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:	Concise Statement of Facts, Issues and Contentions
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: 4/10/2023 10:00 AM

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.

PUBLIC VERSION

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

CONCISE STATEMENT OF FACTS, ISSUES AND CONTENTIONS

OF THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

[redacted]

PART I INTRODUCTORY MATTERS

1. This proceeding is a review under s 101 of the *Competition and Consumer Act 2010* (Cth) (the **Act**) of a determination (**Determination**) by the Australian Competition and Consumer Commission (the **ACCC**) to dismiss an application by Australia and New Zealand Banking Group Limited (**ANZ**) under s 88(1) of the Act. The application sought authorisation for ANZ (or a related body corporate nominated by ANZ) to acquire:

   a. all the issued share capital of SBGH Limited (**Suncorp Bank**) in accordance with the Share Sale and Purchase Agreement (the **SSPA**), and

   b. the Property Leases (as defined in section 1.1 of the SSPA) relating to Suncorp Bank which are not held by an entity that is to be acquired by ANZ

   (together, the **Proposed Acquisition**).

2. The Determination was made on 4 August 2023. The ACCC provided detailed Reasons for Determination (the **Reasons**).

PART II THE STATUTORY TEST

3. In conducting a review of the Determination, the Tribunal is not conducting a re-hearing (see s 101(2) of the Act). Rather, the Tribunal must review the Determination by making its own decision with respect to the application for authorisation in accordance with the statutory criteria in s 90(7), having regard to only the material that is enumerated in s 102(10).

4. The Tribunal's task is to determine whether the decision made by the ACCC was the objectively correct or preferable decision. The Tribunal's task is not to review the reasons for decision of the ACCC with a view to correcting error, although the ACCC's reasons may prove a convenient reference point for defining the matters which are truly in dispute. The Tribunal must make its own findings of fact and reach its own decision as to whether authorisation should be granted or not and, if so, any conditions to which it is to be subject.

5. Section 90(7) relevantly provides that the ACCC (or the Tribunal on review) must not make a determination granting authorisation under s 88 of the Act 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.

6. The word "satisfied" in s 90(7) is not amenable to the application of an evidentiary burden of proof, such as balance of probabilities. In applying s 90(7), the Tribunal will not be "satisfied" unless it reaches an affirmative belief that the conduct would not have

the effect, or would not be likely to have the effect, of substantially lessening competition or that the conduct would result, or be likely to result, in a net benefit to the public.

7. The first limb of this test (i.e., s 90(7)(a)) requires that the Tribunal be satisfied of a negative proposition. It is materially different from s 50 of the Act, which will not be contravened unless a positive proposition is established on the balance of probabilities: that an acquisition would have, or would be likely to have, the effect of substantially lessening competition.

PART III ISSUES ARISING ON THE REVIEW

8. The ACCC agrees that the broad issues identified at [11] to [15] of ANZ's Statement of Facts, Issues and Contentions (**SOFIC**), [15] to [18] of Suncorp's SOFIC and [4] of Bendigo and Adelaide Bank's (**Bendigo**) SOFIC are likely to arise in these proceedings.

PART IV INDUSTRY BACKGROUND

9. Australia's retail banking sector is an established oligopoly in which the four major banks (CBA, Westpac, ANZ and NAB) collectively account for 72% of banking system assets. A further six authorised deposit-taking institutions (**ADIs**), including Suncorp Bank, each have between a 1% and 5% share of banking system assets. These six ADIs collectively account for close to 14% of reported banking system assets. Finally, there is a large number (>100) of small ADIs, which individually have a share of banking system assets of less than 0.7%. These small ADIs collectively account for approximately 14.5% of reported banking system assets.

10. In addition to ADIs, non-ADI lenders account for a small share of total financial system assets in Australia. Non-ADI lending is undertaken by registered financial corporations and some types of managed investment funds, which in total account for around 5% of total Australian financial system assets.

11. The Applicants contend that the banking sector is intensely competitive, and that competition is increasing. However, there is a substantial body of material before the Tribunal which supports a different view; that competition between the major banks is ineffective and that smaller banks have limited capacity to compete on price.

12. The major banks have significant scale advantages over smaller competitors. They benefit from lower cost-to-income ratios, higher profitability and returns on equity, and a lower cost of funds. Smaller banks also have less ability to invest in technology and face proportionally higher compliance costs.

13. There are only limited examples of successful new entry and expansion into banking markets over the past 5-10 years. Where new entry has occurred (such as Macquarie Bank (**Macquarie**) or Judo Bank), it has taken many years for new entrants to build market share and no new entrant has grown to a similar size as the major banks.

14. The major banks' net interest margins (**NIM**) and return on equity (**ROE**) have declined since 2000. The Applicants contend that this is evidence of competition in the banking

sector. However, the more likely explanation for reductions in NIM and ROE lies elsewhere: in particular, it has been driven by APRA's tighter capital standards and the low interest rate environment, rather than an increase in competition. The NIM and profitability of the major banks remains higher than that of banks in comparable jurisdictions, and that has been the case for a sustained period.

15. A more appropriate metric for assessing the level of competition may be the banks' implied lending spread. This is the difference between the average interest rate charged on outstanding loans made by the bank and the average cost of its debt and deposit funding. Competition could be expected to lead to lower lending rates for a given level of funding cost, that is, a reduction in lending spread. RBA analysis indicates that the major banks' lending spreads remained roughly the same or increased from at least 2016 until 2020 before narrowing across 2021 and 2022.

16. The Tribunal will need to assess whether this recent narrowing of lending spreads represents a long term trend in competition between the banks.

PART V THE COUNTERFACTUAL

17. Two counterfactuals have a realistic prospect of occurring in the future without the Proposed Acquisition:

    a. Suncorp Bank continues to operate under the ownership of Suncorp Group (**No-Sale Counterfactual**), or

    b. Suncorp Bank is acquired by, or merged with, Bendigo (the **Bendigo Merger Counterfactual**).

A. No-Sale Counterfactual

18. The Applicants describe the No-Sale Counterfactual as the "status quo".

19. However, the Applicants will need to satisfy the Tribunal about how Suncorp Bank is likely to operate in the No-Sale Counterfactual. It should not merely be assumed that Suncorp Bank will operate unchanged. The evidence reveals the following commercially realistic possibilities as to how Suncorp Group may operate Suncorp Bank in the No-Sale Counterfactual:

    a. It may continue to execute [redacted]

    b. Suncorp may divest some of Suncorp Bank's portfolios [redacted] and/or

    c. Suncorp Bank would [redacted].

20. It would be open to the Tribunal to conclude on the evidence that, in the No-Sale Counterfactual, Suncorp Group would maintain, or even improve, the competitiveness of Suncorp Bank and seek to increase shareholder value. As a second-tier bank it will have

incentives to continue to differentiate its offering and engage in non-price competition, better customer care and service levels.

B. Bendigo Merger Counterfactual

21. There is material before the Tribunal which supports the conclusion that there is a realistic prospect of the Bendigo Merger Counterfactual occurring in the future without the Proposed Acquisition, given that:

   a. there would be strong incentives for Suncorp Group to divest Suncorp Bank and [redacted]

   b. [redacted]

   c. Bendigo Bank has strong commercial incentives to seek to acquire Suncorp Bank, and has the ability to make an offer to Suncorp Group [redacted]

   d. prior to the announcement of the Proposed Acquisition, Bendigo Bank was seeking to engage with Suncorp Group and preparing to make an offer to merge with Suncorp Bank [redacted]

   e. if such an offer were made, the Suncorp Group Board would be obliged to consider it.

   f. the execution risks Suncorp has identified to the Bendigo Merger Counterfactual are likely surmountable in the counterfactual.

22. If Bendigo puts a formal offer to Suncorp, as a public company its directors would consider whether it was in the best interests of its shareholders. There is a reasonable commercial likelihood that the parties would reach an agreement, given the incentives for each of them to enter a Bendigo/Suncorp transaction. Any effects from a Bendigo/Suncorp transaction would occur over a number of years.

23. It is open to the Tribunal to conclude that there is a realistic commercial possibility that, in the Bendigo Merger Counterfactual, the merged entity would be a larger second-tier bank that:

   a. is better placed to compete with the major banks than Bendigo or Suncorp Bank alone;

   b. will benefit from lower average fixed costs, and will have greater incentives to invest in efficiency-enhancing technologies, than Bendigo or Suncorp Bank alone;

   c. will have a credit rating equal to or higher than Bendigo's current credit rating, which may result in benefits to the merged entity's wholesale funding position; and

d. may have improved capital funding as a result of being formally IRB accredited in the medium and longer term.

PART VI HOME LOANS MARKET

24. It is not in dispute that there is a home loans market with a national geographic scope and that any coordination between competitors in that market may reduce competition.

25. The Tribunal should consider whether there is or has historically been coordination in the home loans market and whether the Proposed Acquisition would meaningfully increase the ability and incentive of the major banks to coordinate or make any existing coordination more stable or effective. If the Proposed Acquisition were to materially increase the incentives and ability to initiate and sustain coordination (or lead to greater coordination) in the home loans market, that would be likely to substantially lessen competition.

26. There is evidence that the national home loans market is currently likely to be conducive to coordination, having regard to the following matters.

    a. **Concentration:** While there are a large number of suppliers of home loans, the home loans market is moderately concentrated, with the largest 8 suppliers (CBA, Westpac, NAB, ANZ, Macquarie, Suncorp, BABL and BOQ) responsible for approximately 95% of all home loans. Of those, the major banks account for approximately 75%.

    b. **Barriers to entry and expansion**: Barriers to entry and expansion remain high and the capacity of existing competitors to grow organically remains constrained. New entrants have had (and have been largely perceived to have had) little competitive impact. Other than Macquarie, whose example is unlikely to be repeated in a relevant timeframe, second tier banks have struggled to gain market share. Interested parties (including Bendigo and BOQ) submitted to the ACCC that barriers to expansion are significant.

    c. **Recent competition in the home loans market**: There is evidence of heightened competition in the home loans market in recent years, but this price competition does not represent the level of enduring competition that is likely to persist in this market.

    d. **Symmetry:** There is symmetry among the major banks in terms of their business models, accommodative pricing strategies and cost structures, particularly as compared with second-tier banks. Notwithstanding some asymmetry in terms of, for example, market shares, the level of symmetry is such that coordination among the major banks is feasible to initiate and/or sustain.

    e. **Price transparency:** Information about index or ‘headline’ interest rates on home loan products is widely published, although information about discounts is more opaque. While banks’ information about competitor discounting is imperfect and may be delayed, overall there appears to be a relatively high degree of price transparency between the major banks, which would facilitate coordination between them.

f. **'Forward looking' market shares:** Both ANZ and Suncorp contend that Macquarie's share of new loans is approximately 12%. [redacted]

g. **Innovation:** There is mixed evidence on the nature and source of innovation. The Applicants contend that innovation is led by the major banks while Bendigo and BOQ submit that smaller banks play an important role in driving innovation and the Proposed Acquisition may reduce innovation in the future.

   Innovation has done little to disrupt the position of the major banks, and the short-medium term effect of innovation in the home loans market will not be sufficient to undermine coordination between the major banks.

h. **Consumer choice frictions:** Barriers and costs to customers switching have in general been reducing over time. However, certain frictions (particularly stemming from the opaqueness of interest rate discounts for consumers) have increased and accordingly the level of switching in the market is still very low. Key barriers to switching identified in the ACCC's 2020 Home Loan Price Inquiry remain. Ongoing significant consumer choice frictions facilitate coordination by limiting the incentives for banks to 'deviate' from coordinated strategies (e.g., by undercutting competitors).

27. There is evidence that the major banks may have a greater ability and incentive to coordinate with the Proposed Acquisition than without it. That is principally because the Proposed Acquisition will increase symmetry between ANZ and the other major banks:

   a. The Proposed Acquisition increases the size of ANZ, and reduces the level of asymmetry in market shares between ANZ and the other major banks. The Proposed Acquisition closes the gap in market share of the home loans market between ANZ (currently 13%; post-acquisition 15%) and the other three majors (15%; 22% and 26%).

   b. [redacted]

   c. The Proposed Acquisition will also further increase ANZ's domestic focus towards retail banking, in common with the domestic focus of the other major banks.

28. In addition, the Proposed Acquisition prevents the possibility of the creation of a combined Bendigo/Suncorp Bank through the Bendigo Merger Counterfactual, which would strengthen and diversify the competitive fringe of challenger banks in a way that has the potential to decrease the ability and incentives of all four major banks to engage in coordination relative to a future with either the Proposed Acquisition or the No-Sale Counterfactual.

29. For the Tribunal to reach the view it is satisfied that the Proposed Acquisition would not have the effect or likely effect of substantially lessening competition in the home loans market in the circumstances of this matter, it would need to reach an affirmative belief that:

   a. there is no real chance of coordinated conduct that substantially lessens competition in the future with the Proposed Acquisition; or

   b. there is no material difference in the likelihood, severity or sustainability of such coordination in a future with the Proposed Acquisition compared to a future without it.

30. The competitive impact of any coordination between the major banks is substantial, given the importance of competition between the major banks in the home loans market, the significant cost and scale advantages they enjoy over other banks, and the high barriers to entry and expansion.

PART VII AGRIBUSINESS BANKING MARKET

31. Two key issues for the Tribunal in relation to SME and agribusiness banking are whether:

   a. it is appropriate to define separate markets for the supply of banking services to agribusiness and SME customers in order to assess the likely competitive effects of the Proposed Acquisition, or whether there is relevantly a single market for the supply of "business banking products and services" that encompasses all business banking customers (including agribusiness and SME customers); and

   b. the geographic scope of the relevant market(s) is local/regional, Queensland-wide or national.

32. There is evidence which supports a conclusion that agribusiness banking should be treated as a separate market to SME banking for present purposes:

   a. agribusinesses typically have tailored banking products, given their diversity and special banking requirements;

   b. different service propositions and serviceability considerations underpin agribusiness banking;

   c. agribusiness customers place importance on relationship managers, and banks are typically more dependent on their relationship managers or bankers to understand the risks of their agribusiness customers to price or customise their products, compared to other types of business customers;

   d. many agribusiness customers would be unlikely to switch to general business banking products in response to a small but significant increase in price or reduction in quality due to the differences in product features and services; and

   e. banks supplying broader business banking services are unlikely to be able to redeploy promptly the assets and staff used in supplying those services to the supply of specialised agribusiness products and services in response to a small but significant increase in price or reduction in quality.

33. It is preferable to examine competition in the agribusiness banking market or markets at a regional or State level, instead of nationally, because:

  a. agribusiness customers value specialised bankers with local knowledge and industry expertise (which can be specific to local areas and conditions); and

  b. agribusiness bankers or relationship managers need to be located within reasonable distance to the customers they serve, so that they can travel to the customer's premises or meet at an agreeable location.

34. In light of the available data and evidence, it is appropriate to assess competition at a Queensland-wide level as a proxy for the regional markets within the State when considering the likely competitive effects of the Proposed Acquisition on agribusiness customers.

35. Treating agribusiness banking and business banking as part of a single national market would not make a significant difference to the assessment of the competitive effects of the Proposed Acquisition. That is because the number of substantial competitors serving agribusiness customers would remain the same and agribusiness would remain a significant section of any broader market.

36. In considering whether it is satisfied that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in markets for agribusiness banking products, the Tribunal should have regard to the following matters in particular:

  a. the Proposed Acquisition will reduce the number of agribusiness banking competitors operating in Queensland, which will increase concentration in a market that is already quite concentrated;

  b. ANZ and Suncorp Bank overlap in the supply of business banking products and services to agribusiness;

  c. Suncorp Bank imposes an important competitive constraint on ANZ and other banks supplying agribusiness banking products in Queensland, principally through its competitive pricing, its customer service (which is highly valued), and its ability and willingness to serve non-standard agribusiness banking needs;

  d. if ANZ acquires Suncorp Bank, there is little incentive for ANZ to maintain Suncorp Bank's specific relationship management model and focus on service quality;

  e. other banks provide only limited constraint given differences in their service offering;

  f. the constraint imposed by the threat of entry or expansion is limited; and

  g. a combined Bendigo/Suncorp Bank is likely to impose a competitive constraint similar to, if not stronger than, Bendigo Bank and Suncorp Bank individually.

PART VIII SME BANKING MARKET

37. There is evidence which supports the conclusion that the competitive effects of the Proposed Acquisition are best assessed by defining a discrete market for the supply of banking services to SME customers, rather than a single market for business banking services. This is because:

    a. there is a distinct cohort of SME customers who have particular attributes and needs that are not shared by large commercial customers or agribusiness customers;

    b. there are banking products or services that are specifically tailored to SME customers' needs; and

    c. some banks have distinct customer portfolios or strategies for their SME customers.

38. Ultimately, however, the outcome of the competition analysis will not turn on whether SME banking is a discrete market. That is because even if it is appropriate to define a single market for business banking services (which includes, but is not limited to, banking services to SMEs):

    a. SME banking remains a significant section of that market; and

    b. any effect or likely effect of substantially lessening of competition in SME banking would be an effect in a significant section of the market.

39. The relevant markets are likely to be local/regional in scope rather than State-wide or national. That said, there are deficiencies in data that make a local/regional analysis difficult. For this reason, it is appropriate to assess competition at a Queensland-wide level as a proxy for the regional/local markets within the State.

40. In considering whether it is satisfied that the Proposed Acquisition would not be likely to have the effect of substantially lessening competition in a market or markets for the supply of SME banking services to customers in Queensland, the Tribunal should have regard to the following matters in particular:

    a. Suncorp Bank has a materially differentiated offering and is competitive in markets for the supply of banking services to SME customers. In this regard:

        (i) Suncorp Bank is [redacted]

        (ii) Suncorp Bank has a strong and differentiated customer service and care offering, evidenced by its [redacted] and

        (iii) Suncorp Bank is the [redacted] largest SME bank lender in Queensland and the [redacted] largest SME deposit holder in Queensland;

    b. the Proposed Acquisition will reduce the number of competitors offering SME banking services in Queensland;

c. if the Proposed Acquisition proceeds, ANZ will have incentives to bring Suncorp Bank's products and services into line with its own products and services, resulting in a loss of consumer choice and competitive constraint given the evidence that:

   (i) [redacted]

   (ii) Suncorp Bank has strong customer service propositions and is an important driver of competition with major banks and other regional banks because it generally seeks to distinguish itself on non-price product dimensions;

   (iii) Suncorp Bank has a strategy of competing hard in particular industry segments; and

   (iv) Suncorp Bank can leverage its reputation, branch network and customer relationships to complete strongly in Queensland;

d. the removal of Suncorp Bank's differentiated offering is likely to reduce customer choice and competition in a market or markets for the supply of SME banking services to customers in Queensland;

e. existing competitors will impose some constraint on the merged bank, but there are reasons to question the extent of such constraints given the business models of the major banks, and the limited presence of smaller banks in Queensland; and

f. barriers to expansion, particularly for small banks, are significant and barriers to entry are high.

PART IX OTHER MARKETS

A. Retail deposits

41. The ACCC concluded that: (i) there was likely to be a lessening of competition, albeit one that was not substantial, in the market for retail deposits as a result of the Proposed Acquisition; and (ii) that the effect on competition in that market was a public detriment that ought to be taken into account under s 90(7)(b).

42. The ACCC considered that the Proposed Acquisition would lessen competition in the retail deposits market, but not substantially, in circumstances where: (i) there are high barriers to entry and expansion; (ii) customer switching levels are relatively low and the market is not currently intensely or highly competitive; (iii) Suncorp is not currently a particularly vigorous competitor, nor a particularly close competitor of ANZ's; and (iv) a merged Suncorp-Bendigo would likely be a more vigorous competitor than either entity alone.

43. The Tribunal's role is to determine whether it is satisfied that the Proposed Acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition in this market. Further, the Tribunal should take any lessening of competition that is likely to result in this market into account as a detriment to the public under the s 90(7)(b) test.

B. Credit cards

44. As Suncorp is not a supplier of credit cards, no competition issue arises and the Tribunal need not consider whether an effect or likely effect of the Proposed Acquisition is a substantial lessening of competition in this market.

PART X PUBLIC BENEFITS AND DETRIMENTS

45. The ACCC was not satisfied that there were likely to be public benefits that would outweigh the public detriments that would be likely to result from the Proposed Acquisition.

A. Public benefits

46. The Applicants claim that the Proposed Acquisition would give rise to six categories of public benefits which are substantial, sufficiently certain, and merger-specific. The ACCC's contentions in relation to each category of public benefit are below.

47. **Improved performance of Suncorp's insurance business:** The Applicants contend that the Proposed Acquisition would result in public benefits by allowing Suncorp Group to become a more efficient and competitive insurance business. Any such benefit could be realised without the Proposed Acquisition, and so any benefit is likely to be confined to that benefit being realised sooner than in either counterfactual.

48. **Synergies:** The Applicants contend that the Proposed Acquisition would result in public benefits arising from integration synergies. The quantum of cost savings arising from such synergies is uncertain and likely not as substantial as the Applicants claim. In particular:

    a. the integration of ANZ and Suncorp Bank's systems involves considerable difficulty and complexity;

    b. the integration plans are yet to be finalised and therefore depend upon a degree of assumption;

    c. similar bank integrations historically have experienced integration costs far larger than anticipated given the complexity of each bank's standalone systems;

    d. some of these benefits may be achieved without the Proposed Acquisition; and

    e. the extent to which any benefits in the form of reduced costs may be passed on to consumers is unclear (the extent of such pass through being relevant to the weight to be attributed to such cost savings as a public benefit).

49. **Prudential safety:** ANZ submits that the Proposed Acquisition will improve prudential stability or safety. This asserted public benefit is doubtful. The evidence does not suggest that the Proposed Acquisition addresses a meaningful risk of prudential instability relative to any realistic counterfactual. Indeed, to the extent that the Proposed Acquisition would enlarge ANZ, it may increase systemic risk because the consequences of any failure of ANZ will be larger and more widespread.

50. **Major bank levy:** Increased contributions to the Major Bank Levy are not a public benefit as asserted by the Applicants, given they are part of a mechanism designed to address increased systemic risk associated with a larger bank.

51. **Lower funding costs and greater access to wholesale funding:** ANZ submits that Suncorp Bank will likely obtain wholesale funding at lower cost following the Proposed Acquisition, resulting in lower prices for Suncorp Bank customers. While there may be some benefit arising in the form of lower funding costs, any such benefit will likely be small, given that it would be offset, at least partially, by the imposition of countervailing burdens on the merged entity (such as higher contributions to the Major Bank Levy and higher capital requirements). Even assuming there were cost savings, it is speculative as to whether such savings would be passed on to customers (which is relevant to the weight to be given to such savings as a public benefit).

52. These benefits are also likely to be small when compared to any realistic counterfactual. There is no evidence to suggest that Suncorp Bank is unlikely to be able to access the funding it requires in the No-Sale Counterfactual, and a merged Bendigo/Suncorp Bank entity would likely be able to access necessary funding at commercially acceptable rates.

53. **Queensland commitments:** The Applicants contend that commitments made under Implementation Agreements between the State of Queensland and each of ANZ and Suncorp Group are public benefits of the transaction.

54. That contention raises the following legal questions:

    a. *first*, do the commitments relevantly "result" from the "conduct" for the purposes of s 90(7) — viz., the Proposed Acquisition — insofar as they are the product of separate commitments made by ANZ to the State of Queensland; and

    b. *second*, is a commitment made to one State to, for example, preserve jobs or make investments in that State, a "public benefit" for the purposes of s 90(7), if there is a likely correlative detriment in another State or Territory?

55. Further, the benefits said to arise from the Queensland commitments are not likely to be substantial. In particular:

    a. if there are profitable lending or other investment opportunities in Queensland, ANZ or other banks would take advantage of them with or without the Proposed Acquisition;

    b. to the extent that the Proposed Acquisition means that lending may occur on more favourable terms under the Queensland commitments than otherwise:

        (i) the benefit would be confined to the difference between those other offers and the offers under the commitments; and

(ii) there would be a need to assess the extent to which such improved terms under the Queensland commitments were offset by the imposition of less favourable terms in other States and Territories.

B. Public detriments

56. The most significant public detriments from the Proposed Acquisition are the likely impacts on competition.

57. Given the significance of the banking markets to Australian consumers and businesses, any lessening or substantial lessening of competition in these markets as discussed in Parts VI to IX above is a public detriment that should be given considerable weight.

58. The acquisition of Suncorp Bank by one of the major banks involves an additional public detriment, being the loss of an attractive acquisition target (Suncorp Bank) for existing smaller banks to build scale and better compete with the major banks. Given the barriers to entry and expansion in banking markets, acquisitions are one of the most effective means by which banks can grow. The loss of Suncorp Bank as a potential acquisition target for second-tier banks will further entrench the existing oligopoly in the banking sector. It would make it more likely that Australia's banking sector will be dominated by the major banks for the foreseeable future.

C. Weighing the public benefits against the detriments

59. 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 on the evidence before it that it is not satisfied in all the circumstances that the public benefits which would result or would be likely to result from of the Proposed Acquisition outweigh the public detriments or likely detriments.

Prepared by AGS and settled by Garry Rich SC, Robert Yezerski, Christopher Tran, Megan Caristo and Erin O'Connor Jardine.