



ANZ and Suncorp Bank



Report for Ashurst | 1 December 2022

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1. Introduction

1.1 Personal

1. My name is Philip Williams. I was a full-time academic economist at the University of Melbourne from 1978 until February 2002 when I resigned my full-time position as Professor of Law and Economics in the Melbourne Business School. Since February 2002 I have been the leader of the Competition and Legal Group of Frontier Economics Pty Ltd. This work involves giving advice on the economics of legal disputes and giving expert testimony before Courts and Tribunals. I have given evidence in cases before the courts in Australia, New Zealand and Singapore. These cases are listed in my current CV which is Annexure A to this Report.
2. By reason of the above, I have particular expertise in two sub-fields of economics: (i) industrial economics; and (ii) law and economics.
3. I have read, understood and complied with the Federal Court of Australia's Expert Evidence Practice Note and Harmonised Expert Witness Code of Conduct (GPN-EXPT).
4. I have been assisted in preparing this Report by Mr David Kontrobarsky.
5. Mr Kontrobarsky graduated from Monash University with a joint Honours degree (H1) in Econometrics and Economics, and a minor in Mathematics. He joined Frontier Economics at the beginning of 2022. Prior to that he worked as a Research Assistant at Monash University and University of Melbourne in the fields of trade economics and political economy, providing skills in statistical modelling and econometrics. He also worked as a tutor, teaching business statistics, at Monash University in the Department of Econometrics & Business Statistics.
6. All the opinions expressed in this Report are my own.

1.2 This report

7. I have been retained by Ashurst, lawyers for Australia and New Zealand Banking Group Limited (ANZ) for the purpose of providing my expert opinion in the form of this written report in connection with a proposed application (Authorisation Application) to the Australian Competition and Consumer Commission (ACCC) for authorisation of its proposed acquisition of SGBH Limited, the holding company for Suncorp Bank, from Suncorp Group Limited (Suncorp Group) (Proposed Transaction). My Letter of Instructions is contained in Annexure B to this Report.
8. The Letter of Instructions asks me to address the following questions:
 - a. What economic principles, consistent with section 4E of the CCA, should, in your opinion, be used to define the market(s) relevant to assessing the likely competitive effects of the Proposed Transaction in relation to the supply of banking products in Australia?
 - b. Applying the relevant economic principles identified in response to 8a, what is/are, in your opinion, the relevant product and geographic dimensions of the market or markets for the purposes of assessing the likely competitive effects of the Proposed Transaction in relation



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- to the supply of banking products, and specifically commercially banking products, in Australia?
- c. In providing your answer to bb, please specifically consider whether:
 - (i) the supply of banking products to different customer types (such as retail and commercial customers) occurs in one or more separate relevant markets; and
 - (ii) the supply of commercial banking products to any segment of business customers (such as small to medium enterprises, commercial property or agribusiness customers) occurs in one or more separate relevant markets, distinct from the market(s) in which commercial banking products are supplied to other customers.¹
 - d. What economic principles should, in your opinion, be used to determine whether the Proposed Transaction is likely to substantially lessen competition in relation to the market or markets identified in response to bb and cc?
 - e. Applying the relevant economic principles identified in response to dd, is the Proposed Transaction likely to substantially lessen competition in relation to the market or markets identified in response to bb and c? Please explain how you reach your opinion in response to this question.

1.3 Summary of opinions

9. In this case, markets need to be defined to assess whether the Proposed Transaction is likely to have the effect of substantially lessening competition. The initial candidate market should be selected so as best to analyse whether this is likely to occur. These markets may then need to be modified to take account of substitution in demand and substitution in supply.
10. I used the Hirschmann Herfindahl Index (HHI) thresholds in the ACCC Merger Guidelines to identify initial candidate markets. I found two initial candidate markets that appeared to exceed these thresholds. These were: (i) the supply of loans by banks to Queensland agribusiness; and (ii) the supply of loans by banks to purchasers of housing in Queensland.
11. My consideration of the provision of substitutes for these services indicates that:
 - a. non-bank providers offer some substitutes for the products offered by the banks; and
 - b. the market for the supply of loans to purchasers of housing is national in scope.
12. I conclude that the (only) relevant market for assessing the likely effect on competition of the Proposed Transaction is the market for the supply of loans to Queensland agribusiness.
13. Market power is the antithesis of effective competition. The indicia of market power and the state of competition in a market may be classified under the headings of structural indicia, conduct indicia and performance indicia. These indicia may be influenced by underlying basic conditions of demand and supply and by public policy.
14. Judgements as to whether conduct lessens or is likely to lessen competition involve comparing the state of competition in the market with and without the impugned conduct. Any assessment of the effect or likely effect of conduct on the state of competition in a market will involve assessing the impact of that conduct on the indicia of competition that are most likely to be affected by that conduct.

¹ I was instructed that Commercial banking products are banking products supplied to business customers by financial institutions and include commercial lending products, deposit products (including transaction and savings accounts, and term deposits), merchant services and risk management products. See Letter of Instructions, para 2.1.



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15. Expressing an opinion as to whether conduct substantially lessens competition requires making a judgement as to the severity of the lessening of competition. I adapt the words of Carl Shapiro: conduct substantially lessens competition when it disrupts the competitive process and harms trading parties on the other side of the market.
16. All horizontal mergers have the effect of lessening competition to some extent. The Proposed Transaction is no exception: it will tend to lessen competition in the supply of loans to Queensland agribusiness. However, it is relatively unconcentrated compared with most of the markets that are subject to detailed consideration by the ACCC: the best available estimates put the post-merger HHI at 2,143.4. The proposed merging parties are not particularly close competitors. Suncorp does not have [REDACTED] [REDACTED] to satisfy the needs of larger customers. For this reason, Suncorp tends to serve [REDACTED] whereas ANZ serves the complete range of sizes; and this difference is likely to become increasingly important in the future [REDACTED]. The performance of the market is reasonably dynamic due, in no small part, to the activity of Rabobank.
17. It is my opinion that the Proposed Transaction is likely to cause a slight lessening of competition in the supply of loans to Queensland agribusiness; but this is unlikely to cause any increase in prices or decrease in the quality of service to agribusiness borrowers. For these reasons, I conclude that the Proposed Transaction is unlikely to substantially lessen competition in the market for the supply of loans to Queensland agribusiness.



2. Principles for defining markets

18. I have been asked the following question:

What economic principles, consistent with section 4E of the CCA, should, in your opinion, be used to define the market(s) relevant to assessing the likely competitive effects of the Proposed Transaction in relation to the supply of banking products in Australia?

19. In my opinion, the process of defining a market should consist of two stages. The first is to consider an initial candidate market. This should be defined with reference to the market power or anticompetitive conduct that is the subject of the dispute. The second stage is to assess whether the initial candidate market should be widened because there are substitutes (of demand or supply) which closely constrain the activities of the suppliers in the initial candidate market.

2.1 Identifying the initial candidate market

20. In my opinion, the initial candidate market should assist in analysing the issue of market power or harm to competition that is at the heart of the dispute. As I understand, this opinion is consistent with the starting point of market definition proposed by Justice Gordon in *Air New Zealand v ACCC*²:

The first step is to identify “precisely what it is that is said to have been done in contravention of the section”. As has been rightly said in the Federal Court of Australia, the court begins with the problem at hand and asks “what market identification best assists the assessment of the conduct and its asserted anti-competitive attributes.” Identifying a market is a “focusing process” which is “to be undertaken with a view to assessing whether *the substantive criteria for the particular contravention in issue* are satisfied, in the commercial context the subject of analysis.”³

21. In this case, markets need to be defined to assess whether the Proposed Transaction is likely to have the effect of substantially lessening competition. The initial candidate market should be selected so as best to analyse whether this is likely to occur.

22. When analysing the harm caused to competition, the initial candidate market should be defined according to the advice of Jonathan Baker’s survey article on market definition. That is, the initial candidate market should be defined by identifying the products that are purchased by the buyers who are likely to be harmed by the conduct under review. Professor Baker states:

Where should the process of market definition begin? Suppose a product market must be defined in order to analyse the competitive effects of conduct undertaken by Coca-Cola. Perhaps Coke is acquiring another firm, is accused of harming competition by excluding some rivals, or has introduced a practice, on its own or by agreement with other firms, said to facilitate coordination among rivals. Among other products, Coca-Cola sells regular Coca-Cola (a cola-flavored soft drink), Diet coke (sugar free), caffeine-free Diet

² *Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd V Australian Competition and Consumer Commission* [2017] HCA 21, 14 June 2017.

³ *Air New Zealand*, para 58, emphasis provided by Gordon J.



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Coke, Sprite (a lemon-lime flavoured soft drink), and Dasani (bottled water). Moreover, these products are sold in a variety of package types, including bottles and cans in a range of sizes. In principle, one might specify each finely distinguished product – for example, caffeine-free Diet Coke in 12 oz. cans – as a candidate market, thus beginning the analysis with a large number of candidate markets. If caffeine-free Diet Coke in 12 oz. can were not a market, the candidate market would be expanded to the next best substitute – perhaps caffeine-free Diet coke in bottles, perhaps caffeine-free Coca-Cola, perhaps Diet Coke (caffeinated), or perhaps caffeine-free Diet Pepsi (sold by a competitor) – and the hypothetical monopolist test applied again.

In practice, market definition would likely begin with a larger aggregate – all colas, all soft drinks, or all beverages, for example. If disaggregated information about buyer substitution is available and the outcome turns on the starting point, a more finely defined product might be an appropriate place to begin the analysis. But it would almost never be appropriate to begin by disaggregating more narrowly than the specific products that are purchased by the buyers alleged to have been harmed by the conduct under review.⁴

23. The products purchased by the buyers alleged to have been harmed by the conduct under review can be characterised in various ways:
 - a. by the nature of the products – this is generally called the product dimension of the market;
 - b. the level of the production chain in which they are traded – this is generally called the functional dimension of the market; and
 - c. the geographical area in which the production and trade occur – this is generally called the geographical dimension of the market.

2.2 Substitution in demand and supply

24. Although a useful starting point for defining the relevant market is to identify the products purchased by the buyers harmed by the conduct under review, one should then identify the constraints on the prices charged for those products. This involves consideration of substitution in supply and demand.⁵
25. According to the economics literature, the classic way to consider substitution in demand is to conduct a thought experiment known as the hypothetical monopolist test (also called the ‘SSNIP’ test, where SSNIP refers to a small but significant non-transitory increase in price). This test involves assuming away the constraint of direct competitors in the initial candidate market by assuming they were to join to form a monopoly. The thought experiment is then to ask whether such a hypothetical monopolist would find it profitable to raise price above the current level in a non-transitory way by, say, 5-10 per cent.⁶ If such an increase in price by the hypothetical monopolist of services in the initial candidate market were profitable, then the market should not be widened because the constraint provided by other producers is not nearly so close as the constraint of producers in the initial candidate market. However, if the hypothetical monopolist’s raising price by 5-10 per cent would cause it to lose a sufficiently large amount of business to producers outside the initial candidate market, the price increase

⁴ Jonathan Baker, “Market definition: An Analytical Overview”, *Antitrust Law Journal*, Vol 74 (2007) pp 129-173, at 145-146.

⁵ Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge University Press (2004) pp 102-105.

⁶ Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge University Press (2004) pp 102-103.



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would not be profitable. In that case, these producers outside the initial candidate market are acting as a close constraint on the suppliers in the initial candidate market and, for that reason, they should be included in the market.

26. The hypothetical monopolist test focuses on price competition. But competition can take other forms – in which case, other evidence (such as the attitudes of market participants or the methods of classifying competitors adopted by market observers) might also be instructive.
27. Substitution in supply exists when suppliers outside the initial candidate market can readily shift their stock of assets from producing one kind of service to producing the services supplied in the initial candidate market. Where substitution in supply between two kinds of services is strong, both services should be included in the market – because the producers outside the initial candidate market will constrain the pricing or other competitive activities of the producers in the initial candidate market.
28. The substitution in supply relevant to the market definition should not be confused with substitution in supply in the form of new entry to the market. The former refers to switching production that is relatively rapid and does not require any significant expenditure on the acquisition of assets, whereas the latter is likely to take longer and is likely to require significant expenditure on the acquisition of assets. As Motta states:

Note that there are several conditions that should be fulfilled for supply substitutability to widen the relevant market. In particular, switching production must be easy, rapid and feasible. The producer of another good must already have the skills and assets required to produce the product under consideration, it should not incur considerable sunk costs, and any barriers to entry must be surmountable in a rapid and relatively cheap way.⁷

29. If a firm has acquired assets that, although not currently employed to produce products that are close substitutes for those in the initial candidate market, can readily be switched to the production of close substitute products, that firm should be classified as an incumbent in the market.
30. If a firm has acquired some but not all the skills and assets required to produce the product under consideration, the analyst will need to exercise judgement when choosing whether to classify the enterprise as an incumbent or as a potential entrant to the market. This judgement caused Caves and Porter to distinguish mobility barriers from barriers to entry. They suggested that there may well be segments in a market; and an incumbent in one segment may have some but not all the skills and assets needed to operate in another segment. The acquisition of the extra skills and assets needed to operate in that other segment may be a barrier to mobility across segments of a wider market.⁸ This language is now widely accepted in the literature on barriers to entry.

2.3 Conclusions on principles of market definition

31. In this case, markets need to be defined to assess whether the Proposed Transaction is likely to have the effect of substantially lessening competition. The initial candidate market should

⁷ Massimo Motta, *Competition Policy, Theory and Practice*, Cambridge University Press (2004) p 104.

⁸ Richard E Caves and Michael E Porter, "Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition", *Quarterly Journal of Economics*, Vol 91 (May 1977) pp 241-262.



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be selected so as best to analyse whether this is likely to occur. These markets may then need to be modified to take account of substitution in demand and substitution in supply.



3. Markets relevant to assessing the Proposed Transaction

32. I have been asked the following question:

Applying the relevant economic principles, what is/are, in your opinion, the relevant product and geographic dimensions of the market or markets for the purposes of assessing the likely competitive effects of the Proposed Transaction in relation to the supply of banking products, and specifically commercially banking products, in Australia?

In providing my answer to this question, I have been asked to consider whether:

- the supply of banking products to different customer types (such as retail and commercial customers) occurs in one or more separate relevant markets; and
- the supply of commercial banking products to any segment of business customers (such as small to medium enterprises, commercial property or agribusiness customers) occurs in one or more separate relevant markets, distinct from the market(s) in which commercial banking products are supplied to other customers.

3.1 The relevant initial candidate market

33. As I explained in section 2 above, the initial candidate market(s) should be selected so as best to analyse whether the Proposed Transaction is likely to have the effect of substantially lessening competition. The initial candidate market should be defined by identifying the products that are purchased by the buyers who are likely to be harmed by the conduct under review.

34. In order to identify the buyers who would most likely be harmed by the Proposed Transaction one must consider the buyers who are served by ANZ and Suncorp Bank. The buyers served by ANZ and Suncorp Bank are all those who borrow or deposit funds with ANZ or Suncorp Bank. However, it may be that only a subset of these buyers is likely to be harmed by the Proposed Transaction.

35. I adopted the following procedure to identify the relevant initial candidate market.

- a. I focussed on the lending activities of ANZ and Suncorp Bank. I did this because funds can be placed in many alternatives other than banks; and, if the Proposed Transaction were to harm buyers, it seemed most likely that those buyers would be borrowers rather than depositors.
- b. I used seller concentration as measured by the HHI as the device to identify the groups of buyers that were most likely to be harmed by the Proposed Transaction. As the ACCC Merger Guidelines state: “the HHI is calculated by adding the sum of the squares of the post-merger market share of the merged firm and each rival firm in the relevant market, thereby giving greater weight to the market shares of the larger firms. The HHI therefore requires the market shares, or estimates of them, for all the participants in the relevant market. The HHI indicates the level of market concentration while the change in the HHI (or



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'delta') reflects the change in market concentration as a result of the merger."⁹ Seller concentration as measured by the HHI is a useful sorting device because both the Cournot model of unilateral effects¹⁰ and the Stigler model of co-ordinated effects¹¹ suggest that market power depends at least in part on concentration as measured by the HHI. I did not rely on the HHI to analyse the effect of the Proposed Transaction on competition; indeed, that would be inappropriate in an industry characterised by such a high degree of product differentiation. Rather, I used the HHI merely as an initial sorting device to determine the relevant initial candidate market(s).

- c. I followed the advice of Professor Baker recorded in section 2.1 above that it would almost never be appropriate to begin by disaggregating more narrowly than the specific products that are purchased by the buyers alleged to have been harmed by the conduct under review. For this reason, I started with the broadest group of buyers - all borrowers from Authorised Deposit-Taking Institutions (ADIs) throughout Australia - to see if those buyers were likely to be harmed by the Proposed Transaction. If buyers from such a broad group were unlikely to be harmed, I would then examine narrower groups until I could find a group or groups that were most likely to be harmed. This group or group would be my initial candidate market.
- d. I decided that I would cease narrowing my focus when I had discovered a group of buyers for whom the Proposed Transaction crossed the HHI thresholds in the ACCC Merger Guidelines. The Merger Guidelines state that the ACCC will generally be less likely to identify horizontal competition concerns when the post-merger HHI is (i) less than 2,000, or (ii) greater than 2,000 with a delta (that is the difference between the pre-merger HHI and the post-merger HHI) less than 100.¹² In applying these thresholds, I ceased the narrowing process when I had discovered a group of buyers for which the post-merger HHI was greater than 2,000 and the delta was greater than 100.

(a) Putative nation-wide initial candidate markets

36. The Australian Prudential Regulation Authority (APRA) publishes data for the total lending of each ADI by category of business.¹³ However, the APRA data provides quite broad categories of business.

37. The Annual Report of Suncorp-Metway Limited for 2021-22 states:

Suncorp-Metway Limited (the Company) and its subsidiaries (the Group) provides banking and related services to retail, commercial, small and medium enterprises and agribusiness customers in Australia. The Group conducts the Banking operations of the Suncorp Group.¹⁴

38. Suncorp's retail lending is almost entirely concentrated in housing. During the global financial crisis Suncorp Bank sold its credit card book to Citibank and entered an arrangement to offer

⁹ ACCC, *Merger Guidelines*, November 2008, para 7.13.

¹⁰ See K G Cowling and M Waterson, "Price-cost margins and market structure", *Economica*, Vol 43 (1976) pp 267 to 274.

¹¹ G J Stigler, "A theory of oligopoly", *Journal of Political Economy*, Vol 72 (1964) pp 44 to 61.

¹² ACCC, *Merger Guidelines*, November 2008, para 7.14.

¹³ <https://www.apra.gov.au/monthly-authorized-deposit-taking-institution-statistics>

¹⁴ Suncorp-Metway Annual Report, 2021-22, p 11.

Suncorp branded credit cards, issued by Citibank. With the subsequent sale of Citi's consumer banking business to NAB, this white labelling arrangement has continued but with cards issues by NAB.¹⁵ Suncorp decided to exit personal lending in November 2020 and redirect resources to home lending.¹⁶

39. Table 1 shows how Suncorp-Metway's lending was allocated in 2021-22. Its retail lending was principally in housing. Fortunately, APRA provides data on housing lending.

Table 1: Loans and advances by Suncorp-Metway and its subsidiaries

Customer Segment	2022 (\$M)	2021 (\$M)
RETAIL LOANS		
HOUSING LOANS	45,616	41,697
SECURITISED HOUSING LOANS	4,598	4,374
PERSONAL LOANS	67	122
	50,281	46,193
BUSINESS LOANS		
COMMERCIAL	4,884	4,404
SME	2,641	2,738
AGRIBUSINESS	4,267	4,228
	11,792	11,370
GROSS LOANS AND ADVANCES	62,073	57,563

Source: Suncorp-Metway Ltd, Annual Report 2021-2022, p 16

40. Table 1 indicates that Suncorp-Metway's business lending was apportioned among commercial, SME and agribusiness. I was unable to discover data that would enable me to estimate shares in business lending between commercial and SME. However, survey data published by DBM separated market shares for commercial and agribusiness.¹⁷

41. The HHIs estimated from these two sets of data are recorded in Table 2.

¹⁵ van Horen Witness Statement, para 39.

¹⁶ van Horen Witness Statement, para 38 (a).

¹⁷ Supplied by Ashurst. The DBM data does not record some very small market shares. However, I am instructed that the excluded shares are those that DBM considers too small to be reporting on using its research methodology.

Table 2: HHIs of lending in putative national markets

	APRA data			DBM data	
	TOTAL LENDING	HOUSING	BUSINESS	AGRI-BUSINESS	COMMERCIAL
WITHOUT MERGER	1,424.2	1,579.1	1,203.3	1,397.7	1,166.7
WITH MERGER	1,475.0	1,641.4	1,233.7	1,504.5	1,234.7
DELTA	50.8	62.3	30.4	106.7	68.2

Source: APRA, DBM and Frontier Economics

42. As Table 2 indicates, none of the putative national markets crosses the ACCC HHI thresholds. For this reason, I reject them as relevant initial candidate markets.

(b) Putative Queensland initial candidate markets

43. Because I found no initial candidate markets on a national scale, I then considered initial candidate markets confined to Queensland.

44. Suncorp Bank seems to be strongest in Queensland. Mr van Horen states, Suncorp Bank grew from Metway Bank, which started as a building society and expanded to have a strong presence in Queensland by the mid-1990s.¹⁸

45. Witness statements refer to Suncorp Bank as a regional bank. With respect to commercial banking, Mr Mendelson states that Suncorp is routinely included in ANZ's competitor benchmarking analysis; and it tends to offer similar services to commercial customers to those offered by ANZ. He understands that its brand may be perceived as more attractive to customers in the State or region they were first established in.¹⁹ Mr Rankin states that regional banks, such as Suncorp, offer a comparable range of commercial banking services to ANZ and exert a degree of competitive pressure on ANZ Commercial, albeit to a lesser extent than CBA, NAB and Westpac. While these banks tend to win a higher volume of business in their 'home' regions due to their historical footprint, his assessment is that this largely reflects the value of their brand and greater physical presence in those regions rather than any material geographic differences in any of the drivers of competition.²⁰

46. Mr Campbell states that regional banks, such as Suncorp Bank, are typically strong in housing loans in their respective home regions but also compete across the country.²¹

¹⁸ van Horen Witness Statement, para 37.

¹⁹ Mendelson Witness Statement, para 71 (d).

²⁰ Rankin Witness Statement, para 93 (c).

²¹ Campbell Witness Statement, para 52 (e).



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47. Mr van Horen states:

Suncorp has traditionally held a strong agribusiness lending base in Queensland, where it services customers in beef, cotton, fruit, grain and mixed farming, sheep and livestock and sugar. Suncorp also has a sound agribusiness lending base in New South Wales and continues to also offer agribusiness lending products in Victoria.²²

48. The evidence of these trade witnesses suggests that there may be relevant initial candidate markets that are confined to Queensland; and that these markets may be in the activities of:

- a. the supply of loans by banks to Queensland agribusiness;
- b. the supply of loans by banks to Queensland SMEs; and/or
- c. the supply of loans by banks to purchasers of housing in Queensland.

49. Lawyers for ANZ supplied me with some data concerning lending by banks to Queensland agribusiness. Lawyers for ANZ advised me that the market share data on which these estimates are based may have large standard errors. The relevant HHIs are recorded in Table 3.

Table 3: HHI estimates of lending in putative Queensland markets

	Agribusiness	Commercial
WITHOUT MERGER	1,589.6	1,227.5
WITH MERGER	2,143.4	1,409.9
DELTA	553.9	182.4

Source: DBM and Frontier Economics

50. I considered whether lending to small and medium enterprises (SMEs) in Queensland might be another relevant initial candidate market. The data in Table 3 suggests that commercial lending in Queensland would not qualify as an initial candidate market according to my criteria. However, it appears that Suncorp's lending is directed at [REDACTED]. As I observed above, the Annual Report of Suncorp-Metway Limited for 2021-22 states that it provides banking and related services to retail, commercial, small and medium enterprises and agribusiness customers in Australia.²³

51. Mr van Horen suggests that Suncorp bank is limited in the services it can provide to larger businesses. He states:

Suncorp Bank presently does not have the scale to be able to offer all of its Business Banking customers a more complex end-to-end banking service and these customers must engage and interact with more than one bank if they want to acquire end-to-end banking services. [REDACTED]

[REDACTED] Suncorp Bank is presently unable to offer to its customers more complex transactional payment solutions and foreign exchange services. [REDACTED]

²² van Horen Witness Statement, para 98.

²³ Suncorp-Metway Annual Report, 2021-22, p 11.



- [REDACTED]
- [REDACTED]²⁴
52. Although lending to SMEs might provide an initial candidate market, such a market is impossible to define with any clarity because there is no readily accepted definition of the dividing line between a medium and a large business. Mr van Horen refers to SME customers as those borrowing less than \$ [REDACTED] million and having fewer than [REDACTED] employees.²⁵ [REDACTED]
- [REDACTED]
- [REDACTED]²⁶ As I stated in section 2 above, initial candidate markets should assist in analysing the issue of market power or harm to competition that is at issue. Because of the difficulty of defining and analysing a market for lending to SME, I reject this as an initial candidate market.
53. My final possible initial candidate market is the supply of loans by banks to purchasers of housing in Queensland. The data in Table 1 indicates that the national housing lending market does not cross the thresholds I have adopted for the identification of initial candidate markets. Nevertheless, because the lending of Suncorp Bank is concentrated in Queensland, the Queensland housing lending market may exceed the thresholds of a Queensland housing market. Unfortunately, I have been unable to find data for such an initial candidate market to apply my threshold tests. However, I shall proceed with Queensland housing lending as a second initial candidate market.
54. I conclude that there are two initial candidate markets relevant to assessing the effect on competition of the Proposed Transaction. These are: (i) the supply of loans by banks to Queensland agribusiness; and (ii) the supply of loans by banks to purchasers of housing in Queensland.

3.2 Substitution concerning the initial candidate markets

55. As I observed in section 2 above, the second stage when defining markets is to assess whether the initial candidate market should be widened because there are substitutes (of demand or supply) which closely constrain the activities of the suppliers in the initial candidate market. I discuss substitution possibilities for each of my initial candidate markets.

(a) Substitutes for bank lending to Queensland agribusiness

56. Mr Bennett observes that some non-bank institutions provide finance of certain kinds to agribusiness customers. In particular, he mentions:
- agricultural suppliers (such as Elders) who supply seasonal finance to assist their own customers in buying their products or using their services;
 - “new technology” suppliers operating via the internet; and
 - The Regional Investment Corporation established by the federal government.²⁷
57. Data from the Reserve Bank of Australia (RBA) suggests that these alternative suppliers are fringe players in the provision of rural finance. The RBA publishes data on Rural Debt by Lender

²⁴ van Horen Witness Statement, para 122 (a).

²⁵ van Horen Witness Statement, para 79.

²⁶ Rankin Witness Statement, para 9.

²⁷ Bennett Witness Statement, paras 181 to 189.



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for Australia as a whole.²⁸ The latest data published by the RBA (for 30 November 2021) show that Rural Debt is dominated by loans from banks. The data shows total rural debt owed to banks at \$90,304 million, which represents 96 per cent of total rural debt of \$94,072 million. The other providers of rural debt are listed as pastoral and other financing companies, Other Government, and Life Insurance Companies.

58. Although some non-bank suppliers compete with banks in the provision of certain kinds of finance for agribusiness, this competition is at the margins. I shall refer to the market as the market for the supply of loans for Queensland agribusiness. However, I acknowledge that the principal competition faced by ANZ and Suncorp Bank in the supply of loans for agribusiness is from other banks.

(b) Substitutes for bank lending for housing in Queensland

59. Mr Campbell lists the categories of providers of home loans in Australia. These include the banks, as well as:

- a. credit unions and building societies;
- b. emerging specialist lenders such as AFG Home Loans, Pepper Money Ltd, Liberty Financial Group, Resimac and Firstmac; and
- c. neo-banks and fintechs which provide services predominantly online.²⁹

60. However, it appears that other banks are the principal competitors for ANZ in the provision of housing loans. Mr Campbell states that he and representatives from the Pricing, Product, Distribution and Finance teams each fortnight attend a home loan pricing meeting. The meeting considers portfolio metrics, pricing metrics and competitive metrics. Competitive metrics include the conduct of ANZ's competitors. [REDACTED]

[REDACTED]

61. Mr van Horen states that Suncorp Bank tracks the ADI and non-ADI lenders that its customers move to in order to refinance their home loans.³¹ [REDACTED]

[REDACTED]

62. It appears that the product dimension of this market is the provision of loans for housing; and the principal competition for ANZ and Suncorp Bank in the provision of these loans comes from the other banks.

63. Mr Campbell suggests that the competition ANZ faces in home loans is national in scope. He states:

ANZ generally tracks and considers the activities of competing lenders nationally because, like ANZ, competing lenders generally supply their home loan products throughout Australia. Likewise, customers do not limit their purchasing decisions to lenders that are located nearby to them – many acquire home lending products from lenders that do not have physical branches in their local area or state. Many lenders do not have a branch

²⁸ At <https://www.rba.gov.au/statistics/tables/>; Table D9.

²⁹ Campbell Witness Statement, para 52.

³⁰ Campbell Witness Statement, para 46.

³¹ Van Horen Witness Statement, para 50.

³² CVH-1.23 Suncorp Bank National Home Lending External Refinance Data for FY22.



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network at all – ME Bank, ubank, Athena, Rabobank and ING, for example, do not have branches and operate under an online and call centre-based business model. Banks with historical links with particular regions such as Suncorp Bank, Bank of Queensland, Bendigo and Adelaide Bank and BankWest all supply home lending products across Australia. Home loan prices and terms and conditions are generally the same across the country and do not vary by State or Territory.³³

64. Mr van Horen states that Suncorp Bank's home loan products are also priced nationally.³⁴
65. Consideration of the hypothetical monopolist test,³⁵ suggests that it would be inappropriate to confine the housing loan market to Queensland. Because of national pricing, it would seem inappropriate to define a price discrimination market³⁶; and an attempt by lenders to collude to increase the price of housing loans in Queensland by five per cent would be defeated by borrowers arranging their loans from a lender in another state.
66. The ability of borrowers to seek substitutes for the offerings of a local bank has been enhanced by the increased activity of mortgage brokers. [REDACTED]
- [REDACTED]³⁷ He understands that some other lending institutions, such as Macquarie, are even more heavily reliant on mortgage brokers and aggregators.³⁸ This is consistent with data published by the MFAA indicating that mortgage brokers were responsible for 68% of new residential home loan settlements in the June 2022 quarter.³⁹
67. Mr van Horen states that in FY22, approximately 70 per cent of Suncorp Bank home loans were broker originated.⁴⁰
68. Mr Campbell states that the prevalence of mortgage brokers and aggregators, new entrants and comparison websites has increased awareness and visibility of options available to consumers.⁴¹
69. For these reasons, I consider that the market for the supply of loans to purchasers of housing is national in scope. It follows from my discussion of HHIs in section 3.1.1 above, that the national housing market would not breach the thresholds in the ACCC Merger Guidelines. I shall not analyse the likely effect of the Proposed Transaction on this market in any further detail.

3.3 Conclusions on relevant markets

70. I used the HHI thresholds in the ACCC Merger Guidelines to identify initial candidate markets. I found two initial candidate markets that appeared to exceed these thresholds. These were: (i)

³³ Campbell Witness Statement, para 48.

³⁴ van Horen Witness Statement, para 49.

³⁵ Adopted in section 2.2 above.

³⁶ See ACCC Merger Guidelines, paras 4.35 to 4.38.

³⁷ Campbell Witness Statement, para 63.

³⁸ Campbell Witness Statement, para 64.

³⁹ Referred to in the Campbell Witness Statement, para 64.

⁴⁰ van Horen Witness Statement, para 47.

⁴¹ Campbell Witness Statement, para 75. He elaborates on this proposition in paras 76 to 83.



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the supply of loans by banks to Queensland agribusiness; and (ii) the supply of loans by banks to purchasers of housing in Queensland.

71. My consideration of the provision of substitutes for these services indicates that:
 - a. non-bank providers offer some substitutes for the products offered by the banks; and
 - b. the market for the supply of loans to purchasers of housing is national in scope.
72. I conclude that the (only) relevant market for assessing the likely effect on competition of the Proposed Transaction is the market for the supply of loans to Queensland agribusiness.



4. Principles for assessing an slc

73. I have been asked:

What economic principles should, in your opinion, be used to determine whether the Proposed Transaction is likely to substantially lessen competition in relation to the market or markets you have defined?

4.1 Principles to determine the effect or likely effect of conduct on competition

74. The seminal paper in developing a notion of competition suitable for analysing real-world market condition is the 1940 paper by J M Clark on the topic of what he termed 'workable competition'.⁴² This initial contribution led to the development of a literature on workable competition (sometimes called 'effective competition').

75. The literature on workable competition developed to acknowledge that a range of indicia could be used to assess the degree of competition in a market. In general, these indicia can be classified under the headings of structural indicia, conduct indicia or performance indicia.

76. In *Re QCMA and Defiance Holdings* the Trade Practices Tribunal (Tribunal) refers to 'effective competition' and to a 'socially useful competitive process' but it deliberately avoids providing a neat definition of competition:

Since we give such importance to the relevance of competitive considerations in proceedings for authorization, we add a few comments on how the Tribunal views competition. However, "competition" is such a very rich concept (containing within it numbers of ideas) that we should not wish to attempt any final definition which might, in some market settings, prove misleading or which might, in respect of some future application, be unduly restrictive. Instead we explore some of the connotations of the term.⁴³

77. In her academic writing, Professor Brunt (the economist member of the Tribunal in *QCMA*) explains the meaning of market power and its antithesis, effective competition. She states:

Market power is essentially the power of a firm to "administer" its production and selling policies (for example its prices, its service, its capacity, its techniques) somewhat independently of market pressures: it is the extent to which a firm can "give less and charge more" without its market being undermined by rivals' incursions. Yet the firm may not choose to give less and charge more. Rather, it has the discretion to do so. And so we say the essence of market power is "discretionary power".

Such discretionary power rests upon an absence of close substitutes for the firm's output, either actually or potentially. This means that market power ultimately rests upon two factors that act as constraints upon a firm's business behaviour: the numbers of (independent) firms and patterns of substitution for their products within an industry;

⁴² J M Clark, "Toward a Concept of Workable Competition," *American Economic Review*, Vol 30 (1940) pp 241-256.

⁴³ *Re QCMA and Defiance Holdings* (1976) ATPR 40-012, p 17,245.



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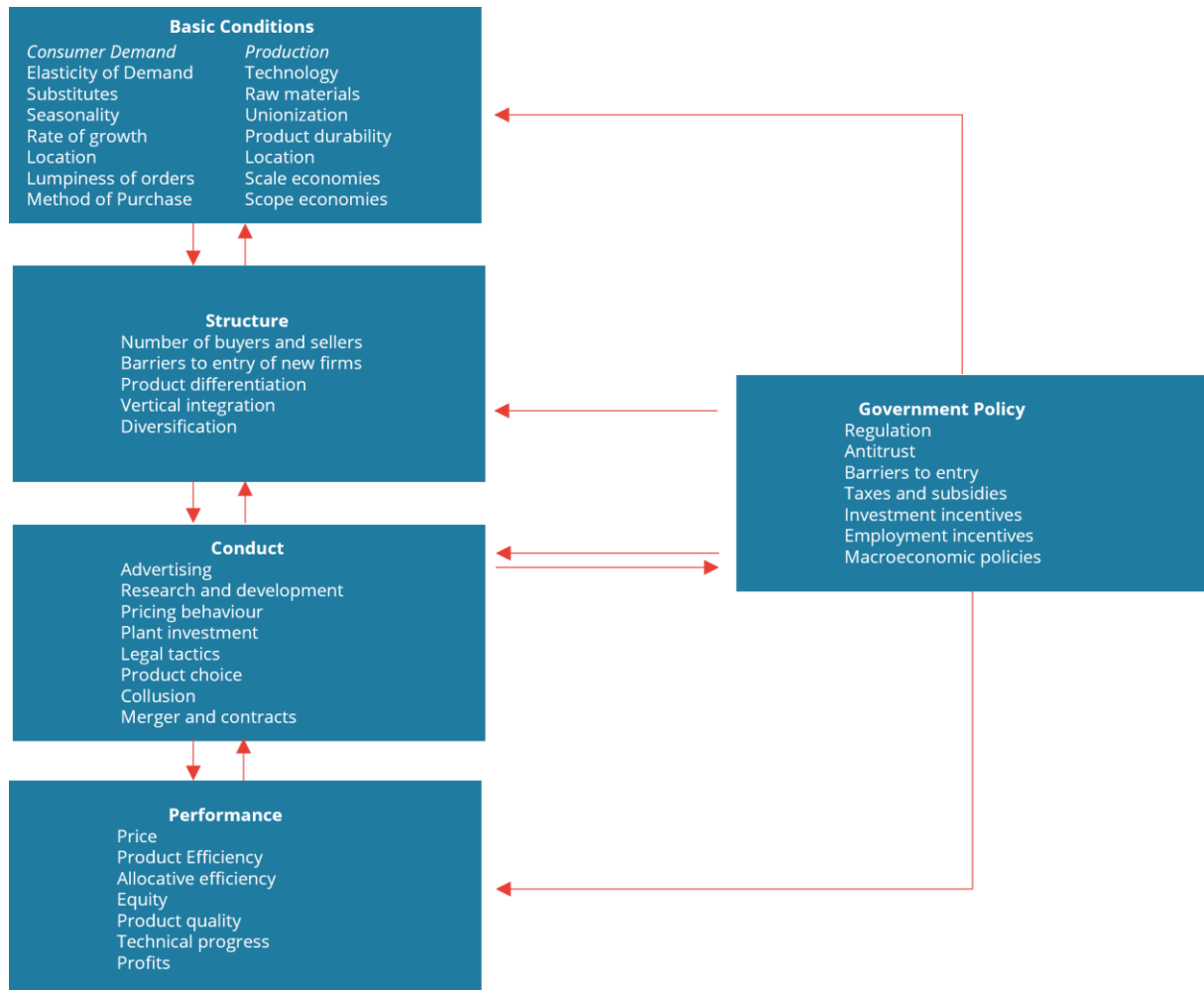
and the extent to which there are barriers to entry of new firms, which would produce close substitute products, from "outside" an industry (including the limbo of unborn firms). Thus market power rests upon these key features of what economists term "market structure".⁴⁴

78. The well-known undergraduate textbook by Dennis Carlton and Jeffrey Perloff contains a useful diagram illustrating the relationships between the structure, the conduct and the performance of markets and how these relationships play out when analysing market power and competition.⁴⁵ The diagram (reproduced in Figure 1 below) suggests that the indicia of competition and market power may be classified as:
- a. structural indicia
 - b. conduct indicia
 - c. performance indicia.
79. Furthermore, the structure, conduct and performance of a market are dependent on underlying basic conditions of consumer demand and production characteristics – as well as on government policy.

⁴⁴ Maureen Brunt, "Market Definition" Issues in Australian and New Zealand Trade Practices Litigation', *Australian Business Law Review*, April 1990, pp 86-128 at 93.

⁴⁵ Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization*, Pearson, 4th edition (2015), p 28.

Figure 1: The structure-conduct-performance paradigm



Source: Dennis W Carlton and Jeffrey M Perloff, *Modern Industrial Organization*, Pearson, 4th edition (2015) p 28.

80. This system of classifying the indicia of competition under the headings of structure, conduct and performance was adopted by the Tribunal in *Chime Communications No. 2*. The Tribunal stated:

What, then, do we draw from the various models for studying a market to determine its competitiveness and for assessing how the market may behave in the future? In the Tribunal's view a market is sufficiently competitive if the market experiences at least a reasonable degree of rivalry between firms each of which suffers some constraint in their use of market power from competitors (actual and potential) and from customers. The criteria for such competition are structural (a sufficient number of sellers, few inhibitions on entry and expansion), conduct-based (eg no collusion between firms, no exclusionary or predatory tactics) and performance-based (eg firms should be efficient, prices should reflect costs and be responsive to changing market forces).⁴⁶

⁴⁶ Application by *Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at paragraph 48.



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81. *Chime Communications No. 2* refers to the exposition of workable competition in the textbook by Scherer and Ross.⁴⁷ The Tribunal states:

Much of the literature on workable competition was analysed by S H Sosnick in his paper 'A Critique of Concepts of Workable Competition' (1958) 72 Quarterly Journal of Economics 380. Sosnick suggests a large number of characteristics that will determine whether a market is workably competitive. Scherer and Ross (at 53 - 54) have divided them into structural, conduct and performance categories as follows:

Structural criteria:

- The number of traders should be at least as large as scale economies permit.
- There should be no artificial inhibitions on mobility and entry.
- There should be moderate and price-sensitive quality differentials in the products offered.

Conduct criteria:

- Some uncertainty should exist in the minds of rivals as to whether price initiatives will be followed.
- Firms should strive to attain their goals independently, without collusion.
- There should be no unfair, exclusionary, predatory, or coercive tactics.
- Inefficient suppliers and customers should not be shielded permanently.
- Sales promotion should be informative, or at least not be misleading.
- There should be no persistent, harmful price discrimination.

Performance criteria:

- Firms' production and distribution operations should be efficient and not wasteful of resources.
- Output levels and product quality (that is, variety, durability, safety, reliability, and so forth) should be responsive to consumer demands.
- Profits should be at levels just sufficient to reward investment, efficiency, and innovation.
- Prices should encourage rational choice, guide markets toward equilibrium, and not intensify cyclical instability.
- Opportunities for introducing technically superior new products and processes should be exploited.
- Promotional expenses should not be excessive.
- Success should accrue to sellers who best serve consumer wants.

The point we draw from Sosnick's work, as is made evident by Scherer and Ross, is that determining whether competition is "workable" involves an analysis of

⁴⁷ F M Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 3rd edition (1990) Houghton Mifflin Company.



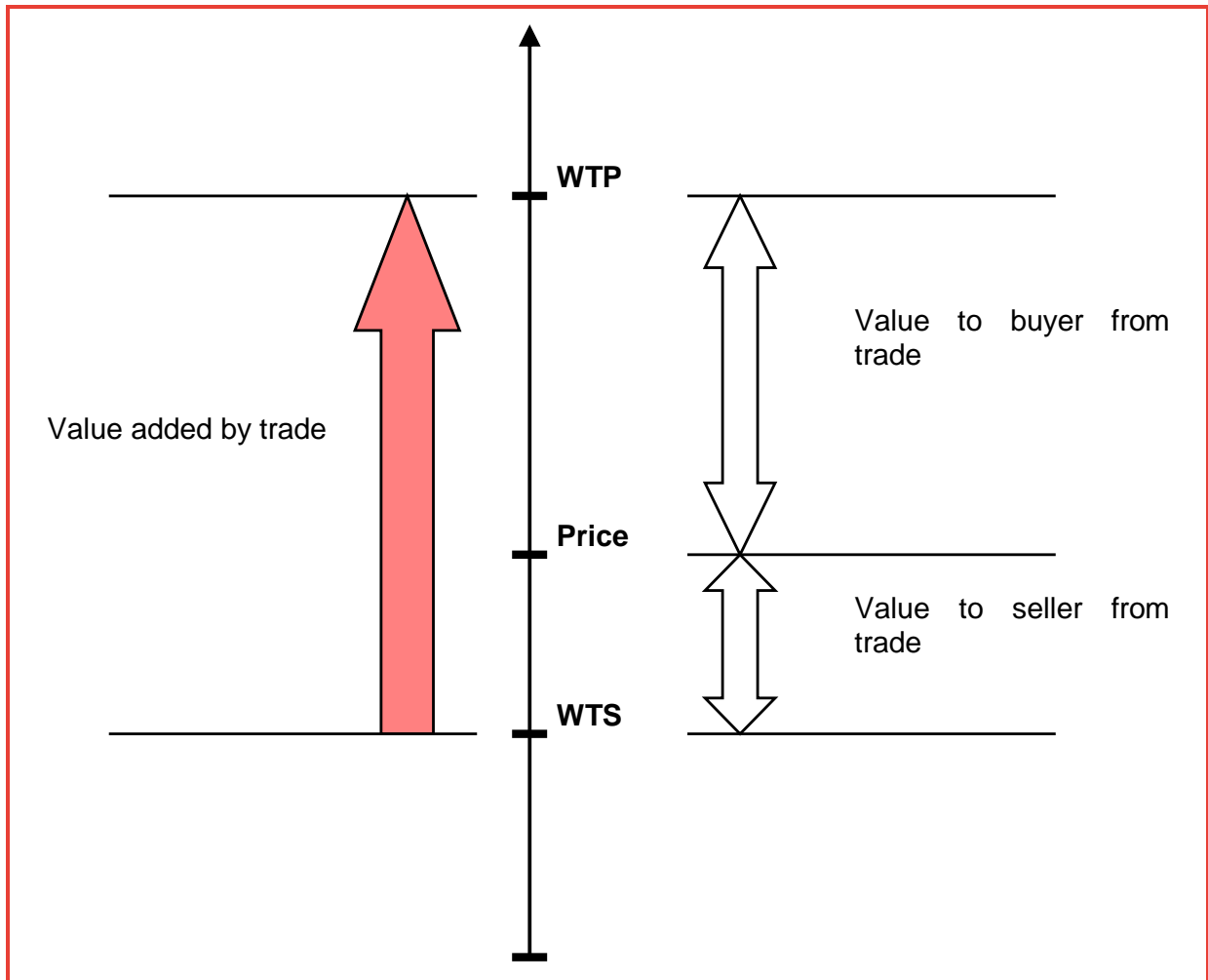
empirical data regarding the structure and dynamics of a market and its participants.⁴⁸

4.2 The relevance of economic efficiency

82. As I observed in the preceding section, the likely impact of a firm's conduct on the state of competition in a market can be assessed by a range of criteria; and these criteria include those relating to economic performance. When assessing economic performance, it is natural for an economist to focus on economic efficiency.
83. Economically efficient conduct is that which creates value; and a market is said to be economically efficient when value is maximised. Value is defined as the difference between the willingness to pay (WTP) of the buyer and the willingness to sell (WTS) of the seller. The WTP of the buyer is the maximum price the buyer would be prepared to pay rather than not purchase the product. The WTS of the seller is the minimum price the seller would need in order to recover its costs. As depicted in Figure 2 below, price determines the way the value created by a trade is divided between the buyer and the seller.

⁴⁸ *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2, paragraph 36.

Figure 2: Creation and division of value



Source: Frontier Economics

- 84. These definitions suggest that value can be enhanced in two ways: by enhancing the product (or offering better quality service) so that the WTP of the buyer increases, or by reducing the cost of production so that the WTS of the producer decreases.
- 85. The conduct of a for-profit business can generate profit in one of two ways:
 - a. the conduct can create value – by increasing WTP or by decreasing WTS; or
 - b. the conduct can increase the share of the value that the business captures – the seller gains a larger share of the available value, at the expense of buyers.
- 86. Much of the economic analysis of competition focuses on these alternative explanations of conduct. The analysis attempts to determine whether the principal effect of the conduct is an increase in value or merely a redistribution of a given amount of value.
- 87. The US Supreme Court in *United States v. Grinnell Corp*⁴⁹ stated:

The offense of monopoly under s2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or

⁴⁹ 384 U.S. 563 (1966).



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maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.⁵⁰

88. The second of these elements (shorn of its element of wilfulness) involves the establishment of conduct that acquires or maintains market power as distinct from conduct that promotes economic efficiency.

89. In *Aspen Skiing v. Aspen Highlands Skiing Corporation*,⁵¹ the US Supreme Court discussed Ski Co's business justification in these words:

Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose. Ski Co. was apparently willing to forgo daily ticket sales both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk. The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long-run by harming its smaller competitor.

That conclusion is strongly supported by Ski Co.'s failure to offer any efficiency justification whatever for its pattern of conduct.⁵²

90. In *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Limited* [2003] FCAFC 149, the Full Federal Court (per Heerey and Sackville JJ) upheld part of the appeal from the decision at trial because the trial court failed to consider the underlying reason as to why Safeway engaged in the impugned conduct. It quotes the reasoning of the trial judge as to taking advantage and then states:

In our view, this analysis ignores the question of why Safeway engaged in the impugned conduct. This is not the same question as to whether one or more of the statutorily proscribed purposes existed. Before reaching that point it is necessary to look at not only what the firm did, but why the firm did it. That is why a business rationale for the conduct, independent of the question of market power, is relevant: *Melway Publishing*, at 13-14 [17]-[19], 18-19 [31], 20 [38], 26 [62], per Gleeson CJ, Gummow, Hayne and Callinan JJ; *Boral Besser*, at 643-644 [170]-[171], per Gaudron, Gummow and Hayne JJ; D Robertson, "The Primacy of 'Purpose' in Competition Law - Part 1" (2001) 9 CCLJ 101, at 115, 121.⁵³

91. When I teach students, I summarise these passages from the United States Supreme Court and the Full Federal Court using the language of Professor Brunt, I tell my students that the decision of a court in a competition case can be reduced to its decision as to 'what's going on here': is the principal effect of the conduct the creation of value or the redistribution of a given amount of value?

⁵⁰ *Grinnell*, 570-571.

⁵¹ 472 U.S. 585.

⁵² *Aspen Skiing* p 471.

⁵³ At para 329.



4.3 Judgements as to whether any lessening of competition is substantial

92. In my opinion, judgements as to whether impugned conduct has the effect or likely effect of substantially lessening competition involve:

- a. comparing the states of competition in the market with and without the impugned conduct; and
- b. making a judgement as to the severity of the lessening of competition.

93. When I taught The Economics of Competition Law to LLM students, I had a class on substantial lessening of competition. As reading for the class, I often referred my students to the extra-judicial writing of Justice Robert French (as he then was). In a paper entitled “The role of the Court in competition law”, French argues that much competition law (and, indeed other branches of the law) consist of fact-value complexes. He draws our attention to Professor Julius Stone’s discussion of Roscoe Pound’s category of ‘legal standards’ as distinct from ‘legal rules’.⁵⁴ Stone classifies legal standards as the typical category of indeterminate reference: I quote:

When courts are required to apply such standards as fairness, reasonableness and non-arbitrariness, conscionableness, clean hands, just cause or excuse, sufficient cause, due care, adequacy, or hardship, then judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case. This is recognised, indeed, as to many equitable standards, and also as to such notorious common law standards as ‘reasonableness’. They are predicated on fact-value complexes, not on mere facts.

The category of indeterminate reference is illusory, as has been pointed out, only in the modified sense that it does not usually lead compellingly to any one decision in a concrete case, but rather allows a wide range for variable judgment in interpretation and application, approaching compulsion only at the limits of the range.⁵⁵

94. In a footnote, Stone refers to Neale’s Anti-Trust text as authority for the proposition that “the maintenance of competition can only be set as the objective if ‘competition’ is given an indeterminate qualification, such as the notion of ‘adequate’, with its alternative sub-standards of ‘pure’, ‘workable’, or ‘effective’ competition.”⁵⁶

95. In recent years, many competition law conferences have featured debates on the objectives of competition law and the values that economists should employ when expressing opinions as to whether impugned conduct substantially lessens competition. One of the leading contributors to this debate is Carl Shapiro. Professor Shapiro has written: “a business practice is judged to be anti-competitive if it disrupts the competitive process and harms trading parties on the other side of the market.”⁵⁷ I find this a useful formulation for explaining what I mean when I refer to conduct that has the effect of substantially lessening competition.

⁵⁴ Justice Robert French, “The role of the Court in competition law” (FCA) [2005] FedJSchol 4, p 2.

⁵⁵ Julius Stone, *Legal System and Lawyers’ Reasonings*, Stanford University Press (1964) p 263-264.

⁵⁶ *Ibid*, fn 185 at p 265.

⁵⁷ Carl Shapiro, Opening Statement of Professor Carl Shapiro before the United States Senate Judiciary Committee Subcommittee on Antitrust, Consumer Protection and Consumer Rights, “The Consumer Welfare Standard in Antitrust: Outdated, or a Harbor in a Sea of Doubt?”, 13 December 2017, p 2 at <https://faculty.haas.berkeley.edu/shapiro/consumerwelfarestandard.pdf>



96. In my understanding, the Shapiro test is similar to that proposed by the Full Federal Court in *Universal Music*:

Competition is a process and the effect upon competition is not to be equated with the effect upon competitors, although the latter may be relevant to the former. Competition is a means to the end of protecting the interests of consumers rather than competitors in the market (Queensland Wire per Mason CJ and Wilson J at 191). Competition is defined to include competition from imported goods (s 4). The Court has to make a qualitative judgment about the impact of the impugned conduct on the competitive process. For example, a short term effect readily corrected by market processes is unlikely to be substantial. The lessening of competition must be adjudged to be of such seriousness as to adversely affect competition in the market place, particularly with consumers in mind. It must be 'meaningful or relevant to the competitive process': *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38; (2000) ATPR 41-752 at para [114].⁵⁸

4.4 Conclusions on market power and competition

97. Market power is the antithesis of effective competition. The indicia of market power and the state of competition in a market may be classified under the headings of structural indicia, conduct indicia and performance indicia. These indicia may be influenced by underlying basic conditions of demand and supply and by government policy.

98. Judgements as to whether conduct lessens or is likely to lessen competition involve comparing the state of competition in the market with and without the impugned conduct. Any assessment of the effect or likely effect of conduct on the state of competition in a market will involve assessing the impact of that conduct on the indicia of competition that are most likely to be affected by that conduct.

99. Expressing an opinion as to whether conduct substantially lessens competition requires making a judgement as to the severity of the lessening of competition. I adapt the words of Carl Shapiro: conduct substantially lessens competition when it disrupts the competitive process and harms trading parties on the other side of the market.

⁵⁸ *Universal Music Australia Pty Ltd v Australian Competition & Consumer Commission* [2003] FCAFC 193, para 242. This passage was quoted by Allsop J in *ACCC v Baxter Healthcare Pty Ltd* [2005] FCA 281 at para 634.



5. My assessment of slc

100. In my opinion, judgements as to whether conduct has the effect or likely effect of substantially lessening competition involve:
- comparing the states of competition in the market with and without the conduct; and
 - making a judgement as to the severity of any lessening of competition.
101. In the case of future conduct, such as the Proposed Transaction, this will require one to compare the future states of the relevant markets with and without the Proposed Transaction. When I assess the Proposed Transaction, I shall assume that, in its absence, ANZ and Suncorp Bank would continue to operate much as they have in the recent past. I shall consider the likely effects on competition in the market that I have defined: the market for the supply of loans to Queensland agribusiness.
102. Consistent with the Structure-Conduct- Performance paradigm that I adopted in section 4 above, I shall consider the Basic Conditions of the market, the Structure of the market, the Conduct in the market and its Performance. I shall then be able to state my conclusion on whether the Proposed Transaction is likely to cause a substantial lessening of competition.

5.1 Basic conditions of the market

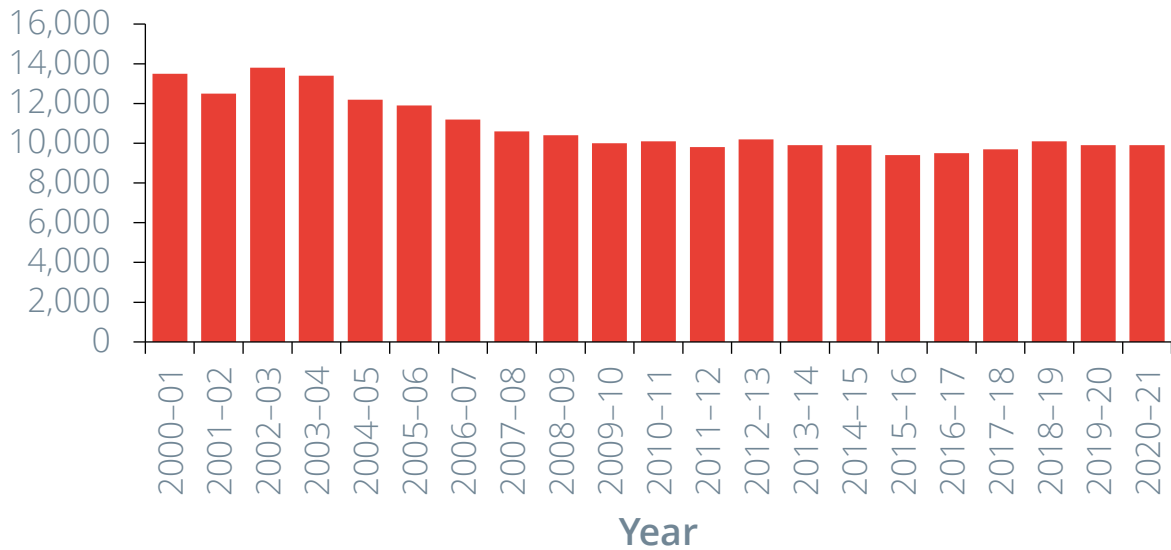
103. The nature of demand for farm debt is changing in various ways. Many of these changes are caused by the trend in recent decades to fewer, but larger, farm businesses. The Australian Bureau of Agricultural and Resource Economics and Sciences (ABARES) states:
- Size is an important determinant of farm business performance. Larger farms tend to be more profitable, invest more, and generate a higher rate of return on capital than smaller farms. Moreover, larger farms have more capacity to reduce their costs through scale, and a greater ability to invest in productivity-enhancing capital additions. These factors have driven a trend in recent decades towards fewer, but larger farm businesses. An important consequence of this trend is that industry level farm performance is increasingly driven by the performance of the largest farms.⁵⁹
104. The annual farm surveys conducted by ABARES record the reduction in the number of farms in Queensland. The data are recorded in Table 4 below.

⁵⁹ <https://www.agriculture.gov.au/abares/research-topics/surveys/disaggregating-farm-size>



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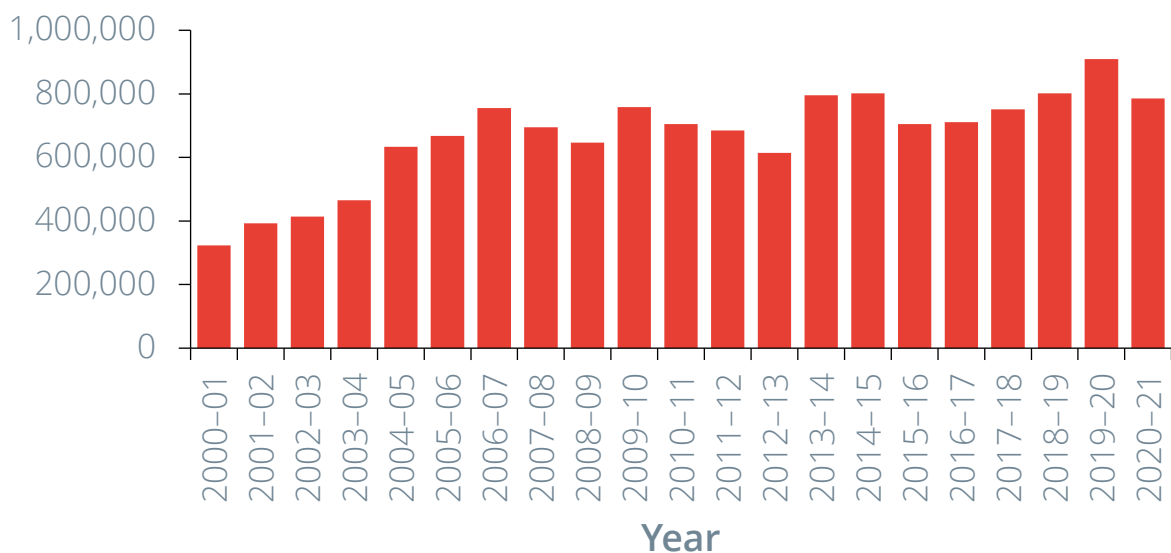
Table 4: Total population of dairy and broadacre farms in Queensland 2000-01 to 2020-21



Source: ABARES farm surveys⁶⁰

105. The trend to fewer but larger farms has produced an increase in average debt per farm. The increase in average debt per farm as recorded in the ABARES farm surveys is presented in Table 5 below.

Table 5: Average total debt per dairy and broadacre farm in Queensland 2000-2001 to 2020-21



⁶⁰ <https://www.agriculture.gov.au/abares/research-topics/surveys/farm-debt>



Source: ABARES farm surveys⁶¹

5.2 The structure of the market

106. The DBM Survey data referred to in section 3 above gives an idea of the shares of the ANZ and Suncorp Bank in the supply of loans to Queensland agribusiness. The market shares for the 12 months up to and including October 2022 are recorded in Table 6.

Table 6: Top 5 Lenders to Qld Ag, Forestry and Fishing, Nov 2021 to Oct 2022

Bank	Market Share
NAB	[REDACTED]
RABOBANK	[REDACTED]
SUNCORP BANK	[REDACTED]
ANZ	[REDACTED]
WESTPAC	[REDACTED]

Source: DBM Survey

107. These data are consistent with the statement of Mr Bennett that although he does not have access to reliable market share data for agribusiness banking in Queensland (or in any other State), in his view, NAB and Rabobank are the first and second largest agribusiness banks in Queensland, respectively, Suncorp Bank is third, and ANZ is fourth. [REDACTED]

108. Mr Rankin suggests that the higher share of regional banks in their home states largely reflects the value of their brand and physical presence rather than price or quality of service. He states:

While these [regional] banks tend to win a higher volume of business in their 'home' regions due to their historical footprint, my assessment is that this largely reflects the value of their brand and greater physical presence in those regions rather than any material geographic differences in any of the drivers of competition I set out above (service, credit policy, product features, price or origination options).⁶³

109. When analysing mergers in differentiated product markets, it is generally useful to understand the extent to which purchasers regard the products of the merging parties as substitutes. Data to assess this can often be found in win/loss records of the merging parties.

⁶¹ <https://www.agriculture.gov.au/abares/research-topics/surveys/farm-debt>

⁶² Bennett Witness Statement, paras 205 and 207.

⁶³ Rankin Witness Statement, para 93 (c).



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In this case, I was unable to discover such data for lending to Queensland agribusiness. As Mr Rankin states:

ANZ does not have access to comprehensive refinancing or 'win/loss' data about where ANZ customers switch from or to. For commercial lending, ANZ Commercial monitors its own win/loss rates by comparing its quote activity to loan drawdown activity, but that does not provide insight into movements to and from any particular competitors.⁶⁴

110. When we lack data of where customers switch from or to, the general procedure among economists is to assume that customers move in accordance with market shares. [REDACTED]

[REDACTED]⁶⁵

111. One form of product differentiation among banks in lending to agribusinesses appears to be that the larger banks can offer the wider range of services required by larger, more-complicated businesses which the smaller, regional, banks are unable to supply. Mr Bennett states:

As a general proposition, the regional banks tend to attract significant customer loyalty in their home State, and therefore tend to compete more strongly with the major banks in their home State than in other areas. [REDACTED]

[REDACTED]

I consider that the reason why these types of customers are attracted to ANZ is that the regional banks do not have equivalent capacity, products, experience, developed policy and established ways to satisfy the banking needs of larger customers. Also, major banks

⁶⁴ Rankin Witness Statement, para 98.

⁶⁵ Rankin Witness Statement, para 100 (a).



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tend to price more competitively than regional banks on larger transactions and have other relationship benefits where their footprints extends to a national basis which can bring to a state domiciled, yet national business.⁶⁶

112. The advantages of the larger banks in dealing with larger agribusiness customers coupled with the trend to consolidation of farms might suggest that new entry is very unlikely – except at the margin for internet-based lenders. Although barriers to entry might be quite high, the success of Rabobank suggests that mobility among lenders can be substantial. As Mr Bennett explains:

Rabobank is a Dutch cooperative bank with a history of heavily focusing on customers in the food and agricultural industry in Holland. Rabobank first came to Australia in the late 1980s as a merchant bank. Until deregulation of Australian agribusiness banking in the 1980s, banks were limited in offering long term finance to farmers. This problem was addressed by introducing PIBA to operate in conjunction banks to offer long term loans. This changed post deregulation in 1985, when PIBA for the first time offered loans directly to farmers, bypassing local banks. When Rabobank acquired PIBA in 1994, it acquired the ability to lend directly to Australian agribusiness and began specialising in agribusiness loans and deposits. Rabobank had significant appetite for Australian agribusiness and offered several attractive product features. First, it offered farmers long term loans over a period of around 15 years, subject to reviews every 3 to 5 years; Rabobank actively promoted this feature, whereas other agribusiness banks did not so openly offer equivalent loan tenor. Secondly, Rabobank's key loan product was simple: it had only one fee and no other charges. Thirdly, Rabobank offered agribusiness customers relatively easy access to, and self-management of, loan structure decisioning; for example, when to fix an interest rate and over what portion of their total debt. When I first arrived at Rabobank, it did not maintain a physical presence outside of capital cities; instead, bankers worked out of capital cities; instead, bankers worked out of capital cities, and travelled to regional areas to see and attract customers.⁶⁷

113. Rabobank has been remarkably successful in increasing its share of lending to Queensland agribusiness in recent years. DBM data referred to in Table 6 above shows that the market share of Rabobank in the 24 months to October 2019 was [REDACTED] compared with its market share in the 24 months to October 2022 of [REDACTED].

5.3 Conduct in the market

114. ANZ allocates its agribusiness customers into one of three categories:
- those handled by small business banking (SBB) or business banking (BB) if they have business lending limits up to [REDACTED] (for SBB) or [REDACTED] (for BB);
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶⁸

⁶⁶ Bennett Witness Statement, paras 167 and 168.

⁶⁷ Bennett Witness Statement, para 116.

⁶⁸ Rankin Witness Statement, paras 21 to 42.

5.4 The performance of the market

117. Mr Bennett suggests that competition in the supply of loans to Queensland agribusiness has become more vigorous in recent years. This is reflected in increased focus by the traditional banks on agribusiness in response to the threat posed by Rabobank.⁷¹

118. It also is reflected in reduced margins. Mr Bennett states:

... when I was an RM with Rabobank, from around the mid-1990s, it was much easier for bankers to find and write good deals than it is today.

[Redacted text block]

5.5 Conclusions concerning the likely effect of the Proposed Transaction on competition in the supply of loans to Queensland agribusiness

119. All horizontal mergers have the effect of lessening competition to some extent. The Proposed Transaction is no exception: it will tend to lessen competition in the supply of loans to Queensland agribusiness. However, it is relatively unconcentrated compared with most of the markets that are subject to detailed consideration by the ACCC: the best available estimates put the post-merger HHI at 2,143.4. The proposed merging parties are not particularly close competitors. Suncorp does not have the [redacted] to satisfy the needs of larger customers. For this reason, Suncorp [redacted] whereas ANZ serves the complete range of sizes; and this difference is likely to become increasingly important in the future because of the long-term trend to larger farms. The performance of the market is reasonably dynamic due, in no small part, to the activity of Rabobank.

120. It is my opinion that the Proposed Transaction is likely to cause a slight lessening of competition in the market for the supply of loans to Queensland agribusiness; but this is unlikely to cause any increases in prices or decreases in the quality of service to agribusiness borrowers. For these reasons, I conclude that the Proposed Transaction is unlikely to substantially lessen competition in the market for the supply of loans to Queensland agribusiness.

[Redacted text block]

⁷¹ Bennett Witness Statement, para 117.

⁷² Bennett Witness Statement, para 118.



6. Annexure A: CV



Dr Philip Williams AM

EXPERTISE: Competition

Phone: [REDACTED]

Email: [REDACTED]

Philip Williams leads the Legal and Competition Team at Frontier Economics (Asia-Pacific). He provides economic advice to clients in the areas of antitrust, valuing damages, transfer pricing, intellectual property and contractual disputes.

Prior to joining Frontier Economics, he taught full-time at the University of Melbourne from 1978 to February 2002, when he resigned as Professor of Law and Economics in the Melbourne Business School at the University.

In addition to his role at Frontier Economics, he is a member of the Competition and Consumer Committee of the Law Council of Australia, Chairman of the Epworth Medical Foundation and a member of the Council of Court Services Victoria.

Philip Williams

EXPERIENCE GIVING EVIDENCE

Evidence before superior courts or tribunals in Australia

Corum Systems Pty Ltd v Fred IT Group Pty Ltd SCI 2020 02683 reserved.

Copyright Agency Limited v University of Adelaide [2022] AComT 2.

Roo Roofing Pty Ltd & Anor v Commonwealth of Australia [2019] VSC 331.

ACCC v Pacific National Pty Limited and Others (No. 2) [2019] FCA 669.

Bayer Pharma Aktiengesellschaft and another v Generic Health Pty Ltd and another [2017] FCA 250.

ACCC v Colgate-Palmolive Pty Ltd (No 4) [2017] FCA 1590.

Sea Swift Pty Ltd's Proposed Acquisition of certain Toll Marine Logistics assets, [2016] AComT 9 (28 July 2016).

ACCC v Cement Australia Pty Ltd and ors (penalty proceedings) [2016] FCA 453.

Novartis Pharmaceuticals Australia Pty Limited v Bayer Australia Limited [2015] FCA 35.



Philip Williams

Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Limited [2014] AComT 1 (25 June 2014).

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Sportsbet Pty Ltd v Harness Racing Victoria (No 6) [2012] FCA 896 (21 August 2012).

Sportsbet Pty Ltd v State of Victoria [2011] FCA 961 (22 August 2011).

Sundararajah v Teachers Federation Health Limited [2011] FCA 1031 (2 September 2011).

ACCC v TF Woollam & Son Pty Ltd [2011] FCA 973.

Phonographic Performance Company of Australia Limited (CAN 000680 704) under section 154(1) of the Copyright Act 1968 [2010] ACopyT 1.

Application by Fortescue Metals Group Limited (2010) ATPR 42-319.

ACCC v Australian Abalone Pty Ltd [2007] FCA 1834.

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Seven Network Limited v News Limited and others (2007) ATPR (Digest) 46-274.

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Australian Association of Convenience Stores and Queensland Newsagents Federation; 7-Eleven Stores Pty Ltd (1994) ATPR 41-357.

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Philip Williams

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Queensland Wire Industries Pty. Limited v The Broken Hill Proprietary Company Limited (1989) 167 4 CLR 177.

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NZX Limited v Ralec Commodities Pty Ltd [2016] NZHC 2742.

Commerce Commission v Air New Zealand and others (2011) CIV-2008-404-8352.

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Evidence before the Singapore Copyright Tribunal

SingNet Pte Ltd v Composers and Authors Society of Singapore Ltd CT1 of 2019 [2021].

Career

2002 - present	Head of Legal and Competition Team, Frontier Economics
1988 – 2002	Melbourne Business School, University of Melbourne
1978 – 1988	Economics Department, University of Melbourne
1973 – 1977	Ph D Student, London School of Economics
1970 - 1973	Non-tenured tutor, Department of Economics, Monash University

Education

1977	Ph D London University (London School of Economics)
1973	M Ec Monash University

Publications

Economics Dep



Career

Books

- (With John Alford and Royston Gustavson) *The Governance of Australia's Courts: A Managerial Perspective* (Australian Institute of Judicial Administration, 2004).
- (Edited with Frances Hanks) *The Twenty-Fifth Anniversary of the Trade Practices Act: A Celebration and a Stocktake* (Federation Press, 2001).
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Career

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RESTRICTION OF PUBLICATION CLAIMED

Career





7. Annexure B: Instructions



Our ref: JDJ\JMCK\1000-122-202
 Your ref: Project Galileo
 Partner: Justin Jones
 Direct line: [REDACTED]
 Email: [REDACTED]
 Contact: John McKellar
 Direct line: [REDACTED]
 Email: [REDACTED]

1 December 2022

Ashurst Australia
 Level 16
 80 Collins Street, South Tower
 Melbourne VIC 3000
 Australia

GPO Box 9938
 Melbourne VIC 3001
 Australia

Tel +61 3 9679 3000
 Fax +61 3 9679 3111
 DX 388 Melbourne
 www.ashurst.com

BY EMAIL

Dr Philip Williams AM
 Frontier Economics Pty Ltd
 Ground Floor
 395 Collins Street
 Melbourne VIC 3000

ashurst

Dear Dr Williams

Letter of engagement – ANZ /Suncorp Bank proposed transaction

We act for Australia and New Zealand Banking Group Limited (**ANZ**) in respect of its proposed acquisition of SGBH Limited, the holding company for **Suncorp Bank**, from Suncorp Group Limited (**Suncorp Group**) (as described further in paragraph 1.1).

Herbert Smith Freehills acts for Suncorp Group.

On behalf of ANZ, we are instructed to seek your expert opinion, in the form of a written report, in connection with a proposed application to the Australian Competition and Consumer Commission (**ACCC**) for merger authorisation under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Authorisation Application**).

This letter sets out the instructions for the preparation of your expert report.

1. **RELEVANT BACKGROUND**

The Proposed Transaction

1.1 On 18 July 2022, ANZ announced that it had agreed to purchase:

- (a) 100% of the shares in SBGH Limited, the immediate non-operating holding company of Suncorp Bank; and
- (b) certain property rights held by Suncorp Group entities to facilitate the operation of Suncorp Bank,

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

1.2 The Proposed Transaction is subject to certain conditions, being approval by the Federal Treasurer under the *Financial Sector (Shareholdings) Act 1998* (Cth), approval by the ACCC or Australian Competition Tribunal, or a declaration by the Federal Court of Australia, under section 50 of the CCA, and the repeal of, or making of certain amendments to, the *State Financial Institutions and Metway Merger Act 1996* (Qld).

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 Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group.



The Parties

- 1.3 ANZ and Suncorp (the **Parties**) overlap in the supply of various retail and commercial banking products in Australia.

ACCC's assessment

- 1.4 The ACCC may grant merger authorisation if it is satisfied in all the circumstances that either:
- (a) the Proposed Transaction would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or
 - (b) the Proposed Transaction would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the Proposed Transaction.¹

2. INSTRUCTIONS

- 2.1 You are instructed to prepare an expert report (**Expert Report**) giving your expert opinion on the following matters:
- (a) What economic principles, consistent with section 4E of the CCA, should, in your opinion, be used to define the market(s) relevant to assessing the likely competitive effects of the Proposed Transaction in relation to the supply of banking products in Australia?
 - (b) Applying the relevant economic principles identified in response to 2.1(a), what is/are, in your opinion, the relevant product and geographic dimensions of the market or markets for the purposes of assessing the likely competitive effects of the Proposed Transaction in relation to the supply of banking products, and specifically commercially banking products, in Australia?
 - (c) In providing your answer to 2.1(b), please specifically consider whether:
 - (i) the supply of banking products to different customer types (such as retail and commercial customers) occurs in one or more separate relevant markets; and
 - (ii) the supply of commercial banking products to any segment of business customers (such as small to medium enterprises, commercial property or agribusiness customers) occurs in one or more separate relevant markets, distinct from the market(s) in which commercial banking products are supplied to other customers.

Commercial banking products are banking products supplied to business customers by financial institutions and include commercial lending products, deposit products (including transaction and savings accounts, and term deposits), merchant services and risk management products. They are further described in paragraph 60 of the Isaac Rankin witness statement and paragraphs 21 to 23 of the Guy Mendelson witness statement, both at **Annexure A** to this letter.

¹ We refer you to section 90(7) of the CCA and the ACCC's Merger Authorisation Guidelines (October 2018) which are available at: <https://www.accc.gov.au/system/files/Merger%20Authorisation%20Guidelines%20-%20October%202018.pdf>



- (d) What economic principles should, in your opinion, be used to determine whether the Proposed Transaction is likely to substantially lessen competition in relation to the market or markets identified in response to (b) and 2.1(c)?
- (e) Applying the relevant economic principles identified in response to 2.1(d), is the Proposed Transaction likely to substantially lessen competition in relation to the market or markets identified in response to (b) and 2.1(c)? Please explain how you reach your opinion in response to this question.

2. DOCUMENTS PROVIDED TO YOU

For the purposes of preparing your Expert Report, we have provided you with copies of the following documents which are included in **Annexure A**:

- (a) The signed witness statements of:
 - (i) John Campbell dated 30 November 2022;
 - (ii) Yiken Yang dated 30 November 2022;
 - (iii) Guy Mendelson dated 1 December 2022;
 - (iv) Isaac Rankin dated 30 November 2022;
 - (v) Clive van Horen dated 25 November 2022; and
 - (vi) Mark Bennett dated 1 December 2022.
- (b) Information obtained from the Australian Prudential Regulation Authority.
- (c) Information obtain from DBM about deposits and lending to commercial and agribusiness customers.

3. CONTENTS OF YOUR REPORT AND EXPERT WITNESS CODE OF CONDUCT

- 3.1 Your Expert Report may be submitted to the ACCC as part of the Authorisation Application, and may be made available to the Australian Competition Tribunal and Federal Court of Australia in any subsequent reviews and appeals of the ACCC's determination.
- 3.2 Accordingly, we ask that you review the requirements for expert reports set out in the Federal Court's Expert Evidence Practice Note (GPN-EXPT) (**Practice Note**), which includes the Harmonised Expert Witness Code of Conduct (**Code**). A Copy of the Practice Note (including Code) is available [here](#).
- 3.3 We ask that you prepare your Expert Report in accordance with the requirements of the Practice Note and the Code. You are expected to be objective, professional and to form an independent view regarding matters relevant to your analysis. It is important that you carefully read and comply with the Code.
- 3.4 We note that under the Code, your Expert Report must clearly state the following:
 - (a) your name and address;
 - (b) an acknowledgement that you have read the Code and agree to be bound by it;
 - (c) your qualifications as an expert to prepare the Expert Report;



- (d) the assumptions and material facts on which each opinion expressed in the Expert Report is based (this letter of instructions may be annexed);
- (e) the reasons for and any literature or other material utilised in support of each such opinion;
- (f) (if applicable) that a particular question, issue or matter falls outside your field of expertise;
- (g) any examinations, tests or other investigations on which you have relied, identifying the person who carried them out and that person's qualifications;
- (h) the extent to which any opinion which you have expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
- (i) a declaration that you have made all the inquiries which you believe are desirable and appropriate (save for any matter identified explicitly in the Expert Report), and that no matters of significance which you regard as relevant have, to your knowledge, been withheld from the court;
- (j) any qualifications on an opinion expressed in the Expert Report without which the Expert Report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the Expert Report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the Expert Report is lengthy or complex, a brief summary of the Expert Report at the beginning of the Expert Report.

3. TERMS OF ENGAGEMENT

3.1 The key terms of your engagement are as follows.

- (a) You will provide your services as an independent expert for the purpose of assisting Ashurst to advise ANZ in relation to its Authorisation Application for the Proposed Transaction.
- (b) You will provide your services through, and with the resources available to you at Frontier Economics Pty Ltd (**Frontier**). However, you will be personally available to provide advice in this matter.
- (c) You must not accept any other appointment or retainer to provide assistance or services to any other party in relation to this matter or the events surrounding this matter. You must at all times avoid any real or apparent conflict of interest between ANZ's interests in relation to this matter and the interests of any other person.
- (d) You confirm that you have disclosed to us all information that is material to your engagement as an expert in this matter, including but not limited to:
 - (i) the nature of any services that Frontier is currently providing, or may have previously provided, to other participants in the financial services industry;



- (ii) any holding of securities in other participants in the financial services industry or any of their related bodies corporate that are held by you or your immediate family or any company in which you or a member of your immediate family has a material financial interest; and
 - (iii) any real or apparent conflicts of interest that Frontier may have in relation to the Proposed Transaction.
- (e) You will tell us about any matters of the sort listed above that arise, become known to you or significantly change after the date of this letter.
- (f) Without in any way limiting section 2 above, all communications (including reports) which you are to provide to us pursuant to this letter must be provided in the form and manner we advise you from time to time.
- (g) Relevantly in relation to legal professional privilege and confidentiality:
- (i) When undertaking your review and preparing your Expert Report, please ensure that Frontier keeps confidential all notes, statements and/or other documents (including any drafts) prepared for the purpose of your review and the preparation of your Expert Report.
 - (ii) To avoid confusion, any documents you prepare under this retainer, except for your final report, should be marked as follows on each page: "*Confidential and subject to legal professional privilege*" and should be marked as "*Draft*" in respect of draft versions.
 - (iii) Your Expert Report, any drafts of it (or any other documents you create for the purposes of your report) can be provided to Ashurst, but they should not be disseminated to others given the confidential and privileged nature of the Expert Report.

4. FEES

- 4.1 ANZ will pay you for time spent on this matter in accordance with the instructions of Ashurst, at the following per day rates including GST:
- (a) Philip Williams – AUD \$7,744.
- 4.2 The rates are capped daily rates and are to be pro-rated where less than 8 hours is worked on any one day.
- 4.3 Unless otherwise agreed, the assignment of specific Frontier personnel to work on the Expert Report must be approved by us and may not be changed without our prior approval. Except in exceptional circumstances, we will not be liable to pay for work completed by Frontier personnel whom we have not approved.
- 4.4 Notwithstanding any other provision in this Letter, you must not charge for and we will not be liable to pay for:
- (a) overhead costs (e.g., in-house photocopying, overtime, administrative or clerical services, including secretarial, docket, word processing, accounting, library or other clerical staff time), time charges for preparation of invoices, seminars or special publications;



- (b) third party disbursements (eg facsimiles, telephone, purchase of research papers and courier services);
 - (c) travel time in which productive work for us was not performed; or
 - (d) any other expenses.
- 4.5 Frontier will issue tax invoices addressed to Ashurst in respect of your fees and disbursements (and provide copies of all third party invoices).
5. **CONFIDENTIALITY**
- 5.1 You agree to keep strictly confidential all Confidential Information disclosed to you during the course of your engagement. This obligation survives the conclusion of your engagement under this Letter.
- 5.2 You acknowledge that the Confidential Information is secret, confidential and of value to ANZ, and its unauthorised use or disclosure may significantly damage ANZ's business.
- 5.3 You agree that you must:
- (a) keep the Confidential Information secret and confidential at all times;
 - (b) not disclose, directly or indirectly, any Confidential Information to any person other than Ashurst, unless you have prior written consent from Ashurst;
 - (c) not use the Confidential Information other than for the purpose of carrying out your engagement in accordance with this Letter and our instructions; and
 - (d) ensure that each person to whom you disclose Confidential Information with the prior permission of Ashurst, including each member of your staff working with you in connection with this engagement, makes the same acknowledgment, agrees to comply with, and does comply with, (a), (b) and (c) above.
- 5.4 Nothing in this document prohibits the disclosure of information where:
- (a) that disclosure is required by law (you will give us notice of any such requirement as soon as practicable after learning that it may apply, and will co-operate with any efforts by us or ANZ to remove or restrict the legal requirement); or
 - (b) at the time of the disclosure the information is in the public domain (unless the information or material came into the public domain through a breach by any person of a confidentiality obligation, including a breach by you of the terms of this letter).
- 5.5 On request by Ashurst, you must:
- (a) return to Ashurst any documents or other materials containing Confidential Information, or, if they are in electronic form, erase or destroy them and provide evidence of erasure or destruction to the satisfaction of Ashurst; and
 - (b) provide to Ashurst or destroy any materials created by you in connection with this engagement that contain Confidential Information, or, if they are in electronic form, erase or destroy them and provide evidence of erasure or destruction to the satisfaction of Ashurst.



- 5.6 All communications in relation to this matter, whether verbal or written, should be directed to Ashurst, with attention to Justin Jones.
- 5.7 To the extent your report refers to information highlighted as confidential in any of the documents at Annexure A, please:
- (a) include the words "**RESTRICTION OF PUBLICATION CLAIMED**" in the header of each page of your report; and
 - (b) highlight any information confidential to ANZ in yellow, highlight any information confidential to Suncorp Bank in green, and highlight any information from DBM in blue. We may provide you with further instructions as to the specific material in your report that should be highlighted as confidential, once you have prepared it.
6. **INTELLECTUAL PROPERTY RIGHTS**
- 6.1 You agree:
- (a) that ANZ retains all Intellectual Property Rights in any Materials which may be disclosed to you in the course of your engagement; and
 - (b) to transfer to ANZ all Intellectual Property Rights in any Materials created by you in the course of your engagement.
7. **MEDIA COVERAGE**
- 7.1 You must not respond to any inquiries from the news media, or make or authorise any other public announcement or communication, in relation to the Proposed Transaction or the Expert Report. All inquiries from the news media must be promptly referred to us.
8. **INTERPRETATION**
- In this letter:
- (a) **Confidential Information** includes all information in any form or medium relating to ANZ, which is disclosed to you by ANZ or its officers, employees, advisers or agents, any brief or other material we send you, any communication we have with you (whether alone or with others) about this matter but does not include any information which you can show:
 - (i) is in the public domain, otherwise than as a result of a breach of the contents of this letter; or
 - (ii) is already known to you prior to the disclosure or which is subsequently known to you as a result of disclosure by another source which was not, to the best of your knowledge, subject to any agreement for confidentiality.
 - (b) **Intellectual Property Rights** means all present and future rights conferred by statute, common law or equity in or in relation to copyright, trade marks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions and confidential information, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields whether or not registrable, registered or patentable. These rights include:
 - (i) all rights in all applications to register these rights;



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- (ii) all renewals and extensions of these rights; and
 - (iii) all rights in the nature of these rights, such as moral rights.
- (c) **Materials** means works, ideas, concepts, designs, inventions, developments, improvements, systems or other material or information, created, made or discovered by you (either alone or with others and whether before or after the date of this document) in the course of your engagement or as a result of using the resources of ANZ or in any way relating to any business of ANZ.

Please indicate your agreement to the terms of this engagement by signing and returning a copy of this letter. We look forward to working together with you in relation to the Proposed Transaction.

If you have any questions or would like to discuss this matter further, please do not hesitate to call Justin Jones, Partner, on [redacted] or John McKellar, Senior Associate, on [redacted].

Yours faithfully



Ashurst

Accepted for and on behalf of Frontier Economics by its duly authorised representative

Name: Philip Williams

Date:





Frontier Economics

Brisbane | Melbourne | Singapore | Sydney

Frontier Economics Pty Ltd
395 Collins Street Melbourne Victoria 3000

Tel: +61 3 9620 4488

<https://www.frontier-economics.com.au>

ACN: 087 553 124 ABN: 13 087 553 124