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13 July 2023

By email

Daniel McCracken-Hewson
General Manager | Merger Investigations
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Mr McCracken-Hewson

ANZ proposed acquisition of SBGH Limited – market structures

We refer to your letter of 6 July 2023 (**6 July letter**) in which the ACCC suggested three potential competitive detriments, which it indicated it is considering for the purposes of assessing the application for authorisation under sections 90(7)(a) and (b) of the *Competition and Consumer Act (CCA)*.

The 6 July letter states that the ACCC is considering whether the proposed acquisition of Suncorp Bank by ANZ (**Proposed Acquisition**) could result in competitive detriments “for the Australian banking industry more broadly”, including:

- (a) entrenching an existing oligopoly among the major banks which will not be effectively constrained by other market participants;
- (b) removing the last opportunity for second-tier banks to acquire meaningful scale and exert effective constraint on the major banks;
- (c) leading to further consolidation of the Australian banking industry, and in particular the acquisition of other second-tier banks by major banks.

In short, ANZ says that the potential competitive detriments suggested in the 6 July letter are not detriments the ACCC can properly consider in the ACCC’s application of s 90(7)(a) or (b) of the CCA because:

- (a) the “Australian banking industry” is not a relevant market in which the competitive effects of the proposed acquisition can be assessed and it is not open to the ACCC (under s 90(7)(a)) to consider competitive effects unless there is an appropriately defined market;
- (b) further, the suggested competitive detriments are speculative and based on unarticulated facts and assumptions; and

- (c) there is, in any event, no real chance of the Proposed Acquisition resulting in the suggested detriments. The evidence demonstrates strong and dynamic competition in all markets in which the Australian banking sector participates. The effect of the Proposed Acquisition will help to preserve this competition by ensuring the sector has competitors that can compete effectively.

Section 90(7)(a) and (b)

The 6 July letter indicates that the ACCC is considering the specified potential competitive detriments for the purposes of considering ANZ's authorisation application under ss 90(7)(a) and (b) of the CCA.

Section 90(7) requires that the ACCC reach an affirmative belief that the relevant conduct:

- would not have the effect, or would not be likely to have the effect, of substantially lessening competition (the **competition test**) – s90(7)(a); or
- would result, or be likely to result, in a net benefit to the public (the **net benefit test**) – s90(7)(b).

Competition test

The competition test in s 90(7)(a) requires the ACCC to “*assess the likely effects of the proposed conduct in all relevant markets*”.

The “Australian banking industry” (which ANZ notes has an undefined scope) is not a market in which the competitive effects of the proposed acquisition can be appropriately assessed.

The products and services which comprise the “Australian banking industry broadly” have not been identified by the ACCC but they presumably include transaction accounts, deposit and saving accounts, loans including home loans, commercial loans, including asset finance, credit cards and buy now pay later products. It is self-evident that the various products and services, which might satisfy the description “the Australian banking industry”, are not substitutable for (ie exercise some competitive constraint on) each other. A credit card is, for example, not substitutable for a home loan.

Furthermore, the identification of product markets by the ACCC and its expert, such as local/regional markets for agribusiness and SME banking reflects the view that those products and geographies are not substitutable for other products comprising the banking industry nationwide. The analysis concerning these markets is inconsistent with the existence of a national market in which all banking products and services are substitutable for each other.

As such, it is not open to the ACCC to consider the potential detriments suggested in the 6 July letter in its assessment of the proposed acquisition under s 90(7)(a) of the CCA, unless it is in reference to relevant markets.

In any event:

- The first and second detriments suggested by the 6 July letter, albeit expressed in different terms to the coordinated effects theory of harm and the 'alternative buyer' counterfactual, are the subject of extensive evidence and submissions in the context of the relevant markets.
- The third detriment suggested by the 6 July letter does not appear to be capable of assessment under the competition test. It appears to require consideration by reference to unspecified banking policy and national interest criteria.

Net benefit test

The net benefit test in s 90(7)(b) requires that the ACCC is satisfied in all the circumstances that the conduct would be likely to result in a benefit to the public that would outweigh the detriment to the public likely to result from the conduct.

As with the likely effect of the proposed conduct on competition, the benefits and detriments will not be taken into account unless there is a real chance, and not a mere possibility, that the benefit or detriment will eventuate. It is not enough for the benefit or the detriment to be speculative or a theoretical possibility [*Re Qantas Airways Limited* [2004] ACompT 9 156].

Each of the competitive detriments suggested in the 6 July letter is speculative and is predicated on assumptions and facts which are not identified.

Further, the evidence establishes that there is no real chance that any of the competitive detriments suggested in the 6 July letter will eventuate and the ACCC should not take them into account in making its determination.

Firstly, ANZ has provided extensive evidence that it and other major banks face intense competition in each of relevant markets and ANZ does not have market power in any capacity. Further, as illustrated by the ACCC's expert's consideration of agribusiness banking, SME banking, and combined agribusiness and SME banking, the banking industry includes markets in which it is not suggested that there is an oligopoly of the major banks.

Secondly, the 6 July letter suggests there is a notion of 'meaningful scale' which is needed to be an effective competitor and that the Proposed Acquisition is the last opportunity for such scale to be achieved. This is contradicted by numerous examples of effective competition from smaller players in different parts of the

banking industry who have achieved growth from a small base and without relying on inorganic acquisition of scale.

For example, in home loans, Macquarie Bank has become a very successful and effective competitor in the past 5 years. It did so by adopting an innovative business model involving a focus on speed of processing, broker facilitation and no branch network.

In deposits, ING built its position as the fifth largest competitor by introducing an attractive online transaction and savings proposition without a branch network and without relying on any scale advantages.

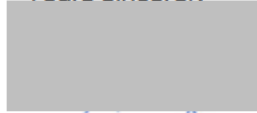
In commercial banking, since obtaining its banking licence in April 2019, Judo Bank has achieved extremely rapid growth over the last 3 years. Judo Bank is a relatively new entrant who has offered a differentiated proposition focussed on SMEs. It has expanded from a single product (secured loans) to multiple products (term deposits, business loans, asset finance, line of credit and home loans) with a loan book that is now almost 20% of ANZ's and larger than Suncorp Bank and Bendigo Bank in SME lending. Similarly, Rabobank's approach was to differentiate itself as a bank focussed on agribusiness, rather than acquire scale in the banking industry, and has become the second largest lender to the agribusiness sector.

Thirdly, no evidence has been disclosed in this process that supports the proposition that the Proposed Acquisition is likely to remove "the last opportunity for the cohort of second-tier banks to acquire meaningful scale". Suncorp Bank is not the only "second-tier bank", and, if the acquisition of scale was seen to be desirable, there could be opportunities for combinations of one or more other banks such as BOQ, Bendigo and Adelaide Bank, AMP Bank, ING Bank, and RACQ Bank. (ANZ and Suncorp Bank have also provided submissions and evidence concerning the highly speculative 'alternative buyer' counterfactual, and the ability of a merged Bendigo/Suncorp Bank to exert competitive pressure in relevant markets).

Finally, the third competitive detriment, namely that the Proposed Acquisition could lead to the acquisition of other second-tier banks by major banks, is entirely speculative. There is no evidence that the Proposed Acquisition will alter the incentives for merger activity. Further, any such theoretical acquisitions would be considered by a range of regulators, including the ACCC, and the Australian Treasurer and would be subject to a comprehensive competition assessment and an evaluation by reference to the national interest, among other things. The implicit suggestion that authorisation of the Proposed Acquisition could alter the outcome of those assessments and evaluations is mere speculation.

In summary, there is no real chance that any of the competitive detriments will eventuate and the ACCC should not take them into account in applying the net benefit test.

Yours sincerely



Peter Armitage

Partner