which would have fewer than four alternative bank branches supplying SME banking services.[218] The Tribunal should not be satisfied there is likely to be a substantial lessening of competition in those markets.

74. *Sixth*, the threat of expansion and new entry acts as a further competitive constraint.

(a) Barriers to expansion are not high, and the Commission did not conclude that they are.[219] The Commission correctly accepted that existing banks have the capacity to expand.[220] Potential barriers identified by the Commission — such as acquiring personnel and branch presence[221] — are not significant, particularly in circumstances where there is no evidence that existing banks cannot successfully compete for SME bankers or that expanding their branch presence is necessary to compete.[222] Customers can and do multi-bank and switching has increased, particularly for smaller business customers.[223] To the extent that there is customer stickiness, the evidence relied on by the Commission suggests it operates equally in favour of smaller regional banks in the form of customer loyalty. In those circumstances, Judo Bank's lack of branch presence and Bendigo's limited presence in Queensland do not limit their capacity to act as constraints (contrary to the Commission's conclusions).[224]

(b) The Commission's conclusion that barriers to entry are otherwise high is not consistent with the weight of the evidence before the Tribunal in a number of respects. That evidence establishes that timely and sufficient entry and expansion is possible. In particular:

(i) the evidence does not support the conclusion that the regulatory barriers to becoming an ADI are significant,[225] as evidenced by the presence of over 100 ADIs in Australia[226] and the findings of the Productivity Commission that the regulatory environment is conducive to competition and supports new entrants in SME banking;[227]

(ii) there is no evidence that potential new entrants cannot compete effectively to attract SME bankers, particularly SME bankers that typically serve small business customers;[228]

(iii) new entrants are likely to face lower technological barriers, given they are unburdened by legacy technology systems (as the Commission correctly accepted);[229]

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[218] See paragraph 25(c).

[219] See paragraph 25(c); Decision [6.574].

[220] Decision [6.561].

[221] Decision [6.555], [6.562].

[222] Decision [6.557].

[223] See paragraph 25(c); Decision [6.544], [6.547].

[224] Decision [6.573].

[225] c.f. Decision [6.553]-[6.554], [6.575].

[226] Decision [4.31].

[227] Decision [6.553]; see also Starks report [9.270].

[228] See Decision [6.470], c.f. Decision [6.555], [6.562].

[229] Decision [6.556].

(iv) branch set up is unlikely to act as a barrier to entry or expansion;[230]

(v) as the Commission correctly accepted, competition from new entrants is an existing feature of the market: Judo Bank and Macquarie Bank are each examples of successful new entry[231] and competition from non-bank lenders and fintechs is growing;[232]

(vi) as the Commission also accepted, the use of brokers is increasing, has contributed to customer switching, and is critical for new entry and expansion particularly for new, online and non-bank lenders.[233]

(c) Further, as the Commission correctly accepted, competitive constraint (whether from new or existing entrants) comes from competition in particular industry segments and 'unbundled' products and services.[234] That proposition is fundamental to the Commission's conclusion as to the competitive significance of Suncorp Bank.[235] That is inconsistent with the Commission's conclusion that it is necessary to offer a full range of deposit and lending products to be an effective competitor.[236]

75. *Seventh,* to the extent that a combined Bendigo/ Suncorp Bank would impose a constraint similar to Suncorp Bank alone, there is no increase in competitive constraint in the Bendigo merger counterfactual. For the reasons outlined in paragraph 48 to 50 above, a merged Bendigo/ Suncorp Bank is unlikely to be a more effective competitor at all, or in supplying SME customers where neither bank, but particularly Bendigo, does not impose a strong constraint.

No substantial lessening of competition in agribusiness

76. The key facts about the supply of banking products and services to agribusiness customers are set out at paragraph 26. The Commission wrongly assessed the proposed acquisition by reference to a Queensland market (as a proxy for local/ regional markets) for agribusiness banking. The appropriate market is a national market for business banking products and services, for the reasons described in paragraph 39 above.

77. However, even accepting the Commission's market definition, the Tribunal should be satisfied that the proposed acquisition will not have the effect of substantially lessening competition on the weight of the evidence (including the expert evidence and the Commission's own expert who concluded there was no real chance of a substantial lessening of competition in this market)[237] before the Tribunal, for the following reasons.

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[230] Decision [6.557].

[231] Decision [6.502].

[232] Decision [6.504]-[6.506].

[233] See paragraph 25(c); Decision [6.510]-[6.514].

[234] See paragraph 25(c); Decision [6.567], [6.569].

[235] Decision [6.534], [6.567], [6.569].

[236] Decision [6.558].

[237] See paragraph 26(a).

78. *First,* the Commission wrongly concluded the market concentration is "moderately high".[238] The Commission's analysis is based on incomplete data. Properly analysed, the market is not concentrated nationally and only moderately concentrated in Queensland.[239]

79. *Second,* the evidence does not establish that Suncorp Bank imposes a particular competitive constraint that is not replicated by other banks.[240] The evidence does not establish that Suncorp Bank leads the market or drives competition on price.[241] Nor does the evidence establish that Suncorp Bank's relationship management is unique or different to other regional banks, or is otherwise "more personalised and attentive" than major banks.[242] The Commission's conclusion is based on its inference from the proportion of relationship managed customers and the number of customers allocated to each manager.[243] However, ANZ and Suncorp Banks's relationship models are comparable and to the extent Suncorp Bank currently offers a relationship management model to small customers where ANZ does not, it will not compete for those customers in the status quo counterfactual, as part of the agribusiness portfolio.[244] Further, given the importance of relationship management to supplying business customers (particularly agribusiness customers) from both a demand and supply perspective, ANZ will not have the incentive to cease offering a relationship management model to customers, including to Suncorp Bank customers it acquires as a result of the proposed acquisition.

80. *Third,* ANZ and Suncorp Bank are not each other's closest competitors and ANZ will continue to be constrained by other more significant competitors.[245] Even accepting that ANZ and Suncorp Bank are likely to compete for some customers in the 11 towns where ANZ and Suncorp overlap, there are at least three other banks supplying agribusiness customers (including CBA, NAB, Westpac or Rabobank) in each of those locations.[246] As the Commission accepted, ANZ will continue to be constrained by each of the major banks and Rabobank[247] and the evidence establishes that NAB and Rabobank impose a greater competitive constraint on ANZ than Suncorp Bank and they will continue to impose that constraint.[248]

81. *Fourth,* the threat of new entry and expansion acts as a competitive constraint.[249] The Commission wrongly concluded that the constraint imposed by the threat of new entry or expansion is limited.[250] The weight of the expert evidence establishes that barriers to expansion are likely to be low.[251] The Commission's conclusion that recruiting or training specialised agribusiness bankers is sufficiently difficult to limit the threat of expansion or entry is inconsistent with Judo Bank's recent entry into agribusiness banking (including its capture of agribusiness bankers from ANZ).[252] Given low barriers to expansion, the Tribunal should conclude that ANZ

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[238] Decision [6.674].

[239] See paragraph 26(c).

[240] See paragraph 26(e).

[241] Decision [6.696].

[242] Decision [6.701]-[6.702].

[243] Decision [6.648].

[244] Paragraph 26(g).

[245] Paragraph 26(c) and 26(d).

[246] Decision [6.678], referring to Starks report [9.228]-[9.229].

[247] Decision [6.747].

[248] Paragraph 26(e)

[249] Paragraph 26(f).

[250] Decision [6.731], [6.738], [6.748].

[251] First Williams [112]; Second Williams [47]; Starks report [9.236].

[252] Paragraph 26(f); See Decision [6.737], referring to Starks report [9.234] and Bennett statement [179]-[180].

is likely to be constrained by the threat of expansion from Rabobank in the limited number of towns which would not have a regional or second-tier presence following the proposed acquisition, and more generally by BOQ, Judo Bank and Bendigo.

82. *Fifth,* to the extent that a combined Bendigo/ Suncorp Bank would impose a constraint similar to Suncorp Bank alone,[253] there is no increase in competitive constraint in the Bendigo merger counterfactual. For the reasons outlined in paragraphs 48 to 50 above, a combined Bendigo/ Suncorp Bank is unlikely to be a more vigorous and effective competitor than Bendigo or Suncorp Bank alone, or in agribusiness where neither bank, but particularly Bendigo, imposes a strong constraint.[254]

Public benefits

83. The proposed acquisition gives rise to a number of substantial public benefits, including the following:

(a) Suncorp Group will be able to focus on, and invest in, developing its insurance business, including investing in digitisation, and will have better access to capital, allowing it to become a more efficient and competitive insurance business.[255]

(b) The proposed acquisition is likely to achieve substantial merger-specific integration synergies — in the order of annual costs savings of $260 million within six years from completion (with a net present value of approximately [redacted] after accounting for integration costs and Suncorp Group's additional separation costs) — resulting from the elimination of duplicate fixed costs and ANZ performing functions at a lower cost than Suncorp Bank on its own. These effects are likely to enhance productive efficiency and be passed through to consumers in the form of lower costs or better products (including through technological investment).[256] The estimated synergies are reliable, merger-specific, sufficiently certain and conservative.[257]

(c) The proposed acquisition would result in Suncorp Bank benefiting from ANZ's higher credit rating (S&P Global "AA" versus its current "A" rating under Suncorp Group). This would be likely to reduce Suncorp Bank's wholesale funding cost to a substantial degree and constitutes a productive efficiency. This is likely to result in material cost savings passed through to consumers,[258] and would be unlikely to be materially offset by any increased major bank levy that ANZ would pay based on adding Suncorp Bank's assets, or by any higher capital requirements or greater systemic risk.

(d) The proposed acquisition will improve the prudential safety of Suncorp Bank, by subjecting it to the capital requirements of a domestic systemically important bank (**D-SIB**) and thereby reducing residual systemic risk in the Australian financial system.[259] This will benefit Suncorp Bank depositors in terms of the increased safety and soundness

[253] Decision [6.749].

[254] Paragraph 26(f) and 26(h); Decision [6.747].

[255] First Johnston statement [41]-[46], [101]-[106], [87]-[92]; Second Johnston statement [94]-[124].

[256] First Smith report; Second Smith report [10]-[18]; Third Smith report [11]-[17]]; First and Second Higgins statements.

[257] First Higgins statement [83]-[85] [93]-[94]; Second Higgins statement [7]-[12].

[258] See also Decision [4.92]-[4.96].

[259] First and Second Carmichael Reports.

of their deposits, and taxpayers and the broader public public more generally through reduced systemic risk.

(e) The combined banking business of ANZ and Suncorp Bank will make a greater contribution to government through the major bank levy of approximately $24 million per year by reason of Suncorp Bank's liabilities becoming subject to that levy.[260]

(f) There will be direct benefits to the Queensland economy and Queenslanders as set out in the Queensland Commitments given by ANZ and Suncorp Group to the State of Queensland, including: [redacted] ANZ's [redacted], the establishment of the Tech Hub described in paragraph 18(a)(iii) [redacted] These commitments and investments would not be made absent the proposed acquisition and are necessary for the proposed acquisition to complete.[261]

84. Each of these public benefits is likely to arise only as a result of the proposed acquisition. By contrast, in the future without the proposed acquisition, even if a Bendigo/ Suncorp Bank merger occurred (which is speculative and commercially unlikely):

(a) a merged Bendigo/ Suncorp Bank is unlikely to achieve integration synergies of the kind or in the timeframe achievable by ANZ;[262]

(b) a merged Bendigo/ Suncorp Bank is likely to face higher costs of wholesale funds;[263]

(c) a merged Bendigo/ Suncorp Bank would decrease prudential safety because the merger would increase underlying systemic risk, without any corresponding mitigation through a change in capital adequacy requirements (in contrast to a merged ANZ/ Suncorp Bank);[264]

(d) a merged Bendigo/ Suncorp Bank is unlikely to have the balance sheet, scale or expertise to make the equivalent commitments to the Queensland government, which were relevant to the Queensland government's decision to commit to repealing the Metway Merger Act.[265]

85. The proposed acquisition is not likely to give rise to any public detriments or otherwise any detriments that outweigh the benefits described in paragraph 83 above. The Commission correctly accepted that the proposed acquisition is unlikely to result in public detriments from reduced access to physical banking services or employment impacts.[266]

The proposed acquisition is likely to result in a net public benefit

[260] Application [8.71].

[261] First Elliott statement Part E; Second Elliott statement Part H.

[262] See paragraph 41.

[263] See paragraph 41.

[264] Second Carmichael report.

[265] Third Johnston statement, [35]-[36].

[266] Decision [7.146], [7.150].

86. The evidence before the Tribunal establishes each of the significant public benefits arising from the proposed acquisition described in paragraph 83 above. The Commission correctly accepted that the proposed acquisition is likely to result in public benefits from Suncorp Group becoming a stronger insurer,[267] costs savings likely to accrue to ANZ,[268] and some "prudential related benefits".[269]

87. However, the Commission discounted the weight to be given to those public benefits, and to public benefits from the Queensland Commitments, in its assessment. Contrary to the conclusions reached by the Commission, the evidence establishes that those benefits are substantial, sufficiently certain, and result from the proposed acquisition.

88. Further, the alleged public detriments to the Australian banking industry are not established on the evidence or are otherwise speculative and not a result of the proposed acquisition.

Stronger insurer benefits

89. The Tribunal should give weight to the benefits of Suncorp Group's monoline insurance focus, which are both significant and merger-specific:

(a) The evidence establishes that there are likely to be significant efficiencies from Suncorp Group simplifying its insurance business via the proposed acquisition and the Commission wrongly concluded the public benefit would be small despite accepting the proposed acquisition would be likely to improve the overall performance of Suncorp Group's insurance business.[270]

(b) The benefits are merger-specific because, for the reasons set out in paragraph 46 above, the only commercially realistic possibility of such a divestment arises from the proposed acquisition.[271] There is no evidence that equivalent benefits from any improvement to Suncorp Group's insurance business would be likely to be realised in the Bendigo merger counterfactual, and the Commission wrongly concluded that the benefit should be confined to the benefit arising sooner than it would in the Bendigo merger counterfactual.[272]

Significant costs synergies

90. The Tribunal should also give significant weight to the public benefits from cost savings likely to be achieved by the proposed acquisition, which are substantial even when dis-synergies, integration costs and any non-merger specific synergies are accounted for. Those benefits are sufficiently certain, and unlikely to be achieved by Suncorp Bank (under Suncorp Group's ownership) or in any comparable way in the Bendigo merger counterfactual.[273]

91. The Commission wrongly concluded that the likelihood and quantum of synergies estimated by ANZ is not sufficiently certain.[274] The Commission's conclusion that the synergies estimate is

[267] Decision [7.26], [7.107].

[268] Decision [7.59], [7.106].

[269] Decision [7.107].

[270] Decision [7.27], [7.31].

[271] c.f. Decision [7.29], [7.31].

[272] Decision [7.30].

[273] Smith report [13] and [60], Second Smith report [49].

[274] Decision [7.52].

likely to be overstated,[275] ignores ANZ's detailed evidence in favour of speculation based on public statements about the 2008 Westpac/ St George merger and general statements made by ANZ about the complexity of bank integrations.[276] ANZ's evidence establishes that it has benchmarked both integration costs and operating cost savings against past mergers and acquisitions, carefully considered the complexity of bank integrations and past experience in testing its synergies estimates and that it is highly unlikely that the information ANZ will obtain following completion of the proposed acquisition will be materially different or that ANZ will face impediments which have not been factored into its synergies analysis.[277] The evidence before the Tribunal establishes that the basis on which ANZ has estimated the synergies likely to result from the proposed acquisition is robust and transparent and the resulting estimates are conservative.[278] The evidence before the Tribunal further establishes that the estimated costs savings of the proposed acquisition remain substantial even taking into account dis-synergies from integration and Suncorp Bank's separation and stranded costs.[279]

92. The evidence establishes that the vast majority of ANZ's estimated synergies of $260 million per annum are merger-specific. In particular, they arise uniquely from the combination of ANZ and Suncorp Bank and are derived primarily from the migration of Suncorp Bank customers to ANZ technologies and platforms, in circumstances where ANZ has already made significant investment in transforming its technology estate, while Suncorp Bank has not. Only a very small proportion of ANZ's estimated full run rate synergies of $260 million per annum, relating to branch closures, could be realised by Suncorp Bank without the proposed acquisition.[280] The evidence before the Tribunal does not substantiate any comparable synergies likely to be achieved in the Bendigo merger counterfactual.[281] To the contrary, for the reasons explained in paragraph 49(c) above, there are likely to be significant dis-synergies arising from the integration complexity of the Bendigo merger.

93. Finally, the Tribunal should be satisfied that cost savings will be passed on to consumers in the form of better quality or lower price products and services.[282] As the Commission correctly recognised, even retained cost savings can constitute a public benefit.[283] The Tribunal should give weight to the public benefit of retained costs savings that are likely to be distributed to ANZ shareholders.

Reduced wholesale funding costs

94. The Commission correctly accepted that there is public benefit in the form of lower funding costs for Suncorp Bank following the proposed acquisition.[284] However, the Commission was wrong to conclude that the benefit is offset by the major bank levy, higher capital requirements and greater systemic risk.[285] The Commission's approach wrongly double discounted for each of

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[275] Decision [7.52].

[276] Decision [7.53]-[7.54].

[277] Second Higgins statement; Second Smith report [16].

[278] See First and Second Higgins statements.

[279] Second Smith report [16]-[17].

[280] Smith report [14], [61]-[63].

[281] Smith report [60], Second Smith report [49].

[282] Smith report [76]-[80]; Second Smith report [26], [28], [48]-[60]; Second Elliott statement [109].

[283] Decision [7.57].

[284] Decision [7.80].

[285] Decision [7.80].

those factors, having regard to its conclusion that the major bank levy and higher capital requirements each offset greater systemic risk.[286]

95. The Commission also correctly accepted that lower funding costs constitute a productive efficiency to the extent that lower costs do not reflect an implicit subsidy as a result of D-SIB status and capital requirements.[287] However, the Commission gave insufficient weight to the expert evidence that any implicit subsidy is substantially mitigated by the D-SIB capital requirements and major bank levy.[288] The Commission was wrong to conclude, contrary to the expert evidence, that lower funding costs thus constitute only a small benefit.

96. For the reasons outlined in paragraph 93 above, the Tribunal should be satisfied that benefits are likely to be passed through to consumers[289] and should nonetheless give weight to retained benefits, particularly where those benefits are likely to be distributed to ANZ shareholders.

Increase in prudential safety

97. The Commission wrongly concluded that the reduction in residual systemic risk described by Dr Carmichael is too unclear to take into account as a public benefit.[290] Although not possible to quantify precisely, the reports of Dr Carmichael provide a clear basis for finding that by subjecting Suncorp Bank assets to greater capital adequacy requirements (of almost 60%), the proposed acquisition will reduce residual systemic risk, to the substantial benefit of the broader community, particularly when compared to the Bendigo merger counterfactual.[291] This is consistent with the conclusions of the Commission's expert that the benefits are plausible and "it is reasonable to treat any material reduction in the risk of bank failure as a significant public benefit."[292]

Increase to the major bank levy

98. The proposed acquisition will substantially increase ANZ's major bank levy payments. This is a significant benefit that will not arise in the (only commercially realistic) counterfactual. The Commission correctly accepts this could represent a public benefit to the extent it does not offset an increase in systemic risk.[293] For the reasons outlined above, any increase in systemic risk is already accounted for in the estimation of public benefits.

Queensland Commitments

99. The Tribunal can properly take into account the benefits from the Queensland Commitments when considering the public benefits of the proposed acquisition.[294] The benefits from the Queensland Commitments will flow from conduct which itself is an effect of, or a result of, the proposed acquisition, namely commitments that ANZ and Suncorp have given the State of Queensland pursuant to Implementation Agreements executed on [redacted]

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[286] Decision [7.85].-[7.86], [7.89].

[287] Decision [7.81].

[288] Second Ali report, [88], [92].

[289] Smith report [23]-[24], [96]-[97].

[290] Decision [7.86]-[7.87].

[291] Carmichael report [2.6], [3]; Second Carmichael report [2.16], [2.17].

[292] Starks report [10.54].

[293] Decision [7.89]-[7.90].

[294] c.f. Decision [7.99]-[7.100].

[redacted] The Implementation Agreements are an effect of, or a result of, the proposed acquisition and the effects of the Implementation Agreements are thus properly to be considered as effects or results of the proposed acquisition. Those effects are thus causally related to the proposed acquisition. The SSPA and Implementation Agreements are not coincident agreements entered into as part of one commercial transaction. Rather, the Implementation Agreements were entered into after the SSPA, and as a direct result of the proposed acquisition. Relevantly:

(a) The SSPA is conditional on the Metway Merger Act being repealed or amended such that it does not apply to any holding company of Suncorp Bank (i.e., ANZ) (the condition precedent).[295]

(b) In order to bring about this result, it was necessary for ANZ and Suncorp to give the Queensland Commitments as recorded in the Implementation Agreements: they are therefore an effect of, or a result of, the proposed acquisition.[296] The Implementation Agreements are conditional on the proposed acquisition completing and cannot be terminated by ANZ or Suncorp Group if the proposed acquisition completes.

(c) The evidence of ANZ and Suncorp Group is that the commitments in the Implementation Agreements result from the proposed acquisition.[297]

100. The Tribunal should also be satisfied that the Queensland benefits are merger-specific.[298]

(a) The evidence establishes that ANZ would not make the investments to which it has committed, or invest to the same extent, in the future without the proposed acquisition.[299]

(b) The evidence establishes that Suncorp Group would not otherwise make the investments in Queensland to which it has committed (including in the Bendigo merger counterfactual), because the funding for those investments is made possible only through the value realised as a result of the proposed acquisition.[300]

(c) By contrast, in the future without the proposed acquisition, there is no commercially realistic possibility that such public benefits would be achieved, or achieved to any similar extent.

(d) The Commission was wrong to discount the Queensland benefits on the basis that, absent the proposed acquisition, it is likely ANZ or other banks would take advantage of profitable lending or investment opportunities in Queensland.[301] The very point of the investment commitments is that the parties are bound to give effect to them regardless of whether there is economic benefit to be obtained.[302] Thus it is not simply a question of whether the investment occurs on more favourable terms, but whether it occurs at all.[303] [redacted]

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[295] Share Sale and Purchase Agreement, cl. 2.1(c), cl. 2.6, Sch. 17 (Part A).

[296] See, for example, Fourth Johnston statement [7]-[16].

[297] Third Elliott statement [9]; Third Johnston statement [32], [36].

[298] c.f. Decision [7.102].

[299] ANZ SOPVR [9.155]; First Elliott statement [88]; Second Elliott statement [122], [126], [135] and Third Elliott statement [9].

[300] Third Johnston statement [36].

[301] Decision [7.102].

[302] c.f. Decision [7.102].

[303] c.f. Decision [7.103].

[redacted]

101. The Tribunal should give the Queensland benefits significant weight in its assessment of the public benefits of the proposed acquisition. The Commission gave insufficient weight to the Queensland commitments, including [redacted] and the disaster recovery centre and other commitments given by Suncorp Group, described in paragraph 18(b).

102. [redacted] Finally, contrary to the Commission's conclusions, the timeframes of the commitments are not uncertain, [redacted]

No competitive detriments from a lessening of competition in relevant markets

103. The Commission concluded that the proposed acquisition would be likely to result in competitive detriment in markets for home loans, retail deposits, SME banking services and agribusiness banking products. However, as noted above the Decision does not indicate that the Commission has made a positive finding that the proposed acquisition would be likely to substantially lessen competition in any market. Instead, the Commission concluded that there exists some degree of potential loss of competition that meets an undefined threshold, from which the Commission cannot be satisfied that there will not be a substantial lessening of competition in markets for home loans, SME banking services and agribusiness banking products.

104. ANZ contends that the absence of satisfaction under the competition test does not amount to an appropriate counterweight to a positive finding of public benefits. In any event, any lessening of competition in the markets for home lending, SME banking services and agribusiness banking would not be meaningful for the reasons identified above. The Commission rightly concluded that the proposed acquisition would not be likely to substantially lessen competition in retail deposits, and to the extent there is any public detriment in that market from a loss of competition, it would not be meaningful.

105. ANZ contends that when set against the weight of the evidence, the Tribunal should be positively satisfied that the public benefits of the proposed acquisition outweigh any competitive detriments.

No competitive detriments for the Australian banking industry more broadly

106. The Commission wrongly concluded that the proposed acquisition would result in competitive detriments for the Australian retail banking industry more broadly, by "removing the best and most meaningful opportunity for another second-tier bank to bolster its ability to effectively

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[304] First Elliott statement [88]-[89]; second Elliott statement [122]-[130]; Transcript of Examination under section 155(1)(c), Shayne Elliott (ANZ), 28 April 2023, T178:28-T181:11.

[305] First Elliott statement [88]-[89].

[306] Decision [7.104].

challenge the major banks through a step change in scale" that would "further entrench an oligopoly structure".[307]

107. The Commission's approach was misconceived. The matters identified by the Commission cannot properly be assessed as competitive detriments other than by reference to relevant markets.[308] That is so, whether or not the competitive effects are considered under the competition test or public benefits test. Whether there exists an oligopoly, who are the market participants and whether those participants exert an effective competitive constraint, and the extent of barriers to entry and expansion[309] each direct attention to the question of the relevant markets in which competition is taking place. The "Australian banking industry" is not a market in which those matters can properly be assessed. The Commission, in its Decision, has not identified any markets in which those competitive conditions exist or detriments are likely to manifest beyond the markets considered in the Decision.

108. The Commission's conclusions in respect of the "Australian banking industry" can thus only be understood as generalised or aggregated from its conclusions in respect of relevant markets. When properly assessed by reference to the relevant markets, the proposed acquisition is not likely to result in those detriments in any relevant market for the reasons described in Part B above. In particular:

(a) The relevant markets are competitive and the evidence does not establish an existing oligopoly of the major banks in any relevant market (a conclusion not disputed by the Commission at least in respect of agribusiness banking and SME banking).

(b) Meaningful scale may be helpful, but not necessary for effective competition, as evidenced by examples of effective competition from smaller players — including Macquarie Bank, Judo Bank and RaboBank who have achieved organic growth in the relevant markets — and having regard to the Commission's finding that there is no minimum efficient scale to compete.[310]

(c) This is particularly evident in respect of non-price competition. The Commission accepts that smaller banks are effective non-price competitors in the absence of scale (and the Commission does not suggest that the scale achievable in the Bendigo merger counterfactual will be sufficient to compete other than on non-price aspects of competition).[311]

(d) The evidence does not establish that this is the last or "best and most meaningful" opportunity for a second tier or regional bank to acquire meaningful scale. The Commission correctly accepted that there are other second-tier banks of similar scale to Suncorp Bank.[312] There is no evident reason why an opportunity to acquire scale is not available through other combinations of Bendigo, BOQ or other smaller banks. The Commission relies on the fact that ANZ considers the proposed acquisition to be a unique opportunity for ANZ: but the fact that the proposed acquisition is particularly attractive and complementary for ANZ does not make it the only available or attractive opportunity for

[307] Decision [7.112], [7.133].

[308] *Pacific National* at [101], referring to *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at [190].

[309] Decision [7.114].

[310] Decision [4.87].

[311] Decision [7.119]-[7.120], see paragraph 50.

[312] Decision [7.128]-[7.129].

other banks. There is no inconsistency in this position:[313] rather it reflects in part the different capital and technology requirements of major banks, and their focus on price competition.[314]

(e) The evidence does not establish that a Bendigo/ Suncorp Bank merger (or indeed any other second tier merger counterfactual) will materially increase the competitive effectiveness of the merged second tier bank. For the reasons outlined in paragraph 50 above, the Tribunal should be satisfied that a scale increase in the Bendigo merger counterfactual will not materially increase its effectiveness as a competitor.

109. As the Commission conceded, its assessment of the competitive effect of the proposed acquisition in the relevant markets, and the alleged detriments arising in the Australian banking industry, are overlapping.[315] For the reasons outlined above, to the extent the alleged detriments are considered detriments at all, the Tribunal ought properly to consider them as detriments arising in respect of particular markets. No additional detriment arises for consideration under the public benefits test.

E. CONCLUSION

110. In all the circumstances, and having regard to the facts summarised in Part B and the contentions in Part D, the Tribunal should be satisfied that:

(a) the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition; and

(b) the proposed acquisition would result, or be likely to result, in a benefit to the public, and the benefit would outweigh any detriments to the public that would result, or be likely to result from the proposed acquisition.

[313] Decision [7.125].

[314] See Decision [5.28]-[5.29], [7.127].

[315] Decision [7.154].

ATTACHMENT B

KEY DOCUMENTS SUBMITTED TO THE COMMISSION IN CONNECTION WITH THE APPLICATION

Part A – ANZ and Suncorp Submissions

No.	Document	Date
Merger Authorisation Application		
1.	Confidential merger authorisation application	2 December 2022
2.	Annexures to the merger authorisation application	2 December 2022
Responses to third party submissions and the Commission's requests for information (**RFIs**)		
3.	Suncorp Group's response to interested party submissions	7 February 2023
4.	ANZ's response to interested party submissions	9 March 2023
5.	ANZ's response to the ACCC RFI dated 3 March 2023	10 March 2023
6.	Suncorp's response to the ACCC's RFI dated 6 March 2023	13 March 2023
7.	ANZ's response to Bank of Queensland's submission	22 March 2023
8.	ANZ's response to Bendigo and Adelaide Bank's submission	29 March 2023
9.	Suncorp's letter re submission from Bendigo and Adelaide Bank	3 April 2023
10.	ANZ's response to the ACCC's RFI dated 20 June 2023	28 June 2023
11.	CONFIDENTIAL – QLD AGRI ReFI IN and OUT data	28 June 2023
ANZ's SOPV Response		
12.	ANZ Response to Statement of Preliminary Views	23 May 2023
13.	Annexures to ANZ's Response to the Statement of Preliminary Views	23 May 2023
14.	ANZ Submission in Response to ACCC Statement of Preliminary Views Evidence Roadmap	16 June 2023
15.	Update to ANZ's Response to the ACCC's Statement of Preliminary Views	30 June 2023
16.	Letter from ANZ to ACCC re market structure and public benefits	13 July 2023

No.	Document	Date
Suncorp's SOPV Response		
17.	Suncorp Group submission in response to ACCC Statement of Preliminary Views	22 May 2023
18.	Response to ACCC statement of preliminary views on Queensland commitments	22 June 2023
19.	Suncorp Group Submission regarding Part C of Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2) [2023] ACompT 2 [Alternatively titled: Suncorp submission re public benefits]	13 July 2023
Suncorp's response to the Starks Reports		
20.	Suncorp Group submission in response to Mary Starks reports and second submission of Bendigo and Adelaide Bank	14 July 2023
ANZ's response to the Starks Reports		
21.	ANZ's response to the ACCC Independent Expert Reports	17 July 2023

Part B – Documents and data submitted by ANZ

No.	Document	Date submitted
ANZ's response to the s 155 notice dated 13 December 2022		
22.	ANZ's response to Schedule 1 of the s 155 notice	4 January 2023
23.	Schedule 1 – Item 4 – Product Register	4 January 2023
24.	Schedule 1 – Item 15 – Face-to-face points of presence	4 January 2023
25.	Schedule 1 – Item 27 – Agribusiness managers	4 January 2023
26.	Schedule 1 – Item 29 – Mobile lender postcodes	4 January 2023
27.	ANZ's covering letter for response to Q22 of Schedule 1	13 January 2023
28.	ANZ's response to Q22 of Schedule 1 to the s 155 notice	13 January 2023
29.	ANZ's response to Schedules 2 and 3 of the s 155 notice	13 January 2023
30.	ANZ's response to Schedules 4 and 5 of the s 155 notice	25 January 2023

No.	Document	Date submitted
ANZ's response to s 155 notice dated 10 March 2023 notice (data notice)		
31.	Covering letter for response to Schedule 1 of the s 155 notice (Tranche 1)	6 April 2023
32.	Spreadsheet data for Tranche 1 response	6 April 2023
33.	Covering letter for response to Schedule 1 of the s 155 notice (Tranche 2)	14 April 2023
34.	Spreadsheet data for Tranche 2 response	14 April 2023
35.	Covering letter for response to Schedule 1 of the s 155 notice (Tranche 3)	19 April 2023
36.	Spreadsheet data for Tranche 3 response	19 April 2023
ANZ's response to agri RFI dated 20 June 2023		
37.	ANZ's response to the ACCC's RFI dated 20 June 2023	28 June 2023

Part C – Lay and expert evidence submitted by ANZ and Suncorp

No.	Name	Date of statement
ANZ expert witnesses		
38.	First report of Patrick Smith	1 December 2022
39.	Second report of Patrick Smith	17 May 2023
40.	Third report of Patrick Smith	17 July 2023
41.	First report of Dr Phillip Williams AM	1 December 2022
42.	Second report of Dr Phillip Williams AM	23 May 2023
43.	First report of Dr Jeffrey Carmichael AO	25 November 2022
44.	Second report of Dr Jeffrey Carmichael AO	13 May 2023
Suncorp expert witnesses		
45.	First report of Mozammel Ali	17 May 2023
46.	Second report of Mozammel Ali	23 July 2023
47.	Dr David Howell	15 May 2023

No.	Name	Date of statement
ANZ lay witnesses		
48.	First Adrian Went statement and Exhibits AW-1, AW-2 and AW-3	28 November 2022
49.	Second Adrian Went statement and Exhibits AW-2-1 and AW-2-2	17 May 2023
50.	Guy Mendelson statement	1 December 2022
51.	Isaac Rankin statement and Exhibits IR-1, IR-2, IR-3 and IR-4	30 September 2022
52.	First John Campbell statement and Exhibits DJC-1, DJC-2 and DJC-3	30 November 2022
53.	Second John Campbell statement	17 May 2023
54.	First Mark Bennett statement and Exhibits MSB-1, MSB-2, MSB-3, MSB-4, MSB-5, MSB-6, MSB-7 and MSB-8	1 December 2022
55.	Second Mark Bennett statement	17 May 2023
56.	Third Mark Bennett statement	7 July 2023
57.	First Shayne Elliott statement and Exhibits SCE-1, SCE-2, SCE-3, SCE-4, SCE-5, SCE-6, SCE-7, SCE-8 and SCE-9	30 November 2022
58.	Second Shayne Elliott statement and Exhibit SCE-A, SCE-1, SCE-2, SCE-3, SCE-4, SCE-5, SCE-6, SCE-7, SCE-8, SCE-9, SCE-10, SCE-11, SCE-12, SCE-13, SCE-14 and SCE-15	17 May 2023
59.	Third Shayne Elliott statement and Exhibits SCE-1, SCE-2, SCE-3 and SCE-4	30 June 2023
60.	First Yiken Yang statement	30 November 2022
61.	Second Yiken Yang statement	17 May 2023
62.	Peter Dalton statement and Exhibits PJD-1, PJD-2, PJD-3, PJD-4, PJD-5, PJD-6 and PJD-7	13 December 2022
63.	James Anthony Lane statement	5 July 2023
64.	First Louise Higgins statement and Exhibits LCH-1, LCH-2, LCH-3, LCH-4, LCH-5, LCH-6, LCH-7, LCH-8, LCH-9 and LCH-10	17 May 2023
65.	Second Louise Higgins statement	17 July 2023

No.	Name	Date of statement
66.	James Lane statement	5 July 2023
Suncorp lay witnesses		
67.	First Steven Johnston statements	25 November 2022
68.	Second Steven Johnston statements	17 May 2023 (1)
69.	Third Steven Johnston statements	17 May 2023 (2)
70.	Fourth Steven Johnston statements	13 July 2023
71.	First Clive van Horen statement	25 November 2022
72.	Second Clive van Horen statement	17 May 2023
73.	Third Clive van Horen statement	14 July 2023
74.	Adam Bennett statements and Exhibits ALB-1 and ALB-2	16 May 2023