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ANZ Proposed Acquisition of SBGH Limited

Response to the ACCC Independent Expert Reports

17 July 2023

Contents

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Executive Summary

1. This document sets out ANZ's response to the two expert reports of the independent expert engaged by the ACCC, Mary Starks (**Starks Reports**).

2. ANZ submits that the Starks Reports do not offer a foundation for the ACCC to deny authorisation of ANZ's proposed acquisition of Suncorp Bank. The Starks Reports do not provide a basis to conclude either that the proposed acquisition would have the effect or likely effect of substantially lessening competition (**SLC**) in any market or that it would result in public benefits that do not outweigh any public detriment.

3. Starks concludes that there is no real chance that the proposed acquisition would SLC in any market for the supply of transaction accounts, deposits or for the supply of banking services to SMEs or agribusiness. ANZ agrees.

4. There is significant material in the Starks Reports supporting the conclusion that this transaction is not likely to result in an SLC in the relevant markets. These include Starks's opinions, based on the evidence provided by ANZ and Suncorp Bank that:

   (a) The proposed acquisition will only result in a modest increase in ANZ's market share in the markets that Starks examines and will not lead to a material increase in market power.

   (b) In respect of SME and agribusiness banking, the combined ANZ/Suncorp Bank will continue to face competitive constraints in Queensland, and barriers to entry or expansion are likely to be low.

   (c) ANZ and Suncorp Bank are not particularly close competitors in any of the markets Starks examines, and Suncorp Bank is not a vigorous and effective competitor in home loans, transaction accounts or deposits, and its business model can be replicated by other competitors in SME and agribusiness banking.

   (d) There have been changes in the market since 2018 which "*might indicate that coordination is structurally harder to maintain*".

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(e) There is capacity for existing competitors to constrain coordination, including as a result of the broker channel, the new consumer best interests duty, and reduced switching costs, enabling smaller lenders to win business from the major banks.

5. The table below summarises Starks's opinions in the Starks Reports.

Market	Theory of harm	Counterfactual	Supplementary Starks Report
Home loans (national)	Horizontal	Status quo	No real chance
		Alternative buyer	No real chance*
	Coordinated	Status quo	No real chance
		Alternative buyer	Real chance of SLC
Transaction accounts (national)	Horizontal	Status quo	No real chance
		Alternative buyer	No real chance*
	Coordinated	Status quo	No real chance
		Alternative buyer	No real chance
Deposits/term products (national)	Horizontal	Status quo	No real chance
		Alternative buyer	No real chance
	Coordinated	Status quo	No real chance
		Alternative buyer	No real chance
Agribusiness banking (local/regional)	Horizontal	Status quo	No real chance*
		Alternative buyer	No real chance*
SME banking (local/regional)	Horizontal	Status quo	No real chance*
		Alternative buyer	No real chance*
SME and agribusiness (local/regional)	Horizontal	Status quo	No real chance*
		Alternative buyer	No real chance*

6. ANZ submits that Starks's opinion that there is no real chance of SLC outlined in the table above is supported by the evidence.

7. As indicated by the * in the above table, in some cases Starks expresses the view that although the evidence does not demonstrate a real commercial likelihood of an SLC, Starks cannot rule it out. This reservation is not based on the evidence, but is instead based on the possibility of additional information. ANZ submits that this speculation cannot and should not be relied on to establish a real chance of an SLC in any of those markets, particularly given that the ACCC had been

obtaining information, compulsory and voluntarily from relevant sources for over 6 months prior to the Starks Supplementary Report and any relevant information would have been made available to Starks by the ACCC. Starks has had access to extensive evidence of ANZ and Suncorp Bank, as well "responses to ACCC requests for information from ANZ, Suncorp and various third parties", a "note prepared by ACCC on data", material supplied by Bendigo and Adelaide Bank (**Bendigo Bank**) and other opponents of the proposed acquisition and section 155(1)(c) examination transcripts (much of which ANZ has not been provided).

8. Starks's opinions in relation to the national market for home loans are nuanced. Starks concludes that the evidence does not establish a real chance of an SLC in the national market for home loans (or, specifically, in relation to Queensland) irrespective of the counterfactual based on unilateral effects. In other words, the merged ANZ/Suncorp Bank will be effectively constrained by other competitors and will not have or be able to exercise substantial market power.

9. Starks further concludes that the evidence does not establish a real chance of an SLC in the national markets for home loans based on coordinated effects when comparing the proposed acquisition to a status quo counterfactual.

10. However, Starks's tentative opinion is that there could be a real chance of an SLC in the national market for home loans on one theory of harm and one speculative counterfactual: based on coordinated effects compared to a counterfactual where Bendigo Bank merges with Suncorp Bank.

11. Critically, Starks was instructed to assume that an acquisition by Bendigo Bank with Suncorp Bank is commercially realistic. That assumption is incorrect: there is substantial evidence that Bendigo Bank's proposed acquisition of Suncorp Bank is not commercially likely or realistic, and even if it occurred, would not result in Bendigo Bank becoming a stronger competitor in home loans or any other market.

12. Starks speculates that despite and, to a material extent, because of evidence of the intensity of competition in the national home loans market, the major banks are likely to ease competition and engage in coordinated conduct in the future, which is more likely to be disrupted by a combined Bendigo Bank/Suncorp Bank.

13. This is not based on any evidence that the majors have engaged in coordinated conduct in the present. Each element of Starks's argument on coordinated effects requires negative inferences from what is, as she acknowledges, evidence that may indicate either coordination *or* competition. Starks does not articulate why she infers coordination rather than competition. She dismisses the evidence of ANZ and Suncorp officers on this point. Most importantly, Starks does not make an overall evaluative assessment of whether or not there is any real chance of an SLC in the national market for home loans. That overall assessment should take into account her opinion that there is no real chance of SLC in the national market

for home loans based on unilateral effects in either counterfactual, or on coordinated effects in the status quo counterfactual.

14. Starks's conclusion depends on all of a number of speculative possibilities, including: the major banks will cease competing vigorously and engage in coordinated conduct; competition from Macquarie Bank (the second largest winner of new home loans and refinances) and other banks will not disrupt the coordination; and despite the availability of extensive information to consumers and brokers about lenders, and brokers' duty to act in the best interests of consumers, consumers will cease to choose and switch to more competitive offerings. This string of speculative possibilities is directly contradicted by the fact that competition has contributed to a long and steady decline in bank return on equity, and that the major banks have progressively lost market share to focussed competitors like Macquarie Bank, ING and Bendigo Bank (particularly through its digital bank Up).

15. A fundamental problem in the analysis by Starks is that, while it refers to the role of brokers, it does not place proper weight on the significant impact that brokers have had in making consumers better informed, reducing search costs and promoting switching in the market.

16. In the Starks Reports, considerable emphasis is placed, in relation to market definition (ie the process of identifying areas of relevance for the assessment of the impact of the proposed acquisition on competition) on the demand side features of markets. Those demand side features include the availability of substitutes and the ability of consumers to switch to those substitutes. Those same features are critical to the competition analysis.

17. There is no dispute on the evidence that, particularly over the past 5 years: consumers have become well informed; they have been increasingly exposed to more encouragement to switch by brokers; their switching has been facilitated by brokers and they have, in fact, switched or secured improved terms as a result of threatening to switch in very large numbers ([Confidential to ANZ] ANZ experiences annual attrition in its home loans front and back books of approximately [redacted]). This consumer behaviour is fundamentally disruptive to any coordinated conduct.

18. Starks does not and could not suggest that there is any basis for concluding that consumers would revert to some previous state of ignorance and inertness, unless Bendigo Bank acquires Suncorp Bank. Consumer behaviour will be the same, regardless of the counterfactual and consumer behaviour, facilitated by brokers, will defeat any attempted coordinated conduct.

19. ANZ submits that, Starks's qualified and tentative opinions of an SLC in the national market for home loans should not form the basis for concluding that there

is a real chance that the proposed acquisition would result in an SLC or net detriments in the face of the detailed and comprehensive evidence provided by ANZ and Suncorp Bank.

1. Introduction

Purpose of this submission

1.1 The purpose of this submission is to respond to:

(a) the **Starks Reports** comprising:

(i) a report dated 16 June 2023 (received, with redactions, on 20 June 2023) (**Interim Starks Report**), which did not take into account the ANZ and Suncorp Bank submissions and evidence provided to the ACCC on 17 May 2023 in response to the ACCC's statement of preliminary views (**SOPV**); and

(ii) a supplementary report dated 10 July 2023 (**Supplementary Starks Report**) updated to take account of those submissions and evidence; and

(b) the second submission of Bendigo Bank and second report of Professor Stephen King dated 30 June 2023 and received 11 July 2023 (**Second Bendigo submission**).

1.2 This submission is supported by:

(a) a third expert report of Patrick Smith of RBB Economics;

(b) a third statement of Mark Bennett, ANZ Head of Agribusiness, dated 7 July 2023;

(c) a statement of James Lane, ANZ State Manager of Business Banking – Queensland, dated 5 July 2023; and

(d) a supplementary statement of Louise Higgins, ANZ Managing Director – Suncorp Integration, dated 17 July 2023.

Process

1.3 ANZ and Suncorp Bank observe that they have been asked to respond to the Starks Reports (received on 20 June 2023 and 10 July 2023, respectively), and the Second Bendigo submission (received on 10 July 2023) in a compressed timeframe and in circumstances where significant material has been redacted.

1.4 Through the course of the merger authorisation process, ANZ has been provided information, often with material redactions, days or weeks after it has been provided to the ACCC. ANZ has then been provided limited time to consider and respond to it.

1.5 ANZ notes the following timeline:

(a) On 2 December 2022, ANZ submitted the merger authorisation application and supporting evidence. This followed a draft merger authorisation application lodged on [Confidential to ANZ] [redacted].

(b) On 12 December 2022, the ACCC commenced public consultation, with a request for submissions by 18 January 2023. It appears the ACCC accepted a number of submissions after the closing date for public consultation (including submissions by Judo Bank dated 7 February 2023, Bank of Queensland (**BOQ**) dated 23 February 2023, and Bendigo Bank dated 3 March 2023). Copies of those submissions were only made available to ANZ at the same time they were published on the public register, with material redactions. The BOQ submission was not published until 9 March 2023, and the Bendigo Bank submission was not published until 24 March 2023.

(c) On 4 April 2023, the ACCC published its statement of preliminary views (**SOPV**). That SOPV in fact contained little, if anything, by way of preliminary views on the issue of an SLC in any markets.

(d) On 12 April 2023, the ACCC published a report, prepared by Nicolas de Roos (**de Roos Report**) dated 5 April 2023.

(e) Neither the SOPV nor the de Roos Report mentioned the possibility that the ACCC would receive a further independent expert report.

(f) On 17 May 2023, ANZ and Suncorp provided submissions, witness statements and expert reports in response to the SOPV and de Roos Report (**SOPVR Evidence**). Public versions of the materials were lodged on 23 May 2023.

(g) On 16 June 2023, ANZ provided an Evidence Roadmap requested by the ACCC to assist in navigating both the SOPVR Evidence, as well as the other evidence provided with ANZ's application and provided in the course of the merger authorisation process, against the questions raised in the SOPV. On the same day, Shayne Elliott, ANZ Chief Executive Officer and Ken Adams, ANZ Group General Counsel, provided a verbal briefing to the Commissioners and staff on the proposed acquisition and invited the ACCC to identify any areas of particular interest or concern so that ANZ could provide additional relevant material.

(h) On 20 June 2023, the ACCC provided ANZ with a copy of the Interim Starks Report, with redactions, dated 16 June 2023, which did not take into account the SOPVR Evidence.

(i) On 28 June 2023, in response to enquiries on behalf of ANZ, the ACCC informed ANZ that it intended to obtain a supplementary report from Starks, and that ANZ would have five business days to respond to that further report.

(j) On 10 July 2023, the ACCC provided a redacted version of provided the Supplementary Starks Report to ANZ. The SOPVR Evidence was provided to Starks for the purposes of the Supplementary Starks Report. At the same time, the ACCC published the Second Bendigo submission (dated 30 June 2023), including a second expert report of Professor Stephen King. It is apparent that Starks was provided the Second Bendigo submission before ANZ (see her letter of instructions dated 7 July 2023). No explanation was provided to ANZ for the preferential treatment of the ACCC's expert. Instead, ANZ was given five days to respond.

1.6 The ACCC has indicated that if ANZ considers that it needs more time to respond, then the ACCC would be willing to consider an extension to the process. ANZ has already agreed to two extensions to the timeline, and ongoing delay has significant detrimental financial consequences for ANZ and Suncorp Bank.

2. Statutory test and ACCC Merger Guidelines

The statutory test

2.1 The ACCC must not make a determination granting an authorisation under section 88 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) in relation to conduct unless:[1]

(a) the ACCC is satisfied that in all the circumstances the conduct would not have the effect, or would not be likely to have the effect, of an SLC; or

(b) the ACCC is satisfied in all the circumstances that:

(i) the conduct would result, or be likely to result, in a benefit to the public; and

(ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

2.2 The ACCC has the power to grant merger authorisation where it is satisfied that at least one limb of the above test is met.[2]

Future with and without

2.3 Mergers are prohibited under section 50 of the CCA if they would have the effect, or be *likely* to have the effect, of an SLC. Likely", in that context, means a real chance, in the sense of a "real commercial likelihood".[3] A "mere possibility" would be insufficient.[4]

2.4 Merger analysis requires comparing likely future states — the future with the merger and the future without the merger.[5] In particular, the ACCC will compare the state of competition and the public benefits and detriments likely to arise in the future where the acquisition occurs, against the future in which the acquisition does not occur.[6]

Role of market definition in ACCC's assessment

2.5 Section 50(6) of the Act requires that an SLC occur in a market for goods and services in Australia, or a state, territory or region of Australia. The concept of a market is further defined in section 4E, when used in relation to any goods or

[1] Section 90(7) of the *Competition and Consumer Act 2010* (Cth).
[2] ACCC Merger Authorisation Guidelines 2018, paragraph 6.2.
[3] *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77; 277 FCR 49 (**Pacific National**) at [246] (Middleton and O'Bryan JJ).
[4] *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 at [348] (French J), approved in Pacific National at [245]; see also ACCC Merger Guidelines 2018, paragraph 6.10.
[5] See Pacific National at [103] and authorities cited therein; see also ACCC Merger Authorisation Guidelines 2010, paragraph 6.8.
[6] ACCC Merger Authorisation Guidelines 2018, paragraph 6.8.

services, to include a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

2.6 The identification of markets is the essential first step in assessment of present competition and likely competitive effects.[7]

2.7 The ACCC's starting point for delineating relevant markets to assess a merger under section 50 of the CCA is identifying the products and geographic regions actually or potentially supplied by the merger parties. The ACCC then focuses on defining markets in areas of activity where competitive harm could occur. Generally, the ACCC focuses on overlaps between the products or geographic regions supplied by the merger parties, or some other meaningful economic relationship — such as an actual or potential vertical relationship or where the products supplied by the merger parties are complementary in nature.[8]

2.8 The ACCC then considers what other products and geographic regions, if any, constitute relevant close substitutes in defining the market.[9] Substitution involves switching from one product to another in response to a change in the relative price, service or quality of two products (holding unchanged all other relevant factors, such as income, advertising or prices of third products).[10]

No SLC

2.9 The word "substantial" requires the impact of the acquisition to be meaningful or relevant to the competitive process.[11]

2.10 Broadly speaking, the ACCC's assessment of competitive effects is based on two theories of potential competitive harm – namely, unilateral and coordinated effects. Acquisitions result in unilateral and/or coordinated effects when they weaken or remove the competitive pressure on firms in a market. In cases where unilateral and/or coordinated effects amount to a significant and sustainable increase in the market power of the merged firm and/or other firms in a market, the acquisition is likely to substantially lessen competition.[12]

Unilateral effects

2.11 Mergers have unilateral effects when they remove or weaken competitive constraints in such a way that the merged firm's unilateral market power is increased. That is, as a result of the merger, the merged firm finds it profitable to

[7] Pacific National at paragraph 101, referring to *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169 at paragraph 190
[8] ACCC Merger Authorisation Guidelines, paragraph 6.14, referring to ACCC Merger Guidelines 2008, paragraph 4.10.
[9] ACCC Merger Guidelines 2008, paragraph 4.11.
[10] ACCC Merger Guidelines 2008, paragraph 4.12.
[11] *Australian Gas Light Co v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317.
[12] ACCC Merger Authorisation Guidelines 2018, paragraph 7.5.

raise prices, reduce output or otherwise exercise market power it has gained, and can do so, even given the expected response of other market participants to the resulting change in market conditions.[13]

2.12 Examples of unilateral effects in horizontal mergers include:

(a) limited effective constraints from other sources or no rivals remaining post-merger;[14]

(b) a post-merger market characterised by a single firm with market power and numerous other smaller competitors that can supply only a small portion of the total market demand because of factors limiting their ability to significantly expand output;[15] and

(c) in markets involving homogeneous products with no dominant firm, the merged firm sets its post-merger output level significantly below the level of output that would have prevailed absent the merger and, despite the response of competitors, brings about a higher price than would have prevailed absent the merger.[16]

Coordinated effects

2.13 Mergers have coordinated effects when they assist firms in the market in implicitly or explicitly coordinating their pricing, output or related commercial decisions. A merger may do so simply by reducing the number of firms among which to coordinate, by removing or weakening competitive constraints or by altering certain market conditions that make coordination more likely.[17]

2.14 Coordinated conduct involves:

(a) interdependence between rivals – a market is characterised by a small number of firms (an oligopoly or a duopoly), with each firm anticipating the response of the other firms and devising their commercial strategies accordingly;[18] and

(b) a change in the nature of interdependence between rivals – such as implicit agreements among rivals to refrain from competing (known as "tacit collusion"), or firms signalling to each other that they will not compete on price, output, customer allocation or any other parameter of competition.[19]

[13] ACCC Authorisation Guidelines 2013, paragraph 5.1.
[14] ACCC Authorisation Guidelines 2013, paragraphs 5.5 and 5.6.
[15] ACCC Authorisation Guidelines 2013, paragraph 5.7.
[16] ACCC Authorisation Guidelines 2013, paragraph 5.8.
[17] ACCC Authorisation Guidelines 2013, paragraph 6.1.
[18] ACCC Authorisation Guidelines 2013, paragraph 6.3.
[19] ACCC Authorisation Guidelines 2013, paragraph 6.4.

Merger factors

2.15 The ACCC must take into account the "merger factors" relating to actual and potential competitive constraints faced by the merged firm, which are set out in section 50(3) of the CCA. The significance of the merger factor, and the weight that is placed on them, will depend on the matter under consideration.[20]

2.16 The likely presence of effective competitive constraints post-acquisition is a key indicator that a proposed acquisition is unlikely to result in an SLC.[21]

2.17 Conversely, the absence of a single particular constraint is unlikely to be conclusive of an increase in the market power as a result of a proposed acquisition.[22]

Public benefits outweigh public detriments

Public benefits

2.18 The CCA does not expressly limit the range of public benefits which may be taken into account by the ACCC.[23] The ACCC has traditionally given "public benefits" a broad meaning. It includes:

> "*anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress". Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources.*"[24]

2.19 When considering the anticipated benefits put forward by an applicant, the ACCC will assess (among other things):

(c) whether the anticipated benefit is transaction specific;

(d) who the benefit accrues to and how widely it is shared in the community;

(e) whether the benefit is ongoing or a one-off;

(f) how the benefit will arise;

(g) when the benefit is likely to arise;

[20] ACCC Merger Authorisation Guidelines 2018, paragraph 7.8.
[21] ACCC Merger Authorisation Guidelines 2018, paragraph 7.8; ACCC Merger Guidelines 2008, paragraph 7.4.
[22] ACCC Merger Authorisation Guidelines 2018, paragraph 7.8.
[23] ACCC Authorisation Guidelines 2013, paragraph 8.2.
[24] ACCC Merger Authorisation Guidelines 2018, paragraph 8.1; *Re 7-Eleven Stores Pty Limited* (1994) ATPR 41-357 at [42,677]; *Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481, 510; *VFF Chicken Meat Growers' Boycott Authorisation* (2006) ACompT 9 at [75].

(h) the likelihood that the benefit will be realised; and

(i) the magnitude of the benefit.[25]

2.20 The ACCC takes into account any benefits that would result from the proposed acquisition regardless of the market in which that benefit arises.[26]

2.21 Public benefits may be expressed as an increase in:

(j) *allocative efficiency* – improving the allocation of society's resources to better reflect consumer preferences;

(k) *productive efficiency* – making the merged entity more cost effective by increasing economies of scale or scope, allowing better use of existing capacity, reducing cost through asset rationalisation, or through combining complementary production capabilities;

(l) *dynamic efficiency* – resulting in innovation that may not have occurred without the acquisition, including the introduction of new or improved product or production processes.[27]

Public detriments

2.22 The Tribunal has defined "public detriment" as:

> "*any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency*".[28]

2.23 The ACCC considers that in applying the public benefit test to a merger authorisation, all public detriments likely to arise from the proposed acquisition for which authorisation is sought can be taken into account.[29]

2.24 In most cases the likely identifiable detriments will be those constituted by a lessening of competition.[30]

[25] ACCC Merger Authorisation Guidelines 2018, paragraph 8.3.
[26] ACCC Merger Authorisation Guidelines 2018, paragraph 8.4.
[27] ACCC Merger Authorisation Guidelines 2018, paragraph 8.10.
[28] ACCC Merger Authorisation Guidelines 2018, paragraph 8.17; *Re 7-Eleven Stores Pty Limited* (1994), ATPR 41-357 at [42,683].
[29] ACCC Merger Authorisation Guidelines 2018, paragraph 8.18.
[30] ACCC Merger Authorisation Guidelines 2018, paragraph 8.20.

3. General observations about the opinions in the Starks Reports

Summary of Starks's opinions

3.1 Starks concludes there is **no real chance, or no real commercial likelihood of an SLC** on either counterfactual or theory of harm in national markets for transaction accounts and deposits/term products, and in local/regional markets for agribusiness and SME, alone or combined.[31]

3.2 The only market in which Starks has concluded there is a real chance of an SLC is the Australian home loans market under the alternative buyer counterfactual (but not the status quo, or on the basis of unilateral effects in either counterfactual).

3.3 Starks was specifically asked to identify whether, even where there was no real chance of an SLC, there remained a “risk” of SLC. Starks responded to that instruction by identifying that, even though her view is that there is no real chance of an SLC, she could not “rule out” an SLC in home loans,[32] transaction accounts[33] and deposits/ term products[34] on the basis of unilateral effects in the alternative buyer counterfactual, or in agribusiness or SME, alone or combined, on the basis of unilateral effects in either counterfactual.[35]

3.4 Table 1 summarises Starks's opinions.

Table 1: Summary of Starks's opinions

Market	Theory of harm	Counterfactual	Starks opinion
Home loans (national)	Horizontal	Status quo	No real chance
		Alternative buyer	No real chance*
	Coordinated	Status quo	No real chance
		Alternative buyer	Real chance of SLC
Transaction accounts (national)	Horizontal	Status quo	No real chance

[31] Supplementary Starks Report at paragraph 7.45: “I am persuaded that the evidence does not demonstrate a real commercial likelihood of an SLC. I have therefore changed my view from "real chance of an SLC" to "cannot rule out an SLC" in either the combined market for SME and agribusiness banking, or in each of those markets separately”.
[32] Starks at paragraph 9.45.7 described her opinion in the following terms: “while I cannot rule out an SLC, I do not believe that there is a real chance of an SLC”; and in respect of Queensland specific effects at paragraph 9.55 “in my opinion, there is no real chance that the acquisition will lead to an SLC in the Australian market for home loans due to horizontal unilateral effects in Queensland”.
[33] Starks’s conclusion at paragraph 9.136.5 was “I consider that there is no real chance of an SLC due to horizontal unilateral effects in this market, although I cannot rule out an SLC entirely.”
[34] Starks conclusion is “while I cannot rule out an SLC based on horizontal unilateral effects in the deposits/term products market, in my opinion, there is no real chance of an SLC; in particular, an SLC is less likely in this market than in the market for home loans.
" at paragraph 9.176.5.
[35] Supplementary Starks Report at paragraph 7.45:

Market	Theory of harm	Counterfactual	Starks opinion
		Alternative buyer	No real chance*
	Coordinated	Status quo	No real chance
		Alternative buyer	No real chance
Deposits/term products (national)	Horizontal	Status quo	No real chance
		Alternative buyer	No real chance
	Coordinated	Status quo	No real chance
		Alternative buyer	No real chance
Agribusiness banking (local/regional)	Horizontal	Status quo	No real chance*
		Alternative buyer	No real chance*
SME banking (local/regional)	Horizontal	Status quo	No real chance*
		Alternative buyer	No real chance*
Combined SME and agribusiness (local/regional)	Horizontal	Status quo	No real chance*
		Alternative buyer	No real chance*

Application of the statutory test to the Starks Reports

3.5 As with any statutory discretion, the ACCC must determine if it is in fact satisfied of the matters listed in (a) and (b) of section 90(7) of the CCA. It must do so reasonably and in good faith, in accordance with the law and the purposes of the relevant Act and taking into account relevant considerations to the exercise of its discretion and not taking into account irrelevant considerations.[36]

3.6 An important matter the ACCC must be satisfied of is that the proposed acquisition would not be likely to have the effect of substantially lessening competition. These words, in the context of the CCA, have been subject to significant judicial consideration. It is now accepted that the word "likely" in section 90(7)(a) means a real chance in the sense of a "real commercial likelihood".[37] This is the test that the ACCC instructed Starks to consider in preparing her reports.

[36] See, eg, *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at [136] per Gummow J citing *Buck v Bavone* (1976) 135 CLR 110 at 118-119 per Gibbs J.
[37] *ACCC v Pacific National* [2020] FCAFC 77 at [246].

Starks opinion of "no real chance" of SLC

3.7 Where Starks has concluded that there is "no real chance" or "no real commercial likelihood" of an SLC, the ACCC should be satisfied that the proposed acquisition would not be likely to substantially lessen competition in that market.

3.8 The ACCC should be so satisfied even where Starks has added that she "cannot rule out an SLC" or "cannot rule out an SLC entirely". A risk of SLC that is less than a real commercial likelihood is not a likely effect within the meaning of section 90(7)(a).

3.9 A "real commercial likelihood" does not mean a "mere possibility".[38] The ACCC did not instruct Starks in writing to exclude "mere possibilities" that the proposed acquisition would substantially lessen competition. In fact, by requesting that Starks "comment on whether there remains a risk that the proposed acquisition would substantially lessen competition", the ACCC appears to have instructed Starks to speculate about "mere possibilities". Starks did so by concluding that, in respect of some markets, that even though she did not have evidence of a "real chance of an SLC" but she could not "rule it out ".[39]

3.10 The ACCC would not properly perform its statutory task under section 90(7) of the CCA if it relied on an opinion that an SLC could not be "ruled out" to conclude the proposed acquisition would have the likely effect of substantially lessening competition; equally, the ACCC would not properly perform its statutory task if it relied on such an opinion to conclude it was not satisfied that the proposed acquisition would not be likely to have the effect of an SLC. Opinions that there are "mere possibilities" of an SLC do not constitute evidence that can be reasonably relied upon in assessing whether there is a likelihood that the proposed acquisition could result in an SLC. To do so would "set the bar so high as effectively to expose acquiring corporations to a finding of contravention simply on the basis of possibilities, however, plausible they may seem, generated by economic theory alone", and that is not the "competition risk management policy" the CCA establishes.[40]

Starks's opinions of "real chance" of SLC

3.11 Where Starks concludes there is a "real chance of SLC" (on the basis of coordinated effects in the home loans market in the alternative buyer counterfactual) the ACCC must approach Starks conclusions with caution, having regard to the instructions on which her opinions are based.

3.12 The correct approach to assessing the likelihood that an acquisition would have the effect of an SLC is to conduct a "single evaluative judgment" – in other words,

[38] *AGL v ACCC (No 3)* [2003] FCA 1525 at [348].
[39] See for example the Supplementary Starks Report at paragraph 7.20.
[40] See *AGL v ACCC (No 3)* [2003] FCA 1525 at [348].

to assess "both the counterfactual and the alleged competitive effects together" to determine if a "real commercial likelihood of a substantial lessening of competition has been shown".[41] This is not the approach taken in the Starks Reports. Rather, those reports express an opinion about each market against each theory of harm and against each counterfactual scenario. Starks does not express an opinion in an overall evaluative sense there is a real chance of an SLC.

3.13 Setting that significant shortcoming to one side, Starks was instructed to assume that the alternative buyer counterfactual would occur and to make certain further assumptions about that counterfactual (including that a combined Bendigo/ Suncorp Bank would continue investing in the technological transformation currently being undertaken by Bendigo).[42] Starks states expressly in her supplementary report that "*the likelihood of any counterfactual scenario happening absent the acquisition is a factual matter and I have not been asked for a view on this. My considerations concern the competitive impact of the acquisitions relative to the counterfactual scenarios*".[43] This is significant for two reasons. First, it is contrary to the evidence. Secondly, having not evaluated the likelihood or otherwise of the counterfactual, it makes it impossible for Starks to undertake an overall evaluative assessment of a real chance of an SLC. That is because she has not herself evaluated the likelihood of the counterfactual.

3.14 This instruction divorces an assessment of the probability of the alternative buyer counterfactual occurring from an assessment of the competitive impact of the proposed acquisition, entirely inconsistently with the "single evaluative judgment" that is required.

3.15 The instruction also substantially and inappropriately tips the consideration of the competitive effects in this matter against the proposed acquisition. Effectively, Starks was asked to assume the probability of the alternative buyer counterfactual is 100%, leaving only for consideration whether there is a real chance the alternative buyer would result in substantially more competition than the proposed acquisition.

3.16 Had Starks been appropriately directed to evaluate both the counterfactual and and the alleged competitive effects together, to determine whether there was a real commercial likelihood of a substantial lessening of competition, Starks may well have reached a different conclusion.

3.17 As a result, the ACCC cannot rely on Starks's opinions in respect of coordinated effects in the home loans market in the alternative buyer counterfactual as dispositive evidence that the proposed transaction would be likely to SLC.

[41] *ACCC v Pacific National* [2020] FCAFC 77 at [246]; *ACCC v Pacific National (No 2)* [2019] FCA 699 at [1276] and [1278].
[42] Interim Starks Report at paragraph 1.5; paragraph 7.1.7.
[43] Supplementary Starks Report at paragraph 4.11.

Criticism of Dr Williams's approach to market definition is unfounded

3.18 Starks criticises Dr Williams's approach to market definition as incorrect, which she describes as "starting from a very wide market definition and then narrowing". One reason she gives is that it is inconsistent with *Singapore Airlines*.[44] This criticism is unfounded.

3.19 The judgment in *Singapore Airlines* included a detailed discussion of market definition that is not inconsistent with the approach of starting with a broader market then narrowing it. For example, the Full Federal Court in *Singapore Airlines* cited the following list of tasks that the Tribunal in *Re Tooth and Co Ltd* identified for market definition:[45]

> "*1. Identification of the relevant area or areas of close competition.*
>
> *2. Application of the principle that competition may proceed through substitution of supply source as well as product.*
>
> *3. Delineation of a market which comprehends the maximum range of business activities and the widest geographic area within which, if given a sufficient economic incentive, buyers can switch to a substantial extent from one source of supply to another and sellers can switch to a substantial extent from one production plan to another.*
>
> *4. Consideration of longrun substitution possibilities rather than shortrun and transitory situations recognising that the market is the field of actual or potential rivalry between firms .*
>
> *5. Selection of market boundaries as a matter of degree by identification of such a break in substitution possibilities that firms within the boundary would collectively possess substantial market power so that if operating as a cartel they could raise prices or offer lesser terms without being substantially undermined by the incursions of rivals.*
>
> *6. Acceptance of the proposition that the field of substitution is not necessarily homogeneous but may contain sub-markets in which competition is especially close or especially immediate. This is subject to the qualification that competitive relationships in key sub-markets may have a wider effect upon the functioning of the market as a whole.*
>
> *7. Identification of the market as multi-dimensional involving product, functional level, space and time.*"

[44] *Singapore Airlines v Taprobane Tours WA Pty Ltd* (1991) 104 ALR 633 (***Singapore Airlines***).
[45] *Singapore Airlines* at page 652, citing *Re Tooth & Co Ltd and Tooheys Ltd* (1979) 39 FLR 1 (***Re Tooth and Co Ltd***).

3.20 This does not require or even suggest that the process of starting with the narrowest possible market is the only appropriate method.

3.21 Similarly, the Court in *Singapore Airlines* also discussed and cautiously accepted use of sub-markets as a "tool of analysis" to consider the nature and intensity of competition within various segments of a market.[46] This discussion also suggests that the Court did not intend to preclude an approach that works from broader to narrower markets and sub-markets to identify potential competition issues.

3.22 Turning to the Court's definition of a market on the facts of the case in *Singapore Airlines*, it is not the case that the Court, as Starks contends, "started from the market for travel to the Maldives, and then asked themselves whether travel to other destinations were sufficiently close substitutes that the market should be expanded".[47]

3.23 The relevant section of the Court's judgment started with the following statements:[48]

> "*The primary product class of concern in this case consists of airline services from Australia to destinations off shore. It extends to the provision of such services to other countries and to islands forming part of Australia. The secondary product class of interest relates to packaged holiday tours from Australia to other countries or to Islands forming part of Australia. Other holiday travel within Australia no doubt forms part of the "infinite range" of possible substitutes for the products at the centre of this case, but there is nothing to suggest, and it was not contended, that it would form part of any relevant product market.*
>
> *There is no real dispute that the geographic market in issue is Australia-wide, although as in Re Howard Smith Industries and the Avis Rent-a-car cases, some competitors at both wholesale and retail levels would confine their activities to one or more centres. The evidence indicated that the opportunity existed for a travel agent based in Perth to expand its activities to other capitals. Although the costs of geographic expansion might constitute a hurdle to be overcome, the evidence did not support a finding that those costs would constitute a barrier to entry defining a market boundary.*
>
> *At the functional level it would be possible to limit the market to the supply of services by airlines to wholesalers. Such a limitation, however, seems unduly restrictive …*"

[46] *Singapore Airlines* at page 656.
[47] Supplementary Starks Report at paragraph 5.2.
[48] *Singapore Airlines* at page 657.

3.24 In these paragraphs, addressing product, geographic and functional elements of market dimension, the Court started with the broadest possible market and then considered (and dismissed) reasons for considering a narrower market as a relevant market. While this paragraph seemed to consider whether a broader product dimension is possible, it is clear the Court did so to explain how it chose the broadest, commercially reasonable market as its starting point.

3.25 The Court then states that:

> "*... But given the complexity of the possible combinations of choices and the varieties of circumstances of potential purchasers, it is difficult and, if not necessary, probably inappropriate to essay a precise market definition. In one sense it is sufficient to pose the question whether within the range of arguable product markets there is any in which Singapore Airlines has a substantial degree of power and which would answer the description of the market to which s.46 applies in this case.*[49]"

3.26 This summarises the purposive approach to market definition that Dr Williams has identified as central to the views in his report.

3.27 The Court then considers the trial judge's identification of a narrower "market for the supply of airline services to persons engaged in providing wholesale tours to Maldives".[50] The crucial page 659 of the judgment rejects the possibility of narrowing the market definition as the trial judge proposed, as follows:

> "*In the end the relevant substitutions are not between airlines, but between destinations. The evidence supports the conclusion that there are island holiday packages available at the retail and wholesale levels which are substitutable for Maldive Island holiday services. The range of possible alternatives is wide as Professor McKern pointed out in his evidence and would include such destinations as Bali, Fiji, Tahiti, New Caledonia, Hawaii, Penang, the Philippines, the Solomon Islands, the Barrier Reef Islands, Guam and Mauritius. It is not at all clear that the product market would not extend to the provision of holiday package tours to the Mediterranean and Caribbean Islands. Whatever its outer limits, there is nothing to support the view that Singapore Airlines would have a substantial degree of market power in any market covering the provision of island holiday services across a range of destinations. His Honour identified what may be described as a sub-market in which the airline had such power. And in some cases, as has been observed, power in a sub-market may translate into a substantial degree of power in a market. But with respect to his Honour, that is not this case. The definition of the*

[49] *Singapore Airlines* at page 657.
[50] *Singapore Airlines* at page 657.

> *relevant market was critical to the outcome of the proceedings before his Honour and once it is accepted that the market properly defined ranges at least as far as other island holiday destinations, there is no basis for attributing to Singapore Airlines a substantial degree of power in the relevant market. …*"

3.28 ANZ submits that the Full Federal Court's approach to market definition is consistent with Dr Williams's approach in his report, and does not support the criticisms of Starks.

3.29 Starks's citations to the merger guidelines of various competition authorities indicate that starting with the narrowest plausible market is a common approach. But these guidelines recognise that this is a tool of analysis and not an inflexible rule. The ACCC's guidelines state that it will adopt a purposive approach to market definition (that is, that the definition of the market must be considered in the context of the proposed acquisition).[51] For example, the European Commission's draft revised Market Definition Notice states that:

> "*In its decisions, the Commission may set out and assess alternative market definitions, beginning with potential wider or potential narrower markets, depending on the specificities of the case.*[52]"

[51] ACCC Merger Authorisation Guidelines 2018, fn 51; ACCC Merger Guidelines, paragraph 4.8.
[52] European Commission, *Review of the Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law* (8 November 2022) at paragraph 46.

4. Market definition

Home loans

4.1 ANZ and Starks agree that there is a national market for home loans.

Transaction accounts and deposits

4.2 ANZ and Starks agree that the geographic dimension of the markets for transaction accounts and deposits is national.

4.3 Starks considers there are separate product markets for transaction accounts and deposits. ANZ does not agree, and submits that the evidence establishes that transaction accounts and deposits are part of the same market, with transaction accounts at one end of the spectrum, and term deposits at the other. However, whether these products are part of the same market or not, the overall competition assessment is the same.

Commercial banking

Product dimension of the market

4.4 Starks defines three commercial banking markets in the Interim and Supplementary Starks Reports:

(a) a local/regional SME market;

(b) a local/regional agribusiness market; and

(c) in the Supplementary Starks Report, a further local/regional combined SME/agribusiness market.[53]

4.5 ANZ submits that SME and agribusiness customers are part of the same broader market to supply banking products and services to business or commercial customers for the reasons previously provided and summarised in the Supplementary Starks Report.

4.6 Fundamentally:

(a) commercial banking customers are customers that run businesses, and seek banking products and services for those businesses;

(b) the range of banking products and services they seek are fundamentally the same irrespective of the kind of business they operate: as explained by Mark Bennett, Isaac Rankin, Guy Mendelson and Clive van Horen, those services are core debt, transaction accounts and asset finance;[54] and

[53] Supplementary Starks Report at paragraph 5.10.
[54] Supplementary Starks Report at paragraph 5.6.

(c) those customers are serviced in fundamentally the same way: customers with lower business limits and simpler banking needs are portfolio managed, while customers with higher business limits and more complex banking needs are remotely or directly managed with a relationship manager, and all customers' day-to-day banking is generally conducted using self-service options (online or by phone) and, particularly where cash handling is required, at a branch or other physical points of presence,[55] a point that is further emphasised by James Lane, ANZ State Manager of Business Baking for Queensland, and Mark Bennett, ANZ Head of Agribusiness;[56] and

(d) some customers prefer to choose a bank or banker that has a deep understanding of the particular industry they operate in, but this is not unique to agribusiness. The same applies to other specialities within the commercial banking market, including healthcare, commercial property and emerging corporate,[57] all of which are within the same commercial banking product market, and generalist bankers can develop in a speciality over a reasonable timeframe. For example, Mark Bennett indicated in his first statement that "an agribusiness banker with at least 5 years' experience, is usually proficient in managing customers across a range of agribusiness industries",[58] indicating that becoming proficient in a speciality area is achievable over the medium-term.

4.7 ANZ disagrees with Starks's assertion that supply-side considerations are "*generally considered of secondary importance relative to demand-side considerations*".[59] Starks's citation of Professor King's second report does not support this assertion; rather, the cited paragraphs of Professor King's second report allege (incorrectly) that Dr Williams's reports considered neither supply-side or demand-side substitutability. The ACCC's merger guidelines do not support this assertion either.

4.8 In any event, the demand-side considerations are similar to the supply-side considerations, and the parties have provided evidence indicating the demand-side substitutability of SME and agribusiness products for customers. The statements of Mark Bennett, Isaac Rankin, Guy Mendelson and James Lane address the needs of SME and agribusiness customers and ANZ has shown that there are strong similarities in what SME and agribusiness customers need and expect from their banks. A good example is James Lane's observation that customers value the "higher touch" relationship model ANZ offers for BB

[55] Supplementary statement of Isaac Rankin at paragraphs 29 to 30, First statement of Mark Bennett at paragraph 109, First statement of Clive van Horen at paragraph 40.
[56] Statement of James Lane at paragraph 29; Third statement of Mark Bennett at paragraphs 22 and 24.
[57] Supplementary statement of Isaac Rankin at paragraph 42.
[58] First statement of Mark Bennett at paragraph 64.
[59] Supplementary Starks Report at paragraph 5.5.

customers across the board,[60] which is the same relationship model Mark Bennett describes in his various statements for agribusiness customers in the BB segment.

Geographic dimension of the market: national versus local/regional

4.9 As mentioned above, Starks considers that the geographic dimension of the SME, agribusiness and combined SME/agribusiness markets is local/regional, with the region for agribusiness customers being substantially larger than individual towns and their surrounding local areas.[61]

4.10 Starks states that the parties "*present no evidence on the number of customers that would be willing to buy SME or agribusiness banking services from a bank without a presence in the community, or the number of customers in the market already doing so*".[62] Starks then goes on to consider the evidence about the extent to which ANZ's relationship managers will travel to visit agribusiness customers, and finds that this is consistent with local/regional markets.[63]

4.11 In both Starks Reports, Starks expresses no concluded opinions as to the geographic dimensions of these markets: Starks states it is "difficult to reach a firm conclusion on geographic market definition for SME banking",[64] that the relevant geographic markets for agribusiness banking are "likely" to be regional or local but there is "limitations in the available data",[65] and she is "unable to conclude on the geographic scale or extent of markets in this case".[66]

4.12 ANZ does not agree that geographic markets for SME/agribusiness customers are local/regional or that the geographic boundaries of each market should be based on the location of relationship managers who travel to visit some of their customers (but not, conversely, based on the fact the majority of banking activities take place online or over the telephone). Starks's observations regarding the size of regions for agribusiness customers are consistent with the evidence that ANZ bankers will drive significant distances to service agribusiness customers.[67] But Starks does not proceed to combine this with other evidence available to her which indicates that there are wider markets for SME/agribusiness customers than regional markets.

4.13 The evidence that Starks does not engage with in this respect includes the following evidence provided by ANZ:

[60] Statement of James Lane at paragraphs 10 to 21.
[61] Supplementary Starks Report at paragraphs 5.13 to 5.15.
[62] Supplementary Starks Report at paragraph 5.11.
[63] Supplementary Starks Report at paragraph 5.13.
[64] Interim Starks Report at paragraph 6.30.
[65] Interim Starks Report at paragraph 6.42.
[66] Supplementary Starks Report at paragraph 5.13.
[67] See ANZ's RFI response dated 28 June 2023 at paragraph 3(c).

(a) [Confidential to ANZ] evidence regarding the high proportion of ANZ's Queensland agribusiness customers ([redacted]) who are portfolio managed by a team of small business specialists and primarily use self-service options to manage their banking needs – while these customers have the option of in-person banking, their needs are also supported by phone, email or online.[68] Mark Bennett indicates that among this segment of agribusiness customers, as well as other agribusiness customer segments, "day-to-day banking is typically done online or over the telephone and, increasingly rarely, at branches";[69]

(b) evidence that Rabobank successfully built its agribusiness portfolio starting with a presence only in State capitals,[70] and Judo Bank contrary to Starks's assertion (which is not supported by any evidence) that "*a customer in Weipa may well look as far as Cairns for a bank, but it is unlikely that they would consider a bank whose only presence in Queensland was in Brisbane*" (and, in any case, there is now no major competitor for SME or agribusiness customers that only has a presence in Brisbane–including new entrant, Judo Bank);[71]

(c) in respect of SME banking, evidence of alternative cash-handling options (besides branches) like Bank@Post[72] - ANZ submits that these reduce the importance of local presence of a bank for SME customers choosing a provider, and thus support a broader market definition than Starks suggests;[73] and

(d) evidence (from not only ANZ, but third parties such as BMAgBiz) of the increasing role of brokers for SME and agribusiness customers,[74] who can be local to the customer but direct business to banks that do not have a local presence near the customer – [Confidential to ANZ] [redacted].[75]

4.14 From a supply-side perspective, it would be impossible for a bank that only serviced SME and agribusiness customers in a local/regional geographic region to exist. This is a significant indicator towards geographically larger markets for these customers, but (as she does with other evidence of supply-side substitutability) Starks dismisses this evidence without much analysis.[76]

[68] See ANZ's RFI response dated 28 June 2023 at paragraph 3(a).
[69] Third Statement of Mark Bennett dated 7 July 2023 at paragraph 12.
[70] First statement of Mark Bennett at paragraph 116.
[71] Supplementary Report of Mark Starks at 5.13.
[72] ANZ's SOPV Response at paragraph 3.44(b).
[73] Supplementary Starks Report at paragraph 5.16.
[74] ANZ's SOPV Response at paragraphs 5.25 and 6.9 to 6.10. See also the Statement of James Lane at paragraph 22.
[75] Third statement of Mark Bennett at paragraph 22.
[76] Supplementary Starks Report at paragraph 5.14.

5. The counterfactual

A critical matter not addressed in Starks reports: the commercial likelihood of a Bendigo Bank/Suncorp Bank merger

5.1 The alternative buyer counterfactual is fundamental to Starks's opinion that there is a real chance of an SLC in the national market for home loans based on coordinated effects. Critically, Starks was asked to assume the alternative buyer counterfactual would happen and not instructed to comment on the likelihood of an alternative buyer counterfactual.[77] Consequently, Starks does not engage with the submissions and evidence as to why the alternative buyer counterfactual is not commercially realistic. If, as the Suncorp evidence establishes, it is not commercially realistic, then there is no basis for Starks's opinion that the proposed acquisition would result in a real chance of SLC in the national market for home loans.

5.2 Suncorp has provided considerable evidence as to why the alternative buyer counterfactual is not commercially realistic. This is evidence is given by very experienced executives: Suncorp Group Chief Executive Officer, Suncorp Bank Chief Executive Officer and Suncorp Group Chief Information Officer.[78] ANZ does not repeat that evidence here, but emphasises that it is comprehensive and should be preferred, particularly in circumstances where (as far as ANZ is aware) Bendigo Bank has not provided responsive evidence, only assertions.

5.3 Suncorp's evidence also establishes that if the proposed acquisition does not proceed, then Suncorp Group would continue to own Suncorp Bank. Suncorp Bank's business has materially improved under the current leadership,[79] as recognised by Starks,[80] and is viable under Suncorp Group ownership. [Confidential to Suncorp] [redacted][1]

5.4 Given this, the ACCC cannot be satisfied that there is a real commercial likelihood of the alternative buyer counterfactual, and should not evaluate the proposed acquisition on the basis of that counterfactual.

5.5 If contrary to ANZ’s submissions and the evidence, the ACCC is satisfied there is a real commercial likelihood of the alternative buyer counterfactual occurring, the degree of likelihood should nonetheless be considered small, having regard to the evidence provided by Suncorp. The degree of likelihood of the counterfactual actually occurring in turn makes an SLC less likely.[82] Considering both the degree

[77] Supplementary Starks Report at paragraphs 4.8 and 4.11.
[78] See the first, second and four statements of Steve Johnston;, third statement of Clive van Horen and statement of Adam Bennett.
[79] First statement of Clive van Horen at paragraph 38.
[80] Interim Starks Report at paragraph 9.16.
[81] Second statement of Steve Johnston at paragraph 126.
[82] Pacific National at [246].

of likelihood of the counterfactual occurring and the alleged competitive effects identified by Starks together, the ACCC could not conclude there is a real commercial likelihood of a substantial lessening of competition has been shown in the national market for home loans.

If Bendigo Bank acquired Suncorp Bank, would it be a more effective competitor?

A combined Bendigo Bank/Suncorp Bank would not be more competitive than a standalone Bendigo Bank

5.6 Starks is instructed to assume that the alternative buyer counterfactual will occur, and, on that assumption, to consider whether a combined Bendigo Bank/Suncorp Bank (the alternative buyer counterfactual) would be a stronger competitor relative to Bendigo Bank operating independently (in the factual).[83] In doing so, Starks again is instructed to make assumptions about the combined bank achieving IRB accreditation and its technology investment.[84]

5.7 Starks dismisses the submission that a combined Bendigo Bank/Suncorp Bank will not be an effective competitor. In many instances, this is done at the level of theory and without engaging with the evidence. The analysis in the Starks Reports tends to discount or disregard the evidence of ANZ and Suncorp Bank while uncritically accepting the assertions of Bendigo Bank.

5.8 This is particularly evident when comparing Starks's opinion on the evidence about the public benefits likely to result from the proposed acquisition to Starks's assessment of how acquiring Suncorp Bank would strengthen Bendigo Bank. As Patrick Smith explains in the Third Smith Report, all of the factors that the ACCC has regard to when assessing public benefits are also relevant to assessing a claim that a merger between Bendigo Bank and Suncorp Bank would create a stronger competitor.[85] Smith undertakes that assessment and concludes that he is not convinced that Bendigo Bank would become a substantially more effective competitor to the major banks if it acquired Suncorp Bank.[86] Starks does not undertake that assessment.

5.9 Having said that, Starks also qualifies her conclusion with the caveat that "*any assessment of the manner in which a merged BEN/Suncorp entity would compete involves significant uncertainty*"[87] and, in particular, there is "*significant uncertainty around the likelihood, magnitude and timeframe*" of such an impact.[88]

[83] Supplementary Starks Report at paragraph 6.50.
[84] Interim Starks Report at paragraph 5.1
[85] Third Smith Report at paragraph 25.
[86] Third Smith Report at paragraph 21.
[87] Interim Starks Report at paragraph [7.18].
[88] Interim Starks Report at paragraph 4.32.1.

Starks agrees funding costs would be higher, but that this will be offset by other factors

5.10 Starks considers that Bendigo Bank/Suncorp Bank's funding costs would be higher, with a high degree of uncertainty, but that this will only make a modest difference to its ability to compete.[89] Starks considers this on the basis that advanced IRB accreditation and scale would have a greater effect, but does not provide a quantitative assessment of that effect. Starks conclusions in this regard are neither robust nor reflective of the evidence:

(a) First, Starks does not herself consider the likelihood of Bendigo/ Suncorp Bank obtaining advanced IRB accreditation; rather, she is instructed to make that assumption (in one version of the alternative buyer counterfactual).

(b) Second, Starks does not provide a quantitative assessment of the effect of advanced IRB accreditation, which is considered further below in paragraph 5.20 below. Indeed, she observes there is "significant uncertainty about the magnitude of this benefit".

(c) Similarly, Starks refers to the "potential benefits" of scale, each of which she identifies only at a theoretical level,[90] without providing any assessment of scale. The effect of scale is considered further below in paragraph 5.24.

5.11 As Smith highlights, this is particularly significant given Starks opinion that Bendigo Bank/Suncorp Bank would have scale advantages that outweigh the increase in funding costs. However, that is asserted without any evidence or estimation of the magnitude of those costs.[91]

5.12 The fact that Starks accepts that funding costs would be higher is important because higher funding costs means higher funding costs across all of the lending in the combined Bendigo Bank/Suncorp Bank portfolio. This factor alone puts a combined Bendigo Bank/Suncorp Bank at a disadvantage relative to Suncorp Bank. Starks accepts the evidence that Suncorp Bank is not a particularly vigorous effective competitor in home loans and is not strong enough to disrupt the alleged return to coordinated effects. It follows that, unless the funding cost disadvantage is outweighed by other clear benefits, combining Suncorp Bank, a not particularly vigorous competitor which would have a higher cost of funding, with Bendigo Bank would not result in a more effective competitor that is strong enough to disrupt the hypothetical resumption of coordinated effects.[92]

[89] Supplementary Starks Report at paragraph 6.19; Interim Starks report at paragraph 7.57.
[90] Interim Starks report at paragraphs 7.53- 7.556.
[91] Third Smith Report at paragraph 51.
[92] Third Smith Report at paragraph 47.

Starks discounts the real challenges and impact of technology integration

5.13 The technology integration challenges that would be faced by Bendigo Bank to integrate Suncorp Bank are not the same as those faced by ANZ. Bendigo Bank and Suncorp Bank would require a merger of equals. By contrast, ANZ has the opportunity to integrate the Suncorp Bank portfolio into its ANZ Plus platform following the separation period, in circumstances where it is already planning a much larger integration of its own customers to a new platform.

5.14 Against this backdrop, Starks is instructed to assume that Bendigo Bank would continue its transformation process.[93] This has the "*aim to move from 7 core banking systems to 1, 10 brands to 3, and from 19.9% of its applications being the cloud to 50% by FY24*".[94] This assumption is, in fact, misleading given that a transaction would require Bendigo Bank to deal with Suncorp Bank's systems, in addition to its own 7 core banking system – it appears highly likely that the need to account for additional systems would present unforeseen challenges and delay Bendigo Bank's transformation process

5.15 Adam Bennett provided evidence about how long it would take to integrate Bendigo Bank's and Suncorp Bank's systems.[95] The same observations, based on experience, are made by Louise Higgins,[96] Clive van Horen,[97] and Shayne Elliott.[98] Starks comments that "*it is not uncontroversial that technology integration is highly complicated, and involves uncertain timescales and execution risks*" and that this "*also applies to any integration between ANZ and Suncorp Bank*", noting that "*it has taken nearly 15 years for Westpac to get all of its customers on to the same banking system post-merger*".[99]

5.16 However, Starks considers these challenges will not affect Bendigo Bank being an effective competitor, essentially on the basis that Bendigo Bank asserts that it has experience in technological integration and because scale will help spread technology costs.[100] In respect of Bendigo Bank's claim about experience:

(a) Bendigo Bank's timelines for consolidating its own systems (18 months to 2 years for consolidating the three Bendigo Bank platforms, and transitioning to 70% of its applications in the cloud by 30 June 2025[101]) are not fundamentally different to Adam Bennett's estimates, and Bendigo Bank does not provide a timeline for dealing with Suncorp Bank's systems;

[93] Supplementary Starks Report at paragraph 6.20.
[94] Supplementary Starks Report at paragraph 6.20.
[95] Statement of Adam Bennett at paragraph 46.
[96] Statement of Louise Higgins at paragraph 97.
[97] Second statement of Clive van Horen at paragraph 31.
[98] Second statement of Shayne Elliott at paragraph 92.
[99] Supplementary Starks Report at paragraph 6.25.
[100] Supplementary Starks Report at paragraph 6.27.
[101] Second Bendigo submission at paragraphs 2.6 and 2.8.

(b) Bendigo Bank does not have experience in migrating 1.2 million customers to its platform. Its previous migrations from acquired banks were significantly smaller, with the largest being Adelaide Bank with around 180,000 customers, almost an order of magnitude smaller in number.[102]

(c) The example Bendigo Bank provides of 600,000 new customers joining its core platform says nothing about Bendigo Bank's integration capability. Those customers joined directly, through Bendigo Bank's digital bank, Up.[103]

5.17 In respect of Bendigo Bank's claims about scale: those benefits only arise if Bendigo Bank is also able to reduce costs. Bendigo Bank's own submissions give reason to doubt this would occur. In particular:

(a) Bendigo Bank indicates that it only intends to consolidate "*branches in very close geographic proximity*" and maintain its large branch network;[104]

(b) a combined Bendigo Bank/Suncorp Bank would be required to pay the major bank levy;[105] and

(c) Bendigo Bank has made assertions, but has not provided evidence, about cost synergies which has been made available to ANZ.[106]

5.18 It is also relevant that Bendigo Bank has chosen not to put on any additional evidence to rebut the evidence of Suncorp Bank, and particularly the evidence of Adam Bennett. This diminishes the weight of Bendigo Bank's submission, and undermines the basis for Starks's analysis.

Cultural differences are material

5.19 Starks agrees that "*brand and cultural alignment is a significant challenge for merging businesses*" but considers they are material enough to mean Bendigo Bank/Suncorp Bank could not be an effective competitor.[107] This is despite the fact the evidence establishes that Bendigo Bank and Suncorp Bank have different strategies and risk appetites.

Starks places considerable weight on IRB accreditation but does not engage with the evidence establishing that it is not viable and may not improve Suncorp Bank's competitive position

5.20 Advanced IRB accreditation is a very significant factor in Starks opinions about the strength of a Bendigo Bank/Suncorp Bank as a competitor. Starks considers

[102] Statement of Adam Bennett at paragraph 51.
[103] Second Bendigo submission at paragraph 2.10.
[104] Second Bendigo submission at paragraph 2.14.
[105] Second Bendigo submission at paragraph 2.20.
[106] Second Bendigo submission at paragraph 2.15. First Bendigo submission at paragraph 6.1(d).
[107] Supplementary Starks Report at paragraph 6.29.

that "*there is a real chance that IRB accreditation would enable the merged entity to become a disruptive competitor*".[108] This is even though "*it appears that a portion of the benefit from IRB accreditation would be used to rebuild profitability rather than compete for market share*".[109]

5.21 As Smith explains, Starks does not consider whether IRB accreditation is likely or whether it would arise as a result of acquiring Suncorp Bank. This is important because Starks's opinion that Bendigo Bank would be a more effective competitive in the alternative buyer counterfactual is significantly conditioned on Bendigo Bank achieving IRB accreditation. If this is unlikely to occur, or if it is likely to occur even if Bendigo Bank does not acquire Suncorp Bank (ie in the factual), then this materially undermines the basis for her opinion that the proposed acquisition would SLC.[110]

5.22 Further, the conclusion that Bendigo Bank/Suncorp Bank should or could obtain IRB accreditation is contrary to the substantial evidence provided by ANZ and Suncorp Bank that indicates advanced IRB accreditation is not viable.

5.23 Further, Clive van Horen explains that Suncorp Bank has not pursued advanced accreditation to conclusion given its assessment of the uncertainty of the benefits that it will receive from such accreditation, relative to the significant costs involved.[111] [Confidential to Suncorp] [redacted]

Starks places weight on increased scale but does not quantify the magnitude of that benefit

5.24 The evidence from Shayne Elliott[112] and Clive van Horen[113] is that a combined Bendigo Bank/Suncorp Bank would remain sub-scale. Starks does not agree with this proposition, but the reasoning in relation to that evidence has been redacted and is not available to ANZ.

[108] Supplementary Starks Report at paragraph 6.43.
[109] Supplementary Starks Report at paragraph 6.51.4.
[110] Third Smith Report at paragraphs 31 to 42.
[111] Third statement of Clive van Horen at paragraph 8.
[112] ANZ oral submission to the ACCC on 16 June 2023.
[113] Second statement of Clive van Horen at paragraph 35.

5.25 Suncorp provides a detailed analysis of why the combined scale of Bendigo Bank/Suncorp Bank will not close the competitive gap with the major banks, with a combined Bendigo Bank/Suncorp Bank still be only about 40% of the size of the smallest major bank, ANZ. It is not apparent that there will be meaningful benefits in scale, particularly in the face of the higher funding costs, and integration, technology and cultural alignment challenges

5.26 Further, scale is not a prerequisite for a bank to effectively compete, particularly for new entrants which are not burdened with legacy systems. The evidence shows that, in the case of home loans, success has been achieved by competitors with a targeted and focussed offering, like Macquarie Bank and ING. The Second Bendigo submission also illustrates this – Bendigo Bank's customer growth since 2018 has been driven through its digital bank Up, which did not require building its current scale through the traditional bank. The impacts in relation to home loans is discussed further at paragraph 7.44 below.

Overall assessment

5.27 Starks concludes that:

(a) funding costs will be higher, but that will only have a modest impact;

(b) technology integration and cultural alignment are challenges, but will not affect a combined Bendigo Bank/Suncorp Bank from being "an effective competitor"; and

(c) scale and, in particular, the net impact of IRB accreditation would strengthen the combined Bendigo Bank/Suncorp Bank's competitive position.

5.28 On this basis Starks not only concludes that a combined Bendigo Bank/Suncorp Bank would be a stronger competitor than Bendigo Bank in the factual, but that it would be such a strong competitor that it would be disruptive to the major banks, particularly in the national home loans market. A close review of Starks's underlying analysis suggests a more finely balanced position, which does not reconcile with that conclusion.

5.29 For example, in home loans, Starks does not identify what a combined Bendigo Bank/Suncorp Bank would *actually do*, that is different to what a bank like Macquarie Bank is already doing, which would mean it is materially or substantially more effective as a competitor.

5.30 Further, ANZ submits that Starks has not placed sufficient weight on the extensive evidence demonstrating the material challenges that Bendigo Bank would face in a merger of equals with Suncorp Bank.

5.31 There are also inconsistencies in Starks's assessment of the combined Bendigo Bank/Suncorp Bank's competitive impact. For example, as addressed in further detail in the following sections, Starks considers that the combined entity would not be a significant enough competitor that there is a real chance of SLC in the market for home loans based on unilateral effects. In other words the combined Bendigo Bank/Suncorp Bank would not impose a material competitive constraint on the major banks individually. But she concludes that it would be a significant enough competitor that there is a real chance of SLC in the market for home loans based on coordinated effects which appears to be incoherent and the reasons for this difference in assessment, when considered through the unilateral and coordinated effects lenses, are not clear.

6. Unilateral effects

No real chance of unilateral effects in the national market for home loans

6.1 Starks's opinion is that there is no real chance of an SLC in the national (or Queensland) market for home loans due to unilateral effects on either counterfactual (although she does add that she "cannot rule out" an SLC in this market compared to the alternative buyer counterfactual. ANZ agrees that there is no real chance of an SLC. Specifically, ANZ notes that Starks's opinion relies on a number of facts that accord with the evidence. These include:

(a) The market share increment in the national market for home loans due to the proposed acquisition will be small (2.40%).[114] While the proposed acquisition would make ANZ the third largest lender in home loans, ahead of NAB, it is "*unclear how material this increase in symmetry in market share is, given the large existing gap between CBA/Westpac and NAB/ANZ*".[115]

(b) ANZ (along with Westpac, NAB and CBA) have lost market share in the period from 2012 to February 2023. In percentage terms, ANZ, Westpac, NAB and CBA lost 15.62%, 16.66% and 11.62% and 5.20% of their market shares respectively.[116]

(c) Suncorp Bank's market share has declined over the past decade (from 2.79% in 2012 to 2.40% in February 2023).

(d) The two strongest performers in terms of growth are CBA (accounting for 22%-38% of market growth) and Macquarie Bank (accounting for 15%-25% of market growth).[117]

(e) Suncorp Bank is not a particularly vigorous competitor in the supply of home loans. Suncorp Bank does not account for a disproportionately high share of refinancing away from ANZ compared to its market share, with CBA, Westpac/St George, Macquarie Bank and NAB all accounting for a greater share than Suncorp Bank for FY22.[118]

(f) Across all parameters of competition, the major banks compete more closely with each other than other banks.[119]

[114] Interim Starks Report at paragraph 9.11.
[115] Interim Starks Report at paragraph 9.18.
[116] Interim Starks Report at paragraph 9.9.
[117] Interim Starks Report at paragraph 9.19.
[118] Interim Starks Report at paragraph 9.24.
[119] Interim Starks Report at paragraph 9.34.

(g) Barriers to entry are surmountable and are reducing over time. The importance of branch presence has also declined over time, with the majority of new loans sourced via the broker channel.[120]

(h) [Confidential to ANZ] [redacted], it is likely that ANZ will continue to work on improving its competitiveness in home loans and, given Suncorp Bank's low market share, it is unlikely that buying Suncorp Bank's back book will significantly change ANZ's incentives to compete.[122]

6.2 In summary, Starks's opinions are consistent with the evidence that ANZ does not have, and will not obtain, market power as a result of the proposed acquisition. The increase in concentration arising from the proposed acquisition is modest, ANZ and Suncorp Bank are not close competitors, Suncorp Bank does not drive price competition, innovation or product development and, importantly, competition is increasing due to technology, brokers, and increasing consumer propensity to switch.

No real chance of unilateral effects in the markets for transaction accounts and deposits/term products

6.3 Starks concludes that there is "no real chance" of an SLC in respect of transaction accounts and deposit/term products assessed on any theory of harm and against both counterfactuals. ANZ agrees with this conclusion.

6.4 While Starks states that she "cannot rule out SLC" in respect of a horizontal theory of harm against the alternative buyer counterfactual,[123] ANZ considers that on the evidence the ACCC to be affirmatively satisfied that the proposed acquisition is not likely to have the effect of SLC. This is regardless of whether there is one national market comprising both transaction accounts and deposits/term products or separate national markets for transaction accounts and deposits/term products. In particular:

(a) Starks's assessment of "competition in the factual" where ANZ acquires Suncorp Bank does not recognise that ANZ may have an increased ability and incentive to compete in the supply of transaction accounts and deposits after the proposed acquisition.[124] She does not take into consideration that ANZ will need to continue to compete vigorously after the proposed acquisition to retain existing ANZ customers and the

[120] Interim Starks Report at paragraphs 9.36 to 9.38.
[121] Interim Starks Report at Table 6.
[122] Interim Starks Report at paragraph 9.43.
[123] Interim Starks Report at paragraphs 9.136.5 and 9.176.5.
[124] Interim Starks Report at paragraph 9.134.

additional Suncorp Bank customers it acquires,[125] including because of the expiry of the term funding facility[126] and [Confidential to ANZ] [redacted][127] ANZ will need to compete vigorously after the proposed acquisition just to retain the additional Suncorp Bank customers it acquires.[128] These considerations should be given greater weight than the evidence Starks uses to conclude that switching in transaction accounts is low, because the evidence she uses is not specific to ANZ and so does not reflect its incentives to compete or the risk of Suncorp Bank customers switching.[129] She also contemplates the possibility of a reduction in ANZ's incentives to invest in its banking app or digital banking platform after the proposed acquisition,[130] but does take into account the fact that the proposed acquisition will increase ANZ's scale and improve its ability and incentive to develop and invest in its ANZ Plus platform and proposition.

(b) In respect of transaction accounts, Starks's conclusion that the merged Bendigo Bank/Suncorp Bank could be a more effective competitor is particularly contingent (she writes that such a merged entity "*may* be able to invest greater amounts" into its banking platform, and "*could* impose a greater competitive constraint on the major banks than it currently does"),[131] but any evidence that substantiates these assertions has not been disclosed to ANZ. It is also not based on reliable metrics. Bendigo Bank's (strategic) NPS scores and the awards it has received are not a reliable basis on which to judge its competitive impact in respect of customer outcomes and product and brand usage, as Shayne Elliott has explained.[132]

(c) In respect of deposits and term products, Starks's conclusion that the merged Bendigo Bank/Suncorp Bank "may be able to compete more effectively in the deposits market" is based on no real evidence of relevant facts, only Bendigo Bank's assertions.[133]

6.5 For these reasons, and those given in ANZ's authorisation application and SOPV Response, the ACCC should be satisfied that the proposed acquisition is not likely to have the effect of SLC regardless of whether there is one national market comprising both transaction accounts and deposits/term products or separate national markets for transaction accounts and deposits/term products.

[125] ANZ's SOPV Response at paragraph 8.53.
[126] ANZ's SOPV Response at paragraph 8.7.
[127] ANZ's SOPV Response at paragraph 8,31.
[128] ANZ's SOPV Response at paragraph 8.53.
[129] Interim Starks Report at paragraphs 3.35 to 3.37.
[130] Interim Starks Report at paragraph 9.134.3.
[131] Interim Starks Report at paragraph 9.136.3 (emphasis added).
[132] Second statement of Shayne Elliott at paragraph 81.
[133] Interim Starks Report at paragraph 9.176.3.

No real chance of an SLC in SME and/or Agribusiness

6.6 Starks concludes in respect of SME/agribusiness banking that the evidence does not "demonstrate a real likelihood of an SLC" although she "cannot rule out an SLC".[134]

6.7 Starks states that she is unable to rule out an SLC because:

(a) she could not "be sure that there is no local market where the merger causes there to be only three or fewer competitors left"; and

(b) she cannot rule out that "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".[135]

6.8 ANZ submits that the ACCC should be satisfied from the evidence that no SLC in any markets for the supply of banking products and services to SME and/or agribusiness customers, including on the basis of the Supplementary Starks Report, is likely.

6.9 The evidence referred to in the Starks Reports coupled with evidence provided by ANZ and Suncorp support this, in particular:

(a) Starks identifies that the combined ANZ/Suncorp Bank will continue to face competitive constraints in agribusiness in Queensland, in respect of larger customers, from Rabobank, and in respect of smaller customers from Bendigo Bank and BOQ.[136] This is particularly significant given that she also concludes there are low barriers to expansion for existing Queensland agribusiness banks (as well as only "moderate" barriers to entry for existing banks in Queensland who do not currently serve agribusiness customers, and for existing banks serving agribusiness outside Queensland).[137] In respect of SME banking, she acknowledges the existence of non-bank entrants as well as the entry of Judo Bank, and acknowledges that barriers to entry and expansion have fallen over time.[138] She expects that the barriers to expansion for Bendigo Bank and BOQ in SME banking are "likely to be low".[139] These are supported in ANZ's evidence identified in its submissions.[140]

(b) For agribusiness customers, there are only two towns in Queensland (Ayr and Chinchilla/Miles) which will only have one existing, alternative agribusiness focussed competitor to the combined ANZ/Suncorp Bank, and

[134] Supplementary Starks Report at paragraph 7.45.
[135] Supplementary Starks Report at paragraph 7.44.
[136] Interim Starks Report at paragraphs 9.222 to 9.223.
[137] Interim Starks Report at paragraph 9.232.
[138] Interim Starks Report at paragraphs 9.267 to 9.270.
[139] Interim Starks Report at paragraph 9.272.1.
[140] For example, see ANZ's SOPV Response at paragraphs 5.29 and 6.6.

one town (Cairns) which will not have an independent regional bank post-acquisition.[141] However, all of these towns are within a reasonable drive-time (less than two hours) from towns with more competitors. Competition for customers in or near a location is not restricted to those with bankers or branches based in those locations. For example, Ayr is about an hour away from the regional city of Townsville. ANZ considers that there are multiple banks competing effectively for agribusiness customers in all of these locations today, and a merged ANZ/Suncorp Bank would not change that. In respect of branches for SME customers, there is no town which will have less than four alternative bank branches to the combined ANZ/Suncorp Bank.[142] This, in particular, enables the ACCC to satisfy itself that the possibility Starks raises, that the proposed acquisition will result in a local market where the merger causes there to be only three or fewer competitors left (see 6.7 above), is unsupported by any evidence.

(c) Starks acknowledges that ANZ and Suncorp Bank are not particularly close competitors in SME banking,[143] a position supported by ANZ's evidence, including evidence from James Lane.[144]

(d) Starks accepts that "Suncorp's relationship-based model is not unique to Suncorp and is to an extent replicable".[145] Starks hypothesises that some unique offering of Suncorp Bank will be lost post-acquisition, which is a mere speculation – and, if Suncorp's model is replicable and barriers to expansion for Rabobank, Bendigo Bank and BOQ are low, then this is not a basis to conclude that the proposed acquisition will result in an SLC.[146]

6.10 Starks's conclusion in the Interim Starks Report that "*Suncorp is a vigorous and effective competitor in agribusiness in Queensland*"[147] overstates the evidence of Suncorp Bank's effectiveness (some of which she acknowledges)[148] and any uniqueness of their servicing proposition or competition on non-price factors. Mark Bennett gives evidence that he has not seen any evidence that regional banks (including Suncorp Bank) are more flexible in pricing or service than ANZ, or that there is a real difference (except at the margins) in what banks are doing regarding relationships with agribusiness customers.[149]

6.11 [Confidential to Suncorp] [redacted]

[141] Interim Starks Report at paragraphs 9.228 to 9.229, and 9.240.2.
[142] Interim Starks Report at Table 26.
[143] Interim Starks Report at paragraph 9.260.
[144] Statement of James Lane at paragraph 25.
[145] Supplementary Starks Report at paragraph 7.33.
[146] Supplementary Starks Report at paragraph 7.34.
[147] Interim Starks Report at paragraph 9.220.
[148] Interim Starks Report at paragraph 9.258, Supplementary Starks Report at paragraph 7.2.
[149] Third Statement of Mark Bennett at paragraph 24.

[redacted] [Confidential to ANZ] In contrast, ANZ has a remote managed and direct managed proposition for commercial (including agribusiness) customers typically with total business limits of [redacted] or more.

6.12 James Lane emphasises the strong relationship model that ANZ has in its BB segment (as defined in the statement of Isaac Rankin),[150] which he considers is a "higher touch" than its competitors.[151] He emphasises that ANZ's work in automation and digitisation is not to supplant the relationship model, but to reduce "manual work and intervention" so that "ANZ Relationship Managers are better supported to consider the particular needs of their customer and have meaningful engagements".[152] He also considers that the proposed acquisition will enable ANZ to "deliver a more sustainable relationship proposition to customers", and "bring stability to locations where ANZ is currently underweight and give customers the confidence that ANZ is committed to supporting them in the long term".[153] This evidence, as well as the evidence of Mark Bennett, is strongly contrary to the proposition that there is some strict distinction between "banks that use a relationship-based model" and banks that use a "more mass-market service model".[154] In particular, Starks's inference that ANZ's digitisation and automation "suggests a move away from personalised banking for customers who do not qualify for relationship-managed banking" is based on a misconception.[155] In particular, ANZ's centralised model for remote management of some SBB customers, through its National Business Centre, aims to provide a single point of contact for those customers when they have banking needs for resolution – it is a way in which personalised banking is efficiently maintained. For ANZ, the combination of frontline representation through Relationship Managers, Business Banking Managers, and Small Business Specialists, and the remote proposition through SBMs, creates a commercial value chain that supports customers through their commercial business cycle journey of starting, running, growing and succession planning or exiting a business

6.13 Consequently, compared to the status quo counterfactual, the proposed acquisition will strengthen ANZ's competitive position by allowing ANZ to deliver a more sustainable relationship proposition to customers.

6.14 In respect of the alternative buyer counterfactual, there is no evidence (disclosed to ANZ) that Bendigo Bank uses a relationship model for SME or agribusiness customers, or a relationship model that is particularly unique. There is also

[150] Statement of Isaac Rankin at paragraph 15.
[151] Statement of James Lane at paragraph 11.
[152] Statement of James Lane at paragraph 16.
[153] Statement of James Lane at paragraph 30.
[154] Interim Starks Report at paragraph 9.262.
[155] Supplementary Starks Report at paragraph 7.16.

insufficient evidence to suggest that a combined Bendigo Bank/Suncorp Bank could offer a significantly greater relationship-based SME/agribusiness model than banks currently do – [Confidential to ANZ] [redacted][156]
[Confidential to Suncorp] [redacted]

6.15 More generally, there is no evidence (disclosed to ANZ) to contradict the views of the experienced bankers, Mark Bennett and James Lane, who do not see how the alternative buyer counterfactual would result in a stronger competitor for customers in regional Queensland, or even an equally strong competitor to Suncorp Bank as currently constituted.[157]

6.16 ANZ submits that the preceding paragraphs 6.10-6.15 sufficiently address Starks's other possibility, noted above in 6.7(b) that the proposed acquisition could lessen competition by reducing the availability of more flexible, personalised, relationship-based offerings for SME/agribusiness customers.

6.17 On this basis, the ACCC should be affirmatively satisfied that there is not a real chance that the proposed acquisition will result in an SLC in any market that involves the supply of banking products and services to SME and agribusiness customers.

[156] Third Statement of Mark Bennett at paragraphs 14 to 15.
[157] Third Statement of Mark Bennett at paragraph 25(c), Statement of James Lane at paragraphs 33 to 34.

7. Coordinated effects

Home loans

7.1 Starks considers there is a real chance of an SLC in the national home loans market due to coordinated effects in the alternative buyer counterfactual (but not the status quo counterfactual) despite the fact that she considers that there is no real chance of SLC on the basis of unilateral effects in the national home loans market or specifically in Queensland.

7.2 The central components to that opinion are as follows:

(a) The assumption Starks has been asked to make that the alternative buyer counterfactual is commercially realistic. That is not supported the by the evidence, for the reasons set out in chapter 5 starting at paragraph 5.1.

(b) Starks's opinion that Bendigo Bank/Suncorp Bank will become another significant competitor in the competitive fringe that "*will have a material impact in undermining coordination, particularly if BEN/Sun obtains IRB accreditation*"[158] That is not supported by the evidence, for the reasons set out in chapter 5 starting at paragraph 5.6.

(c) The markets are conducive to coordinated effects, and there is a propensity to return to coordination. ANZ submits this interpretation is not supported by the evidence, as explained below.

7.3 The approach that Starks takes relies significantly on an assumption that coordinated effects exist, and then applying that assumption to certain features of the market to conclude that there will be a propensity to coordinate that will not be undermined by existing competitors. The approach is as follows:

(a) Firstly, Starks concludes that there was coordinated conduct between the major banks in the past, prior to 2018 on price.

(b) Secondly, Starks identifies features of each market that *could* be conducive to coordinated effects. This is fundamentally based on:

(i) a small number of coordinating firms – the four majors;

(ii) symmetry in costs (with the RBA official cash rate being an important common driver of costs);

(iii) interest rates that are transparent to rivals due to frequent interaction; and

[158] Starks Report at paragraph 9.113.5.

(iv) frequent contact between the major banks across multiple markets.

The evidence does not establish a history of coordination

7.4 Starks's opinion that there was a history of coordination is based on her interpretation of the findings that:

(a) price competition was limited (in the 2018 Productivity Commission Report on Competition in the Australian Financial System (**PC Report**)); and

(b) the major banks engaged in "accommodative and synchronised approach to pricing" (in the ACCC's 2018 Residential Mortgages Price Inquiry).[159]

7.5 Neither report explicitly concluded that the major banks' behaviour constituted coordination, and Professor King expressly considered that it "may fall short of coordinated conduct".[160] Starks considers that in terms of pricing "*coordination likely took the form of 'live and let live' strategic behaviour, where the major banks generated margins above those achievable by oligopolistic competition by avoiding vigorous competition on prices*".[161]

7.6 Further, Starks concluded there was no evidence of coordination in other parameters of competition:

> *In particular, there does not appear to be evidence indicative of coordinated conduct in turnaround times, service quality, or investment in their technology platforms, which are other key parameters of competition in the home loans market, although I cannot rule out a 'live and let live' form of coordination in these aspects where the major banks tacitly agree to refrain from active competition.*[162]

7.7 Starks's conclusions of past coordination are integral to her opinion that, despite the evidence of existing competition, the alternative buyer counterfactual "*would reduce the chances of coordination re-establishing itself in a sustainable fashion*".[163] As she described it in her Supplementary Report "*the key question is whether this period of competition is a brief interruption of long-term coordination, or whether something has permanently changed in the market*".[164]

[159] Interim Starks Report at paragraph 9.66.
[160] A view that he changed in his report in support of Bendigo Bank's first submission at paragraph 140.
[161] Interim Starks Report at paragraph 9.66.
[162] Interim Starks Report at paragraph 9.67.
[163] Supplementary Starks Report at paragraph 2.13. That is so despite the caveat at Interim Starks Report at paragraph 9.68.
[164] Supplementary Starks Report at paragraph 2.13.

Recent increase in price competition perversely relied on as evidence for past coordinated conduct

7.8 Starks places considerable weight on the recent increase in price competition as evidence of past coordinated effects, even though Starks acknowledges that this evidence is ambiguous and can be consistent with competitive behaviour:

> *In practice, without evidence of explicit coordination, it is difficult to tell whether firms are engaging in coordination or competition. For example, firms may take the expected reactions of their rivals into account to a degree when setting prices, but this can be consistent with both competitive and cooperative behaviour. However, if there are periods of reduced price competition which can clearly be contrasted with other periods of intense price competition, this can be evidence consistent with coordination (during the periods of reduced price competition).*[165]

7.9 Starks approaches this by asking whether "*evidence of recent active competition in the home loans market indicates a permanent shift away from the 'established oligopoly' characteristics noted by the PC in 2018, or a temporary breakdown of coordination. On the face of it, both are plausible hypotheses*".

7.10 Starks ultimately considers that the recent increase in price competition "*provides further evidence indicative of past coordinated conduct*".[166]

7.11 This raises the question: what is the cause of the recent price competition? Starks identifies the relevant recent developments as follows:

> *There was a sudden and significant shock to demand and to costs as a result of the COVID-19 pandemic and the Russian invasion of Ukraine, which had large and sudden effects on interest rates, driving refinancing demand. When firms find themselves facing higher than average market demand, they will have an increased short-term incentive to deviate from coordination to capture a large share of that transient demand. It is particularly difficult for firms to sustain coordination during periods of high demand.*[167]

7.12 The proposition that there has been higher than average market demand in the period after 2018 is not supported by the long term data. Figure 1 shows that housing credit growth, a measure of demand, is not unusually high.

[165] Interim Starks Report at paragraph 4.46.
[166] Interim Starks Report at paragraph 9.71.
[167] Supplementary Starks Report at paragraph 8.4.

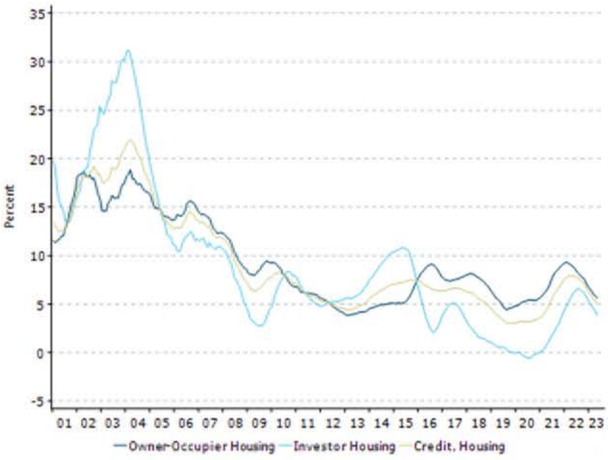

Figure 1: Housing credit growth in Australia[168]

7.13 Similarly, Figure 2 shows that refinancing as a proportion of total commitments has more than doubled from October 2002 to April 2023. This illustrates that while demand ebbs and flows over time, there has been a clear upward trend over time. ANZ submits this is a reflection of competition and consumer propensity to switch, which has continued to increase over time. This is not evidence of coordinated effects. It is an illustration of competition playing out.

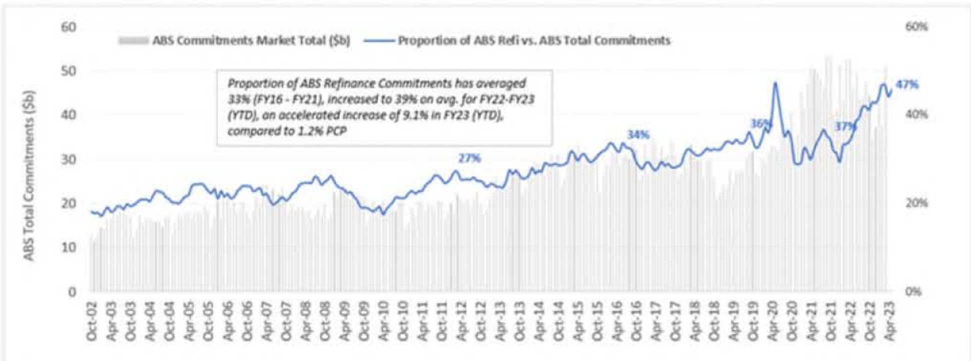

Figure 2: Refinancing as a proportion of total commitments

7.14 Figure 3 shows the movements in the RBA overnight cash rate against the ABS data on refinancing commitments. This also demonstrates that the increase in refinancing demand is not transient – there is an overall upward trend in refinancing commitments, and it began before COVID-19 and the invasion of Ukraine.

[168] Australian Bureau of Statistics, Reserve Bank of Australia, Bloomberg, Macrobond, and ANZ Research.

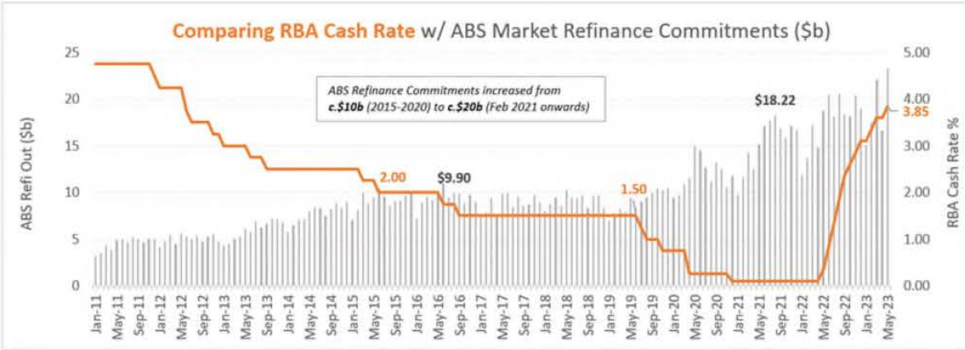

Figure 3: Refinancing demand versus the RBA cash rate (January 2011 - May 2023)

7.15 Asking whether recent competition is a "permanent shift" or "temporary" is misconceived. The recent more intense competition, is part of a longer term trend of increasing competition that started before 2018 and continues to intensify. That longer term trend is illustrated by the above data, and manifest in:

(a) the return on equity and net interest margins of the major banks continuing to decline through the interest rate cycle, which has been sustained over a long period and represents a very significant transfer of value from the major banks to consumers;[169]

(b) the major banks (with the exception of CBA) having lost market share to competitors with a focussed proposition, including Macquarie Bank recently and ING longer term in home loans;[170] and

(c) importantly, the fact customers have become more aware and more willing to switch, supported by the growth in the broker channel and brokers' best interests duty.[171]

7.16 In fact, Starks agrees with the overall trend – Starks agrees there have been changes in the market since 2018 which "*might indicate that coordination is structurally harder to maintain*", pointing to the increasing penetration of brokers and the consumer best interest duty and reflected in increased levels of switching.[172] Even if there is a return to coordination, she concludes it will become structurally harder to sustain.[173]

7.17 There have been, and will continue to be, periods of heightened and lowered price competition, but the sustained structural and behavioural features of the market point to increasing competition in home loans, including non-price competition which can be a focus for competition in periods when price competition is lower. Accordingly, ANZ rejects the proposition that there has been coordination, and

[169] ANZ's SOPV Response at paragraph 3.6 to 311.
[170] ANZ's SOPV Response at paragraphs 3.13 to 3.15.
[171] ANZ's SOPV Response at paragraph 3.32 to 3.38.
[172] Interim Starks Report at paragraph 9.81.
[173] Interim Starks report at paragraph 9.112.

that it will re-emerge once macroeconomic conditions change. There is absolutely no evidence presented by Starks to suggest that such an outcome is likely.

7.18 Starks speculates that changes by some banks to their cashbacks may indicate an easing in competition.[174] That observation does not take into account the range of ways in which banks compete in home loans. The MFAA informed the ACCC in its submission of 26 May 2023 that, in relation to cashbacks, brokers "*are now seeing this dissipate across the market as lenders look to instead sharpen discounts to retain existing customers*".[175] In other words no inferences as to easing in competition should be drawn without considering the totality of the ways in which banks compete in home loans.

7.19 Pointing to present competition as evidence of a lack of past competition is illogical, not supported by the evidence, and driven by Starks's *assumption* that the major banks have engaged in coordination.

A small number of coordinating firms can only successfully coordinate if the entire market follows

7.20 The first factor that Starks identifies as a key driver in the propensity towards coordination is the small number of coordinating firms, and identifies the major banks as the relevant firms. ANZ considers that this, by itself, cannot be a basis to conclude there is coordination.

7.21 As Starks observes, there is a significant difference between the market share of the two largest major banks (CBA and Westpac) and the two smallest major banks (NAB and ANZ), with CBA's market share almost twice of that of ANZ's. CBA has also increased the market share gap between it and ANZ.[176]

7.22 Instead of enabling coordination between the four major banks, CBA's and Westpac's materially larger scale, in particular, would give the smaller banks significant incentive to undermine any coordination to win market share from them. The smaller of the majors have the incentive to compete vigorously to build scale, to improve their ability to compete more effectively against the larger of the major banks. This view is consistent with the evidence from the merger parties of significant competition between the major banks in home loans.[177]

7.23 The differences in size between the major banks, and the presence of a large number of smaller competitive banks (including Macquarie Bank, which Starks acknowledges imposes an effective constraint on the market)[178] and non-bank

[174] Supplementary Starks Report at paragraph 8.4
[175] Submission of MFAA, Response to Question 4.
[176] Interim Starks Report at paragraph 9.10.
[177] ANZ's SOPV Response at paragraphs 4.15 to 4.26.
[178] Interim Starks Report at paragraphs 7.4, 7.7, 8.48, 9.39 and 9.43.3.

lenders competing in the home loans market more broadly, makes it implausible that coordinated effects would arise.

7.24 It is convenient to argue that four firms within the market are capable of acting independently of the market, and leading it, but that opinion is not consistent with the shift in market share from the major banks to differentiated and focussed alternatives – most recently, Macquarie Bank (which is winning 15-25% of new business), and earlier ING, in winning home loan customers.

There is no meaningful symmetry in costs

7.25 Starks's position on symmetry of costs is not correct.

7.26 Firstly, there is no evidence on the operating costs of the major banks on which to conclude that they are similar. This is despite the fact that the ACCC could have obtained information on the operating costs of the major banks and supplied that information to Starks.

7.27 In fact, there are likely to be significant differences in operating costs between the major banks. Operating costs are an area of significant focus for each bank. There is a range of reasons why the operating costs for each major bank (and banks generally) will be different. Most relevantly:

(a) the extent of the investment in technology – in the case of ANZ, a very significant ongoing strategic investment is being made in technology through the ANZ Plus program as described in the statements of Shayne Elliott, Peter Dalton and Louise Higgins; and

(b) the extent of the physical branch network – there are material differences in the footprints of each of the major banks.

7.28 Secondly, the capital cost for the major banks is also very different. There are two elements to capital cost – the target return (representing the opportunity cost of investing capital) and the volume of capital required for lending.

7.29 The Advanced Internal Rating-Based risk weights for home lending, which broadly represent an evaluation of the risk in each bank's lending portfolio, are as follows (excluding overlays[179]):

(a) ANZ: 26.7%;

(b) NAB: 25.2%;

(c) CBA: 23.1%;

[179] ANZ calculates risk weights based on public regulatory disclosures by each bank.

(d) Westpac: 21.1%; and

(e) Macquarie Bank: 16.8%.

7.30 These distinctions drive material differences in capital costs. In broad terms, and all other things being equal, the percentage differences in risk weights will translate into a similar percentage difference in return on equity.

7.31 Thirdly, while funding costs for each of the major banks may be more similar given their credit ratings and access to wholesale funds, any differences are significant because they apply across the lending portfolio.

7.32 Starks cannot therefore rely on speculation that the costs of the major banks are "symmetrical" as a basis for her critical conclusion that there is a propensity for coordinated conduct.

7.33 ANZ also observes that adjustments to the overnight cash rate is the exercise of monetary policy by the RBA that is intended to drive changes in interest rates. The fact that banks change prices following the RBA's changes is not evidence of coordinated conduct: it is a function of monetary policy changing funding costs in order to bring about changes in interest rates.

Interest rates that are transparent to rivals due to frequent interaction

7.34 Starks considers that interest rates are transparent to rivals due to frequent interaction, despite also concluding that actual interest rates are "*somewhat opaque given the prevalence of discounts and cashback offers*".[180]

7.35 Starks appears to suggest that interest rates are opaque for consumers, while less opaque for rivals, but identifies *consumer channels* as the basis for transparency between rivals. Starks opinion that "*price transparency is likely to have increased over time due to the increased importance of the broker channel and new tools like ASIC's MoneySmart calculator*".[181] This is true in the case of consumers, who have access to those tools to compare prices, including discounted prices through brokers, available to them.

7.36 However, banks are not in the same position even though they can access publicly available tools such as the MoneySmart calculator. Shayne Elliott[182] and John Campbell[183] both give evidence that prices are opaque because a significant portion of customers have discretionary discounts negotiated individually. John Campbell indicates that brokers may provide information to banks on final pricing to individual customers that would allow for the discretionary discount component to be inferred, but this is not done in a way that is sufficiently systematic so as to

[180] Interim Starks Report at paragraph 9.83.
[181] Interim Starks Report at paragraph 9.83.
[182] s 155(1)(c) examination of Shayne Elliott dated 26 April 2023, page 42.
[183] First statement of John Campbell at paragraph 23 to 27.

make pricing transparent. ANZ considers that Starks's opinion misunderstands the evidence – consumers, assisted by brokers and other tools such as price comparison websites, have much greater visibility over prices that are available to them (taking into account their individual circumstances) from competing providers than the providers themselves. The fact that brokers and customers may pass on anecdotal information on competitor's pricing from time to time does not create price transparency. In any event, anecdotal information may not always be reliable or accurate.

7.37 The mistaken assertion that actual interest rates are transparent to rivals due to frequent interaction materially overstates the extent to which that information is disclosed and cannot be relied upon to support a conclusion that there is a propensity for coordinated conduct in home loans.

Frequent contact between the major banks across multiple markets

7.38 The major banks, along with a range of other banks (but not all banks), interact with each other, by competing in a range of markets. However, Starks does not explain how that would facilitate coordination in home loans, particularly in circumstances where Starks does not identify material evidence of pre-existing coordinated effects in any of the other markets (including transaction accounts, SME and agribusiness)[184] – in deposits, she tentatively suggests that there "may be some evidence consistent with the second form of coordination".[185] In short, unidentified multi-market interactions cannot be relied upon to support a conclusion that there is a propensity for coordinated conduct in home loans.

Features of the market that are not conducive to coordinated effects

7.39 Starks also correctly identifies a number of features of the home loans market that do not make it conducive to coordination. These are:

(a) lack of symmetry between the major banks (as discussed above);

(b) existing competition outside the coordinating group; and

(c) capacity for existing competitors to constrain coordination, including as a result of the broker channel, the new consumer best interests duty, and reduced switching costs enabling smaller lenders to win business from the major banks.[186]

7.40 ANZ submits these factors further weigh against a finding of a propensity to coordinate, especially in circumstances where the available information is also consistent with competition instead of coordination.

[184] Also see ANZ's SOPV Response at paragraph 4.28.
[185] Interim Starks Report at paragraph 9.179.
[186] Interim Starks Report at paragraph 9.110.

7.41 ANZ submits that Starks has failed to engage with the clear evidence of changed consumer expectations and behaviour. Over the past 5 years in particular, consumers have become well informed; they have been increasingly exposed to more encouragement to switch by brokers; their switching has been facilitated by brokers and they have, in fact, switched or secured improved terms as a result of threatening to switch in very large numbers (ANZ experiences annual attrition in its home loans front and back books of approximately [Confidential to ANZ] [redacted]).[187]

7.42 This consumer behaviour is fundamentally disruptive to any coordinated conduct and there is no basis, in the evidence, for concluding that consumers will revert to some previous state of ignorance and inertness. Consumer behaviour, in actively seeking out competitive home loans facilitated by brokers, will be the same in any future. That is, whether Bendigo Bank acquires Suncorp Bank or ANZ acquires it, consumer behaviour will defeat any attempted coordinated conduct.

7.43 ANZ submits that the evidence cannot support a conclusion that the proposed acquisition "increases the likelihood of coordinated conduct, or results in more complete or sustainable coordination post-merger".

There is no evidence a combined Bendigo Bank/Suncorp Bank would compete more effectively than a standalone Bendigo Bank in the home loans market

7.44 Even if the home loans market were conducive to coordinated effects, it is not apparent how a combined Bendigo Bank/Suncorp Bank would be more effective in disrupting coordination than a standalone Bendigo Bank.

7.45 The discussion beginning at paragraph 27 sets out why a combined Bendigo Bank/Suncorp Bank would be at a disadvantage relative to Suncorp Bank. Given Starks's opinion that Suncorp Bank is not a particularly vigorous effective competitor in home loans and not strong enough to disrupt the alleged return to coordinated effects, and her necessary predicate that Bendigo Bank on its own would not be strong enough to disrupt a return to coordinated conduct, it is clear that it is highly unlikely that a combined Bendigo Bank/Suncorp Bank would be a more effective competitor that is strong enough to disrupt an alleged possible return to coordinated effects.[188]

7.46 Further, Starks's analysis in relation to how a combined Bendigo Bank/Suncorp Bank would compete in the national market for home loans is speculative and tentatively expressed. Starks's assessment relies on her opinion that the combined entity "*may be able to provide additional competitive constraint by catering to customers who either have more complex needs <u>or</u> care about non-*

[187] Second Statement of John Campbell at paragraph 63.
[188] Third Smith Report at paragraph 47.

price aspects of competition (such as service, trust local presence, or banking with a major bank)".[189]

7.47 There is no evidence to suggest that this will be Bendigo Bank's strategy or that it will have an incentive to do that.

7.48 While Bendigo Bank maintains a branch network, Bendigo Bank's digital bank, Up, does not. The Second Bendigo submission highlights that:

(a) more than half of Bendigo Bank's home loan portfolio is through mortgage brokers and other third party originators;[190]

(b) significant customer growth has been through its digital bank, Up, which now has more than 600,000 customers and has broadened its product offering into home loans;[191] and

(c) Bendigo Bank wants to "*accelerate the transition to digital product delivery*".[192].

7.49 In addition, as Smith points out, if Bendigo Bank achieves IRB accreditation (which Starks views as important), it may have an incentive *not* to pursue customers with more complex needs if they are higher risk.[193]

7.50 None of these factors suggest that a combined Bendigo Bank/Suncorp Bank will be a more effective competitor by targeting complex customers or offering stronger service or local presence. Further, Starks inference that there is coordinated effects draws on the Productivity Commission's findings about *price* competition. Starks acknowledges that, on the evidence examined by the Productivity Commission and in the ACCC mortgage inquiry, "*there did not appear to be evidence of coordination in other parameters of competition*".[194] However, despite that, Starks says that she cannot rule it out, and now focusses on it as a key way for a combined Bendigo Bank/Suncorp Bank to disrupt coordinated effects. Starks's opinion that there are coordinated effects that extends to non-price factors is without any foundation.

7.51 ANZ submits that there is no evidence that a combined Bendigo Bank/Suncorp Bank would be a more effective competitor than a standalone Bendigo Bank.

[189] This Smith Report at paragraph 54.
[190] Second Bendigo Submission at paragraph 4.4(a).
[191] Second Bendigo Submission at paragraph 4.4(c).
[192] Second Bendigo Submission at paragraph 4.5.
[193] Third Smith Report at paragraph 55..
[194] Interim Starks Report at paragraph 9.67.

Transaction accounts

7.52 Starks considers that an SLC due to coordinated effects is unlikely relative to both the status quo and alternative buyer counterfactual.[195] ANZ submits the evidence supports this conclusion—and, in fact, competition is stronger than Starks suggests.

7.53 In particular, ANZ strongly rejects there is any basis for Starks hypothesises that "*competition in the transaction account market could be characterised as a 'live-and-let-live' form of coordination, where major banks do not actively compete for new customers by cutting fees, offering bonus terms or investing to radically improve their digital offerings*".[196] ANZ submits that, to the contrary, ANZ is a vigorous competitor in relation to transaction accounts and it actively competes with its competitors (including other major banks) to win customers.

7.54 Firstly, bank fees have reduced so significantly they are no longer a material part of ANZ's income stream for deposits products and fees are structured to recover costs, or influence behaviour to encourage customers to engage with the product.[197] If that is not evidence that banks are actively competing for new customers by cutting fees, it's not clear what evidence would.

7.55 Secondly, ANZ has been undertaking a significant investment program as part of ANZx, and the first customer product released was the ANZ Plus transaction account and saver products.[198] ANZ invested $1,101 million in its Australia Retail and Australia Commercial portfolios in financial year 2022.[199] The proposition that ANZ has not invested to radically improve its digital offerings in relation to transaction accounts is remarkable.

7.56 Thirdly, Yiken Yang explains why ANZ transaction accounts have the highest utility of accounts in the market, including significant investment in new features and technology to maintain that leading position.[200]

7.57 Fourthly, ANZ does offer bonus terms to compete for new customers. For example, currently:

(a) ANZ Online Saver offers an introductory bonus interest rate of 1.80%; and

(b) ANZ Plus offers 4.65% per annum interest on an ANZ Save balance if the customer has less than $250,000, and 1.50% interest if the customer has more than $250,000 (and, in all cases, no monthly account service fee).[201]

[195] Interim Starks Report at paragraphs 9.160 and 9.161.
[196] Interim Starks Report at paragraph 9.156.
[197] Supplementary statement of Yiken Yang at paragraph 13.
[198] First statement of Shayne Elliott at paragraph 53 to 54; statement of Peter Dalton.
[199] First statement of Shayne Elliott at paragraph 28.
[200] Supplementary statement of Yiken Yang at paragraph 9.
[201] https://www.anz.com.au/personal/bank-accounts/

Deposits

7.58 Starks considers that an SLC due to coordinated effects is unlikely relative to both the status quo and alternative buyer counterfactual.[202] ANZ submits the evidence supports this conclusion.

SME and Agribusiness

7.59 Starks does not suggest that there are any coordinated effects in relation to SME or agribusiness. ANZ submits that the evidence shows that this is the case.

[202] Interim Starks Report at paragraph 9.189 and 9.199.

8. Public benefits

The estimated synergies are robust, conservative and merger-specific

8.1 The Supplementary Starks Report accepts that "*ANZ followed a comprehensive process to get a credible estimate of synergies and on-off integration costs*".[203] However, Starks provides several reasons why, in her view, it is "not clear" that the estimated cost savings will result in a public benefit. ANZ responds to each of those reasons below.

8.2 First, in both reports, Starks questions whether certain savings may not be merger-specific on the basis that they "*may be achievable*" or "*could potentially arise*" in the absence of the transaction.[204] Starks points to three examples: branch closure savings that had already been realised by Suncorp; process improvement savings that might be achieved absent the merger (because "*Suncorp could also invest in innovation*"); and enhanced product offerings that Suncorp customers might obtain absent the merger by switching between ANZ and Suncorp Bank.[205] In relation to each of these points:

(a) **Branch closure savings:** The First Smith Report identified branch closure costs that Smith considered were not merger-specific, and excluded those costs from his estimates of the synergies and productive efficiencies arising from the proposed acquisition.[206] It is unclear if Starks considers that Smith's approach was incorrect or if further branch closure costs ought to be treated as non-merger-specific (and, if so, the magnitude of those costs).

(b) **Process improvement savings:** As explained in the Application and the SOPV Response[207], the cost synergies claimed by ANZ arise uniquely from the combination of ANZ and Suncorp Bank. Those synergies are derived primarily from the migration of Suncorp Bank customers to ANZ technologies and platforms, are enabled by technology, in circumstances where ANZ has already made significant investment in transforming its technology estate and Suncorp Bank has not.[208] These savings will not be realised in either of the counterfactuals being considered by the ACCC. ANZ and Suncorp Bank have provided substantial evidence concerning the

[203] Supplementary Starks Report at paragraph 9.2.
[204] Interim Starks Report at paragraph 10.11, Supplementary Starks Report at paragraph 3.8..
[205] Interim Starks Report at paragraphs 10.11 and 10.12.
[206] First Smith Report at paragraph 61.
[207] Application at paragraph 8.9 and ANZ's SOPV Response at paragraph 9.7.
[208] ANZ's SOPV Response at paragraph 9.78; Statement of Peter Dalton, section G, First statement of Shayne Elliott at paragraphs 53 to 55 and 66 to 77; First statement of Louise Higgins at paragraph 88 to 89. See also Application at paragraph 8.9(b).

transformational investments in technology that would need to be made by Suncorp Group (if it continued to own Suncorp Bank).[209]

(c) **Enhanced product offering:** The benefits of an enhanced product offering are not negated by the ease with which customers can switch between ANZ and Suncorp Bank in the absence of the proposed acquisition. As explained in the Supplementary Elliott Statement, the proposed acquisition does not merely combine the same product offerings that would exist in the absence of the transaction. First, the proposed acquisition will allow ANZ to enhance the offerings currently available to Suncorp Bank customers, including by migrating Suncorp Bank customers to ANZ's platforms and providing Suncorp Bank customers with the benefit of ANZ's investments in cyber security and scams protection.[210] Secondly, the increased scale resulting from the proposed acquisition will provide ANZ with greater ability to invest in innovation and better features, to meet customer expectations, which continue to rise. With increased scale, the ANZ Plus proposition, for example, could be more fully built out and faster to meet those customer expectations.[211] Thirdly, Suncorp Bank customers will benefit from access to a wider range of products and services from their MFI.[212]

8.3 Second, Starks asserts that "*ANZ's cost savings estimates can suffer from asymmetric information*" and that there may be "*uncertainty around the costs of the merger*".[213] To the contrary, ANZ's estimates were based on sufficient and reliable information, and Patrick Smith's analysis of public benefits took into account all relevant savings and costs.[214] As explained in the Supplementary Statement of Louise Higgins, [redacted] Starks speculates that unknown information might reveal that integration costs were higher than anticipated.[216] However, Starks does not point to any specific aspects of ANZ's process or assumptions that were optimistic or incomplete or otherwise flawed. The statements of Louise Higgins show that she, and the various internal and external experts who worked on the synergies estimates, had sufficient information to be confident in the estimates announced by ANZ. In fact, with the

[209] See, for example, the Application at paragraph 8; ANZ's SOPV Response at paragraphs 9.78 to 9.83; Second statement of Shayne Elliott at paragraph 92; Suncorp submission in response to the SOPV dated 17 May 2023 (which summarises witness evidence of Adam Bennett and Steve Johnston) at paragraphs 87 to 104 and First statement of Louise Higgins at paragraph 95-98.
[210] Second statement of Shayne Elliott at Section F.
[211] Second statement of Shayne Elliott at paragraphs 68-69.
[212] Application at paragraph 8.14, First statement of Steven Johnston at paragraphs 86(c) and 99.
[213] Supplementary Starks Report at paragraphs 9.4 and 9.8.
[214] See First Smith Report, Second Smith Report and Third Smith Report.
[215] Supplementary statement of Louise Higgins at paragraph 12.
[216] Supplementary Starks Report at paragraph 9.4.

benefit of further detailed work on integration planning and synergies estimates since the proposed acquisition was announced, [Confidential to ANZ] [redacted][217]

8.4 Third, in both of her reports, Starks notes that "*the acquirer can be optimistic about how long it takes to achieve synergies*".[218] ANZ has not been optimistic. [Confidential to ANZ] [redacted][219] This claim is not undermined, in any way, by:

(a) The academic literature or previous banking mergers referred to by Starks. First, for the reasons explained in the Third Smith Report and the Supplementary Higgins Statement, those examples do not support Starks's assertions.[220] Starks has also not attempted to explain how any of the historical banking mergers referred to in her reports (or the literature cited in her reports) are in any way comparable to the proposed acquisition, despite the fact that those other mergers have plainly occurred in vastly different economic and/or jurisdictional and/or technological contexts. Secondly, and more fundamentally, the literature and precedents cited by Starks do not provide any basis for assessing claimed cost synergies, in circumstances where detailed and transaction-specific information is available from a highly qualified witness (Louise Higgins).

(b) The comments of Louise Higgins regarding the "c*omplexity of bank integrations*" in part J of the First Higgins Statement. Starks is incorrect to suggest that those comments indicate that ANZ's own synergy estimates are less certain or quantifiable.[221] To the contrary, those comments demonstrate that Louise Higgins and her team understand the complexity of the integration process, which has been factored into the detailed work described by Louise Higgins.[222]

8.5 Fourth, both reports comment briefly on pass-through.[223] Starks agrees with Patrick Smith that the degree of pass-through will depend on the strength of competition after the acquisition, but is "*unconvinced that the market for home loans will remain competitive in the years post-acquisition*".[224] The notion that current competition in home loans is attributable to specific macroeconomic developments and is temporary is unsupported by the evidence, as discussed

[217] Supplementary statement of Louise Higgins at paragraph 7.
[218] Supplementary Starks Report at paragraph 9.6; Interim Starks Report at paragraph 10.21.
[219] First Statement of Louise Higgins at paragraphs 83 to 85; Supplementary statement of Louise Higgins at paragraph 7.
[220] Supplementary statement of Louise Higgins at paragraph 20; Third Smith Report at paragraph 17.
[221] Supplementary Starks Report at paragraphs 9.5 and 9.6.
[222] See especially the First statement of Louise Higgins at paragraphs 93 to 94.
[223] See Supplementary Starks Report at paragraphs 9.10 to 9.11.
[224] Supplementary Starks Report at paragraph 9.10.

above in paragraph 7.17. Sections 3 and 4 of the Third Smith Report explain why the proposed acquisition is unlikely to give rise to a substantial lessening of competition in the market for home loans, and why the strong price competition in the home loans market is unlikely to be due to macroeconomic developments and transient. For the reasons outlined in ANZ's prior evidence and submissions, the operational costs savings will generate public benefits for customers, shareholders and the wider community.[225]

8.6 Finally, ANZ has not seen details of synergies that Bendigo Bank claims would arise from the alternative counterfactual; Bendigo Bank's submission and Starks's reports are redacted in that regard. Starks does not apply the same – or indeed any – scrutiny to Bendigo Bank's synergy estimates compared to those she has applied to ANZ's as summarised in Table 2. There is no credible evidence that the alternative counterfactual would result in greater net operating cost savings, in a shorter timeframe, than the synergies from the proposed acquisition.

Table 2: Starks relative assessment of Bendigo Bank's and ANZ's submissions

Issue	Starks's treatment of Bendigo Bank's case	Starks's treatment of ANZ's case
Impact of funding costs	Starks concludes that Bendigo Bank/Suncorp Bank's funding costs would be higher, but that this will only make a modest difference to its ability to compete (Supplementary Starks Report at paragraph 6.19)	Starks considers that the reduced funding costs ANZ identifies do not "*necessarily constitute*" a productive efficiency gain (Interim Starks Report at paragraphs 10.32 to 10.40; Supplementary Starks Report at 9.12 to 9.15)
Assessment of integration challenges	Starks considers that technology integration challenges will not affect Bendigo Bank being an effective competitor, essentially because Bendigo Bank submits that it has experience in technological integration and because scale will help spread technology costs (Supplementary Starks Report at paragraph 6.27)	Starks asserts in respect of ANZ's cost savings estimates that they could suffer from "*asymmetric information*" (and "*uncertainty around the costs of the merger*" (Supplementary Starks Report at paragraphs 9.4 and 9.8) and that an acquirer "*can be optimistic about how long it will take to achieve synergies*"

[225] Application at paragraphs 8.6 to 8.18, First Smith Report, ANZ's SOPV Response at paragraphs 9.1 to 9.88, Second Smith Report, First statement of Louise Higgins and Supplementary Statement of Louise Higgins.

Issue	Starks's treatment of Bendigo Bank's case	Starks's treatment of ANZ's case
	Starks considers that brand/cultural differences between Bendigo Bank and Suncorp Banks are not material enough to mean Bendigo Bank/Suncorp Bank could not be an effective competitor (Supplementary Starks Report at paragraph 6.29)	(Supplementary Starks Report at paragraph 9.6)
Benefits of merger for consumers	Starks considers there to be a real chance that IRB accreditation would enable the merged Bendigo Bank/Suncorp Bank entity to become a disruptive competitor, even though she acknowledges that a portion of that benefit would be used to rebuild profitability rather than compete for market share (Supplementary Starks Report at paragraphs 6.43, 6.51)	Starks is sceptical that cost savings ANZ realises from the merger would be passed on to customers (Supplementary Starks Report at 9.10).
Quantifying benefits	Starks places weight on scale for the combined Bendigo Bank/Suncorp Bank (eg Supplementary Starks Report at paragraph 6.27) but does not quantify that benefit.	Starks discounts prudential safety and stability benefits resulting from the ANZ/Suncorp Bank merger because she considers they are "*difficult to quantify*" (Supplementary Starks Report at 9.16). She also discounts ANZ's estimated cost savings because they are "*difficult to quantify in practice*" and "*based on a set of preliminary assumptions*" (Supplementary Starks Report at paragraph 9.9).

Reduced funding costs generate productive efficiencies

8.7 Starks accepts that there is "no reason to doubt that Suncorp would face lower funding costs were it to merge with ANZ, or that it would be difficult to achieve this reduction in funding costs in the absence of this transaction (or a merger with another large bank)."[226]

8.8 However, Starks's opinion is that a reduction in funding costs does not "*necessarily constitute*" a productive efficiency gain, and sets out three reasons as to why the proposed acquisition might reduce funding costs in a way that does not amount to a productive efficiency gain.[227] In relation to those three reasons:

(a) **Capital composition:** ANZ maintains that the capital implications of the proposed acquisition should be assessed separately to funding costs (just as operational costs have been assessed separately). ANZ holds capital in accordance with the prudential regulations discussed in the reports of Dr Jeffrey Carmichael. Dr Carmichael acknowledges that the application of those regulations to Suncorp Bank would involve a substantial capital cost, by reason of the increased capital D-SIBs are required to hold.[228] While that capital cost may be weighed against the substantial (but unquantifiable) prudential safety benefits described by Dr Carmichael, it should not be treated as offsetting the funding efficiencies claimed by ANZ (just as it does not offset the operational cost efficiencies claimed by ANZ).

(b) **Diversification effect:** This criticism conflates funding costs and credit risk. The fact that the proposed acquisition will not reduce the actual credit risk on individual loans does not, in any way, mean that funding costs for Suncorp Bank will not reduce (nor does it negate the benefit of those reduced funding costs). ANZ's evidence demonstrates that the proposed acquisition will enable Suncorp Bank to obtain wholesale funding at a materially lower cost, with the result that Suncorp Bank will be a materially more efficient supplier of lending products to its customers.[229]

(c) **Implicit subsidy:** Starks acknowledges that "it is difficult to assess the existence and scale of... an implicit subsidy" but infers such a subsidy, in part, from the fact that "Moody's and S&P currently both give ANZ a 2-notch uplift in order to reflect the likelihood of government support".[230] However, analysis of the credit ratings for ANZ and Suncorp Bank (extracted in Table 3 below) clearly demonstrates that government support

[226] Interim Starks Report at paragraph 10.31.
[227] Interim Starks Report at paragraphs 10.32 to 10.40; See also Supplementary Starks Report at paragraphs 9.12 to 9.14.
[228] Supplementary Carmichael Report at paragraph 2.16.
[229] See ANZ's SOPV Response at paragraphs 9.89 to 9.98.
[230] Interim Starks Report at paragraphs 10.33 to 10.34.

is not the only factor which influences the relative credit-worthiness of the two entities. In particular:

(i) **S&P:** As explained in Section 4 of the expert report of Dr David Howell dated 15 May 2023, S&P determines a "Standalone Credit Profile" (**SACP**) before taking into account the effect of various types of "support" (including government support or support within a corporate group). The SACP reflects S&P's assessment of a range of factors, including business position, capital and earnings, risk position, and funding and liquidity. The SACP is higher for ANZ than it is for Suncorp Bank. For example, the "business position" of Suncorp Bank is rated as "Adequate", whereas ANZ receives a higher rating of "Strong". Similarly, Suncorp is rated as "Moderate" for the funding category, whereas ANZ is "Adequate".[231]

(ii) **Moody's:** As explained in Section 3 of Dr Howell's report, Moody's analyses a bank's financial and operating environment to capture its standalone probability of failure – that is, its "Assigned BCA" (Baseline Credit Assessment). The Assigned BCA is determined before taking into account affiliate support (ie within a corporate group) and government support. ANZ receives a higher BCA from Moody's than Suncorp Bank.[232]

(d) Further, as explained in the statement of Adrian Went dated 28 November 2022, debt investors ultimately make their own assessment of the credit worthiness or credit strength of an issuer.[233] Investors would therefore also be expected to take into account the strength of ANZ's standalone business profile, in addition to government support. Finally, it is incorrect to assert that the funding advantages reflect a corresponding increase in the risk being borne by taxpayers, given Dr Carmichael's conclusion that the proposed acquisition will "*provide a benefit to the broader community by reducing residual systemic risk in the Australian financial system*".[234] APRA has also stated that the purpose of the additional regulatory capital D-SIBs are required to hold include to "*reduce the risk of taxpayer funds being used for resolution purposes*" and that the requirements are

[231] S&P Global Market Intelligence, *Ratings Direct Report for Suncorp-Metway Ltd.* (11 December 2022) at page 10 and S&P Global Market Intelligence, *Ratings Direct Report for Australia and New Zealand Banking Group Pty Ltd.* (5 March 2023) at pages 16 and 17.
[232] Moody's Investors Service, *Credit Opinion for Suncorp-Metway Limited* (27 June 2023) at page 1 and Moody's Investors Service, *Credit Opinion for Australia and New Zealand Banking Grp. Ltd.* (4 April 2023) at page 1.
[233] First Statement of Adrian Went at paragraph 17(a).
[234] Supplementary Carmichael Report at paragraph 3.4. See also letter from APRA to ACCC, dated 13 July 2023.

"appropriately calibrated for the …probability of ADI failure, as well as the direct and indirect impacts of such failure".[235]

Table 3: Moody's and S&P Ratings

	Moody's				**S&P**		
	Assigned BCA	Affiliate Support notching	Government support notching	Local currency rating	SACP	Sovereign Support	Issuer Credit Rating
ANZ Group Ltd	a2	0	+2	Aa3	A	+2	AA-
Suncorp Bank	baa1	+2	+1	A1	bbb+	0	A+
Bendigo Bank	baa1	0	+1	A3	bbb+	0	BBB+

Prudential safety benefits are substantial, even if they are not quantifiable

8.9 The Supplementary Starks Report observes that the benefits described in Dr Carmichael's report are unproven and difficult to quantify. Starks's report accepts that "*increasing ANZ's size by 7% should not significantly increase systemic risk in Australia's banking system*".[236]

8.10 It is true that the reduction in residual systemic risk described by Dr Carmichael is not possible to quantify. APRA's letter acknowledges that the calibration of capital requirements "involves a high degree of judgment".[237] However, ANZ maintains that the reports of Dr Carmichael provide a clear basis for finding that the proposed acquisition will reduce residual systemic risk, to the substantial benefit of the broader community, particularly when compared to the alternative counterfactual. As noted in the Interim Starks Report, "*it is reasonable to treat any material reduction in the risk of bank failure as a significant public benefit.*"[238]

8.11 Starks is "*somewhat sceptical of the implication that a better capitalised but less diverse banking system is publicly beneficial*".[239] Dr Carmichael was instructed to consider the impact of the proposed acquisition on prudential safety and his reports set out how the proposed acquisition will lead to a better capitalised banking system, which is therefore safer for consumers. While the public benefit of greater prudential safety needs to be weighed against any detriments from the proposed acquisition (as is the case for all public benefits), that was outside the

[235] APRA letter of 13 July 2023 at pages 6 to 7.
[236] Supplementary Starks Report at paragraph 9.17.
[237] APRA letter of 13 July 2023 at page 7.
[238] Interim Starks Report at paragraph 10.54.
[239] Supplementary Starks Report at paragraph 9.18.

scope of Dr Carmichael's mandate. Starks does not explain or seek to quantify the detriments she says may result from having a banking system that has one fewer bank, and in ANZ's view, that is more appropriately considered as part of analysing the competitive effect of the proposed acquisition (and has been addressed in detail, including by experts with relevant expertise).

The proposed acquisition will result in additional, significant public benefits not considered by Starks

8.12 ANZ and Suncorp Bank have provided evidence that the proposed acquisition will deliver substantial public benefits from:

(a) Suncorp Group becoming a stronger insurer, benefitting customers, shareholders and the broader public;

(b) Queensland commitments given by ANZ and Suncorp to the Queensland Government, benefitting Queenslanders and the Queensland and Australian economies;

(c) Suncorp Bank having better access to funding including during periods of market stress; and

(d) greater contributions to the major bank levy.[240]

8.13 None of these public benefits are considered in the Starks Reports.[241]

[240] Application at paragraphs 8.2 to 8.5, 8.19 to 8.39 and 8.62 to 8.74 , First statement of Shayne Elliott, Part E, ANZ's SOPV Response at paragraphs 9.9 to 9.16, 9.89 to 9.127 and 9.135 to 9.178, Second statement of Shayne Elliott, Part H, ANZ's Supplementary Submission dated 30 June 2023, Third statement of Shayne Elliott dated 30 June 2023, Suncorp Group's response to ANZ's SOPV Response, Fourth statement of Steve Johnston, Section B and Submission regarding Telstra/TPG dated 13 July 2023.
[241] The ACCC did not instruct Starks to consider these public benefits.