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AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

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

COMMONWEALTH OF AUSTRALIA
AUSTRALIA
AUSTRALIAN COMPETITION TRIBUNAL

REGISTRAR

Dated: 27/11/2023 2:50 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.

COMMONWEALTH OF AUSTRALIA

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

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2023

Re: Applications by Australia and New Zealand Banking Group Limited and Suncorp Group Limited

Applicants: Australia and New Zealand Banking Group Limited

Suncorp Group Limited

SUBMISSIONS OF THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

[redacted]

PART I INTRODUCTORY MATTERS

1. Banking services play a fundamental role in the Australian economy and affect the lives of all Australian consumers and businesses. For decades, the banking industry in Australia has been dominated by the four major banks: the Commonwealth Bank of Australia (**CBA**), Westpac Banking Corporation (**Westpac**), Australia and New Zealand Banking Group Limited (**ANZ**) and National Australia Bank (**NAB**). Data kept by the Australian Prudential Regulation Authority (**APRA**) shows that the four major banks collectively hold 72% of Australia's banking system assets.[1] This proceeding concerns a proposal whereby one of those major banks, ANZ, will acquire one of its smaller competitors, further consolidating the dominant position of the four major banks. The applicants contend that this will not have the effect or likely effect of substantially lessening competition, and that it will result in a net public benefit. Unless the Tribunal is affirmatively satisfied of the correctness of those contentions, it should refuse the relief sought.

2. This proceeding is a review under s 101 of the *Competition and Consumer Act 2010* (Cth) (**Act**) of a determination (**Determination**) by the Australian Competition and Consumer Commission (**ACCC**) to dismiss an application by ANZ under s 88(1) of the Act to acquire SBGH Limited (which owns 100% of the shares of Suncorp Bank) and related assets from Suncorp Group Limited (the Proposed Acquisition). The ACCC's Determination was made on 4 August 2023 and the ACCC provided detailed Reasons for Determination on that date (the **Reasons**).

PART II THE STATUTORY TEST

A. Role of the Tribunal

3. In reviewing the Determination, the Tribunal is not conducting a re-hearing. Rather, the Tribunal is conducting a reconsideration, whereby the Tribunal must make its own findings of fact and reach its own decision as to whether authorisation should be granted, applying the statutory criteria in s 90(7) and having regard only to the material that is enumerated in s 102(10).[2]

4. The Tribunal's task is not to review the Reasons with a view to correcting error.[3] While the Reasons may prove a convenient reference point for defining the matters which are truly in dispute, and while the Tribunal need not examine in detail findings made by the ACCC which are agreed by the parties, ultimately the Tribunal must determine for itself whether one of the tests for authorisation in s 90(7) is met and, if so, whether authorisation should be granted and on what conditions, if any.[4]

5. It follows that the applicants' submissions to the effect that the ACCC was "wrong" in certain respects are apt to distract from the Tribunal's task, which is not to affirm or reject the ACCC's reasoning but to decide for itself whether authorisation should be granted. Similarly, although the applicants' submissions describe various propositions as having been "accepted" by the ACCC, the issue is not what the ACCC accepted, but whether the Tribunal thinks a proposition ought to be accepted based on the material referred to in s 102(10).

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[1] See APRA, Monthly Authorised deposit taking institution statistics, May 2023 issued 30 June 2023, 71925.047.001.2465.

[2] Act, s 101(2)(a); *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 1)* [2023] ACompT 1 (***Telstra TPG No 1***) at [67]-[70]; *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2 (***Telstra TPG No 2***) at [107]-[108].

[3] *Telstra TPG No 2* at [108]; *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 (***Re Herald***) at 295-296.

[4] *Telstra TPG No 2* at [108]; *Re Herald* at 296.

B. State of satisfaction

6. Section 90(7) of the Act is relevantly to the effect that the Tribunal on review must not grant authorisation under s 88 unless it is "satisfied", in all the circumstances, that the conduct (a) would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or (b) would result or be likely to result in a benefit to the public and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

7. The word "satisfied" requires that the Tribunal reach "an affirmative belief" as to a matter in s 90(7)(a) or (b).[5] "Satisfaction" is a state of mind that has been formed reasonably and upon a correct understanding of the law.[6] The Tribunal's factual findings must have a basis in the evidence, other supporting material, common sense, or its own specialised knowledge.[7]

8. No particular standard of proof, such as the balance of probabilities, applies, save that the Tribunal must be "satisfied" of a matter in s 90(7)(a) or (b) before it may authorise the Proposed Acquisition.[8] Nonetheless, the Tribunal should approach the question of satisfaction with due regard for the nature of the decision that is required to be made and the seriousness of its consequences.[9] Here, the consequences include conferring statutory immunity on an acquisition which might otherwise contravene Part IV of the Act and will be practically irreversible.

C. Section 90(7)(a)

9. Section 90(7)(a) requires the Tribunal to be satisfied of a negative proposition, namely that the Proposed Acquisition would <u>not</u> have the effect, or would <u>not</u> be likely to have the effect, of substantially lessening competition. This differs from what would be required to find that the same conduct contravened s 50: that would require proof on the balance of probabilities that the Proposed Acquisition <u>would</u> have, or <u>would</u> be likely to have, the effect of substantially lessening competition.

10. ANZ's submissions posit that the Tribunal "should" be satisfied of the negative proposition if a likely substantial lessening of competition "has not been shown": at [9]. However, it is not for the ACCC (or anyone else) to "show" that a substantial lessening of competition is likely: rather it is for the applicants to satisfy the Tribunal that a substantial lessening of competition is <u>not</u> likely. Further, the conclusion that a substantial lessening of competition is <u>not</u> likely does not necessarily follow from an absence of proof that it <u>is</u> likely. The Tribunal may consider that the Proposed Acquisition's likely effect remains so uncertain that it is unable to form an affirmative belief that the transaction would not be likely to result in a substantial lessening of competition.

11. Subject to this important difference, the established legal principles concerning the meaning of the words "likely effect of substantially lessening competition" apply to s 90(7)(a). In this regard, a lessening of competition will be "substantial" if it is "real or of substance" and, thereby, meaningful and relevant to the competitive process, but it need not be "large or weighty".[10] Otherwise, it is sufficient to direct the Tribunal's attention to *Telstra TPG No 2* at [111]-[119] and *ACCC v Pacific National Pty Ltd* (2020) 277 FCR 49 at [103]-[104] and [214]-[246].

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5 *Telstra TPG No 2* at [99].
6 See, e.g., *Wei v Minister of Immigration and Border Protection* (2015) 257 CLR 22 at [33].
7 See, e.g., *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 at [17].
8 *Telstra TPG No 2* at [99].
9 *Mailau v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 12 at [94].
10 *ACCC v Pacific National Pty Ltd* (2020) 277 FCR 49 at [104] and [219].

12. One further point bears emphasis. A lessening of competition in a "significant section of the market" can constitute a "substantial" lessening of competition, even if it is not market-wide or does not otherwise affect the whole market.[11] The relevance of this observation in the present case is to reduce the significance of disputes as to market definition in the overall analysis. That is because, as developed below, the Proposed Acquisition will have competitive effects on what are, on any view, significant sections of relevant markets even if not standalone markets themselves.

D. Section 90(7)(b)

13. The Tribunal explained the operation of s 90(7)(b) in *Telstra TPG No 2* at [120]-[126] and [145]-[153]. It is unnecessary to repeat what was said there, save to note that public benefits which result from other coincident conduct that is not the subject of the application for authorisation may not be taken into account under s 90(7)(b).[12]

14. The phrase "benefit to the public" in s 90(7)(b)(i) refers to the Australian public generally.[13] A benefit may be a public benefit notwithstanding that it flows only to a segment of the Australian public, but the weight to be accorded to a benefit will vary depending on who takes advantage of it and a benefit that is not spread widely, or to the community generally, will generally carry less weight.[14] What constitutes a benefit to one segment of the Australian public may constitute a detriment to another. In net terms, it may involve no benefit to the Australian public at all, or any benefit in one area may be reduced by a countervailing detriment elsewhere. The weight to be accorded to any putative benefit for the purposes of s 90(1)(b) will therefore depend upon the extent to which any benefit to one segment of the Australian public causes detriment elsewhere in Australia.[15] This is consonant with the object of the CCA, which is to enhance the welfare "of Australians".[16]

15. In considering detriments under s 90(7)(b)(ii), the Tribunal should have regard to any impairment to the community generally, that is, any harm or damage to the aims pursued by society.[17] This includes any non-trivial competitive detriment which will result, or is likely to result, from the acquisition, whether it occurs on a market-wide basis or not.[18]

E. Exercise of discretion

16. If the Tribunal is not satisfied of the preconditions in s 90(7), it cannot grant authorisation. Further, satisfaction of those preconditions does not oblige the Tribunal to grant authorisation.[19] There is a discretion to refuse authorisation even where the conditions are satisfied.[20]

17. If the Tribunal were satisfied that the conduct is likely to result in a net public benefit, authorisation would ordinarily be granted.[21] However, where that net benefit is insubstantial, it may be

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11 *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 44 ALR 173 at [192]; *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529 at [241].
12 *Telstra TPG No 2* at [145], [147].
13 *Telstra TPG No 2* at [121]; *Re Qantas Airways Ltd* [2005] ATPR 42-065 (***Re Qantas***) at [196]; *Re Medicines Australia Inc* [2007] ATPR 42-164 (***Re Medicines***) at [1087].
14 *Re Qantas* at [183]-[186].
15 See generally *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 514(2)-(3).
16 Act, s 2.
17 *Telstra TPG No 2* at [121], [123].
18 *ACCC v Australian Competition Tribunal* (2017) 254 FCR 341 at [11].
19 *Telstra TPG No 2* at [127].
20 *Re Medicines* at [106].
21 *Telstra TPG No 2* at [127].

appropriate to refuse authorisation, especially if there is a likelihood of anti-competitive detriments flowing from the relevant conduct which are only marginally outweighed by the public benefits.[22]

18. The Tribunal should exercise its discretion with regard to the objectives of the Act and with an appreciation that "[a]uthorisation is a public and official act of some seriousness" because any authorised conduct will be exempted from prohibitions that ordinarily apply under Part IV of the Act and will attract the Tribunal's "official sanction".[23]

PART III COUNTERFACTUAL

19. The Tribunal is to assess the state of the future with and without the Proposed Acquisition.[24] In applying s 90(7), it is appropriate for the Tribunal to have regard to the full range of possible futures, unless it considers a particular scenario to be so unlikely to occur that it can be excluded from its assessment.

20. On the evidence before it, it is open to the Tribunal to conclude that there are two counterfactuals with a realistic prospect of occurring in the future without the Proposed Acquisition, namely Suncorp Bank continues to operate under the ownership of Suncorp Group (**No-Sale Counterfactual**), or Suncorp Bank is acquired by, or merged with, Bendigo and Adelaide Bank (**BEN**) (the **BEN Merger Counterfactual**).[25]

21. The weight that the Tribunal should give to each counterfactual as part of its ultimate assessment depends upon what it regards as the relative likelihood of each counterfactual in the world without the Proposed Acquisition, and the relative extent of harms and benefits that would arise from each counterfactual when compared to the world with the Proposed Acquisition. Whilst it is appropriate for the Tribunal to identify and have regard to these matters, the process should not be atomised: the inquiry prescribed by s 90(7)(a) ultimately requires a "single evaluative judgment".[26] Similarly, the net public benefits test involves an instinctive synthesis rather than a balance sheet approach.[27]

A. The No-Sale Counterfactual

22. All parties before the Tribunal accept that the No-Sale Counterfactual is a realistic counterfactual: ANZ [5]; Suncorp [2(b)]. There is less consensus as to how Suncorp Bank would compete in that scenario, and as to how competitive it will be.

23. [redacted]. They suggest, for example, [redacted]

24. There is a disconnect between this aspect of Suncorp's submissions and its ordinary course business documents. [redacted]

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22 *Re Medicines* at [126]-[128].
23 *Re Medicines* at [126], [128].
24 *Re Medicines* at [117].
25 See Reasons at [5.5], [5.42]-[5.45] [HB 3/16 at 128-9, 136-7] 71925.047.001.1814.
26 *ACCC v Metcash Trading Ltd* (2011) 198 FCR 297 at [227]; *ACCC v Pacific National Pty Ltd (No 2)* [2019] FCA 669 at [1274]-[1279].
27 *ACCC v Australian Competition Tribunal* [2017] FCAFC 150; 254 FCR 341 at [7].

[redacted]. For example, [redacted].[28] [redacted].[29] [redacted].[30]

25. [redacted].[31] [redacted].[32]

26. [redacted],[33] [redacted].[34] [redacted],[35] [redacted].[36]

27. The Tribunal ought to consider [redacted].[37] [redacted]

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28 [redacted].

29 [redacted] (original emphasis).

30 [redacted].

31 [redacted].

32 [redacted]

33 [redacted].

34 [redacted].

35 [redacted].

36 [redacted].

37 [redacted]

[redacted].

28. While it is unsurprising that Suncorp [redacted] recent history is not especially informative about how Suncorp would [redacted] in the No-Sale Counterfactual. The Tribunal may infer that [redacted].[38] [redacted].[39]

29. For all these reasons, Suncorp Bank's current organic plans are not exhaustive of the ways in which Suncorp Bank may be operated in the No-Sale Counterfactual. While Suncorp Bank <u>may</u> continue to execute its current organic plans, the material before the Tribunal suggests other commercially realistic possibilities. The Tribunal should consider, evaluate, and weigh those other possibilities when considering the No-Sale Counterfactual.

30. [redacted].[40] [redacted].[41] [redacted];[42] [redacted].[43]

31. If Suncorp Bank were to divest segments and use the proceeds from those sales to fund [redacted], there is a real prospect that Suncorp Bank would be a re-invigorated competitor in [redacted] in the medium term. The divested portfolios might likewise be more competitive in the hands of their new owners.[44]

32. These possibilities add to the complexity of the counterfactual inquiry required of the Tribunal. In a No-Sale Counterfactual, it is unclear whether Suncorp will [redacted] hold on to all its banking businesses, or divest parts of its business to others. The competitive effects of such transactions cannot be assessed with any certainty, but it is at least apparent [redacted] and boost its competitiveness in those segments.

33. In these circumstances, the nature of the test in s 90(7)(a) is particularly significant. While the Tribunal is likely not in a position to draw detailed conclusions about all the commercially realistic possibilities that arise in the No-Sale Counterfactual, the Tribunal can properly refuse authorisation

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38 [redacted]

39 [redacted].

40 [redacted].

41 van Horen 2 at [16] [HB 9/206 at 549] SML.0030.0001.0001.

42 [redacted]

43 [redacted].

44 Second Submission of Judo Bank (18 April 2023) at 2 [HB 18/616 at 95] 71925.030.001.0169.

if, when undertaking the single evaluative judgment, it is not affirmatively satisfied that the transaction will not likely substantially lessen competition in a market.

B. The BEN Merger Counterfactual

34. The material before the Tribunal supports the conclusion that there is a realistic prospect of the BEN Merger Counterfactual occurring in the future without the Proposed Acquisition. BEN has addressed this topic: BEN [6]-[42]. The ACCC draws attention to the following additional matters.

35. [redacted].[45] [redacted].[46]

36. One of Suncorp's principal rationales for selling Suncorp Bank is to simplify its business and refocus its capital investments by allowing for a "singular focus on its insurance business".[47] It perceives that, by selling Suncorp Bank, it "could achieve a rebalancing and rerating with the consequential enhancement of value for shareholders" and increase its capacity to "attract capital to support the Suncorp general insurance operations at a higher valuation".[48] [redacted].[49]

37. [redacted][50] [redacted].[51] [redacted].[52]

38. *Third*, it may be accepted that Suncorp [redacted].[53]

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45 Reasons at [5.103], [5.142] [HB 3/16 at 153, 156] 71925.047.001.1814. See, e.g., [redacted]

46 [redacted]

47 Johnston 1 at [18], [42]-[43] [HB 7/27 at 7, 13] SML.0004.0001.0061.

48 Johnston 1 at [106] [HB 7/27 at 24] SML.0004.0001.0061.

49 [redacted].

50 [redacted]

51 [redacted]

52 [redacted]

53 See [redacted] see also [redacted].

39. *Fourth*, the Tribunal should give more weight to [redacted] when considering the likelihood of the BEN Merger Counterfactual, than to evidence given since the Proposed Acquisition was finalised. As the Tribunal observed in *Telstra TPG No 2*, such documents are "a more reliable guide to the relevant commercial and economic considerations that will influence commercial decision-making in the future" than witness statements given by the applicants' (or the intervenor's) executives, whose views are "likely to be coloured, whether consciously or unconsciously, by the interest that their respective company has in the application for authorisation". [54] Similarly, the Tribunal should approach the [redacted] with caution, given it was prepared in response to the ACCC's April 2023 Statement of Preliminary Views (**SOPV**), which stated that a merger with a second tier-bank, such as BEN, was a realistic prospect if the Proposed Acquisition did not proceed.

40. [redacted].[55] Similarly, there is nothing in the materials to suggest that the costs and timing risks of integration with BEN are prohibitive or materially greater than those that attend any integration of this nature: *cf.* Suncorp [39].[56]

41. *Sixth*, [redacted]. They should also be treated with some caution because, adopting the language of the Tribunal in *Telstra TPG No 2*, they are likely to be coloured, whether consciously or unconsciously, by the interest Suncorp has in the application for authorisation. [57]

PART IV HOME LOANS

42. In order to be satisfied that the Proposed Acquisition would not have the effect, or likely effect, of substantially lessening competition in the national market for the supply of home loans, the Tribunal will need to be satisfied that there is not likely to be a substantial lessening of competition in that market by reason of either unilateral or coordinated effects.

43. The ACCC found that there was likely to be some, but not a substantial, lessening of competition arising from the unilateral effects of the Proposed Acquisition.[58] Neither applicant has addressed that finding. If the Tribunal reaches the same conclusion, the detrimental unilateral effects of the Proposed Acquisition on competition in the home loans market should be taken into account under s 90(7)(a) (together with coordinated effects as part of a single evaluative judgment), under s 90(7)(b) (as a public detriment in the overall instinctive synthesis) and ultimately in the exercise of the Tribunal's discretion to grant authorisation. The balance of this Part addresses coordinated effects.

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54 See *Telstra TPG No 2* at [482].
55 See Reasons at [5.130] [HB 3/16 at 153] 71925.047.001.1814; see also [redacted] and [redacted]
56 Reasons at [5.136]-[5.137], [5.139]-[5.140] [HB 3/16 at 155] 71925.047.001.1814.
57 See *Telstra TPG No 2* at [482].
58 Reasons at [6.172] [HB 3/16 at 196] 71925.047.001.1814.

A. The economic framework for analysis – coordinated effects

44. Coordinated effects are "the impacts arising from a change in the likelihood and nature of coordinated behaviour between firms".[59] Coordinated behaviour is conduct by firms that is "beneficial only with the forbearance of other firms in the market" and involves "strategies of mutual interest" to those firms.[60] Such behaviour can lessen competition because it approximates the performance of a monopolist, resulting in higher prices or lower quality non-price attributes.

45. The likelihood, extent, severity, and sustainability of coordinated conduct depends on objective market characteristics. Key features of markets and firms that typically influence these matters are market structure (the number and size of firms operating in a market), the symmetry and alignment of firms (in terms of market shares, costs, strategies, products and other attributes), whether there is multi-market contact between firms, the availability of communication devices (such as highly visible pricing announcements), price transparency between firms (enabling monitoring and responses to deviation) and the extent of consumer choice frictions (which reduce the profitability of deviations and therefore the incentive to deviate).[61]

46. While key features can be identified in this manner, no single factor is necessary or sufficient for coordinated effects to arise. It is important not to employ a "checklist" approach. A checklist approach has a tendency also to focus, wrongly, on a snapshot in time. Rather, the question under s 90(7)(a) is whether the Tribunal is satisfied that the Proposed Acquisition is not likely to have the effect of substantially lessening competition by making coordinated behaviour more likely, or more effective or entrenched.[62]

B. Conditions are conducive to coordination

47. The market for home loans is currently conducive to coordination and is at risk of the major banks engaging in coordinated behaviour in the future.[63]

48. **Market Structure:** ANZ contends that the home loans market is not concentrated: ANZ [18]. However, the four major banks make up approximately 75% of home loans nationally, and only 8 other ADIs have more than a 1% market share.[64] Moreover, ANZ's 13% market share (the smallest among the major banks) is almost three times that of the 5th placed ADI (Macquarie) at 4.4% and more than 4.6 times that of the 6th placed ADI (BEN) at 2.8%.[65] It is fair to characterise that market structure as moderately concentrated.[66]

49. ANZ also contends that the market shares of the major banks are "dynamic": ANZ [18]. However, the home loan market shares of CBA and Westpac have increased since 2000, including because they acquired BankWest and St George respectively, such that the market share of all other ADIs besides the major banks is about the same today as it was 23 years ago.[67] While ANZ points to an aggregate 10% decline in the market shares of Westpac, NAB and ANZ in the last 10 years

59 Expert report of Nicholas de Roos (5 April 2023) (**de Roos**) at 1 [HB 16/577 at 1272] 71925.034.001.0498.
60 de Roos at 1 [HB 16/577 at 1272] 71925.034.001.0498.
61 de Roos at 3-6 [HB 16/577 at 1274-1277] 71925.034.001.0498.
62 See Reasons at [6.12] [HB 3/16 at 161] 71925.047.001.1814.
63 See: Reasons at [6.194]-[6.256], [6.277] [HB 3/16 at 200-210, 215] 71925.047.001.1814.
64 Reasons at [6.46] [HB 3/16 at 167] 71925.047.001.1814, citing APRA Monthly Authorised Deposit-taking Institution Statistics. These facts are agreed: Joint Document [HB 3/18 at 614] ABG.5001.0413.1106.
65 Reasons at [6.45] [HB 3/16 at 167] 71925.047.001.1814. These facts are agreed: Joint Document [HB 3/18 at 613-614] ABG.5001.0413.1106.
66 Reasons at [6.200] [HB 3/16 at 201] 71925.047.001.1814.
67 Reasons at [6.50] [HB 3/16 at 168-169] 71925.047.001.1814.

(ANZ [18]), this approximates to a decline of only 1% per year, spread across three banks. The market structure is therefore relatively static and not "dynamic".

50. As for ANZ's contention that Macquarie's share of new loans is materially larger than its share of existing loans (ANZ [18]), it is important not to confuse Macquarie's net loan growth (which is skewed upwards by its relatively smaller and younger lending book) with its share of new loans. [redacted].[68] The [redacted] data relied upon by ANZ at footnote 47 is sourced from only one mortgage aggregator, [redacted], and excludes loans that were not initiated by other brokers. [redacted].[69]

51. **Symmetry and alignment:** Symmetry between firms tends to make coordination between them easier, since they are more likely to have incentives and goals that are aligned.[70] Further, the more symmetrical the distribution of market shares between firms, the less likely it is that there will be a firm that can expect to gain by deviating from coordination.[71]

52. ANZ emphasises ways in which the major banks are different: ANZ [19]. The ACCC acknowledges that some asymmetries do exist.[72] However, other than by way of assertion, ANZ does not engage with the important ways in which there is symmetry and alignment between the major banks, especially relative to other market participants.

53. The ability of the major banks to defray their costs over a much larger customer base and to raise capital more cheaply makes it difficult for other market participants to sustainably compete with them, particularly on price. [redacted].[73] There is ample evidence of the importance of scale in the home loans market, and of the structural impediments to competition that arise from the major banks' scale advantage.[74] Among other things:

    53.1. For ANZ, increasing scale (i.e., enlarging its customer base) was a key driver of the Proposed Acquisition.[75] [redacted].[76] [redacted]

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68 [redacted]

69 [redacted]

70 de Roos at 4, 8 [HB 16/577 at 1275, 1279] 71925.034.001.0498.

71 de Roos at 4, 8 [HB 16/577 at 1275, 1279] 71925.034.001.0498.

72 Reasons at [6.211] [HB 3/16 at 203-204] 71925.047.001.1814.

73 [redacted]

74 See Reasons at [4.80]-[4.87] [HB 3/16 at 113-117] 71925.047.001.1814.

75 [redacted]; ANZ Investor Discussion Pack (18 July 2022) at 6, 7 [HB 29/1246 at 1660, 1661] 71925.046.001.3639.

76 [redacted].

[redacted].[77] [redacted].[78]

[redacted]

[redacted],[79] but as already mentioned, ANZ's home loans market share is almost three times that of its next nearest competitor and more than 4.6 times that of the next competitor after that.[80] The Proposed Acquisition will cause those differentials to increase to about 3.5 times and 5.5 times and the differential between CBA and ANZ to reduce to 1.7 times. The scale differentials among the major banks are thus dwarfed by those between the major banks and everyone else.

53.2. [redacted].[81]

53.3. [redacted].[82]

53.4. Regional banks have higher wholesale funding costs due to differences in credit ratings relative to the major banks, and they do not benefit from APRA's advanced internal ratings-based (**IRB**) accreditation on risk weights, which leads to a relative disadvantage for capital efficiency and returns on equity.[83]

54. [redacted].[84] [redacted].[85] [redacted]

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77 [redacted].

78 [redacted].

79 [redacted].

80 Reasons at [6.45] [HB 3/16 at 167] 71925.047.001.1814. These facts are agreed: Joint Document [HB 3/18 at 613-614] ABG.5001.0413.1106.

81 [redacted]. See also: [redacted]

82 See, e.g., [redacted]

83 Johnston 1 at [31] [HB 7/27 at 10] SML.0004.0001.0061; Statement of Adrian Went (28 November 2022) (**Went**) at [18] [HB 11/371 at 5-6] 71925.002.001.8982; Judo Bank submission, 7 February 2023 at 3 [HB 18/615 at 92] 71925.010.001.0267.

84 Reasons at [6.180]-[6.181], [redacted] [HB 3/16 at 197-198, 202-203] 71925.047.001.1814.

85 [redacted].

[redacted].[86] [redacted].[87] [redacted].[88] [redacted]:[89]

[redacted]

55. In addition, there is evidence of symmetry between the major banks in the following respects:[90]

55.1. *First*, the major banks pursue similar business models: all are commercial banks with loans (predominantly for housing) constituting a large proportion of their assets and with deposits taking up a large proportion of liabilities; they all have a predominantly domestic focus, with significant operations in New Zealand; and they engage in little investment banking activity.[91] All have mass market distribution strategies for home loans (i.e., they strive to supply a home loan proposition to all Australians, including both occupiers and investors), and their products are similar.[92]

55.2. [redacted].[93]

55.3. *Third*, the major banks all have similar credit ratings. The Long-Term Issuer Credit Ratings issued to all four major banks by S&P is AA-. In comparison BEN and BOQ are rated BBB+.[94]

55.4. *Fourth*, the major banks are all approved for the advanced IRB approach for determining credit risk capital requirements and are therefore likely to have lower capital requirements relative to their exposures than competitors using the standardised approach (i.e., all their competitors bar Macquarie and ING).[95] APRA has estimated that the average pricing differential for residential mortgage loans due to differences between the IRB and standardised approaches is 5 bps, meaning the major banks are likely to be able to provide residential mortgage loans 5 bps cheaper than ADIs who use the standardised approach.[96]

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86 [redacted].

87 [redacted]

88 [redacted].

89 [redacted].

90 See Reasons at [6.214] [HB 3/16 at 204] 71925.047.001.1814.

91 See Reasons at [6.205] and the sources cited there [HB 3/16 at 202] 71925.047.001.1814.

92 As to ANZ, see: First Statement of Douglas Campbell (30 November 2022) (**Campbell 1**) at [40] [HB 11/413 at 2265] 71925.002.001.9234; Second Statement of Douglas Campbell (17 May 2023) (**Campbell 2**) at [61] [HB 11/418 at 2397] 71925.034.001.1314. [redacted]

93 See: [redacted]

94 See: Reasons [4.43] [HB 3/16 at 103] 71925.047.001.1814; Credit Ratings Australian Banks and Financial Institutions (20 April 2023) [HB 31/1359] 71925.047.001.2392; Statement of Adrian Went (28 November 2022) at [18] [HB 11/371 at 6] 71925.002.001.8982.

95 See: Reasons at [4.32]-[4.38] [HB 3/16 at 101-102] 71925.047.001.1814; APRA, "Is the capital benefit of being an advanced modelling bank justified?" (23 May 2023) at 3-5 [HB 29/1193 at 455-457] 71925.046.001.1128.

96 APRA, "Is the capital benefit of being an advanced modelling bank justified?" (23 May 2023) at 5 [HB 29/1193 at 457] 71925.046.001.1128; APRA, "Unquestionably Strong Framework for Bank Capital – Information Paper" (November 2021) at 16 [HB 29/1195 at 499] 71925.046.001.1135.

55.5. *Fifth*, the major banks benefit from brand recognition – they have some of the strongest brands in our economy – and there is a perception that the major banks are safer, more resilient than smaller banks, and that the government will step in to help them if needed.[97] [redacted].[98]

56. Accordingly, there is a level of symmetry and alignment between the four major banks that is likely to make coordination between them feasible to initiate and sustain.[99] In particular, the scale, profitability, and cost-related advantages outlined above set the major banks apart from their remaining competitors. The asymmetries that do exist amongst the major banks are less significant for the overall structure of the market and the competitive process than the attributes and advantages which they have in common.

57. **Price transparency:** The easier it is for rival firms to observe each other's pricing, the greater the ability for them to coordinate on pricing and to detect and respond to any deviations.[100]

58. In the home loans market, headline interest rates are well-known because they are widely published and reported on.[101] ANZ seeks to emphasise that headline rates are subject to discretionary discounts which mean it does not know "precisely" what its competitors are offering.[102] [redacted] *cf.* ANZ [20].[103]

59. *First*, brokers have visibility into pricing: brokers "achieve in-depth comparative price information in real time – they know each lender's specials, below the line discounts and cash back offers. Brokers also know lenders' products and processes".[104] [redacted].[105] [redacted].[106] [redacted].[107]

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97 See: Reasons at [4.113]-[4.119], [redacted] [HB 3/16 at 122-123, 176-177] 71925.047.001.1814; Productivity Commission, "Competition in the Australian Financial System – Inquiry Report" (29 June 2018) at 6, 101-102 [HB 23/889 at 18, 113-114] 719225.002.001.7983.

98 [redacted].

99 Reasons at [6.216] [HB 3/16 at 204] 71925.047.001.1814.

100 de Roos at 5 [HB 16/577 at 1276] 71925.034.001.0498.

101 See, e.g., Second Statement of Shayne Elliott, 17 May 2023 (**Elliott 2**) at [58] [HB 11/390 at 429] 71925.034.001.1622.

102 Elliott 2 at [58] [HB 11/390 at 429] 71925.034.001.1622.

103 See: [redacted]

104 Elliott 2 at [58] [HB 11/390 at 429] 71925.034.001.1622.

105 See, e.g.: [redacted]

106 [redacted]

107 [redacted]

60. [redacted].[108]

61. [redacted].[109] [redacted].[110] [redacted].[111]

62. In short, while price transparency is less than perfect, it is not nearly as opaque for the banks as ANZ and Suncorp suggest. The banks are motivated and able to identify the discretionary discounts offered by their competitors, and to respond accordingly.

63. **Consumer choice and frictions:** The stability of coordinated behaviour depends on the ability of firms to restrict the profitability of deviations. Therefore, whether consumers can switch to a different provider easily, and whether they are likely to do so, are important considerations in assessing whether coordination is likely to be sustained.[112]

64. At least historically, there have been several barriers to switching in this market, as set out by the ACCC in its Reasons at [6.101]. Those are, in summary, a lack of engagement, high search costs and "pain points" in the process of switching.

65. The ACCC accepts that brokers do help in this regard.[113] However, actual switching rates remain relatively low. There is evidence that 66% of customers have their home loan with their main financial institution.[114] [redacted],[115] [redacted],[116] even if brokers would be available to assist with that. This is reinforced by the scale, longevity and perceived safety and stability of the major banks compared to smaller providers.[117]

66. The data relied upon at ANZ [22] has real limitations. ANZ's figures are based on external refinancing as a proportion of the total value of new loan commitments and external refinancing activity,[118] rather than as a proportion of total credit outstanding. ANZ's figures also do not take account of growth in the overall size of the market (and so overstate the growth in refinancing within the market as a whole). Further, the [redacted] attrition rate referred to [redacted]. It thus is not an accurate measure of switching behaviour and is of no assistance in understanding competitive dynamics.[119]

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108 See, e.g.: [redacted].

109 [redacted].

110 [redacted].

111 [redacted].

112 de Roos at 5 [HB 16/577 at 1276] 71925.034.001.0498.

113 See: Reasons at [4.111], [6.111] [HB 3/16 at 96, 183] 71925.047.001.1814.

114 Campbell 1 at [81] [HB 11/413 at 2276] 71925.002.001.9234.

115 See [redacted].

116 See [redacted].

117 See Productivity Commission, *Competition in the Australian Financial System – Inquiry Report* (29 June 2018) at 6, 102 [HB 30/1288 at 1704, 1800] 71925.046.001.4679.

118 See Campbell 1 at [78], Figure 3 [HB 11/413 at 2274] 71925.002.001.9234; ANZ response to the ACCC independent expert reports (17 July 2023) at [7.13], Figure 2 [HB 17/608 at 1245] 71925.043.001.0156.

119 See [redacted].

67. **Competition and barriers to entry:** Barriers to entry and expansion assist to facilitate coordinated conduct, because new or smaller competitors will not be able to constrain such conduct.

68. Reference has already been made to the importance of scale in banking and the advantages which it confers on the major banks. Those advantages derive, in part, from the fact that the provision of banking services involves significant fixed costs. But they also derive from matters such as lower costs of capital, lower prudential capital requirements, and more favourable credit ratings. Taken as a whole, the advantages of scale make it difficult for new entrants and smaller existing banks to provide effective competition that meaningfully constrains the major banks.

69. ANZ points to Macquarie's growth in the home loans market as evidence that barriers to entry and expansion are low: ANZ [23], [27], [34]-[35]. [redacted].[120] [redacted].[121] [redacted][122] Yet Macquarie has a market share in the mid-single digits after 10 years. That does not inspire confidence that new or expanded entry of other firms is likely to restrain coordinated conduct in the future.

70. ANZ [24] refers to Ms Starks' evidence. However, she concluded that "while barriers to expansion have fallen in recent years, they are likely to be higher for banks other than the majors and Macquarie".[123] Ms Starks also said: "[i]n the national market for home loans, entry barriers are low but barriers to expansion are high, and it is difficult to gain scale once entry has occurred".[124]

71. ANZ [25] also points faintly to non-bank lenders as effective competitors but that is not borne out by the evidence.

72. **Current increased competition:** There is evidence of recent price competition in the home loans market.[125] The question for the Tribunal is whether that price competition is likely to continue. Put another way, is this price competition a function of market conditions that are likely to endure?

73. In answering that question, two matters ought to be kept firmly in mind. *First*, there is a long history of muted competition in this market.[126] *Second*, the recent price competition has occurred in a macroeconomic context that is most unusual; interest rates have risen very rapidly after several years of inordinately low interest rates and, in the midst of this shifting rates regime, an unusually large number of fixed-rate home loans written during the COVID-19 period have now expired and have required refinancing.[127] Given that context, it cannot be presumed that recent levels of competition will endure.

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120 See [redacted].

121 [redacted]

122 [redacted].

123 Starks 1 at [9.41] [HB 16/577 at 1401] 71925.040.001.0171.

124 Starks 1 at [9.90] [HB 16/577 at 1420] 71925.040.001.0171.

125 See, e.g., Reasons at [6.152]-[6.153] [HB 3/16 at 192] 71925.047.001.1814.

126 See, e.g., Productivity Commission, 'Competition in the Australian Financial System – Inquiry Report' (29 June 2018) at 2, 4-5 [HB 30/1288 at 1700, 1702-3] 71925.046.001.4679; ACCC, 'Residential Mortgage Price Inquiry Final Report' (November 2018) at 6 [HB 30/1280 at 187] 71925.046.001.5365.

127 See: Reasons at [6.136]-[6.137] [HB 3/16 at 192] 71925.047.001.1814.

74. ANZ [32]-[33] relies on a longer-term trend of declining return on equity (**ROE**) and net interest margin (**NIM**)[128] since about 2000 as evidence of enduring competition. But as to ROE, the RBA observes that ROE fell notably in 2016 as the major banks raised additional equity to meet tighter capital standards set by APRA. The RBA considered that this reduction in ROE was likely to be permanent.[129] Other changes in regulatory requirements have operated to further reduce bank profitability over the years. Therefore, any long-term ROE trend is not the result of strong competition.

75. As to NIM, the gist of ANZ's reliance on this metric appears to be that increased competition since about 1999 has required it and other banks to reduce their margins in order to win and retain customers. However, ANZ overlooks the fact that the banks' NIM is indirectly impacted by the cash rate. An RBA discussion paper explains that lower interest rates "can still affect [banks'] profitability even when spreads remain constant" and that NIMs "will fall with interest rates if spreads remain constant".[130] The reason that is so is that "some of the banks' assets are funded by equity" and "as the returns on these assets fall, so does the return on equity".[131] Put differently, the benefits which a bank generates from using its equity capital (as opposed to using debt to fund its assets) necessarily fall, as interest rates fall, even if the bank's lending spread (the difference between its average lending rate and the overall cost of its debt funding[132]) stays constant. Given the declining cash rate from at least 2010 until 2022, it is unsurprising that NIM has reduced over time. However, this longer-term NIM trend is not the result of strong competition.

76. In any event, the preferred metric to assess longer-term trends in the level of competition in the home loans market is the lending spread, for that metric shows whether, in fact, banks are choosing to reduce their own margins to win or retain customers. RBA analysis shows that lending spreads have remained roughly the same or increased from 2010 to 2020 and only narrowed in 2021 and 2022.[133] This does not support a long-term or enduring improvement in competitive conditions.

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128 Net interest margin (NIM) is defined as the difference between banks' interest income and interest expenses (as a share of assets).

129 See: Reasons at [4.67]-[4.69] [HB 3/16 at 111-112] 71925.047.001.1814; RBA, "How Have Australian Banks Responded to Tighter Capital and Liquidity Requirements?" (June 2017) at 42-43 [HB 29/1228 at 1250-1251] 71925.046.001.1167; RBA, "Returns on Equity, Cost of Equity and the Implications for Banks" (March 2017) at 53 [HB 29/1232 at 1331] 71925.046.001.3529.

130 RBA, "The Consequences of Low Interest Rates for the Australian Banking Sector" (December 2022) at .3591 [HB 29/1234 at 1384] 71925.046.001.3585.

131 RBA, "The Consequences of Low Interest Rates for the Australian Banking Sector" (December 2022) at .3591 [HB 29/1234 at 1384] 71925.046.001.3585.

132 RBA, "Developments in Banks' Funding Costs and Lending Rates" (16 March 2023) at .3825 [HB 29/1222 at 1109], 71925.046.001.3819.

133 Reasons at [6.133]-[6.134] [HB 3/16 at 188-9] 71925.047.001.1814; RBA, "The Consequences of Low Interest Rates for the Australian Banking Sector" (December 2022) at 10 [HB 29/1234 at 1393] 71925.046.001.3585; RBA, "Developments in Banks' Funding Costs and Lending Rates" (March 2016) [HB 29/1225] 71925.046.001.4006; RBA, "Developments in Banks' Funding Costs and Lending Rates" (March 2017) [HB 29/1221] 71925.048.001.0267; RBA, "Developments in Banks' Funding Costs and Lending Rates" (March 2021) [HB 29/1224] 71925.048.001.0273; RBA, "Developments in Banks' Funding Costs and Lending Rates" (March 2022) [HB 29/1223] 71925.048.001.0005; RBA, "Developments in Banks' Funding Costs and Lending Rates" (March 2023) [HB 29/1222] 71925.046.001.3819.

77. Representatives of the major banks have said publicly that recent competitive conditions are atypical or may change.[134] Indeed, steps to reduce the volume of capital allocated to the home loans market and to remove cash backs and other incentives have already been taken.[135]

78. As ANZ [31] notes, the ACCC accepted "there have been developments in recent years that may have had a more enduring positive impact on competition".[136] But ANZ omits what the ACCC said next: "these factors have not driven the recent increased price competition in this market" and "have been part of a longer trend with more limited impact and mainly in non-price dimensions".[137]

C. The Proposed Acquisition and the likelihood of coordination

79. If the Tribunal concludes that the Proposed Acquisition would increase the likelihood, severity, or sustainability of coordinated behaviour among the four major banks, then it may not be satisfied that the Proposed Acquisition is not likely to have the effect of substantially lessening competition.

80. The Proposed Acquisition will increase concentration in the home loans market and reduce the level of asymmetry in market shares amongst the major banks. With the Proposed Acquisition, the major banks' market shares will be as follows: CBA 25.6%, Westpac 21.4%, ANZ 15.3% (compared to 13% without), and NAB 14.5%.[138] Further, with the Proposed Acquisition, NAB's market share will be 3.3 times larger than that of Macquarie and 5.2 times larger than that of BEN.

81. ANZ contends that the Proposed Acquisition will not increase symmetry to a material extent because it will result in a "de minimis" increase in ANZ's market share in the order of 2.3%: ANZ [36]-[37]. That increase in market share is significant, however. ANZ's CEO, Mr Elliott, has said publicly that the Proposed Acquisition is "the equivalent of many years of organic system growth".[139] [redacted].[140]

82. ANZ will therefore have more to lose and less to gain by deviating from coordinated behaviour among the major banks in a future with the Proposed Acquisition. The "more" which ANZ will have to lose is a larger market share which it would take ANZ "years" to win via competitive behaviour, and which ANZ will have paid billions to obtain. The likelihood that ANZ will cooperate rather than deviate in a future with the Proposed Acquisition is greater than it would be in a future without the Proposed Acquisition, where ANZ's market share remained around 13%.

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134 CBA, "Commonwealth Bank 1H23 Results Briefing Transcript" (15 February 2023) at pp 5, 12, 17 [HB 29/1249 at 1953, 1960, 1965] 71925.046.001.5498; Exhibit SCE-5 to the Second Statement of Shayne Elliott (17 May 2023) at 44-45, 99-100, 132, 180 [HB 11/396 at 1203-4, 1258-9, 1291, 1339] 71925.034.001.1995.

135 See Sydney Morning Herald, "Westpac steps back from mortgage war to shield returns" (8 May 2023) [HB 31/1318] 71925.046.001.5636; Australian Financial Review, "Suncorp's bank steps away from home loan war" (10 May 2023) [HB 31/1302] 71925.046.001.5633; Australian Financial Review, "NAB lifts mortgage rates for new customers after dumping cashback" (23 May 2023) [HB 31/1295] 71925.046.001.5629; Australian Financial Review, "Borrowers to pay more for home loans as mortgage war recedes" (26 May 2023) [HB 31/1299] 71925.046.001.5622.

136 Reasons at [6.152] [HB 3/16 at 192] 71925.047.001.1814.

137 Reasons at [6.152] [HB 3/16 at 192] 71925.047.001.1814.

138 Reasons at [6.45] [HB 3/16 at 167] 71925.047.001.1814. These facts are agreed: Joint Document [HB 3/18 at 613-614] ABG.5001.0413.1106.

139 ANZ, "Elliott: a transformational advance for ANZ" (18 July 2022) at 2 [HB 29/1264 at 2652] 71925.046.001.3209. See also: [redacted].

140 [redacted]; ANZ Investor Discussion Pack (18 July 2022) at 6, 7 [HB 29/1246 at 1660, 1661] 71925.046.001.3639.

83. The Proposed Acquisition would also increase symmetry between ANZ and its fellow major banks in other respects. It will result in a “material” 22% increase ANZ’s retail deposits,[141] [redacted].[142] [redacted].[143] These changes are likely to affect ANZ’s incentives and align them more closely with the incentives of the other major banks.

84. The likely impact of the Proposed Acquisition on competition is more pronounced when compared with the BEN Merger Counterfactual. The likelihood of coordinated conduct by the major banks is lessened by the presence of a merged BEN/Suncorp entity with some of the benefits associated with increased scale.

PART V AGRIBUSINESS BANKING PRODUCTS AND SERVICES

85. ANZ and Suncorp Bank are each significant suppliers of agribusiness banking products and services in Queensland. As detailed below, the Tribunal can properly conclude that there is a discrete market for the supply of such services at the State or local/regional level. Even if the product or geographic dimensions of the market are wider, however, ANZ and Suncorp Bank compete in what amounts to a significant section of the relevant market. As developed below, there are reasons why the Tribunal may ultimately not be satisfied that the Proposed Acquisition will not, or will not likely, substantially lessen competition in the market in which agribusiness banking products and services are supplied in Queensland.

A. The relevant market

86. **Agribusiness banking is a separate market:** It is open to the Tribunal to find that the supply of banking services to agribusiness customers should be treated as a separate market: *cf.* ANZ [11]-[13]; Suncorp [49]. The weight of the evidence is to the effect that agribusiness banking is a discrete product having regard to demand-side and supply-side substitution possibilities.

87. Agribusinesses typically have tailored banking products,[144] which reflects (a) their specific needs (such as the seasonal and cyclical nature of agribusiness)[145] and (b) the particular characteristics of agribusiness customers, who are generally, [redacted].[146]

88. ANZ submits that, with the exception of Farm Management Deposit accounts, the banking products and services supplied to agribusiness customers are “largely the same” as those supplied to other businesses: ANZ [13]. While it is true that, for some banks, many of the lending, savings account

141 ANZ Investor Discussion Pack (18 July 2022) at 7, 19 [HB 29/1246 at 1574, 1586] 71925.046.001.3639.

142 [redacted]

143 See, e.g., [redacted].

144 [redacted]: see [redacted]; see also Reasons at [6.604] [HB 3/16 at 283] 71925.047.001.1814.

145 Statement of Mark Bennett, 1 December 2022 (**M Bennett 1**) at 36 [HB 12/428 at 124] 71925.002.001.9551; [redacted]

146 [redacted].

and business deposit products offered to agribusiness customers are the same as those supplied to other types of customers, the manner in which those products are sold and supplied to agribusiness customers differs materially to other businesses.

89. The evidence establishes that, to compete successfully in the supply of banking services to agribusiness customers, banks need personnel with specialised knowledge in agribusiness and, typically, relationship managers who maintain relationships with agribusiness customers.[147] A good agribusiness banker needs a detailed understanding of the opportunities and risks for agribusinesses, as those matters affect the price and terms on which banks will offer products to agribusiness customers.[148] The importance of such specialised knowledge is reflected in the fact that most agribusiness bankers are from farming backgrounds,[149] and in the circumstance that attracting and retaining good agribusiness bankers is a key area of competition for banks that provide agribusiness banking products and services.[150]

90. Consistently with this need for specialised knowledge, agribusiness banking is relationship-based.[151] Agribusiness customers value having an ongoing relationship with a particular banker whom they know and trust, and banks consequently often have multigenerational relationships with their agribusiness customers.[152] The evidence of Mark Bennett, Head of Agribusiness at ANZ, is that much of the competition in agribusiness banking is among banks to develop and maintain relationships with customers and potential customers.[153] Mr Bennett said that it is "important for the banker to visit the customer's business to see the assets and operations in person."[154]

91. Reflecting these matters, competition for agribusiness customers occurs on both price and non-price factors, including the experience of the banker and the quality of the customer's relationship with that banker. Mr Bennett's evidence is that, where an agribusiness customer is happy with their relationship with their bank and banker, he would generally expect that the customer would not change banks even if doing so would allow the customer to obtain slightly better prices.[155]

92. ANZ downplays the importance of relationships to agribusiness customers, contending that "relationship management services provided to business customers (including agribusiness, SME and other business customers) are typically the same": ANZ [13]. That contention is at odds with ANZ's own evidence and it conflates the "services" (i.e., the tasks performed) with the knowledge of those who perform them. Again, Mr Bennett explains that it is important that agribusiness customers have specialised agricultural industry knowledge, in addition to personal knowledge of the customer's business.[156]

93. ANZ also observes that some smaller agribusiness customers are not served by dedicated relationship managers: ANZ [13]. That does not negate the proposition that relationship management is important to agribusiness customers and a principal means by which competition

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147 See M Bennett 1 at [91] [HB 12/428 at 134], 71925.002.001.9551; see also [63], [redacted], [119]-[120] [HB 12/428 at 128, 133-134, 138-139] 71925.002.001.9551. See also ANZ application for Merger Authorisation (2 December 2022) 71925.002.001.0596 at [7.184]-[7.188] [HB 17/592 at 350-351] 71925.002.001.0596; see also [redacted]

148 M Bennett 1 at [85]-[88] [HB 12/428 at 133] 71925.002.001.9551; See also [redacted].

149 M Bennett 1 at [11], [160] [HB 12/428 at 120, 147] 71925.002.001.9551.

150 M Bennett 1 at [129] [HB 12/428 at 140] 71925.002.001.9551.

151 M Bennett 1 at [91] [HB 12/428 at 134] 71925.002.001.9551.

152 M Bennett 1 at [91] [HB 12/428 at 134] 71925.002.001.9551.

153 M Bennett 1 at [119]-[94] [HB 12/428 at 138] 71925.002.001.9551.

154 M Bennett 1 at [108] [HB 12/428 at 136] 71925.002.001.9551.

155 M Bennett 1 at [96]-[97] [HB 12/428 at 135] 71925.002.001.9551.

156 M Bennett 1 at [91]-[94] [HB 12/428 at 134] 71925.002.001.9551.

occurs. [redacted].[157] [redacted].[158]

94. There was unanimity amongst the relevant experts as to the product dimension of the relevant market. Professor King expressed the view that agribusiness banking was likely to constitute a separate market, taking account of both demand-side and supply-side substitution possibilities.[159] Ms Starks reached the same conclusion in her first report.[160] In her supplementary report, she considered an "alternative market definition" that included agribusiness and non-agribusiness SMEs in the same market, but this was expressly "in addition" to the approach she took in her first report.[161] Dr Williams also formed the view that the "market for the supply of loans to Queensland agribusiness" was a "relevant market",[162] concluding that non-bank suppliers of finance to agribusinesses were "fringe players" who only provided "competition… at the margins".[163]

95. **The Agribusiness banking market is local/regional:** It is open to the Tribunal to find that the geographic dimension of the agribusiness banking market is local/regional, rather than national.

96. *First*, the specialised knowledge required of agribusiness bankers is local in nature.[164] Agribusiness bankers must be within a reasonable distance of the customers they serve.[165]

97. [redacted].[166] Further, Mr Lane of ANZ explained that competition to win agribusiness customers in an area depends on the competing banks' risk appetites and familiarity with customers' businesses, which can vary by location.[167]

98. *Third*, Professor King and Ms Starks both concluded that agribusiness markets are local/regional including because of the relationship-based nature of servicing agribusiness customers,[168] and

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157 [redacted].

158 [redacted] see [redacted].

159 First Report of Professor Stephen King (3 March 2023) (**King 1**) at [65], see also [66]-[69] [HB 16/573 at 1067-1070] 71925.020.001.6300; Second Report of Professor Stephen King (28 June 2023)(**King 2**) at [18]-[23], [77] [HB16/575 at 1231-1232, 1241] 71925.042.001.0306.

160 Starks 1 at [5.54]-[5.61], [5.66] [HB 16/578 at 1342 -1345] 71925.040.001.0171.

161 Supplementary Expert Report of Mary Starks (7 July 2023) (**Starks 2**) at [5.10] [HB16/580 at 1762] 71925.043.001.0464.

162 Report of Dr Philip Williams (1 December 2022) (**Williams 1**) at [72] [HB 16/154 at 443] 71925.002.001.8851.

163 Williams 1 at [57]-[58] [HB 16/154 at 440-441] 71925.002.001.8851.

164 See M Bennett 1 at [85], [91]-[92], [111]-[113] [HB 12/428 at 113, 134, 137] 71925.002.001.9551; [redacted].

165 See, for example, [redacted]; M Bennett 1 at [107]-[110], [191] [HB 12/428 at 136-137] 71925.002.001.9551; [redacted]

166 See [redacted]

167 Statement of James Lane (5 July 2023) (**Lane**) at [28] [HB 12/467 1091] 71925.043.001.0229.

168 King 1 at [65(c)] [HB 16/573 at 980] 71925.020.001.6300; Starks 1 at [6.31] to [6.41] [HB 16/578 at 1352-1354] 71925.040.001.0171.

because banks think about their competitive strategies in agribusiness on the basis of individual regions.[169] While there are likely discrete local/regional agribusiness banking markets in Queensland, they both concluded that it is appropriate in this case to evaluate the competitive effects of the Proposed Acquisition on agribusiness banking at a State level as a proxy, given the unavailability of more granular data.[170] It is open to the Tribunal to adopt that course.

99. ANZ contends that the market is national for three reasons: ANZ [14]. *First*, it contends that the relevant products are supplied nationally under common bank policies and frameworks. That submission minimises ANZ's own evidence that agribusiness banking is typically priced on a bespoke customer-by-customer basis.[171] *Second*, ANZ relies on Dr Williams' evidence that geographic diversity and a national portfolio is necessary for a bank to balance its agribusiness banking risk.[172] As Professor King observes, however, that misdirects the market definition inquiry by failing to focus upon demand and supply-side substitution possibilities at the local level.[173] There is also no reason why ANZ cannot balance its agribusiness banking risks by operating in multiple different geographic markets. *Third*, ANZ submits that many agribusiness customers do not require a local branch presence. That may be accepted, but Mr Bennett's evidence is that agribusiness customers nevertheless require at least a regional presence, including to enable in-person attendance by bankers at a customer's property.[174]

100. **Alternatively, agribusiness banking is a significant section of the market:** If the Tribunal's view is that there are not distinct local/regional agribusiness banking markets in Queensland, it ought nevertheless conclude that the agribusiness banking sector in Queensland is a significant section of the relevant market.

101. Agribusiness is regarded by banks as a discrete and attractive sector, with peculiar banking needs and particular customer preferences, which justifies the adoption of tailored practices to service and supply that sector.[175] Moreover, from the perspective of agribusiness banking customers, there is a limited range of alternatives for banking services, which is principally limited to those banks with agribusiness portfolios.[176] In these circumstances, a lessening of competition in agribusiness banking services in Queensland may constitute a substantial lessening of competition in the relevant market, even if the geographic dimension of that market is national and even if the product dimension extends beyond agribusiness banking.

B. Tribunal may not be satisfied of no SLC in Agribusiness in Queensland

102. **Supply is concentrated:** There is no definitive source of market share data for agribusiness banking in Queensland (or at the local/regional level within Queensland). On any view, however, ANZ and Suncorp Bank are two significant players in a concentrated market (or segment).

103. In his evidence, Mr Bennett states that Suncorp is currently the third largest agribusiness bank in Queensland, and ANZ is fourth.[177] Mr Bennett identifies NAB, Rabobank as the largest

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169 Starks 2 at [5.11] to [5.16] [HB 16/580 at 1763-1764] 71925.043.001.0464.
170 Starks 1 at [6.31]-[6.41] [HB 16/578 at 1352-4] 71925.040.001.0171; King 1 at [153]-[154] [HB 16/573 at 1006-7] 71925.020.001.6300; King 2 at [77] [HB 16/575 at 1241] 71925.042.001.0306.
171 M Bennett 1 at [89] [HB 12/428 at 133] 71925.002.001.9551.
172 Second Report of Philip Williams (19 May 2023) (**Williams 2**) at [38] [HB 16/566 at 547] 71925.035.001.0155.
173 King 2 at [22] [HB 16/575 at 1232] 71925.042.001.0306.
174 M Bennett 1 at [107], [108], [redacted] [HB 12/428 at 136-137] 71925.002.001.9551.
175 M Bennett 1 at [77]-[78], [115], [143] [HB 12/428 at 131, 138, 143] 71925.002.001.9551.
176 See, e.g., BMAgBiz Submission (18 January 2023) at .0039 [HB 18/627 at 142] 71925.007.001.0037.
177 M Bennett 1 at [205] [HB 12/428 at 156] 71925.002.001.9551.

agribusiness banks and BOQ as the only other regional bank that provides agribusiness banking in Queensland.[178]

104. The Tribunal has before it quantitative share data kept by APRA relating to agribusiness lending (albeit this reflects only one type of agribusiness banking product). According to that dataset, Suncorp Bank ([redacted]) and ANZ ([redacted]) are the [redacted] and [redacted] largest agribusiness lenders in Queensland, and the Proposed Acquisition will result in ANZ becoming the [redacted] largest agribusiness lender with a share in excess of [redacted].[179] The [redacted] largest Queensland agribusiness lenders will account for almost [redacted] of agribusiness lending in that State post-acquisition.

105. In these circumstances, there is force in the submission of one market participant, Brennan Mayne Agribusiness (**BMAgBiz**) (a consulting firm specialising in procuring finance for agribusinesses), that there "*are already only a small number of options when considering moving banks*" and the Proposed Acquisition "*would result in a signification reduction in the already limited options*".[180]

106. **Suncorp's bank offering is differentiated and competitive:** Consistently with its strong share in the Queensland agribusiness banking market, Suncorp Bank is presently an effective competitor with a differentiated offering that is attractive to many agribusiness customers. [redacted].[181] In particular, the major banks have a lower percentage of agribusiness customers that are relationship-managed compared to Suncorp. About [redacted] of Suncorp Bank's agribusiness customers are relationship-managed,[182] which compares very favourably to [redacted],[183] [redacted],[184] [redacted][185] and [redacted].[186] [redacted][187]

107. If the Proposed Acquisition proceeds, ANZ appears unlikely to maintain Suncorp Bank's relationship management model: *cf.* ANZ [77]. [redacted].[188]

108. **Competitive overlap**: There is no apparent dispute that ANZ and Suncorp Bank presently compete for at least some of the same customer segments of the agribusiness banking market in Queensland. Mr Bennett's evidence is to the effect that Suncorp Bank and ANZ are effective in winning business from each other in Queensland.[189] He states that he generally considers that ANZ and Suncorp "*seek similar customers*" in customer segments with total business limits in the

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178 M Bennett 1 at [206] [HB 12/428 at 156] 71925.002.001.9551.

179 [redacted]

180 BMAgBiz Submission (18 January 2023) at .0039 [HB 18/627 at 142] 71925.007.001.0037.

181 [redacted] see also [redacted].

182 [redacted]; see also [redacted]

183 See [redacted]

184 See [redacted].

185 See [redacted].

186 See [redacted]

187 [redacted]; see also [redacted]

188 [redacted]

189 M Bennett 1 at [170] [HB 12/428 at 149] 71925.002.001.9551.

range from [redacted]. Ms Starks observes that ANZ and Suncorp Bank's agribusiness bankers' operations overlap in at least 11 towns in Queensland.[190]

109. **The constraint imposed by the threat of entry or expansion is limited:** The evidence shows that barriers to entry in agribusiness are high and the constraint imposed by new entrants is limited: *cf.* ANZ [76]. Barriers to expansion are more moderate but nevertheless exist.

110. Professor King's evidence is that "entry and potential entry is unlikely to provide a significant competitive constraint in a local or regional agribusiness banking market" and that it "is possible that expansion may provide a competitive constraint subject to the relevant bank already having the physical presence and relationships relevant for agribusiness banking".[191] His conclusions accord with Mr Bennett's evidence, which emphasised: (a) the significant investment in human resources required by a bank, and substantial lead-in period to establish relevant relationships, to enter and compete in a regional agribusiness banking market successfully;[192] and (b) the considerable competition for agribusiness bankers.[193] Professor King's conclusions, and Mr Bennett's statements, are consistent with submissions by BEN and BMAgBiz which emphasised the significant barriers to becoming a full-service agribusiness operator.[194]

111. ANZ suggests that the success of Rabobank and Judo Bank negate the existence of barriers to entry and expansion: ANZ [76]. That submission is doubtful. Rabobank's expansion occurred gradually over a number of decades,[195] which does not suggest that an incumbent competitor could expand in a timely fashion in the short-medium term in response to any lessening of competition.

112. ANZ refers to private survey firm data suggesting Rabobank has expanded quickly in the past three years (ANZ [76]), but those data ought to be treated with some caution. On those data, a merged ANZ/Suncorp Bank would be the largest agribusiness lender in Queensland, with a share of [redacted]%, with its next largest competitor being NAB ([redacted]%) and Rabobank ([redacted]%).[196] If those data are correct, the three largest competitors post-merger would have a combined share of agribusiness lending in Queensland of [redacted]%, which would imply that the adverse effects on competition from the Proposed Acquisition may be very significant.

113. Judo's recent entry likewise does not disprove the existence of significant barriers to entry and expansion. It remains a small competitor and it has acknowledged that it has faced barriers to entry, including significant set-up and operational costs in establishing a new branch network.[197]

114. **Brokers are not widely used in agribusiness:** ANZ and Suncorp emphasise the role of brokers as a competitive constraint in agribusiness lending in their submissions: see ANZ [75], Suncorp [76]. However, brokers are not as widely used in agribusiness and are therefore likely to have a limited effect on competition.[198] The proportion of broker originated agribusiness loans in

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190 Starks 1 at [9.226] and Figure 31 [HB 16/578 at 1465] 71925.040.001.0171.

191 King 1 at [169] [HB 16/573 at 1098] 71925.020.001.6300.

192 King 1 at [166] [HB 16/573 at 1097] 71925.020.001.6300 citing M Bennett 1 at [122] [HB 12/428 at 139] 71925.002.001.9551 where he notes the "multi-year effort" often required to build relationships with potential clients; see also M Bennett 1 at [191(b)], [192]-[193] [HB 12/428 at 152-153] 71925.002.001.9551.

193 King 1 at [166] [HB 16/573 at 1009] 71925.020.001.6300 citing M Bennett 1 at [122] [HB 12/428 at 139] 71925.002.001.9551 where he notes the "multi-year effort" often required to build relationships with potential clients

194 BEN Submission at .7369 [HB 15/551 at 757] 71925.020.001.7324; BMAgBiz Submission (13 April 2023) at 0.138 to 0.139 [HB 18/656 at 1783-1784] 71925.030.001.0136.

195 M Bennett 1 at [116] [HB 12/428 at 138] 71925.002.001.9551.

196 Williams 1 at [106] [HB 16/584 at 455] 71925.002.001.8851.

197 Judo Bank Submission (7 February 2023) at .0269 [HB 18/615 at 92] 71925.010.001.0267.

198 M Bennett 1 at [151] [HB 12/428 at 145] 71925.002.001.9551; [redacted].

Queensland is summarised at ANZ [75] but is incomplete: [redacted],[199] [redacted].[200] The Mortgage and Finance Association of Australia observed in its submission that there is insufficient data on brokers in agribusiness[201] but that it understood that *"agri brokers are highly specialised"*[202] and that *"the way in which agri-brokers work on behalf of their customers is generally through working closely with a business/agri manager within a lender"*. [203] There is therefore reason to question the effectiveness of brokers in ensuring or enhancing competition in agribusiness banking.

115. **Suncorp's business will continue in the No-Sale Counterfactual:** There are various possibilities as to what will happen to Suncorp Bank's agribusiness portfolio in the No-Sale Counterfactual.

116. One possibility is that Suncorp will continue to compete in agribusiness as it does today: *cf*. Suncorp [75]. [redacted].[204] [redacted].[205] If Suncorp Bank pursues its organic plan for the agribusiness portfolio in the No-Sale Counterfactual, it may be expected to remain as competitive as it is today and a constraint on ANZ and others in Queensland.

117. [redacted]. [redacted].[206] [redacted]. Notably, Judo Bank submits that there is a realistic prospect that a second-tier bank will acquire parts of Suncorp Bank, including its agribusiness lending portfolio, if the Proposed Acquisition does not proceed.[207] The ACCC does not contend that the Tribunal need reach any conclusion in that regard, but that submission underscores that competition in agribusiness banking would not necessarily be lessened by a decision by Suncorp Bank to exit that market in the No-Sale Counterfactual.

118. **Competition from BEN/Suncorp Bank in that counterfactual**: Ms Starks concluded that a merged BEN / Suncorp Bank would be at least as strong a constraint on ANZ as Suncorp is in the agribusiness market in the No-Sale Counterfactual, [redacted].[208] Professor King went further than Ms Starks and concluded that competition potentially would be increased if BEN were to acquire Suncorp

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199 See [redacted] see [redacted].
200 See [redacted]
201 Mortgage and Finance Association of Australia (**MFAA**), RFI response (26 May 2023) at .0230 [HB 18/672 at 1862] 71925.036.001.0216.
202 MFAA, RFI response (26 May 2023) at .0231 [HB 18/672 at 1863] 71925.036.001.0216.
203 MFAA, RFI response (26 May 2023) at .0231 [HB 18/672 at 1863] 71925.036.001.0216.
204 [redacted].
205 See [redacted].
206 [redacted].
207 Second Submission of Judo Bank (18 April 2023) at 0170 [HB 18/616 at 95] 71925.030.001.0169.
208 Starks 1 at [9.242.1] [HB 16/578 at 1471] 71925.040.001.0171.

compared to the status quo given the complementary nature of BEN and Suncorp Bank's respective agribusiness banking portfolios.[209]

119. ANZ's contrary submission that a merged BEN/Suncorp Bank would not impose a greater constraint than BEN or Suncorp Bank alone (ANZ [78]) is at odds with the weight of the expert evidence. Moreover, even if it is correct, the submission is of little force in circumstances where Suncorp Bank is an effective competitor in agribusiness banking in Queensland today.

120. **Evaluating the evidence as a whole:** Professor King concluded that the Proposed Acquisition would lead to a substantial lessening of competition in at least some local/regional Queensland agribusiness markets.[210] He did so based on "the status of ANZ and Suncorp Bank as two very significant competitors in the provision of agribusiness banking services across a range of regional locations in Queensland; the overlap of ANZ's and Suncorp Bank's agribusiness operations in Queensland; and the removal of Suncorp as an effective and independent competitor in a range of local/regional agribusiness markets across Queensland in a situation where it is unlikely that entry, expansion or customer switching will offset any substantial lessening of competition".[211]

121. Ms Starks was more equivocal in her conclusions. Ms Starks ultimately could not say if there was a real chance of a substantial lessening of competition in agribusiness in Queensland (given the uncertainties around ANZ's plans with Suncorp, the intentions of competing banks and the lack of data on local markets), but that she could not rule out that it would have that effect.[212]

122. In these circumstances, and having regard to the matters addressed above and the matters raised by Professor King and Ms Starks, the Tribunal could properly conclude that it is not satisfied that the Proposed Acquisition will not, and will not likely, substantially lessen competition in the market for agribusiness banking in Queensland.

PART VI SME BANKING

123. The ACCC concluded that the evidence in relation to SME banking is "finely balanced".[213] As developed below, there is some evidence that suggests that the Proposed Acquisition is not likely to substantially lessen competition in the market(s) for the supply of SME banking services to customers in Queensland. However, there is also evidence that points the other way or suggests that the extent to which competition in the supply of Queensland SME banking services will be lessened by the Proposed Acquisition is not easy to predict with confidence. These are matters the Tribunal must weigh in making the single evaluative judgment required by s 90(7)(a).

A. The relevant market

124. **SME may be a separate market:** There is evidence before the Tribunal that weighs in favour of a conclusion that there is a discrete market for the the supply of SME banking services that does not include agribusiness banking customers or corporate customers: *cf.* ANZ [11]-[13]; Suncorp [49].

125. *First*, there are banking products that are specifically tailored to SME customers' needs: [redacted]; ANZ provides a rapid refinance process to SMEs with lending of up to $1 million; CBA, NAB and Westpac offer payment solutions tailored to SME customers; and NAB offers a cash flow loan product exclusively for its existing

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209 King 1 at [186] [HB 16/573 at 1014] 71925.020.001.6300.
210 King 1 at [7(f)] [HB 16/573 at 959] 71925.020.001.6300.
211 King 1 at [7(f)(i)] [HB 16/573 at 959] 71925.020.001.6300.
212 Starks 2 at [7.35] [HB 16/580 at 1784] 71925.043.001.0464; See Starks 1 at [9.240.1] to [9.240.5] [HB 16/578 at 1469] 71925.040.001.0171.
213 Reasons at [6.579] [HB 3/16 at 278] 71925.047.001.1814.

small business merchant customers.[214] The circumstance that many banks offer banking products that are designed specifically to meet the demands of SME customers is consistent with the proposition that SME customers are an identifiable customer cohort with distinct demands.[215]

126. *Second*, some banks have specific customer portfolios or strategies for their SME customers. [redacted].[216] There is also evidence that ANZ segments its business customers based on their needs, types and complexity.[217] The fact that banks organise themselves in a manner intended to target and service the SME segment specifically suggests that banks recognise that SME customers are an identifiable and coherent customer cohort.

127. *Third*, SME customers are unlikely to switch to other types of business banking products in response to small but significant non-transitory price increases. Ms Starks observed that, on the demand-side, SME customers are unlikely to regard agribusiness or corporate banking products as suitable alternatives for their needs in the face of increased prices, while on the supply-side, banks were unlikely to deploy specialists in agribusiness or corporate lending to service SME customers in such circumstances.[218]

128. ANZ submits that there is "*no distinct cohort or accepted dividing line between SME, agribusiness and other business customers*" and no consistent definition of SME customers between banks: see ANZ [12]. So much may be accepted, but that is not determinative of whether SME banking is a separate market. It merely reflects Deane J's observation in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177 at 196 that the "economy is not divided into an identifiable number of discrete markets into one or other of which all trading activities can neatly be fitted". The fact that individual banks may define the boundaries of the SME segment differently is not to deny the existence of a discrete customer cohort that can be defined coherently by reference to the circumstance that the competitive alternatives available to them are relevantly the same.

129. **SME markets may be local/regional:** The relevant markets for SME banking services may be local/regional, rather than national: *cf*. ANZ [14]; Suncorp [49].

130. Ms Starks' view was that there are two reasons why the market(s) for SME banking services may be local/regional, rather than national. First, cash handling may continue to be important to SME customers (with [redacted] of SMEs still making cash deposits in September 2022), and second because of the importance of personal relationships and local knowledge for lending decisions in relation to SME customers.[219] Ms Starks' second reason is consistent with evidence provided by competitors of Suncorp and ANZ to the effect that competition for some SME customers occurs at a local level,[220] [redacted].[221]

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214 [redacted].

215 [redacted].

216 [redacted]; van Horen 1 at [65], [redacted] [HB 9/206 at 557-8, [redacted]] SML.0004.0001.0033.

217 See e.g. ANZ Application for Merger Authorisation (2 December 2022) at [6.92] [HB 17/592 at 266] 71925.002.001.0596; Statement of Isaac Rankin (30 November 2022) (**Rankin**) at [21]-[23] [HB 12/419 at 5] 71925.002.001.9102.

218 Starks 1 at [5.45]-[5.46] [HB 16/578 at 1340] 71925.040.001.0171; Starks 2 at [7.36] [HB 16/580 at 1784] 71925.043.001.0464.

219 Starks 1 at [6.24]-[6.30] [HB 16/578 at 1351-2] 71925.040.001.0171.

220 BOQ submission (23 February 2023) at .0876 [HB 18/611 at 60] 71925.029.001.0867; Second Submission of Judo Bank (18 April 2023) at 1 [HB 18/616 at 94] 71925.030.001.0169.

221 See [redacted]

131. Having regard to the evidence, Ms Starks determined that it is "*difficult to reach a firm conclusion on geographic market definition for SME banking*" but that "*there is significant evidence pointing to the importance of local factors*", suggesting that the relevant geographic dimension was "*unlikely to be national*".[222] Ms Starks otherwise determined that there was insufficient available data to determine just how local or regional markets for SME in Queensland might be. Ms Starks therefore adopted a pragmatic approach — which is open to the Tribunal — of assessing competition at a Queensland-wide level as a proxy for the regional/local markets within the State.[223]

132. **Alternatively, SME banking is a significant section of the market:** If the Tribunal's view is that there are not distinct local/regional SME banking markets in Queensland, it may nevertheless conclude that the SME sector in Queensland is a significant section of the relevant market.

B. Tribunal may not be satisfied of no SLC in SME markets in Queensland

133. The competitive effects of the Proposed Acquisition on the supply of Queensland SME banking services are not easy to predict with confidence for the following reasons.

134. **SME markets are concentrated**: It is open to the Tribunal to find, as the ACCC did, that the Queensland SME banking market(s) (or segments) are concentrated: *cf.* ANZ [51].

135. Data obtained and analysed by the ACCC indicates that, for calendar year 2022, (a) the combined shares of major banks in Queensland SME lending and SME deposits respectively exceeded [redacted] indicating the market is currently highly concentrated; (b) Suncorp Bank's share of Queensland SME lending and SME deposits was approximately [redacted];[224] (c) [redacted]; (d) Suncorp Bank and ANZ were [redacted] SME bank lenders in Queensland and [redacted] banks for Queensland SME deposits respectively;[225] and (e) the Proposed Acquisition would result in ANZ almost doubling its market share to [redacted] in SME lending in Queensland, while increasing its share of SME deposits to [redacted].[226]

136. In short, these data suggest the Proposed Acquisition would materially increase concentration in what are already highly concentrated markets (or segments).

137. **Suncorp is an effective competitor:** Suncorp Bank is presently an effective competitor in markets for the supply of SME customers in Queensland, which exerts a measure of constraint on its competitors (including ANZ).

138. *First*, there is evidence that Suncorp Bank is [redacted] and regarded as competitive on non-price aspects. [redacted]

[redacted]

222 Starks 1 at [6.30] [HB 16/578 at 1352] 71925.040.001.0171.
223 Starks 1 at [6.30], [6.38]-[6.42] [HB 16/578 at 1352-5] 71925.040.001.0171.
224 [redacted]
225 [redacted]
226 [redacted]

[redacted].[227] Judo Bank submitted that Suncorp Bank is a "vigorous and effective rival, particularly for Queensland SMEs"[228], while BOQ submitted that "smaller regional banks like Suncorp are important drivers of competition [in SME markets]".[229] [redacted].[230]

139. *Second*, Suncorp Bank has a strong customer service and care offering. [redacted].[231] [redacted].[232] [redacted].[233]

140. *Third*, Suncorp Bank's established network, brand recognition and customer relationships in Queensland enable it to exert strong competitive constraints in that State. Mr Rankin noted that BEN, Suncorp and BOQ "exert a degree of competitive pressure on ANZ Commercial, albeit to a lesser extent than CBA, NAB and Westpac" and were able to win more business in their "home regions", which reflected "the value of their brand and greater presence in those regions".[234] [redacted].[235] [redacted].[236] Those materials indicate that Suncorp Bank's brand recognition and branch network is competitively significant within Queensland: *cf.* ANZ [48].

141. *Fourth,* Suncorp has a [redacted] for most small and medium-sized businesses: *cf.* ANZ [46]. [redacted].[237] This compares favourably

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227 See [redacted]

228 First Submission of Judo Bank (7 February 2023) at .0269 [HB 18/615 at 92] 71925.010.001.0267.

229 BOQ submission (23 February 2023) at .0876 [HB 18/611 at 60] 71925.029.001.0867.

230 See [redacted]

231 See [redacted].

232 [redacted]

233 See [redacted]

234 Rankin at [93] [HB 12/419 at 21–23] 71925.002.001.9102.

235 See [redacted].

236 See [redacted]

237 [redacted]

to ANZ, which has a relationship manager and an assistant manager each typically servicing [redacted] business banking customer groups (where each customer group has multiple customers).[238]

142. *Fifth,* [redacted],[239] [redacted].[240]

143. **The role of brokers in SME banking**: While brokers have played an increasing role in driving competition in SME lending in recent years (ANZ [57]), there is evidence to suggest that brokers' ability to drive competition between banks may be more limited. Not all banks rely heavily on brokers to acquire customers,[241] and they play a larger role in originating loans with non-bank and online lenders than they do with the established banks.[242]

144. **Barriers to entry remain**: Barriers to entry in SME banking remain high given the regulatory capital requirements, operational costs, and funding disadvantages that new entrants face relative to incumbents.[243] Barriers to entry are higher for SME deposits compared to SME lending because of the difference in regulatory requirements.[244] However, an effective competitor in SME banking is likely required to offer deposit products and loan products (*cf.* ANZ [56]) because many SMEs rely on transactional banking products,[245] and prefer to hold multiple business banking products together with the same institution.[246] There is also evidence that customer switching rates are low and customer "stickiness" is high.[247] Banks with a retail customer base also have a competitive advantage in gaining and retaining SME customers.[248]

145. While Judo Bank is an example of recent market entry in SME banking, its success should not be exaggerated: *cf*. ANZ [54]-[55]. [redacted].[249] It has also been impeded by barriers from establishing a branch network due to significant set-up and ongoing operational costs.[250]

146. **Evaluating the evidence as a whole:** Ms Starks ultimately concluded that she could not say if there was a real chance of a substantial lessening of competition in the SME banking market(s) in

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238 [redacted]; see also Starks 1 at [9.257] [HB 16/578 at 1478-9] 71925.040.001.0171, noting that "Suncorp Bank adopts a relationship model to SME banking that is similar to other regional banks and Judo Bank and can be differentiated from the models adopted by ANZ and the other majors".

239 See [redacted].

240 [redacted]

241 See Reasons at [6.513] [HB 3/16 at 264-5] 71925.047.001.1814 [redacted]

242 MFAA, RFI response (26 May 2023) at .0235 [HB 18/672 at 1867] 71925.036.001.0216.

243 See First Submission of Judo Bank (7 February 2023) at .0269 [HB 18/615 at 92] 71925.010.001.0267.

244 See ANZ application for Merger Authorisation (2 December 2022) at [7.152(a)] [HB 17/592 at 338] 71925.002.001.0596; see also Reasons [6.559] [HB 3/16 at 274] 71925.047.001.1814.

245 See, e.g. Rankin at [21] [HB 12/419 at 5] 71925.002.001.9102, noting that about [redacted] of ANZ's small business banking customers have working capital and transactional banking facilities.

246 See [redacted] see also Reasons [6.559].

247 See [redacted] M Bennett 1 at [104] [HB 12/428 at 136] 71925.002.001.9551.

248 See [redacted].

249 [redacted].

250 First Submission of Judo Bank (7 February 2023) at 3 [HB 18/615 at 92] 71925.010.001.0267.

Queensland, but that she could likewise not rule out such an effect:[251] That was because she could not "be sure that there is no local market where the merger causes there to be only three or few competitors left" and could not "rule out that under ANZ's leadership Suncorp will change its business model to be more like ANZ, reducing the number of non-major banks that operate based on a more personalised and flexible approach by one".[252] The reasons identified by Ms Starks, together with the other matters addressed above, are a sufficient basis upon which the Tribunal could properly conclude that it is not satisfied that the Proposed Acquisition would not, or would not likely, substantially lessen competition in the market(s) for SME banking in Queensland.

PART VII DEPOSITS

147. The ACCC concluded that the Proposed Acquisition was likely to lead to some, but not a substantial, lessening of competition in the national market for retail deposits. The applicants have not addressed this finding. If the Tribunal reaches the same conclusion, that lessening of competition must be taken into account in deciding whether the Tribunal is satisfied there is a net public benefit under s 90(7)(b) and whether, if so, to grant authorisation. The Reasons at [6.321]-[6.398] provide an appropriate starting point. The ACCC will assist the Tribunal at the oral hearing on any issues arising.

PART VIII PUBLIC BENEFITS AND DETRIMENTS

A. Public benefits

148. The applicants rely on six categories of public benefits which are said to arise from the Proposed Acquisition. Each category is addressed below.

149. **Improved performance of Suncorp's insurance business:** Suncorp submits that the Proposed Acquisition will allow it to focus on, and improve, its insurance business: Suncorp [78]-[83]. The ACCC accepted that would deliver some public benefit but assessed that benefit as small.[253]

150. Suncorp will have the incentive to improve its insurance business without the Proposed Acquisition. How it goes about doing so and how quickly it can do so will differ depending on whether it retains its banking business. But Suncorp's conglomerate structure does not prevent it from improving the performance of its insurance business. It may do so more quickly with the Proposed Acquisition, but that is a less substantial public benefit than Suncorp claims.

151. More importantly, there is no reason why Suncorp could not improve its insurance business and deliver public benefits in the BEN Merger Counterfactual in the same way and to the same extent as with the Proposed Acquisition.

152. Finally, Suncorp has not provided detailed information on the operational efficiencies it may achieve from the sale of the bank to benefit its insurance business. And little weight should be accorded to this benefit in any event, since it will accrue largely, if not entirely, to Suncorp and its shareholders, not to the community generally.

153. **Synergies:** ANZ submits that the Proposed Acquisition is likely to achieve substantial integration synergies: ANZ [80]-[86]. The ACCC accepted that this was a likely public benefit but of a lesser

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251 Starks 2 at [7.45] [HB 16/580 at 1786] 71925.043.001.0464. See also Starks 1, at [9.240.1]-[9.240.5] [HB 16/578 at 1469-70] 71925.040.001.0171.

252 Starks 2 at [7.45] [HB 16/580 at 1786] 71925.043.001.0464. See also Starks 1, at [9.240.1]-[9.240.5] [HB 16/578 at 1469-70] 71925.040.001.0171.

253 Reasons at [7.26], [7.31] [HB 3/16 at 318, 319] 71925.047.001.1814.

magnitude than claimed.[254] A number of factors affect the weight that ought to be accorded to this benefit.

154. *First*, the estimated synergies claimed by ANZ do not include substantial one-off costs to Suncorp following the Proposed Acquisition.[255] These costs offset the quantum of the public benefit associated with synergies.[256]

155. *Second*, the synergies [redacted].[258] Without historical and detailed projections, Ms Starks could not comment on how realistic those estimates may be.[259] Even if the Tribunal is satisfied ANZ followed a comprehensive process to reach a credible estimate of synergies, it may still be in doubt as to the extent and certainty of any claimed public benefits.[260]

156. *Third*, the synergy estimates are not only inherently uncertain, but they are a work in progress. [redacted].[261] [redacted].[262] [redacted],[263] [redacted].[264]

157. *Fourth*, the Tribunal should not share [redacted][265] At the best of times, bank integrations are more complex, costly and time-consuming than initially expected.[266] [redacted].[267] Imperfect information can obviously affect cost saving estimates.[268] [redacted][269] [redacted][270] and organisational differences may further erode ANZ's estimated costs savings.[271] Mr Elliott acknowledged that [redacted][272] The picture is further complicated by the fact that ANZ proposes to [redacted]

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254 Reasons at [7.59] [HB 3/16 at 328] 71925.047.001.1814.

255 Second expert report of Patrick Smith (17 May 2023) (**Smith 2**), at [13]-[15] [HB 16/570 at 1099] 71925.034.001.1096; Reasons at [7.55] [HB 3/16 at 262] 71925.047.001.1814.

256 Smith 2 at [18] [HB 16/570 at 1099] 71925.034.001.1096; Starks 2 at [9.8] [HB 16/580 at 1790] 71925.043.001.0464.

257 [redacted].

258 [redacted].

259 Starks 1 at [10.26] [HB 16/578 at 1491] 71925.040.001.0171.

260 Starks 2 at [9.2] [HB 16/580 at 1789] 71925.043.001.0464.

261 [redacted]

262 [redacted].

263 [redacted].

264 [redacted].

265 [redacted]

266 [redacted]; Starks 1 at [10.21] [HB 16/578 at 1491] 71925.040.001.0171; see also Reasons at [7.53] [HB 3/16 at 262] 71925.047.001.1814.

267 [redacted]

268 Starks 2 at [9.4] [HB 16/580 at 1789] 71925.043.001.0464.

269 [redacted].

270 [redacted]

271 Starks 1 at [10.11.2] [HB 16/578 at 1488] 71925.040.001.0171.

272 [redacted].

[redacted].[273] It is not apparent that the synergies have been benchmarked against comparable transactions.

158. *Fifth*, as stated by Ms Starks, there is no clear evidence that all the cost savings claimed by ANZ are specific to the Proposed Acquisition.[274] It is likely that some measure of public benefits could also be achieved from synergies and efficiency gains in the BEN Merger Counterfactual (BEN at [93]).[275]

159. *Sixth*, the extent to which any benefits from synergies will flow to consumers in the form of lower prices or improved products and services is unclear.[276] That will depend on the extent to which any costs savings relate to fixed or variable costs, and ANZ's incentive to pass on benefits to consumers will depend on the intensity of competition after the Proposed Acquisition.[277]

160. **Prudential safety:** ANZ claims that the Proposed Acquisition will improve the prudential safety of Suncorp Bank: ANZ [87]. The ACCC concluded that material prudential safety benefits were unlikely.[278] There is no meaningful risk of Suncorp Bank failing. On this issue, the Proposed Acquisition is a solution in search of a problem.

161. Since 1 January 2023, APRA has implemented a new capital framework for ADIs with enhanced risk sensitivity and stronger, loss-absorbing capital requirements.[279] In contrast to Dr Carmichael's findings on residual system risk and the future safety and soundness of Suncorp Bank,[280] APRA submitted that its new capital requirements framework, as well as its loss-absorbing capacity requirements, are appropriately calibrated for the risks they are intended to capture.[281]

162. Any theoretical public benefit here must be offset in two ways. *First*, to the extent that the Proposed Acquisition may generate a capital buffer to reduce the risk of Suncorp Bank failing, this may tie up capital with associated costs.[282] There is minimal evidence of a net reduction in systemic financial instability associated with superior risk management and diversification in the Proposed Acquisition.[283] *Second*, the capital requirements for D-SIBs offset increased prudential risks associated with those banks and reflect the likelihood that their failure would be more significant compared to non-systemically important institutions. A larger ANZ increases systemic risk as the consequences of failure will be more significant and widespread.

163. **Major Bank Levy:** *First*, given the major bank levy is a mechanism to address the increased systemic risks associated with a larger bank,[284] it is wrong to characterise an increase in that levy as a meaningful public benefit. Increases to government revenue are offset by the risk of harm that

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273 [redacted].

274 Starks 1 at [10.11.1]-[10.11.3] [HB 16/579 at 1488-1489] 71925.040.001.0171; Starks 2 at [9.3] [HB 16/580 at 1789] 71925.043.001.0464.

275 See also Reasons at [7.56] [HB 3/16 at 327] 71925.047.001.1814.

276 *Re Howard Smith Industries Pty Ltd & Adelaide Steamship Industries* (1977) 28 FLR 385 at 391-392; *Re Qantas* at [185].

277 Starks 1 at [10.15]-[10.17] [HB 16/579 at 1489] 71925.040.001.0171; Expert report of Patrick Smith (1 December 2022) at [17(b)] [HB 16/568 at 675] 71925.002.001.8725; Starks 2 at [9.10]-[9.11] [HB 16/580 at 1790] 71925.043.001.0464.

278 Reasons at [7.78] [HB 3/16 at 333] 71925.047.001.1814.

279 APRA Submission (13 July 2023) [HB 18/617 at 96] 71925.043.001.0566.

280 Expert report of Jeffrey Carmichael (25 November 2022) at sections 2.3-2.4 and 3 [HB 16/562 at 381-384, 388] 71925.002.001.8706; see also ANZ Submissions (10 November 2023) at [88]-[89] [HB 4/21 at 31-32] ABG.5001.0413.1472.

281 APRA Submission (13 July 2023) at .0572 [HB 18/617] 71925.043.001.0566.

282 Starks 1, at [10.52], [HB 16/579 at 1499] 71925.040.001.0171.

283 Starks 1, at [10.53]-[10.54], [HB 16/579 at 1499] 71925.040.001.0171.

284 Starks 1 at [3.01], [7.49] [HB 16/579 at 1300, 1365] 71925.040.001.0171; Second expert report of Mozammel Ali (23 July 2023) at [89]-[90] [HB 16/560 at 305-306] 71925.044.001.0222.

larger banks pose. *Second*, any public benefits from increased contributions to the major bank levy are not unique to the Proposed Acquisition. [redacted],[285] [redacted].[286]

164. **Lower funding costs and greater access to wholesale funding:** The ACCC concluded that there is "potentially some benefit in the form of lower funding costs" but assessed that benefit as small.[287] *First*, any public benefit on this account is likely to be offset (at least partially) by countervailing burdens on the merged entity, such as higher contributions to the major bank levy and higher capital requirements. *Second*, there is no evidence that Suncorp Bank is unlikely to be able to access funding at a commercially acceptable rate in the No-Sale Counterfactual or the BEN Merger Counterfactual.[288]

165. *Third*, the Tribunal should not disregard Ms Starks' expert opinion that the Proposed Acquisition is unlikely to lower funding costs in a way that constitutes productive efficiency gains and substantial public benefits[289] on the basis that her experience in economic consulting and senior regulatory roles is not bank-specific: *cf.* Suncorp [85]. Clearly she has relevant expertise.[290]

166. *Fourth*, it is overly speculative whether the savings are retained by ANZ and its shareholders or flow through to consumers. Mr Smith's economic theory suggests that some benefits may pass to consumers but does not offer reliable predictions about the extent to which that will occur.[291]

167. **Queensland commitments:** The Tribunal should not find that substantial and relevant public benefits will likely flow from the applicants' commitments to the State of Queensland.

168. *First,* the Tribunal may only weigh in the s 90(7)(b) balance those public benefits that result from the very conduct for which authorisation is sought.[292] It would be an error to rely on different commitments, made to a third party (the State of Queensland), under Implementation Agreements that are coincident with the Proposed Acquisition, but for which no authorisation is sought.[293] An important reason why that is so was explained by the Tribunal in *Telstra TPG (No 2)*,[294] namely, the applicants and the State of Queensland would be free to vary the Implementation Agreements without imperilling their authorisation for the Proposed Acquisition, and consequently, to authorise the Proposed Acquisition due to benefits said to arise from the Implementation Agreements would be to adopt a flawed approach.

169. *Second*, it is appropriate for the Tribunal to consider whether the applicants have shown that their commitments in Queensland will not result in correlative detriments in other parts of Australia so that they could not be characterised as net public benefits. For example, the commitments may necessitate that jobs are relocated to Queensland from other States, or that fewer new jobs are

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285 [redacted].
286 [redacted]
287 Reasons at [7.80]-[7.82] [HB 3/16 at 334] 71925.047.001.1814.
288 Reasons at [7.83] [HB 3/16 at 335] 71925.047.001.1814.
289 Starks 1 at [10.30]-[10.42] [HB 16/578 at 1492-1497] 71925.040.001.0171.
290 Starks 1 at [1.1]-[1.3], Annex 1 – Curriculum Vitae [HB 16/578 at 1296, 1502] 71925.040.001.0171.
291 Expert report of Patrick Smith (1 December 2022) at [96]-[97] [HB 16/568 at 697] 71925.002.001.8725.
292 *Telstra TPG (No 2)* at [144]-[159]. See also *Re Qantas* at [156].
293 *Telstra TPG (No 2)* 2 at [144]-[159].
294 *Telstra TPG (No 2)* 2 at [157].

created elsewhere.[295] There is little evidence before the Tribunal on which it could be satisfied that the claimed benefits will not involve swings-and-roundabouts of this nature.

170. *Third*, if commitments to Queensland involve profitable opportunities, it is likely that ANZ or other banks would pursue them even without the Proposed Acquisition, including BEN.[296] [redacted].[297]

B. Public detriments

171. The ACCC found that the most significant public detriments of the Proposed Acquisition are its likely impacts on competition in the markets for home loans, retail deposits, agribusiness banking and SME banking.[298] Anti-competitive effects are substantial public detriments that should be given considerable weight under s 90(7)(b). This is particularly so where, as here, the markets in question are of immense importance to Australian consumers and businesses.

172. In addition, the ACCC determined that the acquisition of Suncorp Bank by a major bank involves a substantial public detriment, being the loss of an attractive acquisition target for existing smaller banks to build scale and strengthen competition.[299] That conclusion is sound, even though it is not confined to any specific market but is instead based on a consideration of the "Australian banking industry" as a whole. Public detriments include any impairments to the community generally, and any harms to society's goals of economic efficiency.[300] It is a broad concept that is not confined to competition effects in discrete markets.[301]

173. As referred to above, there is ample evidence of the importance of scale in the Australian banking industry and the advantages that scale confers on the major banks. The benefits of scale are not confined to specific markets but can be exploited across the various different markets in which banks participate. Given the barriers to entry and expansion in banking markets, acquisitions are one of the most effective means by which banks can grow. That is why Mr Elliott accurately described the Proposed Acquisition as a unique, once-in-a-lifetime opportunity.[302] [redacted].[303] The Proposed Acquisition will remove the best and most meaningful opportunity for a second-tier bank to better compete with the major banks through a step change in scale.

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295 See e.g., [redacted]

296 BEN at [95]. See [redacted]

297 [redacted].

298 Reasons at [7.108] HB 3/16 at 340] 71925.047.001.1814.

299 Reasons at [7.127]-[7.133] [HB 3/16 at 343-4] 71925.047.001.1814.

300 *Telstra TPG (No 2)* at [120]-[126], [695]; *Re Qantas* at [151]-[156] at [150].

301 *Telstra TPG (No 2)* at [120]-[126], [695]; *Re Medicines* at [108].

302 See e.g. [redacted]; ANZ Bluenotes, "Elliott: a transformational advance for ANZ" (18 July 2022) at 2 [HB 29/1264 at 2652] 71925.046.001.3209; Australian Financial Review, "ANZ's 'once-in-a-lifetime' deal comes with complexity" (18 July 2022) [HB 31/1308] 71925.046.001.2670.

303 See e.g. [redacted]

174. Second-tier banks are an important source of competitive pressure on the major banks,[304] and play an important role in non-price competition.[305] The competitive pressure of second-tier banks is significant in a competitive landscape that has long been muted and where it is unlikely there will be a credible threat of sustained new entry and expansion at scale to disrupt and constrain major banks. The loss of Suncorp Bank as a stand-alone competitor and a potential acquisition target for other second-tier banks will further entrench the existing market structure, whereby Australia's banking sector will be dominated by the major banks for the foreseeable future.

175. ANZ claims that this broader detriment overlaps with an assessment of the competitive effects of the Proposed Acquisition in particular markets such that there are no additional detriments to be considered under s 90(7)(b) once those competitive effects are brought to account. That contention should be rejected. This detriment extends beyond the competitive effects discussed in the context of specific markets under s 90(7)(a) and brought to account as public detriments under s 90(7)(b). There is therefore no double counting in considering this detriment to the extent that consideration goes beyond those competitive effects.

C. Weighing the public benefits against the detriments

176. Given the substantial public detriments likely to result from the Proposed Acquisition and the limited benefits that might be considered to be likely to result, the Tribunal may properly conclude that it is not satisfied that the public benefits which would result or would be likely to result from the Proposed Acquisition outweigh the public detriments or likely detriments.

Garry Rich SC, Robert Yezerski SC, Christopher Tran, Megan Caristo, Erin O'Connor Jardine

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304 [redacted]

305 See e.g. BEN Submission (3 March 2023) at [2.2], [5.6], [6.1(d)-(e)], [6.2(c)], [7.2(f)] [HB 15/551 at 721-2, 738-9, 745-6, 750, 761] 71925.020.001.7324; ANZ merger authorisation application (2 December 2022) at [7.196(c)] [HB 17/592 at 354] 71925.002.001.0596; [redacted]