

Proposed acquisition of Suncorp Bank by ANZ

Expert Witness Report

Prepared by: *Mozammel Ali
Managing Director
Theorem Consulting Pty Ltd*

Address:

[REDACTED]

Date: *17 May 2023*

Signed:

[REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

Table of contents

Section 1 – Introduction and scope.....	3
Section 2 – Background	6
Section 3 – Questions	8
Section 4 – Executive Summary	9
Section 5 – Approach to analysis	15
Section 6 – Balance sheet and funding mix.....	17
Section 7 – Debt capital markets funding	19
Section 8 – Short term wholesale funding	35
Section 9 – Valuation implications.....	42
Section 10 – Funding stability	44
Appendix A – Commissioning Letter	51
Appendix B – Moz Ali: Curriculum Vitae	62
Appendix C – AUD floating rate bond trading levels	65
Appendix D – ASX listed AT1 securities.....	66
Appendix E – Evidence Practice Note (GPN-EXPT).....	67

RESTRICTION OF PUBLICATION OF PART CLAIMED

Section 1 – Introduction and scope

1.1 Scope

1. I have been engaged by Herbert Smith Freehills (**HSF**), to prepare an independent expert report, in connection with the application to the Australian Competition and Consumer Commission (**ACCC**) for authorisation of the proposed acquisition by the Australia and New Zealand Banking Group Limited (**ANZ**) of SGBH Limited, the holding company for Suncorp Bank, from Suncorp Group Limited (**SUN**), (**Proposed Acquisition**).
2. In particular, I have been asked to provide my opinion addressing certain questions as specified in the commissioning letter provided to me by HSF (**Commissioning Letter**), a copy of which is included in **Appendix A**.
3. I have been provided various documents including certain company and other related information (**Information Materials**) which are listed within Attachment 3 of the Commissioning Letter, which I have reviewed, considered and relied upon in preparing this Report.

1.2 Relevant experience and qualifications

4. I have over 28 years of experience within the financial services industry, including 18 years across two top tier global investment banks. I am currently Managing Director of Theorem Consulting, an independent consulting firm established in 2018, that provides consulting advice on mergers and acquisitions (**M&A**), acquisition financing, capital raisings and capital structuring.
5. I am also currently working with the Actuaries Institute to develop and teach a professional fellowship examination subject on banking principles, which is scheduled to be launched in 2024 as a component of the Institute's Fellowship qualification pathway.
6. Prior to establishing Theorem Consulting, from 2003 to 2018, I was a senior executive within the Corporate Finance division of Deutsche Bank AG, Sydney Branch, including roles within the Financial Institutions Group, the Capital Markets and Treasury Solutions team and most recently as the Head of Capital Solutions. My primary responsibility in each of these roles was as an adviser to Australian and international clients on various large-scale transactions including M&A, acquisition financing and capital raisings, with a particular specialisation in financial institutions.
7. Throughout this time, I have been involved in dozens of debt, equity, hybrid and other structured capital transactions, raising over AUD50 billion (equivalent) for Australian and international clients.
8. My transaction experience has included designing and executing complex debt, structured capital and acquisition financing for corporate and financial institution clients, across jurisdictions, currencies (including AUD, USD, GBP and EUR) and issuance formats (including retail and institutional public capital markets, private placement markets, syndicated debt facilities and bespoke bilateral capital raising).
9. As an important and necessary part of my role in executing debt, equity and other structured capital markets transactions, I have had significant interaction with my sales desk and syndication colleagues across the equity and debt capital markets divisions.
10. Additionally, in advising issuers on equity, debt and hybrid capital raising transactions, I have also had extensive direct interaction with investors (including chief investment officers, portfolio managers and investment analysts) in the process of hosting investor presentations or 'roadshows' for issuer clients, obtaining investor feedback, responding to queries regarding potential capital raisings, garnering investor appetite and determining the optimal price and volume parameters for potential transactions.

RESTRICTION OF PUBLICATION OF PART CLAIMED

11. As a result, through my experience and interactions with investors as well as sales and syndication colleagues, I have developed an intimate understanding of the factors that are likely to influence investor considerations and ultimately drive price and volume outcomes in relation to debt and equity capital raising transactions.
12. In addition to the successfully executed transactions, I have also been involved as an adviser on a vast number of potential transactions which were ultimately not completed for various commercial reasons.
13. Prior to my time at Deutsche Bank, I was with Citi within its London office where I advised various European financial institutions on M&A and capital raising transactions. Previously I was a management consultant with consulting actuaries, Tillinghast–Towers Perrin, where I spent time within their Sydney, Cape Town and London offices.
14. I hold a Bachelor of Economics (with First Class Honours) from the Australian National University and qualified as a Fellow of the Actuaries Institute (Australia) in 1999, as a Fellow of the Faculty and Institute of Actuaries (UK) in 2000, and as a Graduate of the Australian Institute of Company Directors in 2017.
15. A copy of my curriculum vitae is included in **Appendix B**.

1.3 Acknowledgements

16. This Report sets out my independent opinion of the matters herein which is based wholly or substantially on my specialised knowledge arising from my training, study or experience, having regard to the relevant facts relating to the matters and giving due consideration to the prevailing market circumstances.
17. I have been provided with a copy of the Federal Court of Australia Expert Evidence Practice Note (**GPN-EXPT**), including the Harmonised Expert Witness Code of Conduct, which I have read, understood and agree to be bound by.
18. A copy of the Expert Evidence Practice Note (GPN-EXPT), including the Harmonised Expert Witness Code of Conduct, is included in **Appendix E**.

1.4 Limitations

19. I declare that, in forming the opinions contained in this Report, I have made all the inquiries and investigations which I believe are desirable, appropriate (other than any limitations or matters explicitly identified within this Report), and that no matters of significance which I regard as relevant or are likely to have a material impact on the opinions contained herein have, to my knowledge, been omitted from this report.

1.5 Definitions and capitalised terms

20. Unless otherwise defined in this Report, any defined or capitalised terms within this Report have the same meaning as defined or described in the relevant document within the Commissioning Letter or Information Materials as applicable, where such defined or capitalised terms are used.

1.6 Report structure

21. A brief background to the Proposed Acquisition and the current credit ratings of each of ANZ, Suncorp Bank and BEN, is provided in Section 2.
22. The questions addressed in this report are set out in Section 3.
23. An Executive Summary of my observations and opinions is set out in Section 4.

RESTRICTION OF PUBLICATION OF PART CLAIMED

24. Section 5 includes an overview of the approach I have taken in conducting my analysis.
25. Section 6 includes an overview of the key balance sheet funding components that are used as the starting basis for my analysis.
26. My observations and opinions on the estimated implications for the availability and cost of wholesale or institutional funding under the alternative scenarios are covered in Sections 7 and 8, as follows:
 - Section 7 covers the implications for medium to long term debt capital markets funding; and
 - Section 8 covers the implications for short term wholesale funding and wholesale term deposit funding.
27. My observations and opinions on the potential value implications of the impact on availability and cost of wholesale funding under each of the alternative scenarios is set out in Section 9.
28. My observations and opinions in relation to the relative funding stability of different sources of funding, is set out in Section 10.

RESTRICTION OF PUBLICATION OF PART CLAIMED

Section 2 – Background

2.1 Proposed acquisition of Suncorp Bank by ANZ

29. On 18 July 2022, ANZ announced that it had agreed to acquire 100% of Suncorp Bank from Suncorp Group Limited (**SUN**).
30. The agreed purchase price of \$4.9 billion represents a price to earnings (**P/E**) multiple of 13.8x pre-synergies or 9.3x post full run-rate synergies.¹
31. The Proposed Acquisition is subject to regulatory approvals, including Federal Treasurer approval and Australian Competition and Consumer Commission (**ACCC**) authorisation.
32. ANZ has submitted an application for merger authorisation of the Proposed Acquisition to the ACCC (**Authorisation Application**). In making its decision, the ACCC will consider a range of factors including the likely hypothetical alternative to the Proposed Acquisition (the **Counterfactual**).
33. The Counterfactual put by the parties is that absent the Proposed Acquisition, Suncorp Group would continue to hold Suncorp Bank.
34. In its submission to the ACCC dated 3 March 2023 and published on the ACCC's public register on 24 March 2023, Bendigo and Adelaide Bank (**BEN**), posits an alternative counterfactual of a regional merger between BEN and Suncorp Bank (**BEN Submission**). BEN submits that this would likely result in a credit rating uplift through the increased scale and revenue base it would gain through acquiring Suncorp Bank which would reduce its wholesale funding costs and improve access to funding markets, thereby enhancing its ability to challenge the Major Banks on pricing.

2.2 Existing credit ratings

35. On 29 June 2022, rating agency Standard & Poor's (**S&P**) issued a rating action announcement downgrading Suncorp Bank's from AA-/Stable/A-1+ to A+/Negative/A-1.² This represented a one notch downgrade of both Suncorp Bank's long term and short term credit ratings, as well as placing the lowered credit rating on 'negative outlook'.³
36. On 19 July 2022, S&P issued a further rating action affirming the Suncorp Group holding company rating at A+ and revising the outlook to 'negative'.⁴
37. The current ratings assessments by S&P, Moody's and Fitch for each of ANZ, Suncorp Bank and BEN are as set out in Table 2.1 below.

¹ ANZ investor presentation released on ASX (18 July 2022).

² A+/Negative/A-1 denotes a long term rating of A+ with a negative outlook and a short term rating of A-1.

³ The assignment of a 'negative outlook' on Suncorp Bank reflects a one-in-three potential for further downgrade in the next two years.

⁴

RESTRICTION OF PUBLICATION OF PART CLAIMED

Table 2.1: Credit ratings (as at 12 April 2023)

	ANZ	SUN (Bank)	BEN
Standard & Poor's			
▪ Long term (LT) snr unsecured	AA- (stable)	A+ (positive)	BBB+ (positive)
▪ Short term (ST)	A-1+	A-1	A-2
▪ Subordinated debt	BBB+	A- / BBB+ ⁵	BBB-
Moody's			
▪ LT senior unsecured	Aa3 (stable)	A1	A3 (stable)
▪ Short term	P-1	P-1	P-1
▪ Subordinated debt	Baa1	--	Baa2
Fitch			
▪ LT senior unsecured	A+ (stable)	A+	A- (stable)
▪ Short term	F1	F1	F2
▪ Subordinated debt	A-	--	BBB

38. I have been asked to assume that the long-term credit ratings for BEN following an acquisition of Suncorp Bank would be [REDACTED]

39. [REDACTED]

⁵ Suncorp's subordinated debt is issued by Suncorp Group Ltd. Suncorp Group Ltd's current S&P senior unsecured rating is A+. Suncorp Group's subordinated debt is rated A- (for 10NC5 sub-debt) and BBB+ (for 15NC5 sub-debt with optional coupon deferral features).

RESTRICTION OF PUBLICATION OF PART CLAIMED

Section 3 – Questions

3.1 Issue 1

40. I have been asked to consider two possible alternatives to the Proposed Acquisition:

- a) *a hypothetical acquisition by BEN of Suncorp Bank via a cash and scrip offer. That transaction would involve the demerger of Suncorp Bank from Suncorp Group Limited (**BEN Counterfactual**); and*
- b) *Suncorp Bank continuing under the ownership of Suncorp Group.*

41. Using the acquisition of Suncorp Bank by ANZ as the base case, I have been instructed to prepare an expert report giving my expert opinion on:

- a) **Question 1** – *The availability and cost of funding for Suncorp Bank under Suncorp Group ownership.*
- b) **Question 2** – *The availability and cost of funding for BEN following the acquisition of Suncorp Bank.*

42. For the purposes of preparing my opinion, I have been asked to assume the following credit ratings for BEN under the BEN Counterfactual: [REDACTED]

3.2 Issue 2

Question 3 – *Please comment on the submissions by BEN about the relative stability of retail deposits compared with wholesale funding as set out at pages 16 and 46 of the BEN Submission.*

Section 4 – Executive Summary

4.1 Starting balance sheet and funding mix

43.

[Redacted]

44.

[Redacted]

4.2 Availability and cost of long-term wholesale debt

45.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

4.2.1 Availability of long-term wholesale debt

46.

[Redacted]

47.

[Redacted]

[Redacted]

[Redacted]

[Redacted]

48.

[Redacted]

⁶ SML.0003.0001.0746

⁷

[Redacted]

RESTRICTION OF PUBLICATION OF PART CLAIMED

- [REDACTED]
- [REDACTED]
- [REDACTED]

49.

[REDACTED]

50.

[REDACTED]

51.

[REDACTED]

52.

[REDACTED]

53.

[REDACTED]

54.

[REDACTED]

4.2.2 *Relative cost of long-term wholesale debt*

55.

[REDACTED]

■ [REDACTED]

■ [REDACTED]

56.

[REDACTED]

[REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

[REDACTED]

57. [REDACTED]

58. [REDACTED]

[REDACTED]

[REDACTED]

59. [REDACTED]

[REDACTED]

[REDACTED]

60. [REDACTED]

4.3 Availability and cost of short-term wholesale debt and wholesale term deposit funding

61. [REDACTED]

[REDACTED]

[REDACTED]

4.3.1 Availability of short-term wholesale debt and wholesale term deposits

62. [REDACTED]

63. [REDACTED]

[REDACTED]

⁹

[REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

- [REDACTED]
- 64. [REDACTED]
- 65. [REDACTED]
- 66. [REDACTED]
- 67. [REDACTED]
- 68. [REDACTED]

4.3.2 Incremental cost of short-term wholesale debt and wholesale term deposits

- 69. [REDACTED]
- 70. [REDACTED]
- 71. [REDACTED]
- 72. [REDACTED]
- 73. [REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

4.4 Valuation implications

74.

[Redacted]

[Redacted]

[Redacted]

75.

[Redacted]

[Large redacted block]

76.

[Redacted]

[Redacted]

[Redacted]

RESTRICTION OF PUBLICATION OF PART CLAIMED

4.5 Funding stability

77. In the BEN Submission, it suggests that BEN's funding profile is generally more stable and less susceptible to economic shocks than Suncorp Bank, because its funding predominantly comprises retail deposits and it has relatively lower exposure to more volatile wholesale funding markets.¹⁰
78. In my opinion, a funding profile predominantly comprising retail deposits is not necessarily, always more stable and less susceptible to economic shocks than a funding profile that includes a relatively greater proportion of wholesale funding.
79. In my opinion, the view that customer deposits are a more stable funding source than wholesale funding is an over-simplification of the relative merits of different funding sources. Indeed, depending on the bank's business mix and credit profile, a diverse mix of funding sources can often provide the most appropriate balance between cost, funding stability and resilience to economic shocks, in order to best meet the bank's cash flow and liquidity requirements.
80. Under APRA liquidity standards, both Suncorp Bank and BEN are required to maintain a Net Stable Funding Ratio (**NFSR**) of at least 100%. In my opinion, the NSFR calculation provides a more appropriate measure of funding stability than simply considering the proportion of retail deposit funding.

81. [REDACTED]
82. [REDACTED]
83. [REDACTED]
84. [REDACTED]
85. [REDACTED]

¹⁰ Refer BEN Submission (Section 4.6, page 16 and Section 7.3, page 46).

Section 5 – Approach to analysis

5.1 Modelling and analysis

86. Any estimate of the potential impact to the availability and cost of funding under the two possible alternative scenarios to the Proposed Acquisition necessarily involves elements of both quantitative analysis and qualitative assessment.
87. I have based the quantitative analysis in this report on market observed data, publicly available company information and certain company specific information provided to me as listed in Attachment 3 of the Commissioning Letter.
88. I note that, other than as listed in Attachment 3 of the Commissioning Letter, I have not had access to any detailed internal company information that may be available from the relevant company's management information systems. Accordingly, in the preparation of this report, I have carried out analysis which includes simplified modelling techniques and, in certain instances, approximations and simplifying assumptions.
89. The modelling and analysis that I have conducted was necessarily less detailed and less sophisticated than that which may have been possible with access to more detailed company specific information. However, I believe that the modelling and analysis that I have conducted is reliable for the purposes of the questions I have been asked. I also believe that any assumptions and approximations that I have made, including any simplification of modelling techniques, are reasonable and produce results that are not materially different to the results that I would expect to produce with more detailed and sophisticated modelling and analysis.
90. Furthermore, where I was required to make assumptions that were subjective or required the application of professional judgement, I have erred towards assumptions that I believe would, on balance and taken as a whole, be more likely to result in a lower anticipated impact on the availability or cost of funding under each of the alternative scenarios.
91. To the extent that my observations and opinions in this report are based on qualitative assessments, those assessments are based on my professional judgement resulting from my extensive experience as a corporate finance and capital markets adviser to banks and financial institutions both within Australia and internationally.

5.2 Initial balance sheet

92. [REDACTED]
93. [REDACTED]
94. [REDACTED]

¹¹ SML.0003.0001.0746

RESTRICTION OF PUBLICATION OF PART CLAIMED

95.

5.3

Areas of focus

96.

I have focussed my analysis and observations on the expected impacts on potential availability and cost of funding sourced from institutional (or wholesale) investors. In particular, I have considered the following funding sources currently utilised by Suncorp Bank:

- i. **Debt capital markets funding** – comprising medium to long term senior unsecured borrowings, covered bonds, securitisation, Tier 2 subordinated debt and Additional Tier 1 (**AT1**) capital note issuance;
- ii. **Short term wholesale funding** – comprising short-term borrowings sourced from the US commercial paper market (**USCPs**) and negotiable certificates of deposit (**NCDs**); and
- iii. **Wholesale term deposits** – comprising term deposits sourced from wholesale or institutional investors.

Section 6 – Balance sheet and funding mix

6.1 Suncorp Bank's standalone balance sheet and funding mix

97.

[Redacted]

[Redacted]

98.

[Redacted]

RESTRICTION OF PUBLICATION OF PART CLAIMED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12

13

14

RESTRICTION OF PUBLICATION OF PART CLAIMED

[REDACTED]

[REDACTED]

105. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

106. [REDACTED]

107. [REDACTED]

7.1.2 Availability of covered bond funding

108. [REDACTED]

109. [REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

110.

[REDACTED]

111.

[REDACTED]

112.

[REDACTED]

113.

[REDACTED]

7.1.3 Availability of securitisation funding

114. Securitisation is the process of pooling and packaging certain designated assets and selling interest bearing debt securities that are collateralised with those assets. The most common form of securitisation is residential mortgage backed securitisation (**RMBS**), wherein a designated pool of mortgages over residential homes are packaged into debt securities and sold to investors in the debt capital markets.

115.

[REDACTED]

116.

[REDACTED]

117.

[REDACTED]

118.

[REDACTED]

119.

[REDACTED]

120.

[REDACTED]

121.

[REDACTED]

¹⁷ *Banking Act 1959 (Cth)*, Section 28.

RESTRICTION OF PUBLICATION OF PART CLAIMED

122.

123.

124.

7.1.4 Availability of Tier 2 subordinated debt funding

125.

126.

7.1.5 Availability of Additional Tier 1 capital

127.

128.

7.2 Relative cost of long-term wholesale senior debt

129.

In order to estimate the relative cost of long-term senior wholesale debt, I analysed the current trading levels of existing senior unsecured bond issuance by ANZ, Suncorp Bank and BEN. In particular, I reviewed all current outstanding²³ AUD floating rate senior unsecured debt issuance by both Suncorp Bank and BEN, and all AUD floating rate senior unsecured debt issuance by ANZ since 2019. The complete list of floating rate bonds reviewed is set out in **Appendix C**.

130.

I reviewed only floating rate debt transactions for this analysis because:

- the vast majority of AUD senior unsecured debt issuance by these banks is in floating rate format; and

¹⁸ Refer *Covered Bonds in Australia*, RBA Bulletin September Quarter 2017 (Footnote 13, page 55)

¹⁹ Suncorp 1H23 Financial Results Investor Pack (Page 41).


²⁰

²¹ BEN 1H23 Financial Results.

²² BEN 1H23 Financial Results.

²³ As at 7 April 2023.

RESTRICTION OF PUBLICATION OF PART CLAIMED

- although the pricing (i.e. credit spread) of fixed rate bonds is expected to be largely consistent with corresponding floating rate pricing at the time of issuance, a review of trading margins of historically issued fixed rate bonds can produce distorted results (compared against corresponding floating rate bonds) as interest rates move up or down.
131. Accordingly, in my opinion, a review of trading margins of floating rate bonds provides a more accurate reflection of current market pricing relativities than a review of trading margins of fixed rate bonds. This is particularly so given the recent period of increases in AUD interest rates.
132. Chart 7.1 below shows the current credit margins of existing outstanding AUD floating rate bonds issued by ANZ, Suncorp Bank and BEN plotted against the remaining outstanding tenor for each bond. A polynomial regression line of best fit is included for each issuer to illustrate the indicative relative credit spreads for any given outstanding tenor.
-
- 

133. 

²⁴ Current trading margins as at 7 April 2023.

RESTRICTION OF PUBLICATION OF PART CLAIMED

134.

[REDACTED]

135.

[REDACTED]

136.

[REDACTED]

137.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

138.

[REDACTED]

25

[REDACTED]

28

29

RESTRICTION OF PUBLICATION OF PART CLAIMED

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

139. Although relative credit spreads in the USD bond markets will not necessarily align with relative credit spreads in the AUD bond markets, I consider the above USD financials indices to provide a helpful guide of the relative value placed by debt investors on bonds issued by borrowers of differing ratings, over different points in time during the credit cycle.

140. In particular, it can be observed that the credit spread differentials between financial issuers across ratings categories has been within reasonably consistent ranges over the past five years, albeit:

- a general increase in both the absolute levels and the volatility of credit spread differentials can be observed over the past year; and
- credit spread differentials had increased sharply in early 2020 with general credit market volatility arising from the onset of the global COVID-19 pandemic.

141.

[REDACTED]

142.

[REDACTED]

143.

[REDACTED]

144.

[REDACTED]

145.

[REDACTED]

146.

[REDACTED]

147.

[REDACTED]

[REDACTED]

[REDACTED]

148.

[REDACTED]

7.2.1 *Recent senior unsecured new issue pricing*

149. In addition to the above review of current secondary trading levels of existing senior unsecured bond issuance by ANZ, Suncorp Bank and BEN, I also reviewed recent new issuance of senior unsecured debt by Suncorp Bank, BEN and an Australian major bank.
150. In particular, on 10 May 2023, Suncorp Bank priced AUD1.0 billion of 3 year senior unsecured bonds across two tranches comprising:
- AUD750 million 3 year senior unsecured floating rate bonds priced at a margin of 105bps over 3 month BBSW; and
 - AUD250 million 3 year senior unsecured fixed rate bonds priced at a margin of 105bps over the 3 year mid-swap rate.
151. Earlier that week, on 8 May 2023, BEN priced AUD750 million of 3 year senior unsecured bonds, comprising:
- AUD550 million 3 year senior unsecured floating rate bonds priced at a margin of 125bps over 3 month BBSW; and
 - AUD200 million 3 year senior unsecured fixed rate bonds priced at a margin of 125bps over the 3 year mid-swap rate.
152. In the preceding week, on 4 May 2023, National Australia Bank (**NAB**) (rated Aa3/AA-/A+ by Moody's/S&P/Fitch) priced AUD5.25 billion of senior unsecured debt, comprising:
- AUD2.0 billion 3 year senior unsecured floating rate bonds priced at a margin of 78bps over 3 month BBSW;
 - AUD350 million 3 year senior unsecured fixed rate bonds priced at a margin of 78bps over the 3 year mid-swap rate;
 - AUD2.35 billion 5 year senior unsecured floating rate bonds priced at a margin of 100bps over 3 month BBSW; and
 - AUD550 million 5 year senior unsecured fixed rate bonds priced at a margin of 100bps over the 5 year mid-swap rate.

RESTRICTION OF PUBLICATION OF PART CLAIMED

153. I believe the senior unsecured pricing for NAB to be a very close comparable to senior unsecured pricing for ANZ, given their identical ratings and broadly consistent credit assessments, as perceived by institutional debt investors.

154. It can be observed that:

- the pricing differential between the NAB and Suncorp Bank 3 year senior unsecured bonds is 27bps (being the difference between the 105bps issue margin for the Suncorp Bank 3 year bonds and the 78bps issue margin for the NAB 3 year bonds);³⁰
- the pricing differential between the Suncorp Bank and BEN 3 year senior unsecured bonds is 20bps (being the difference between the 125bps issue margin for the BEN 3 year bonds and the 105bps issue margin for the Suncorp Bank 3 year bonds); and
- the pricing differential between the NAB and BEN 3 year senior unsecured bonds is 47bps (being the difference between the 125bps issue margin for the BEN 3 year bonds and the 78bps issue margin for the NAB 3 year bonds).

155.

[REDACTED]

156.

[REDACTED]

157.

[REDACTED]

158.

[REDACTED]


7.3 Relative cost of covered bond funding

159. Although covered bonds are typically rated AAA, there are still differences between the pricing of covered bonds for bank issuers of different underlying credit profiles.

160. This is primarily because, in the case of a covered bond issuance, investors have recourse to both the underlying collateral pool as well as the issuing bank. Therefore, the credit profile of the issuing bank is relevant in investor decision making and ultimately in the pricing outcome.

³⁰ I have compared the 3 year senior unsecured bond pricing for each of the banks to ensure a like-for-like tenor comparison across each of the banks.

RESTRICTION OF PUBLICATION OF PART CLAIMED

161. Having said that, the relative price differential for covered bonds is expected to be lower than that for senior unsecured bonds.
162. In order to assess the price differential for covered bond issuance, I compared the most recent AUD fixed rate covered bond issuances by Suncorp Bank and BEN.³¹
163. Suncorp Bank issued a \$200 million 3yr fixed rate covered bond maturing on 17 October 2025, which was priced on 11 October 2022 with a coupon rate of 4.85% (with an implied credit margin of 88bps over the 3yr AUD mid-swap rate).³²
164. Several weeks later, BEN also issued a \$200 million 3yr fixed rate covered bond maturing on 11 November 2025, which was priced on 3 November 2022 with a coupon rate of 5.10% (with an implied credit margin of 95bps over the 3yr AUD mid-swap rate).³³
165. 
166. In my opinion, the most appropriate barometer for Australian investment grade credit market conditions for this purpose is the Markit Itraxx index. The Markit Itraxx is composed of five-year credit default swaps (**CDS**) for the 25 most liquid and highly traded investment grade Australian entities in the market.
167. Table 7.2 below shows the relative pricing differential between the most recent Suncorp Bank covered bond and the most recent BEN covered bond issuance, adjusted for the change in the Markit Itraxx since the relevant issue dates.

31



32

33



RESTRICTION OF PUBLICATION OF PART CLAIMED

[REDACTED]

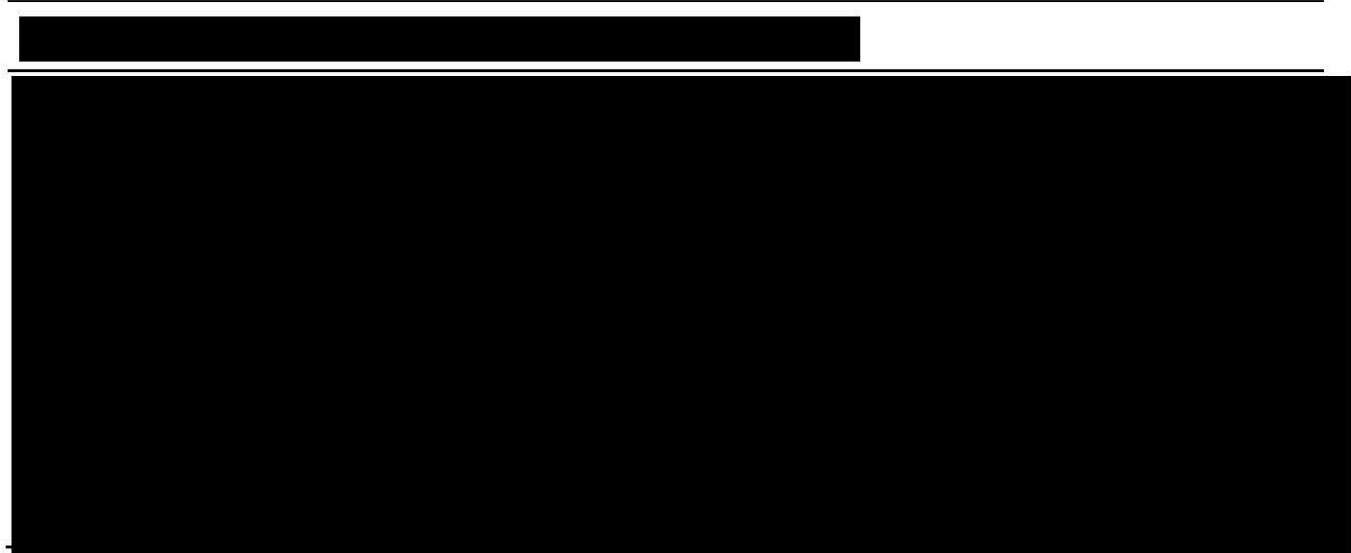
168. [REDACTED]

169. [REDACTED]

[REDACTED]

[REDACTED]

170. [REDACTED]



7.4 Relative cost of securitisation funding

- 171. Although the most senior tranches of securitisation issuance are expected to be rated AAA, the weighted average funding cost for securitisation issuance will be greater than for covered bond issuance because of the higher margins associated with the junior tranches. Accordingly, the blended cost differential for securitisation funding is expected to be greater than that for covered bond funding.
- 172. For the purposes of my analysis, I have conservatively estimated the pricing differential for securitisation funding as being the same as that for covered bond funding.
- 173. Table 7.4 below shows the estimated annualised incremental cost of securitisation funding for Suncorp Bank under each of the alternative scenarios, relative to the base case of the Proposed Acquisition, assuming that the pricing differential for covered bond funding also applies to securitisation funding.



RESTRICTION OF PUBLICATION OF PART CLAIMED

7.5 Relative cost of Tier 2 subordinated debt

174. To estimate the relative cost of Tier 2 subordinated debt funding, I have reviewed the current trading levels of AUD floating rate Tier 2 sub-debt issued by ANZ, Suncorp and BEN.
175. In particular, I considered the current trading level of ANZ's \$1.25 billion 10NC5 sub-debt issuance from August 2020 which is callable in February 2026 (i.e. a remaining tenor to call date of 2.9 years).
176. Because the transaction sizes of the Suncorp and BEN Tier 2 sub-debt bonds are significantly smaller than that for ANZ (and are therefore expected to exhibit lower trading liquidity), I reviewed two Suncorp and BEN Tier 2 sub-debt instruments, in each case with remaining tenors on either side of the ANZ sub-debt instrument.
177. I note that Tier 2 bonds issued by Suncorp Group are 15NC5 structures with optional coupon deferral as opposed to the ANZ and BEN Tier 2 instruments which are 10NC5 structures with no optional coupon deferral. The Suncorp Tier 2 instruments are therefore rated one notch lower by S&P than they would otherwise be rated if they were structured as 10NC5 instruments consistent with the ANZ and BEN structures.
178. Accordingly, I have applied a structure adjustment of 10bps to the Suncorp Tier 2 instruments in order ensure a consistent like-for-like comparison.
179. Table 7.5 below shows the relative pricing differential between the respective AUD floating rate Tier 2 sub-debt instruments, with the appropriate adjustments for structure and tenor.
-
- [REDACTED]
-
- [REDACTED]

180. Based on my experience in the debt capital markets and having regard to the relative pricing differential between the respective Tier 2 sub-debt bonds, I estimate the average (through the cycle) credit margin differentials for AUD Tier 2 sub-debt as being:

RESTRICTION OF PUBLICATION OF PART CLAIMED

181.

[REDACTED]

7.6 Relative cost of AT1 capital

182.

[REDACTED]

183.

[REDACTED]

184.

[REDACTED]

185.

[REDACTED]

186.

[REDACTED]

187.

[REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

[REDACTED]

[REDACTED]

[REDACTED]

188.

[REDACTED]

[REDACTED]

[REDACTED]

Section 8 – Short term wholesale funding

8.1 Availability of short-term wholesale funding

189.

[REDACTED]

[REDACTED]

[REDACTED]

190.

[REDACTED]

191.

[REDACTED]

8.1.1 Availability of USCP and NCD funding

192.

[REDACTED]

[REDACTED]

193.

[REDACTED]

194.

[REDACTED]

³⁴ Suncorp Bank Asset and Liability Committee Paper dated 30 June 2022 (SML.0003.0001.1184).

RESTRICTION OF PUBLICATION OF PART CLAIMED

195.

[REDACTED]

196.

[REDACTED]

197.

[REDACTED]

198.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

199.

[REDACTED]

200.

[REDACTED]

³⁵ SML.0003.0001.1179.

RESTRICTION OF PUBLICATION OF PART CLAIMED

[REDACTED]

- 201. [REDACTED]
- 202. [REDACTED]
- 203. [REDACTED]
- 204. [REDACTED]
- 205. [REDACTED]

³⁶ Suncorp Bank Asset and Liability Committee Paper, dated 30 June 2022 (SML.0003.0001.1184).

³⁷ BEN FY22 Annual Report (page 83).

[REDACTED]

8.1.2 Availability of wholesale term deposit funding

- 206. [REDACTED]
- 207. [REDACTED]
- 208. [REDACTED]
- 209. [REDACTED]
- 210. [REDACTED]
- 211. [REDACTED]

³⁸ Refer APRA Prudential Standard APS 210 Liquidity.

³⁹ [REDACTED]

⁴⁰ [REDACTED]

⁴¹ [REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

212.

[REDACTED]

8.2 Incremental cost of replacing short-term wholesale funding

213.

[REDACTED]

214.

[REDACTED]

215.

[REDACTED]

216.

[REDACTED]

⁴²

[REDACTED]

⁴³ A repo is an agreement between two parties under which one party sells an asset to the other for cash proceeds, with a commitment to buy back the asset at a later date for a specified price. The difference between the sale and repurchase purchase price reflects the rate of interest to be earned by the cash provider. Repos play a significant role within the domestic financial market with the Reserve Bank of Australia typically taking the role of the cash provider to assist banks in managing large or varying cash and liquidity requirements.

RESTRICTION OF PUBLICATION OF PART CLAIMED

- [REDACTED]
- 217. [REDACTED]
- [REDACTED]
- 218. [REDACTED]
- 219. [REDACTED]
- 220. [REDACTED]
- 221. [REDACTED]
- 222. [REDACTED]
- 223. [REDACTED]
- 224. [REDACTED]
- [REDACTED]
- 225. [REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

226.

[REDACTED]

227.

[REDACTED]

228.

[REDACTED]

229.

[REDACTED]

230.

[REDACTED]

[REDACTED]

[REDACTED]

45

[REDACTED]

Section 9 – Valuation implications

9.1 Aggregate incremental cost of wholesale funding

231.

[REDACTED]

[REDACTED]

9.2 Estimated valuation impact

232.

[REDACTED]

233.

[REDACTED]

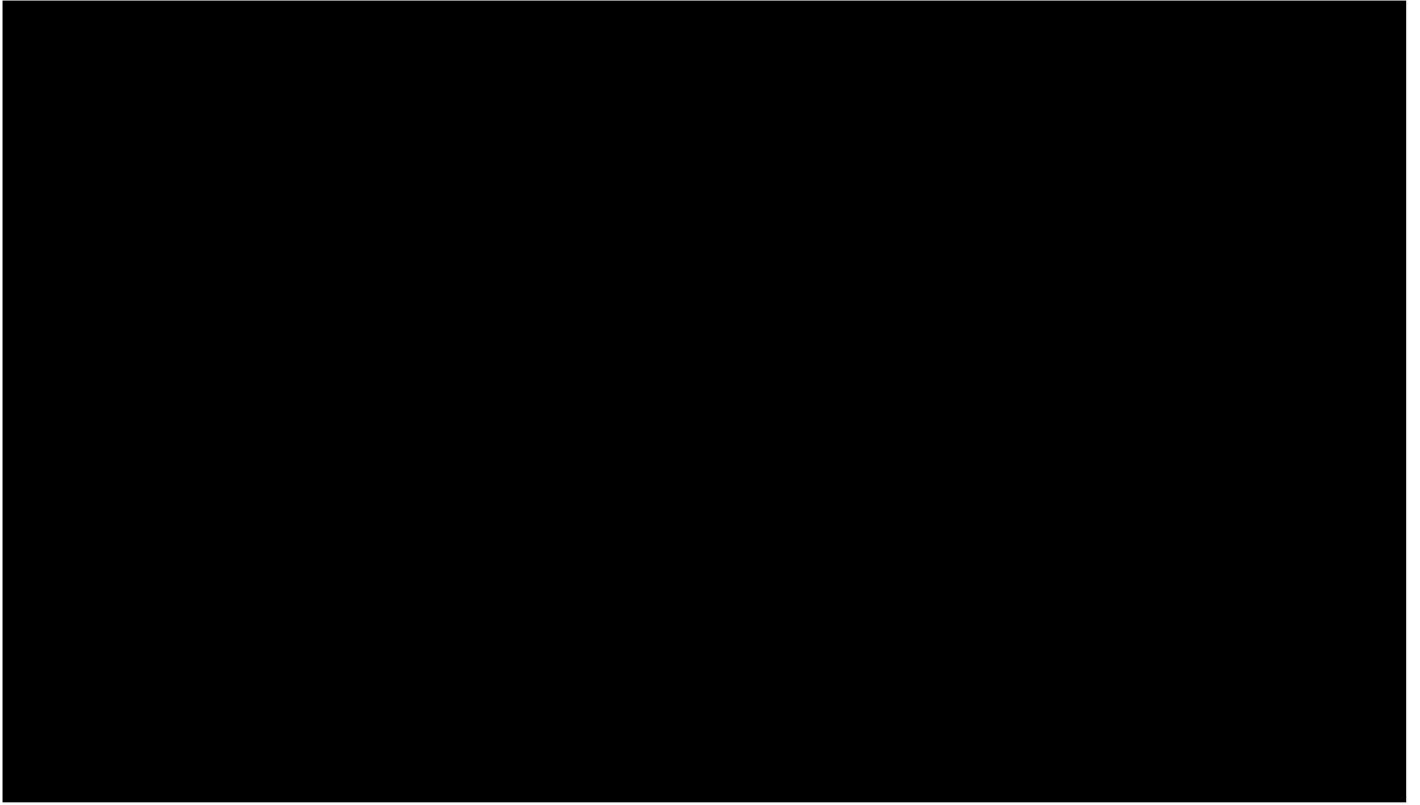
[REDACTED]

[REDACTED]

234.

[REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED



RESTRICTION OF PUBLICATION OF PART CLAIMED

Section 10 – Funding stability

10.1 Relative stability of deposit funding

235. In the BEN Submission it states that, *“BEN has a relatively lower exposure to more volatile wholesale funding markets because it sources its funding primarily through deposits due to its strong customer deposit franchise”*.⁴⁶
236. Whilst it is correct that BEN has a relatively lower exposure to wholesale funding markets because it sources its funding primarily through deposits, I do not agree that deposit funding is necessarily always more stable than wholesale funding.
237. Although deposit funding generally exhibits greater stability than short-term wholesale funding, medium to long term wholesale funding can also provide banks with a relatively high degree of funding stability.
238. In certain circumstances, medium to long-term wholesale funding can provide greater funding stability than customer deposits, for example during periods of severe distress such as in the case of a bank run⁴⁷.
239. Banks require funding stability in order to help mitigate the risk of a liquidity crisis and it is precisely during such a crisis when a bank’s customer deposits (and in particular, at call deposits) are most susceptible to withdrawal. An extreme case of a bank run can lead to insolvency as exemplified by the recent collapse of Silicon Valley Bank⁴⁸, which was the biggest bank run in history.
240. In the BEN Submission, it goes on to state that, *“A funding profile predominantly comprising retail deposits, for example, is generally more stable and less susceptible to economic shocks than a funding profile heavily reliant on wholesale funding... [and] ...BEN has a high proportion of retail deposits (~73% in FY22) and so would a BEN/Suncorp merged entity”*.⁴⁹
241. In my opinion, a funding profile predominantly comprising retail deposits is not necessarily always more stable and less susceptible to economic shocks than a funding profile that includes a relatively greater proportion of wholesale funding.
242. An assessment of a bank’s funding stability is necessarily complex and requires a detailed understanding of both the bank’s asset and liability sides of its balance sheet. However, in my opinion, the statement that customer deposits are a more stable funding source than wholesale funding, is an over-simplification of the relative merits of different funding sources.
243. Indeed, depending on the bank’s business mix and credit profile, a diverse mix of funding sources can often provide the most appropriate balance between cost, funding stability and resilience to economic shocks, in order to best meet the bank’s cash flow and liquidity requirements.

⁴⁶ BEN Submission to the Australian Competition & Consumer Commission opposing merger authorisation, 3 March 2023 (Section 4.6, page 16).

⁴⁷

⁴⁸

⁴⁹ BEN Submission to the Australian Competition & Consumer Commission opposing merger authorisation, 3 March 2023 (Section 7.3, page 46).

RESTRICTION OF PUBLICATION OF PART CLAIMED

10.1.1 Net Stable Funding Ratio

244. Under APRA liquidity standards, both Suncorp Bank and BEN are required to maintain an NFSR of at least 100%.⁵⁰
245. The NSFR requirements under APRA's prudential standards are derived from the corresponding liquidity requirements introduced under Basel III by the Basel Committee on Banking Supervision (**BCBS**).⁵¹
246. The NSFR is a significant component of the Basel III reforms designed to promote longer-term liquidity resilience, by requiring banks to fund their activities with more stable sources of funding in order to mitigate the risk of future funding stress.
247. The NSFR is defined as the amount of Available Stable Funding (**ASF**) relative to the amount of Required Stable Funding (**RSF**). Under APRA's liquidity standards, banks that are subject to the NSFR requirements are expected to maintain an appropriate buffer above their required NFSR, in line with their liquidity risk tolerance.
248. The ASF is the portion of capital and funding expected to be reliably provided over a one-year time horizon. The RSF is the minimum amount of stable funding a bank is required to hold based on the liquidity characteristics and residual maturities of the bank's various assets and off-balance sheet exposures.
249. Consistent with the Basel III regulations, the NSFR is calculated based on regulatory defined categorisations and weightings assigned to each category of the various assets and funding liabilities on the bank's balance sheet, as specified under the APRA liquidity standard.
250. Although the NSFR may not provide a comprehensive picture of funding and liquidity risk for a bank⁵², in my opinion, the NSFR calculation provides a more appropriate measure of funding stability than simply considering the proportion of retail deposit funding, because:
- the NSFR calculation is determined based on the profile of both the asset and liability sides of the bank's balance sheet; and
 - the NSFR calculation is determined based on the funding type and counterparty as well as the funding tenor of the bank's respective funding profile.
251. Chart 10.1 below illustrates the comparison of the retail deposit proportion versus the reported NSFR for each of Suncorp Bank and BEN (as at 30 June 2022).
252. [REDACTED]

⁵⁰ Refer APRA Prudential Standard APS 210 Liquidity. APRA may require banks to maintain a higher NSFR where it considers it appropriate to do so.

⁵¹ Refer Basel III – Net Stable Funding Ratio (<https://www.bis.org/bcbs/publ/d295.htm>).

⁵² [REDACTED]

RESTRICTION OF PUBLICATION OF PART CLAIMED

[REDACTED]

- 253. [REDACTED]
- 254. [REDACTED]
- 255. [REDACTED]



10.2 Stable versus less stable deposits

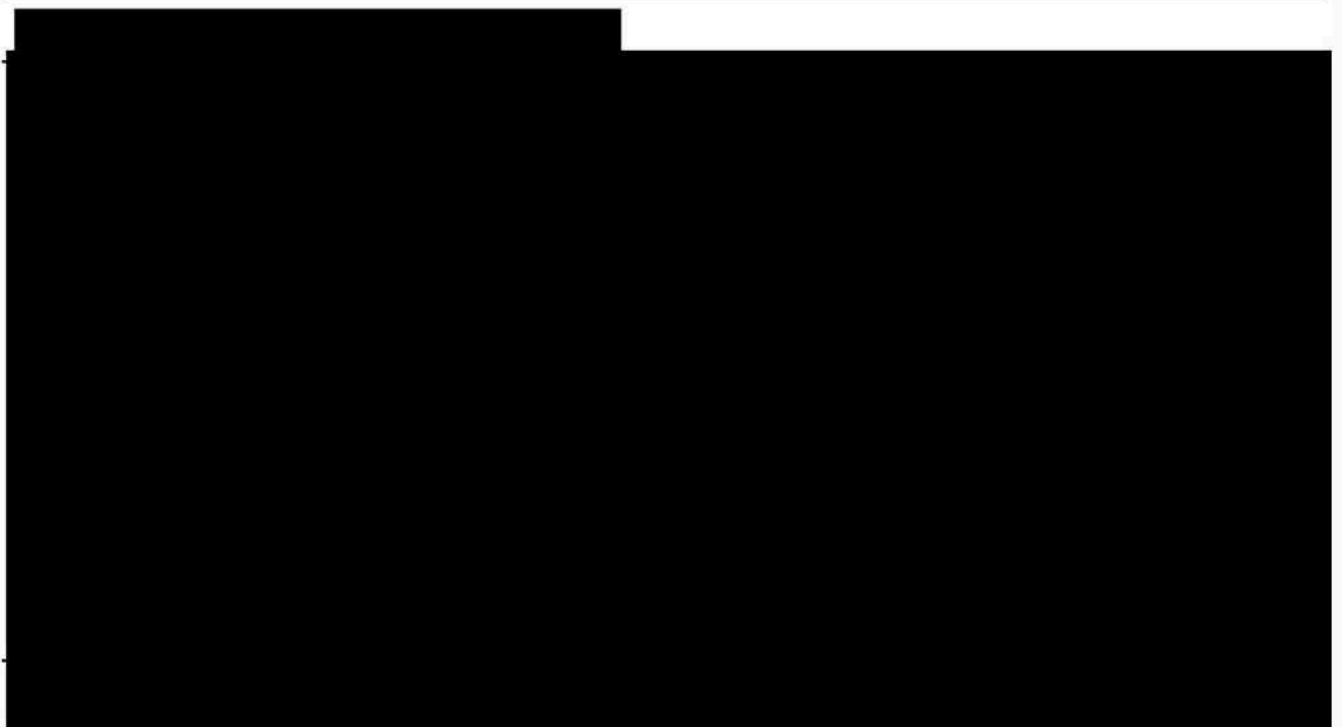
256. [REDACTED]
257. Under APRA's liquidity standard, the calculation of the ASF in the determination of the NSFR, requires banks to categorise its deposit funding sourced from retail and small to medium enterprise (**SME**) customers, into 'stable deposits' and 'less stable deposits'.⁵³
258. Stable deposits are broadly, the portion of deposits sourced from retail and SME customers, that are fully covered by the Financial Claims Scheme (**FCS**)⁵⁴ and where:
- the depositor has other established relationships with the bank that make deposit withdrawal highly unlikely; or
 - the deposits are in transactional accounts (e.g. accounts where salaries are automatically credited).
259. Less stable deposits are the portion of deposits sourced from retail and SME customers that do not meet the criteria for stable deposits.

⁵³ APRA APS 210 Liquidity (Attachment C, paragraphs 12-13).

⁵⁴ Refer <https://www.apra.gov.au/financial-claims-scheme-0>.

RESTRICTION OF PUBLICATION OF PART CLAIMED

260. Charts 10.3 and 10.4 below show the historical retail and SME deposit contribution split between stable and less stable deposits for the quarters ended 31 December 2020 to 31 December 2022, for each of Suncorp Bank and BEN respectively.⁵⁵



⁵⁵

[Redacted footnote text]

RESTRICTION OF PUBLICATION OF PART CLAIMED

261.

[REDACTED]

262.

[REDACTED]

263.

[REDACTED]

264.

[REDACTED]

[REDACTED]

265.

[REDACTED]

266.

[REDACTED]

Appendices

RESTRICTION OF PUBLICATION OF PART CLAIMED

Appendix A – Commissioning Letter



HERBERT
SMITH
FREEHILLS

Mr Moz Ali
Managing Director
Theorem Consulting Pty Ltd
51 Alexandra Street
Hunters Hill NSW 2110

16 May 2023
Matter 82730813
By Email

Dear Mr Ali

Expert retainer letter - ANZ proposed acquisition of Suncorp Bank

1 Introduction

We act for Suncorp Group Limited (**Suncorp Group**) in respect of the proposed sale of SGBH Limited, the holding company for Suncorp Metway Limited (**Suncorp Bank**), to Australia and New Zealand Banking Group Limited (**ANZ**) (**Proposed Acquisition**). As a result of the Proposed Acquisition, Suncorp Bank will become a wholly owned subsidiary of ANZ.

On behalf of Suncorp Group we are instructed to seek your expert opinion, in the form of a written report, in connection with the application to the Australian Competition and Consumer Commission (**ACCC**) for merger authorisation for the Proposed Transaction.

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

2 Background

ANZ has submitted an application for merger authorisation of the Proposed Acquisition to the ACCC (**Authorisation Application**). In making its decision, the ACCC will consider a range of factors including the likely hypothetical alternative to the Proposed Acquisition (the **Counterfactual**).

The Counterfactual put by the parties is that absent the Proposed Acquisition, Suncorp Group would continue to hold Suncorp Bank.

In its submission to the ACCC dated 3 March 2023 and published on the ACCC's public register on 24 March 2023, Bendigo and Adelaide Bank (**BEN**), posits an alternative counterfactual of a regional merger between BEN and Suncorp Bank (**BEN Submission**). BEN submits that this would likely result in a credit rating uplift through the increased scale and revenue base it would gain through acquiring Suncorp Bank which would reduce its wholesale funding costs and improve access to funding markets, thereby enhancing its ability to challenge the Major Banks on pricing.

3 Your instructions

Issue 1: You are asked to consider two possible alternatives to the Proposed Acquisition:

- (a) a hypothetical acquisition by BEN of Suncorp Bank via a cash and scrip offer. That transaction would involve the demerger of Suncorp Bank from Suncorp Group Limited (**BEN Counterfactual**); and
- (b) Suncorp Bank continuing under the ownership of Suncorp Group.

Doc 104450686

ANZ Tower 161 Castlereagh Street Sydney NSW 2000 Australia
GPO Box 4227 Sydney NSW 2001 Australia

T +61 2 9225 5000 F +61 2 9322 4000
herbertsmithfreehills.com

RESTRICTION OF PUBLICATION OF PART CLAIMED



HERBERT
SMITH
FREEHILLS

Using the acquisition of Suncorp Bank by ANZ as the base case, you are instructed to prepare an expert report (**Expert Report**) giving your expert opinion on:

- (a) **Question 1** - The availability and cost of funding for Suncorp Bank under Suncorp Group ownership.
- (b) **Question 2** - The availability and cost of funding for BEN following the acquisition of Suncorp Bank.

For the purposes of preparing your opinion, you should assume the following credit ratings for BEN under the BEN Counterfactual: S&P at [REDACTED] Fitch at [REDACTED] and Moody's at [REDACTED]

Issue 2: Question 3 - Please comment on the submissions by BEN about the relative stability of retail deposits compared with wholesale funding as set out at pages 16 and 46 of the BEN submission.

We include a short guide for the preparation of your expert report as Attachment 2 to this letter.

4 Documents provided to you

For the purposes of preparing your Expert Report, we have provided you with copies of the documents described in and enclosed with Attachment 3 to this letter. The document at Tab 3, a number of the documents at Tab 4 and the documents at Tabs 5 to 13 are confidential to Suncorp Group and are marked as such in Attachment 3.

5 Expert witness code of conduct

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.

Your retainer is governed by the Federal Court's Expert Evidence Practice Note (GPN-EXPT) (**Practice Note**). A copy of the Harmonised Expert Witness Code of Conduct (Annexure A to the Practice Note) is attached as Attachment 1 to this letter (**Code**). You should fulfil the duties and responsibilities set out in the Code in undertaking your work and preparing for the presentation of evidence that you may ultimately be required to give.

6 Confidentiality

Your independent expert report and any drafts prepared in accordance with your retainer are confidential and are not to be copied or used for any purpose unrelated to the Proposed Acquisition without our permission.

Material supplied to you by Herbert Smith Freehills is confidential and is not to be copied or used for any purpose unrelated to your retainer without our permission. As appropriate, you must:

- (a) keep all Suncorp Bank and Suncorp Group documents and information you receive secret and confidential at all times, unless those documents or information are publicly available (**Suncorp Confidential Information**);
- (b) only use Suncorp Confidential Information for the purposes of your expert report;
- (c) as required, only disclose Suncorp Confidential Information in a form that is aggregated and does not disclose the granular detail;
- (d) ensure that your report is clearly marked confidential;

RESTRICTION OF PUBLICATION OF PART CLAIMED



HERBERT
SMITH
FREEHILLS

- (e) not disclose, directly or indirectly, any Suncorp Confidential Information to any person other than Herbert Smith Freehills, unless you have prior consent from Herbert Smith Freehills;
- (f) not use the Suncorp Confidential Information other than for the purpose of carrying out your engagement in accordance with Herbert Smith Freehills' instructions;
- (g) only disclose Suncorp Confidential Information to your employees or contractors who need to know the same for the purposes of your engagement and with the prior written permission of Herbert Smith Freehills, and ensure that each such person makes the same acknowledgement, agrees to comply with, your confidentiality undertaking; and
- (h) if required, return all documents, copies and workings at the conclusion or termination of your retainer.

To the extent your expert report refers to information set out in any of the documents enclosed with Attachment 3 which are marked as confidential, 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 Suncorp in **green**. We may provide you with further instructions as to the specific material in your expert report that should be highlighted confidential, once prepared.

7 Communications

All communications, whether verbal or written, should be directed to Linda Evans or Stephanie Panayi.

Yours sincerely



Linda Evans
Partner
Herbert Smith Freehills



Stephanie Panayi
Partner
Herbert Smith Freehills



Herbert Smith Freehills LLP and its subsidiaries and Herbert Smith Freehills, an Australian Partnership ABN 98 773 882 646, are separate member firms of the international legal practice known as Herbert Smith Freehills.

RESTRICTION OF PUBLICATION OF PART CLAIMED



Attachment 1

Harmonised Expert Witness Code of Conduct Federal Court of Australia

Application of Code

- 1 This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

General Duties to the Court

- 2 An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

Content of Report

- 3 Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;
 - (b) an acknowledgement that the expert has read this code and agrees to be bound by it;
 - (c) the qualifications of the expert to prepare the report;
 - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
 - (e) the reasons for and any literature or other materials utilised in support of such opinion;
 - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - (h) the extent to which any opinion which the expert has 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 the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;
 - (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;

RESTRICTION OF PUBLICATION OF PART CLAIMED



HERBERT
SMITH
FREEHILLS

- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

Supplementary Report Following Change of Opinion

- 4 Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
- 5 In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

Duty to Comply with the Court's Directions

- 6 If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

Conference of Experts

- 7 Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.



Attachment 2

Preparation of your expert report

1 Introduction

Your introduction should contain the following information:

- (a) Your name and (business) address.
- (b) An acknowledgement of having read the Expert Evidence Practice Note (GPN-EXPT) (and having agreed to abide by it) and a reference to the appendix or Attachment in which it can be found.
- (c) A summary of your qualifications and experience.
- (d) The scope of your assignment, including:
 - (1) the questions you have been asked;
 - (2) the assumptions (if any) you have been asked to make; and
 - (3) reference to the appendices or attachments in which these are set out.
- (e) A list of people who have assisted you in the preparation of your report, including their qualifications and the roles they played.
- (f) Reference to the appendices or attachments setting out the lists of documents you have relied on, and been supplied with.
- (g) An acknowledgement that your opinions are based wholly or substantially on specialised knowledge arising from your training, study or experience.

2 Summary of opinions

In the case of reports where a number of opinions have been expressed, a summary of your opinions should appear between the introduction and body of the report.

3 Formalities

Each paragraph of the report should be numbered, the pages should be numbered and the report should be in double spacing.

In the course of providing your opinion, you should ensure that you state, specify or provide:

- (a) the assumptions and the material facts on which each opinion expressed in your report is based;
- (b) the reasons for and any literature or other materials utilised in support of each opinion;
- (c) any examinations, tests or other investigations on which you have relied, identifying the person who carried them out and that person's qualifications;
- (d) 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;
- (e) a declaration that you have made all the inquiries which you believe are desirable and appropriate (save for any matters identified explicitly in your

RESTRICTION OF PUBLICATION OF PART CLAIMED



HERBERT
SMITH
FREEHILLS

report), and that no matters of significance which you regard as relevant have, to your knowledge, been withheld;

- (f) any qualifications on an opinion expressed in your report without which your report is or may be incomplete or inaccurate; and
- (g) whether any opinion expressed in your report is not a concluded opinion because of insufficient research or insufficient data or for any other reason;

If you are unable to provide an opinion because a particular question, issue or matter falls outside your field of expertise, then you must also expressly acknowledge that in your report.

4 Appendices or attachments

As a minimum, your report must have the following appendices or attachments:

- (a) Your curriculum vitae (if this is your first report).
- (b) The question(s) supplied by Herbert Smith Freehills which you answered in your report.
- (c) The documents that record any instructions given to you by Herbert Smith Freehills.
- (d) The assumptions (if any) you were asked to make for the purposes of preparing your report.
- (e) A list of documents and other materials that you have been instructed to consider or on which you have relied upon for the purposes of preparing your report.
- (f) A list of documents supplied to you by Herbert Smith Freehills.
- (g) A copy of the Expert Evidence Practice Note (GPN-EXPT) (this will be provided to you by Herbert Smith Freehills).

5 Checking the report

- (a) **Expert Evidence Practice Note (GPN-EXPT) and Harmonised Expert Witness Code of Conduct contained in Attachment 1**
Ensure you have read and are familiar with this document, including its annexures.
- (b) **Paragraph numbering and cross referencing**
Check the paragraph and table/figure numbering is sequential and that cross referencing is accurate.
- (c) **Footnote**
Check footnotes are on the same page as the paragraphs to which they refer.
Check every document referred to in a footnote is in the list of documents relied upon in the appendices.
- (d) **Documents relied upon**
Check every document referred to in the report is in the list of documents relied upon in the appendices.

Prepare a copy of every document relied upon in your report for sending to Herbert Smith Freehills when your report is filed. In the case of journal articles, internet printouts, media reports, statistics etc, copies of the entire document are required. In the case of text books or other large publications, a copy of the front cover, title page, page showing publication details including edition and

RESTRICTION OF PUBLICATION OF PART CLAIMED



HERBERT
SMITH
FREEHILLS

year of publication, and entirety of any chapter containing material referred to are required.

(e) **Signing off on your report**

When your report is fully completed you must ensure that the last page of the body of the report (ie before any appendices, exhibits or attachments) is signed and dated. There is no requirement that the signature be witnessed.

(f) **Statement and exhibit**

You may be asked to complete an affidavit or witness statement to which your expert report will be exhibited, so that your report may be put into evidence. If so, Herbert Smith Freehills will provide a draft and further instructions on finalising the affidavit or witness statement.

RESTRICTION OF PUBLICATION OF PART CLAIMED



HERBERT
SMITH
FREEHILLS

Tab	Document	Date
6	Confidential document titled "Fitch Maintains Rating Watch Positive on Australia's Suncorp-Metway's 'A' Long-Term IDR" prepared by Fitch Ratings	10 November 2022
7	Confidential document titled "Research Update: Suncorp-Metway Ltd. Outlook Revised To Positive On Planned Acquisition By ANZ; 'A+/A-1' Ratings Affirmed" prepared by S&P Global Ratings	19 July 2022
8	Confidential document titled "Rating Action: Moody's places Suncorp-Metway's senior ratings on review for upgrade" prepared by Moody's Investors Service	19 July 2022
9	Confidential screenshots from Bloomberg comprising issuer descriptions and pricing information for the following bonds issued by BEN: <ul style="list-style-type: none">• A\$200m 5 year fixed bond maturing Sep 2024• A\$300m 5 year floating bond maturing Sep 2024• A\$100m 3 year floating bond maturing March 2025• A\$100m 3 year fixed bond maturing March 2025• A\$200m 3 year fixed bond maturing Nov 2025• A\$250m 3 year floating bond maturing Nov 2025• A\$650m 5 year floating bond maturing Dec 2025• A\$550m 3 year floating bond maturing May 2026• A\$200m 3 year floating bond maturing May 2026• A\$300m 5 year floating bond maturing June 2026• A\$750m 4 year floating bond maturing Jan 2027• A\$275m T2 sub debt callable bond maturing Nov 2028• A\$150m T2 sub debt callable bond maturing Nov 2030• A\$125m T2 callable bond maturing Oct 2031 Screenshot from Bloomberg of the Bendigo Securities List April 2023	April 2023
10	Confidential screenshots from Bloomberg comprising issuer descriptions and pricing information for the following bonds issued by Suncorp Group: <ul style="list-style-type: none">• A\$600m T2 sub debt callable bond maturing Dec 28• A\$250m T2 sub debt callable maturing Dec 35• A\$290m T2 sub debt callable bond maturing Dec 37• A\$250m T2 sub debt callable bond maturing Dec 38 Screenshot from Bloomberg of the Suncorp Group Securities List	April 2023

RESTRICTION OF PUBLICATION OF PART CLAIMED



HERBERT
SMITH
FREEHILLS

Tab	Document	Date
11	<p>Confidential screenshots from Bloomberg comprising issuer descriptions and pricing information for the following bonds issued by Suncorp Bank:</p> <ul style="list-style-type: none"> • A\$200m 3 year floating bond maturing Sep 2023 • A\$550m 5 year fixed bond maturing Sep 2023 • A\$600m 5 year floating bond maturing July 2024 • A\$150m 16 month floating bond maturing Aug 2024 • A\$250m 3 year fixed bond maturing Aug 2025 • A\$500m 3 year floating bond maturing Aug 2025 • A\$200m 3 year fixed bond maturing Oct 2025 • A\$750m 5 year floating bond maturing Feb 2026 • A\$600m 10 year fixed bond maturing Aug 2026 • A\$750m 5 year floating bond maturing Sep 2026 • A\$775m 5 year floating bond maturing Jan 2027 • A\$300m 5 year fixed bond maturing Dec 2027 • A\$700m 5 year floating bond maturing Dec 2027 <p>Screenshot from Bloomberg of the Suncorp Bank Securities List</p>	April and May 2023
12	<p>Confidential screenshots from Bloomberg comprising issuer descriptions and pricing information for the following bonds issued by ANZ:</p> <ul style="list-style-type: none"> • A\$2.2b 5 year floating bond maturing Feb 2024 • A\$1.35b 5 year floating bond maturing Aug 2024 • A\$1.9b 5 year floating bond maturing Jan 2025 • A\$2.0b 3 year floating bond maturing May 2025 • A\$0.5b 3 year floating bond maturing Nov 2025 • A\$2.05b 3 year floating bond maturing March 2026 • A\$1.0b 5 year floating bond maturing May 2027 • A\$1.8b 5 year floating bond maturing Nov 2027 • A\$1.35b 5 year floating bond maturing March 2028 • A\$1.25b T2 sub debt callable bond maturing Feb 2031 	April 2023
13	<p>Confidential screenshots from Bloomberg comprising issuer descriptions and pricing information for the following bonds issued by NAB:</p> <ul style="list-style-type: none"> • A\$2b 3 year floating bond maturing May 2026 • A\$350m 3 year fixed bond maturing May 2026 	May 2023

RESTRICTION OF PUBLICATION OF PART CLAIMED

Appendix B – Moz Ali: Curriculum Vitae

QUALIFICATIONS

2017	<i>Graduate – Australian Institute of Company Directors</i>
2000	<i>Fellow of the Institute and Faculty of Actuaries (UK)</i>
1999	<i>Fellow of the Actuaries Institute (Australia)</i>
1991 – 1994	<i>Australian National University</i> <i>Bachelor of Economics (1st class honours)</i> <ul style="list-style-type: none">• ANU undergraduate scholarship holder

KEY ACHIEVEMENTS

- Advised on and successfully completed over 50 M&A, equity, debt and structured capital transactions over the past two decades for clients in Australia, New Zealand, South Africa, Asia and the UK
- Successfully executed over 30 acquisition financing and capital solutions transactions and advised on dozens more across Australian and international capital markets, raising over AUD50 billion equivalent
- Advised on some of the most high-profile Australian financial institutions M&A transactions, including:
 - Resolution Life’s A\$3.0 billion acquisition of AMP Life;
 - Medibank’s A\$5.7 billion privatisation and IPO by the Australian Federal Government;
 - AXA SA’s A\$14.6 billion joint acquisition of AXA APH together with AMP; and
 - Lloyds TSB’s NZ\$5.5 billion sale of National Bank of New Zealand to ANZ
- Led Deutsche Bank’s Islamic finance business in the Asia Pacific region from mid 2016 and advised on the Republic of Indonesia’s USD3.0bn Sukuk Al-Wakalah RegS/144a bond issuance in 2017
- Developed a series of bespoke highly flexible bilateral regulatory capital transactions to assist Australian banks with capital management during a period regulatory transition from 2007 – 2012 and executed all such transactions by Australian bank issuers (including for NAB, ANZ and BOQ)
- Sole Structuring Adviser on AGL’s first ever hybrid capital transaction, on three of Westpac’s Tier 1 hybrid capital transactions, and developed and executed the first ever fund management fee securitisation transaction for an Australian financial institution (CBA/Colonial AUD700m FMS)

CAREER SUMMARY

2018 – present	<i>theoreM Consulting</i>	<i>Sydney</i>
	Founder and Managing Director	
2003 – 2018	<i>Deutsche Bank AG</i>	<i>Sydney</i>
	Director – Corporate Finance / Head of Capital Solutions, Australia & NZ	
2000 - 2003	<i>Citi</i>	<i>London</i>
	Associate – Financial Institutions Group, European Investment Bank	
1996 - 2000	<i>Tillinghast</i>	<i>Sydney, Cape Town, London</i>
	Consultant	
1995 - 1996	<i>Deloitte</i>	<i>Sydney</i>
	Treasury and Corporate Derivatives Analyst	

RESTRICTION OF PUBLICATION OF PART CLAIMED

SELECTED TRANSACTION EXPERIENCE – CAPITAL MARKETS AND FINANCING

Date	Client	Size	Description
Sep 2021	Latitude	AUD150m	<ul style="list-style-type: none"> PerpNC5 ASX listed Latitude Capital Notes (<i>Arranger and JLM</i>)
July 2021	Transgrid	AUD295m	<ul style="list-style-type: none"> 60NC8 Subordinated Notes private placement to CEFC (<i>Adviser</i>)
Apr 2021	Dexus	AUD400m	<ul style="list-style-type: none"> 3 – 5yr Senior Secured Facility for unlisted fund (<i>Consultant</i>)
Dec 2020	AMP Life	AUD300m	<ul style="list-style-type: none"> 15NC5 Tier 2 regulatory capital (<i>Arranger and JLM</i>)
Jun 2020	Resolution Life	USD600m / AUD225m	<ul style="list-style-type: none"> Senior syndicated holding company term facility and bridge financing to regulatory capital takeout (<i>Arranger and Principal</i>)
Nov 2017 / Apr 2015	Rio Tinto	AUD750m / AUD560m	<ul style="list-style-type: none"> Structured off-market share buybacks (<i>Sole Financial Adviser</i>)
Sep 2017	Santos	USD800m	<ul style="list-style-type: none"> 10yr RegS senior unsecured bond (<i>Sole Underwriter and JLM</i>) Innovative long term underwrite and contemporaneous bridge solution providing certainty of funding and execution
Feb 2017	Republic of Indonesia	USD3.0bn	<ul style="list-style-type: none"> 144A/RegS Sukuk Al-Wakalah 5yr and 10yr bond issue (<i>JLM and Joint Bookrunner</i>)
Dec 2016 / Dec 2015	Santos	AUD1.0bn / AUD2.5bn	<ul style="list-style-type: none"> Equity placement (<i>JLM and Joint Bookrunner</i>) Equity entitlement offer (<i>JLM and Joint Bookrunner</i>)
Aug 2016 / Aug 2014	Telstra	AUD1.25bn / AUD1.0bn	<ul style="list-style-type: none"> Structured off-market share buybacks (<i>Sole Financial Adviser</i>)
Jun 2016	ANZ	USD1.0bn	<ul style="list-style-type: none"> 144A/RegS PerpNC10 AT1 hybrid issue (<i>JLM</i>) First offshore AT1 by an Australian bank since 2009
Dec 2014	Yancoal	USD1.8bn	<ul style="list-style-type: none"> Recapitalisation by majority shareholder (<i>Sole Arranger</i>) Advised the board on minority holder Takeover Panel submission
2006 – 2013	Westpac	Various	<ul style="list-style-type: none"> Advised on 7 regulatory capital transactions, including as Sole Structuring Adviser on 3 of Westpac's Tier 1 capital issues
Apr 2012	AGL	AUD650m	<ul style="list-style-type: none"> 27NC7 ratings friendly hybrid notes (<i>Sole Structuring Adviser</i>) Reduced equity funding requirement in Loy Yang A acquisition
Jun 2011	Origin Energy	EUR500m	<ul style="list-style-type: none"> 60NC7 Euro ratings friendly hybrid (<i>Joint Lead Manager</i>)
Sep 2010	Santos	EUR1.0bn	<ul style="list-style-type: none"> 60NC7 rating friendly hybrid securities (<i>JLM</i>) First ever offshore hybrid transaction by an Australian corporate
Jul 2009	NAB	AUD2.0bn	<ul style="list-style-type: none"> Underwritten institutional equity placement (<i>Joint Underwriter</i>)
May 2009	ANZ	AUD2.5bn	<ul style="list-style-type: none"> Underwritten institutional equity placement (<i>Joint Underwriter</i>)
2007 – 2012	NAB	AUD1.1bn	<ul style="list-style-type: none"> Bespoke Tier 1 capital instruments tailored to accommodate regulatory transition (<i>Sole Arranger and Principal</i>)
Oct 2007	Challenger	AUD400m	<ul style="list-style-type: none"> Strategic investment by Colony Capital (<i>Sole Arranger</i>) Regulatory capital coupled with call options over 57m shares
Oct 2007	CIF	GBP98m	<ul style="list-style-type: none"> CPS convertible private placement to Challenger Life (<i>Sole Financial Adviser</i>)
Aug 2007	BBI	AUD800m	<ul style="list-style-type: none"> Exchangeable Preference Shares (<i>Sole Structuring Adviser</i>) Designed as part consideration in BBI's acquisition of Alinta
Jun 2007	ANZ	GBP450m	<ul style="list-style-type: none"> PerpNC5 Tier 1 hybrid securities (<i>Sole Structuring Adviser</i>) Last major bank offshore Tier 1 hybrid before the GFC
Oct 2006	CBA	AUD700m	<ul style="list-style-type: none"> Fund management securities (<i>Arranger</i>) Private placement securitisation of fund management fees

RESTRICTION OF PUBLICATION OF PART CLAIMED

SELECTED TRANSACTION EXPERIENCE – MERGERS AND ACQUISITIONS

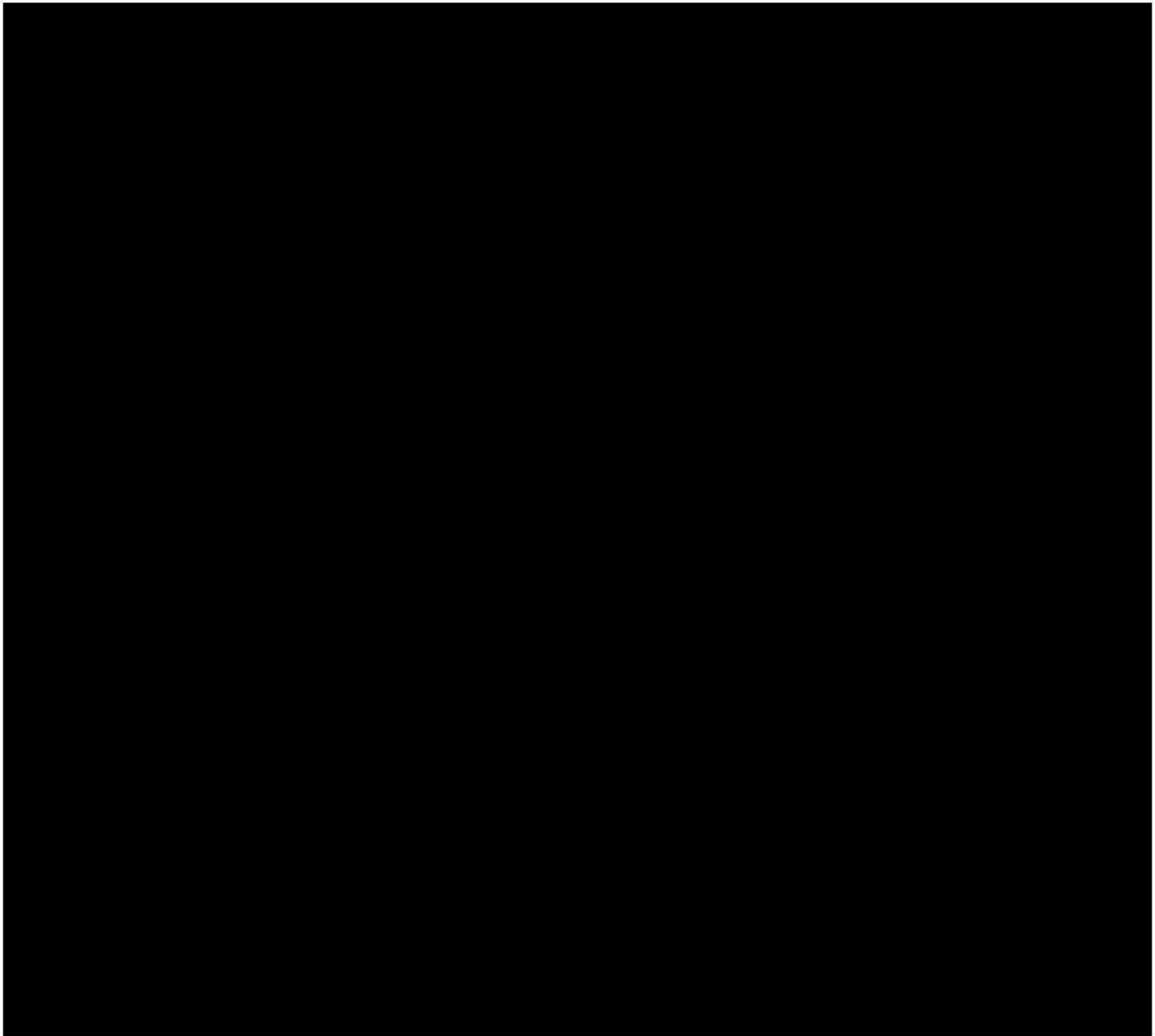
Date	Client	Size	Description
Dec 2021	MA Financial Group	AUD145m	<ul style="list-style-type: none"> Acquisition of Finsure from BNK Bank (<i>Consultant</i>) Leading mortgage broking aggregator with over 2,000 brokers
Jun 2020	Resolution Life	AUD3.0bn	<ul style="list-style-type: none"> Acquisition of AMP Life (<i>Sole Financial Adviser</i>) Largest ever private equity acquisition of APRA regulated insurer
1H 2018	Santos	AUD14.5bn	<ul style="list-style-type: none"> Defence advisory on potential acquisition by Harbour Energy (<i>Sole Financial Adviser</i>) Highly leveraged private equity bid for iconic ASX listed Australian corporate
1H 2018	International consortium	n/a	<ul style="list-style-type: none"> Potential acquisition of 51% of Westconnex from the NSW State Government (<i>Sole Financial Adviser</i>) Including strategic, financing and capital structuring advice
1H 2017	ASX listed corporate	n/a	<ul style="list-style-type: none"> Advised an under-bidder on the potential acquisition of LeasePlan Australia (<i>Sole Financial Adviser</i>) Sale ultimately shelved by LeasePlan NV
1H 2017	International conglomerate	n/a	<ul style="list-style-type: none"> Advised an under-bidder on potential acquisition of the Darling Downs Pipeline from Origin (<i>Sole Financial Adviser</i>) Including M&A and debt financing advisory roles
1H 2016	Global mining company	n/a	<ul style="list-style-type: none"> Global mining company – potential disposal of Australian mine infrastructure (<i>Sole Financial Adviser</i>) Involved potential sale with usage agreements, of plant and port infrastructure
Nov 2014	Medibank Private	AUD5.7bn	<ul style="list-style-type: none"> Privatisation and IPO (Joint Lead Manager) Largest financial institution privatisation by the Australian Federal Government since CBA
Nov 2010	AXA SA	AUD14.6bn	<ul style="list-style-type: none"> Joint acquisition of AXA APH with AMP (<i>Sole Financial Adviser</i>) Involved sale of its 54% stake in AXA APH to AMP and acquisition of Asian businesses
Jan 2006	Liberty Life	AUD145m	<ul style="list-style-type: none"> Sale of Prefsure Life to Tower Life (<i>Sole Financial Adviser</i>) Cross border disposal of non-core asset by South African parent
2H 2005	Australian major bank	n/a	<ul style="list-style-type: none"> Advisory mandate re potential acquisition of Suncorp (<i>Sole Financial Adviser</i>) Including detailed valuation and review of scheme vs hostile takeover options
2H 2004	Australian general insurer	USD450m	<ul style="list-style-type: none"> Advised under-bidder on potential acquisition of Aviva's Asian general insurance businesses (<i>Sole Financial Adviser</i>) Including strategic and financing advice
Oct 2003	Lloyds TSB	NZD5.5bn	<ul style="list-style-type: none"> Sale of National Bank of New Zealand (<i>Sole Financial Adviser</i>) Largest ever M&A transaction in New Zealand
Nov 2002	Prudential plc	EUR130m	<ul style="list-style-type: none"> Sale of German life insurance business to Canada Life (<i>Sole Financial Adviser</i>) Cross border disposal of non-core operations
May 2002	Eureko	Undisclosed	<ul style="list-style-type: none"> Disposal of Portuguese insurance operations to BCP (<i>Sole Financial Adviser</i>) Followed extensive strategic review of European operations
Feb 2001	Equitable Life	GBP1.0bn	<ul style="list-style-type: none"> Sale to Halifax (<i>Sole Financial Adviser</i>) One of the largest bancassurance transactions in the UK

RESTRICTION OF PUBLICATION OF PART CLAIMED

Appendix C – AUD floating rate bond trading levels

Table C.1: AUD floating rate bonds issued by ANZ, Suncorp Bank and BEN (as at 7 April 2023)

Issuer	Pricing Date	Volume (\$m)	Structure	Issue Rating	Maturity/Call	Issue margin (bps)	Trading (bps)
--------	--------------	--------------	-----------	--------------	---------------	--------------------	---------------



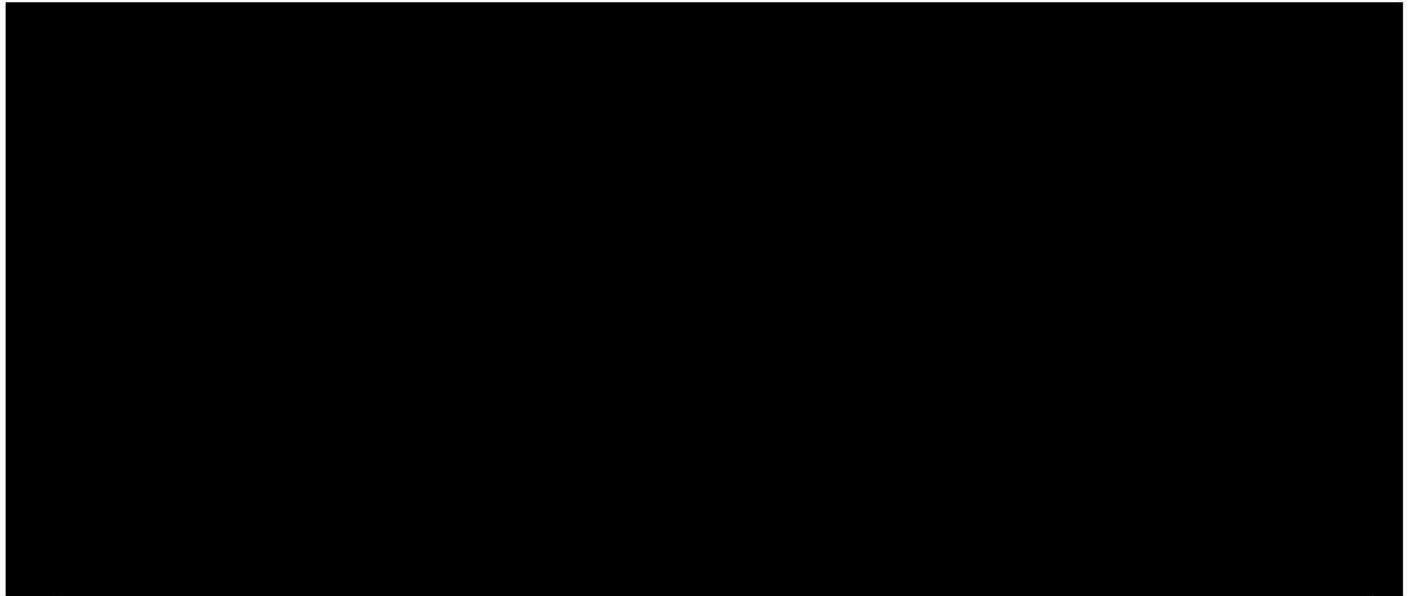
Source: Bloomberg

RESTRICTION OF PUBLICATION OF PART CLAIMED

Appendix D – ASX listed AT1 securities

Table D.1: ASX listed AT1 securities issued by ANZ, Suncorp Bank and BEN

Issuer / Instrument	Issue date	Volume (\$m)	Structure	Call date	Issue margin (bps)	Trading margin (bps)	Remaining tenor (yrs)
---------------------	------------	--------------	-----------	-----------	--------------------	----------------------	-----------------------



Source: ASX releases, Shaw & Partners ASX listed hybrid rate sheet (as at 2 May 2023)



Appendix E – Evidence Practice Note (GPN-EXPT)

General Practice Note

1. INTRODUCTION

- 1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* (“**Code**”) (see **Annexure A**) and the *Concurrent Expert Evidence Guidelines* (“**Concurrent Evidence Guidelines**”) (see **Annexure B**), applies to any proceeding involving the use of expert evidence and must be read together with:
- (a) the Central Practice Note (CPN-1), which sets out the fundamental principles concerning the National Court Framework (“**NCF**”) of the Federal Court and key principles of case management procedure;
 - (b) the Federal Court of Australia Act 1976 (Cth) (“**Federal Court Act**”);
 - (c) the *Evidence Act 1995* (Cth) (“**Evidence Act**”), including Part 3.3 of the Evidence Act;
 - (d) Part 23 of the *Federal Court Rules 2011* (Cth) (“**Federal Court Rules**”); and
 - (e) where applicable, the Survey Evidence Practice Note (GPN-SURV).
- 1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

2. APPROACH TO EXPERT EVIDENCE

- 2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.
- 2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the *Evidence Act*).
- 2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:
- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the *Evidence Act*); and
 - (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence being

unfairly prejudicial, misleading or will result in an undue waste of time (s 135 of the Evidence Act).

- 2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.
- 2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the Federal Court Act (see ss 37M and 37N).

3. INTERACTION WITH EXPERT WITNESSES

- 3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.
- 3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
- 3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness⁵⁶ should, at the earliest opportunity, be provided with:
 - (a) a copy of this practice note, including the Code (see Annexure A); and
 - (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

⁵⁶ Such a witness includes a "Court expert" as defined in r 23.01 of the Federal Court Rules. For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

4. ROLE AND DUTIES OF THE EXPERT WITNESS

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

Harmonised Expert Witness Code of Conduct

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in Annexure A) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

- 5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).
- 5.2 In addition, the contents of such a report must also comply with r 23.13 of the *Federal Court Rules*. Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:
 - (a) acknowledge in the report that:
 - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
 - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
 - (b) identify in the report the questions that the expert was asked to address;
 - (c) sign the report and attach or exhibit to it copies of:
 - (i) documents that record any instructions given to the expert; and

- (ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in Annexure A).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

- 7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:
- (a) who should prepare any joint-report;
 - (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
 - (c) the agenda for the conference of experts; and
 - (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference (“**conference report**”).

Conference of Experts

- 7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.
- 7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:
- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
 - (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
 - (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.
- 7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in

accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).

- 7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.
- 7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).
- 7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

Joint-report

- 7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.
- 7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

8. CONCURRENT EXPERT EVIDENCE

- 8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.
- 8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in Annexure B). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for

concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.

- 8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

9. FURTHER PRACTICE INFORMATION AND RESOURCES

- 9.1 Further information regarding Expert Evidence and Expert Witnesses is available on the Court's website.
- 9.2 Further information to assist litigants, including a range of helpful guides, is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP
Chief Justice
25 October 2016

HARMONISED EXPERT WITNESS CODE OF CONDUCT⁵⁷

APPLICATION OF CODE

1. This Code of Conduct applies to any expert witness engaged or appointed:
 - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
 - (b) to give opinion evidence in proceedings or proposed proceedings.

GENERAL DUTIES TO THE COURT

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

CONTENT OF REPORT

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
 - (a) the name and address of the expert;
 - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
 - (c) the qualifications of the expert to prepare the report;
 - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
 - (e) the reasons for and any literature or other materials utilised in support of such opinion;
 - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
 - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
 - (h) the extent to which any opinion which the expert has 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 the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;

⁵⁷ Approved by the Council of Chief Justices' Rules Harmonisation Committee

- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION

4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

DUTY TO COMPLY WITH THE COURT'S DIRECTIONS

6. If directed to do so by the Court, an expert witness shall:
 - (a) confer with any other expert witness;
 - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
 - (c) abide in a timely way by any direction of the Court.

CONFERENCE OF EXPERTS

7. Each expert witness shall:
 - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
 - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.



ANNEXURE B

CONCURRENT EXPERT EVIDENCE GUIDELINES

APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique⁵⁸ will be utilised by the Court in appropriate circumstances (see r 23.15 of the *Federal Court Rules 2011 (Cth)*). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.
3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.
4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.
5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

⁵⁸ Also known as the "hot tub" or as "expert panels".

CASE MANAGEMENT

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.
7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:
 - (a) the agenda;
 - (b) the order and manner in which questions will be asked; and
 - (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.
8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.
9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.
11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

PROCEDURE AT HEARING

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.
13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.
14. Without intending to be prescriptive of the procedure, parties should expect that, when

evidence is given by experts in concurrent session:

- (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
 - (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
 - (c) the experts will take the oath or affirmation together, as appropriate;
 - (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
 - (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;
 - (f) the judge will guide the process by which evidence is given, including, where appropriate:
 - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
 - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
 - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
 - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
 - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.
15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.
16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.
18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.