

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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

Lodgment and Details

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



REGISTRAR

Dated: 1/12/2023 6:08 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 IN RELATION
TO THE STATE OF QUEENSLAND'S PROPOSED SUBMISSION ON PUBLIC BENEFITS**

PART I BACKGROUND

1. On 20 October 2023, the Tribunal granted leave to the State of Queensland to intervene in the application by Australia and New Zealand Banking Group Limited (**ANZ**) and Suncorp Group Limited (**Suncorp**) for review of the Australian Competition and Consumer Commission (**Commission**) Merger Authorisation Determination MA1000023-1 (**Determination**).
2. The State of Queensland's leave is limited to filing written submissions addressing the public benefits to the State of Queensland from the proposed ANZ/Suncorp merger (**Proposed Acquisition**).¹ The State of Queensland has served the submissions it proposes to make (**Queensland Submissions**).²
3. An issue has arisen as to whether the Tribunal may have regard to some of the material in the Queensland Submissions consistently with s 102(10) of the *Competition and Consumer Act 2001* (Cth) (**CCA**). In short, that is because the Queensland Submissions contain information that was not furnished to the Commission during its consideration of the Proposed Acquisition.
4. While the circumstances in which the Tribunal can have regard to information that was not furnished to the Commission are very limited, the Tribunal is able to seek the additional information contained in the Queensland Submissions for the sole purpose of clarifying information that was before the Commission. If the Tribunal considers it reasonable and appropriate to do so for that purpose, then it may seek and receive the additional information contained in the Queensland Submissions from the State of Queensland, and thereafter have regard to it in accordance with s 102(10)(d) of the CCA.

¹ Australian Competition Tribunal Directions made 20 October 2023 at [12].

² Affidavit of Michael John Kimmins, 6 October 2023 at [4] and the Annexure marked MJK-1; State of Queensland submissions dated 29 November 2023 at [1].

PART II THE LEGISLATIVE REGIME

5. Section 101(2)(a) of the CCA provides that the Tribunal's review of a determination by the Commission in relation to an application for merger authorisation is not a "re-hearing" of the matter; rather, it is a review that is to be conducted having regard only to the material enumerated in s 102(10).³
6. The Tribunal has no discretion to have regard to other material. That follows from the express words of s 102(10), which provides that the Tribunal "*must not*, for purposes of the review, have regard to information, documents or evidence" other than the material described in subparagraphs (a) to (e) of the provision (emphasis added).
7. The purpose of the limitation imposed by s 102(10) is to balance appropriately the interests of all parties to a review of a merger authorisation matter. That is achieved, first, because the limitations "ensure that applicants for merger authorisation provide the Commission with all relevant material at the time of the application, and do not delay production of that material until later in the process or until Tribunal review"; and, second, by facilitating "the Tribunal conducting its review expeditiously, given the time sensitive nature of merger transactions".⁴

PART III THE BASIS ON WHICH THE TRIBUNAL MAY HAVE REGARD TO THE MATERIAL

8. The State of Queensland did not make any submissions or provide any information to the Commission in the course of the Commission's review of the Proposed Acquisition, although it was invited to do so.
9. While ANZ and Suncorp each made various submissions to the Commission as to the asserted benefits of Proposed Acquisition to the State of Queensland, there was limited information, documents or evidence before the Commission as to:
 - a) the State of Queensland's approach to the negotiation of, and its decision to enter into, Implementation Agreements with each of ANZ and Suncorp;
 - b) how, *in the State of Queensland's assessment*, the relevant commitments made in the Implementation Agreements directly or indirectly advance specific policies of the Queensland Government, and specific information about those policies; and
 - c) why the State of Queensland considers that commitments contained in the Implementation Agreements are public benefits to the State of Queensland.
10. The Queensland Submissions address these matters in detail and provide information that was not disclosed in any of the information, documents or evidence before the Commission. That additional information is contained in paragraphs 16-19 of the Queensland Submissions. For example:
 - a) Paragraphs 16 and 17 contain statements as to the State of Queensland's approach to assessing and negotiating the proposed commitments by ANZ and Suncorp; and
 - b) Paragraph 18 (and the following 21 pages) provides a table identifying particular Queensland Government policies and strategies that are said to be advanced by the commitments.
 - c) Paragraph 19 contains statements as to what the State of Queensland regard as the public benefits to Queensland of the Proposed Acquisition.

³ *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 2 at [107].

⁴ *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1 at [83]; Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017, [9.79].

11. The Commission maintains that information of that kind set out in paragraph 10 (above) does not fall within s 102(10)(c). It likewise does not fall within s 102(10)(a), (b) or (e).
12. The information in the Queensland Submissions also does not presently fall within s 102(10)(d) of the CCA. However, the same information would fall within s 102(10)(d) if the Tribunal formed the view that it was reasonable and appropriate to request that information from the State of Queensland for the purpose of clarifying material that was given to the Commission, and made such a request.
13. The Tribunal is empowered to seek information for the “sole purpose” of clarifying material furnished to the Commission. Information will be “clarifying” in the relevant sense if it assists the Tribunal to develop a clearer understanding of the material before the Commission, including by reference to contextual material.⁵ Before the Tribunal is permitted to seek clarifying information, it must be satisfied that something in the information, documents or evidence before the Commission is or may be unclear. The Tribunal’s power to seek clarifying information is not enlivened merely to test the reliability or credibility of information, documents or evidence furnished to the Commission.⁶
14. Section 102(10)(d) is not enlivened merely because an interested person or intervener wishes to provide new information, documents or evidence to the Tribunal. However, in circumstances of the present review, the Tribunal may consider it reasonable and appropriate to seek information from the State of Queensland for the sole purpose of clarifying the nature and extent of any public benefits which are likely to arise from the applicants’ commitments to the Queensland Government.
15. In this regard:
 - a) the State of Queensland’s views as to the value or utility of the relevant commitments to the State of Queensland, and the extent to which those commitments advance its policies and strategies, is a matter peculiarly within the knowledge of the State of Queensland; and
 - b) some of the information that was before the Commission regarding the State’s position may not be able to be used conformably with s 8(1) of the *Parliament of Queensland Act 2001* (Qld), whereas no such impediment would arise in respect of the Queensland Submissions.

PART IV PROCEDURAL STEPS TO RECEIVE THE INFORMATION

16. If the Tribunal considers it reasonable and appropriate to seek clarifying information from the State of Queensland, a further procedural step is required before the Tribunal can have regard to that material.
17. In terms, s 102(10)(d) only permits the Tribunal to have regard to further information, documents or evidence if that material is provided to the Tribunal ‘as a result of the Tribunal seeking such relevant information’. Therefore, in order for the Tribunal to have regard to the additional material contained in the Queensland Submissions, it must first request the information it considers reasonable and appropriate from the State of Queensland and that State must respond to the request.
18. If those steps occurred, it would be open to the Tribunal to accept and have regard to the Queensland Submissions given in answer to that request.

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

⁵ *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1 at [78].

⁶ *Applications by Telstra Corporation Limited and TPG Telecom Limited* [2023] ACompT 1 at [79].