

**ANZ Proposed Acquisition of SBGH Limited**  
**Submission regarding Part C of *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2**

**Introduction**

1. On 21 June 2023 the Australian Competition Tribunal announced, but did not publish, its decision in *Applications by Telstra Corporation Limited and TPG Telecom Limited (No 2)* [2023] ACompT 2 (**Telstra/TPG**). Part C of that decision is the only part of the reasons available to the public. There the Tribunal states that the effects, benefits and detriments of “coincident” conduct that is not the subject of the authorisation application cannot be taken into account for the purposes of the assessment under s 90(7) of the *Competition and Consumer Act 2010* (Cth) (**CCA**). While the Tribunal’s decision has no formal precedential status, the Commission has given the parties an opportunity to make a submission regarding Part C of *Telstra/TPG*. This submission responds to that request, and addresses whether the test articulated by the Tribunal in *Telstra/TPG* operates to exclude consideration of any of the public benefits claimed by ANZ and Suncorp.
2. In short, the ACCC can and should take into account all of the public benefits claimed by the merger parties. None of those benefits is of a type that would be excluded from consideration by the reasoning in *Telstra/TPG*. In those circumstances, it is unnecessary to consider whether that reasoning should be followed.

**The finding in *Telstra/TPG* concerning the assessment under s 90(7)**

3. In *Telstra/TPG*, Telstra and TPG sought merger authorisation for Telstra to use certain TPG spectrum in regional areas known as the “Regional Coverage Zone” under a Spectrum Authorisation Agreement. That agreement formed part of a broader transaction comprising agreements between Telstra and TPG to establish a multi-operator core network (**MOCN**) and to allow Telstra to access 169 TPG sites (the **Sites Agreement**) in the Regional Coverage Zone. The agreements were interrelated, entered into at the same time as part of a single transaction and were conditional on all of the agreements being authorised or otherwise approved by the ACCC: at [144]. Nevertheless, Telstra and TPG only sought authorisation for the agreement dealing with spectrum.

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4. There was an issue as to whether the assessment under s 90(7) of the CCA included the likely effects, benefits and detriments of the MOCN Agreement and Sites Agreement for which no authorisation had been sought. Section 90(7) relevantly provides that the ACCC (and likewise the Tribunal, under s 101(3)) must not make a determination granting authorisation unless satisfied “in all the circumstances” that “the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition” or “would result, or be likely to result, in a benefit to the public” that would “outweigh the detriment to the public that would result, or be likely to result, from the conduct”.
5. The Tribunal held that the assessment under s 90(7), properly construed, does not include the likely competitive effects of, and the public benefits and detriments likely to result from, any conduct that is “coincident” with, but not causally related to, the conduct sought to be authorised. It thus excluded the likely effects, benefits and detriments of the MOCN Agreement and Sites Agreement: [144], [145], [147].
6. In reaching that conclusion, the Tribunal distinguished between conduct which was “coincident” with the conduct sought to be authorised, and conduct which is an effect of, or a result of, the conduct sought to be authorised: [154]. In particular, the Tribunal observed that the MOCN and Sites Agreements were not the effect or result of the Spectrum Authorisation Agreement.
7. The Tribunal gave four reasons for this conclusion.
8. *First*, the text of s 90(7) is said to support this construction, because the preconditions are directed to *the conduct* that is the subject of the application for authorisation. It is directed to the effects, benefits and detriments of the conduct for which authorisation is sought, not other “coincident” conduct that is not causally related to that conduct: [145].
9. *Secondly*, the context and purpose of the authorisation regime is said to support it. The Tribunal said it would be inconsistent with that regime for conduct to be authorised on the basis of effects, benefits and detriments resulting from other coincident conduct when the applicant would be free to engage or not engage in that other conduct once authorisation had been granted without affecting the scope of the authorisation: [147].
10. *Thirdly*, although the Tribunal acknowledged that the “with and without” approach to the assessment under s 90(7) is orthodox, it said this must not overlook the requirement for a

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relevant causal connection between the impugned conduct and its effects, benefits and detriments. It said that events which may not have occurred “but for” the conduct sought to be authorised, such as “coincident” conduct, is not sufficient to make it an effect or result of the conduct: [148] – [154].

11. *Fourthly*, where a transaction includes an acquisition and other conduct, it is open to applicants to seek authorisation under s 88 of the CCA for the whole transaction. The Tribunal found that if this course were taken, the application would not be a “merger authorisation” application, and the ACCC would have to apply the preconditions in s 90(7) to the whole transaction. However, this would avoid the concern above, because if the authorisation were granted, the applicants could not vary any part of the transaction or not proceed with part of it without risking the loss of the statutory exemption: [156].

### ***Telstra/TPG* does not apply to exclude from consideration any of the public benefits claimed by ANZ and Suncorp**

12. In contrast to the benefits of the MOCN Agreement and Site Agreement in *Telstra/TPG*, the public benefits claimed by ANZ and Suncorp would be likely to result from the proposed conduct itself, or from conduct which itself is an effect of, or a result of, the proposed conduct, not merely from (other) coincident conduct. The reasoning in Part C of *Telstra/TPG* therefore does not apply to exclude any of those benefits from consideration.
13. The Application for Merger Authorisation dated 2 December 2022 (the **Application**) seeks authorisation for ANZ (or a related body corporate nominated by ANZ) to acquire all of the issued share capital of SBGH in accordance with Share Sale and Purchase Agreement executed on 18 July 2022 (**SSPA**) and the Property Leases (as defined in section 1.1 of the SSPA) relating to Suncorp Bank which are not held by an entity that is to be acquired by ANZ (the **proposed conduct**).<sup>1</sup>
14. The Application identifies (at [8.1]) the following four categories of public benefits that the proposed conduct will deliver:

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<sup>1</sup> See Application for Merger Authorisation dated 2 December 2022, [1.2], [3.2] and [3.4], and clauses 2.1, 2.6 and Schedule 17 of the SSPA.

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- a. **Stronger insurer:** from completion, Suncorp Group will be able to more efficiently and effectively focus on, and run, its insurance business, which will result in benefits to its customers, shareholders and the broader public;
  - b. **Stronger bank and stronger banking system:** with Suncorp Bank under ANZ ownership, various efficiencies, reduced wholesale funding costs, improved wholesale funding access and increased prudential safety will result;
  - c. **Benefits to Queensland:** there will be direct benefits to the Queensland economy and Queensland as a result of commitments given to the State of Queensland by ANZ and Suncorp; and
  - d. **Increased contribution to major bank levy:** the combined banking business of ANZ and Suncorp Bank will make a greater contribution to government through the major bank levy by reason of Suncorp Bank's liabilities becoming subject to that levy.
15. It is readily apparent that each of the first, second and fourth benefits will result directly from the proposed conduct itself.
- a. The first benefit – making Suncorp Group a stronger insurer – will result directly from the conduct itself, because it is the removal of Suncorp Bank from Suncorp Group that allows, and makes likely, Suncorp Group becoming a “pureplay” insurer.
  - b. The second benefit – a stronger bank and banking system – will also result directly from the conduct itself, because it is by combining Suncorp Bank with ANZ that these efficiency, wholesale funding, and prudential safety benefits come about. For example, the \$260 million cost synergies estimated by ANZ, which include elimination of duplicated fixed costs and ANZ performing functions at lower cost than Suncorp Bank on its own, are realised only by combining the two banks.<sup>2</sup> Likewise, Suncorp Bank would benefit from lower costs of, and improved access to, wholesale funding because ANZ has a higher credit rating than Suncorp Bank and because investors would assume that ANZ would support Suncorp Bank in the event that it faced financial difficulties.<sup>3</sup> Additionally, Suncorp Bank depositors and the

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<sup>2</sup> See Application for Merger Authorisation dated 2 December 2022, [8.6] – [8.18].

<sup>3</sup> See Application for Merger Authorisation dated 2 December 2022, [8.19] – [8.29]; [8.34] – [8.39].

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public would benefit from increased prudential safety by reason of a material increase in the capital adequacy requirements that apply to ANZ and that would apply in respect of the assets of Suncorp Bank.<sup>4</sup> This occurs only by combining Suncorp Bank with ANZ.

- c. The fourth benefit – the increased contribution to the major bank levy – also results directly from the proposed conduct itself, because it is by combining Suncorp Bank with ANZ that the Suncorp Bank liabilities become subject to the levy. In other words, this benefit is a direct product of merging the two banks.
16. As to the third benefit – the benefits to Queensland – these benefits will flow from commitments that ANZ and Suncorp have given the State of Queensland pursuant to Implementation Agreements executed on 15 June 2023.<sup>5</sup> Those effects are causally related to the proposed conduct.
  17. First, the agreements did not exist at the time the SSPA was executed on 18 July 2022.
  18. Secondly, the commitments given in those agreements are a direct result of the proposed conduct. The SSPA is conditional on the *State Financial Institutions and Metway Merger Act 1996* (Qld) (**Metway Merger Act**) being repealed or amended such that it does not apply to any holding company of Suncorp Bank (i.e., ANZ).<sup>6</sup> In order to bring about this result, it was necessary for ANZ and Suncorp to give the commitments recorded in the Implementation Agreements: they are therefore an effect of, or a result of, the proposed acquisition.<sup>7</sup> ANZ's commitments in the ANZ Implementation Agreement result from the proposed acquisition,<sup>8</sup> and Suncorp's commitments in the Suncorp Implementation Agreement likewise result from the proposed acquisition.<sup>9</sup>
  19. Accordingly, the Queensland commitments in the Implementation Agreements flow chronologically from, and are an outworking of, the proposed conduct. The effects of the

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<sup>4</sup> See Application for Merger Authorisation dated 2 December 2022, [8.40] – [8.61].

<sup>5</sup> See Implementation Agreement dated 15 June 2023 between State of Queensland and ANZ; Implementation Agreement dated 15 June 2023 between State of Queensland and Suncorp.

<sup>6</sup> Share Sale and Purchase Agreement, cl. 2.1(c), cl. 2.6, Sch. 17 (Part A).

<sup>7</sup> See, for example, Fourth Statement of Steven Johnston dated 13 July 2023, [7] – [16].

<sup>8</sup> Third Statement of Shane Cary Elliott dated 30 June 2023, [9].

<sup>9</sup> Third Statement of Steven Johnston dated 17 May 2023, [32], [36].

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proposed conduct include the effects of the Queensland commitments which result from the proposed conduct and are necessary to permit the proposed conduct to proceed.

20. Further:

- a. ANZ would not make the commitments to invest, or invest to the same extent, in the future without the proposed conduct. For example, ANZ's commitments make it certain that it will **[Confidential to ANZ]**, and that it will establish a Tech Hub in Queensland **[Confidential to ANZ]**.<sup>10</sup> Likewise Suncorp would not otherwise make the investments in Queensland to which it has committed, because the funding for those investments is made possible only through the value realised as a result of the proposed conduct.<sup>11</sup>
- b. **[Confidential to ANZ]**.<sup>12</sup>

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<sup>10</sup> ANZ submission to the ACCC dated 17 May 2023, "ANZ Proposed Acquisition of SBGH Limited Response to Statement of Preliminary Views", [9.155]; Second Statement of Shayne Cary Elliott, dated 17 May 2023, [122], [126], [135] and Third Statement of Shayne Cary Elliott, dated 30 June 2023, [9].

<sup>11</sup> Third Statement of Steven Johnston dated 17 May 2023, [36].

<sup>12</sup> First Statement of Shayne Cary Elliott dated 30 November 2022, [88].