

Cross-submission: challenges and equity

Market study into personal banking | 5 October 2023

A large, light grey, stylized tree graphic with wavy branches occupies the left side of the page.

➤ **Introduction**

He tina ki runga, he tāmore ki raro.

In order to flourish above, one must be firmly rooted below.

The purpose of this document is to provide a cross-submission on the Preliminary Issues Paper, primarily to highlight the equity issues that are impeding a consumer-centric response to the submissions made by the Australian banks.

The intended audience for this document is the Commerce Commission and other stakeholders who are engaged in the market study. For this reason, it is assumed readers are fully aware of the intent of the market study, its processes and timelines – so these are not explained in this document. For additional information, readers are directed to the Commission’s web pages on the market study, which can be found here:

<https://comcom.govt.nz/about-us/our-role/competition-studies/market-study-into-personal-banking-services>

It should be further noted that this document solely concerns the cross-submission process, and does not speak to the material issues raised in the market study. Separate submission documents address the substantive matters.

➤ Context and background

On 10 August 2023 the Commission released a Preliminary Issues Paper on the market for personal banking services, intended to provide some context and background for the market study. The Commission invited submissions from all interested parties.

The communications shortfall

As we noted in earlier correspondence with the Commission, the existence of the Preliminary Issues Paper – or, indeed, of the market study itself – was not well communicated. While there has been some independent media coverage of the market study process, the Commission’s own outbound communication to stakeholders and interested parties has been scant; there is no evidence of advertising on traditional or social media, there is apparently little proactive communication outside the banking sector itself, and there is seemingly no in-person hui or similar discussions for the general public.

And the information provided by the Commission on its website is similarly scant. While there is a high-level timeline and some documents, the work plan of the Commission is invisible; for instance, there is no indication of what types of economic or market analyses are being undertaken by the Commission, nor of what the scope of any of the putative work components might be. And there is no discussion of who the Commission sees as stakeholders, or what the engagement and communication processes might be.

In addition, the input and feedback mechanisms for the market study are entirely generic. A single email address is provided, but there is clearly no attempt to ask structured questions and receive structured responses, nor to solicit wider viewpoints beyond the market participants who are already aware of the study.

This is entirely puzzling. The issues canvassed in the market study affect 99% of New Zealanders with a bank account and have far-reaching impacts on our entire economy. As the Commission’s Preliminary Issues Paper notes, there is *prima facie* evidence that the Australian banks are making excessive profits, well beyond any reasonably expected return on capital, which means billions of dollars are being siphoned out of the pockets of New Zealanders to provide the undue enrichment of predominantly offshore investors.

Given the wide-ranging social and economic impacts of this pernicious behaviour and the interplay with the regulatory failures that have led to it, the low-key approach of the Commission makes little sense. Comparable issues – such as the proposed Three Waters reforms, or even regional transport projects such as Let’s Get Wellington Moving – are much more widely communicated and debated, and have active and organised engagement processes, even when their societal impacts are orders of magnitude lower.

The exclusion of the public voice

For all intents and purposes, the Commission appears to be taking a technocratic rather than democratic approach. The barriers to finding out about the market study, engaging with the process and providing submission to the Commission on the substantive matters have been set very high, and this is a genuine impediment to wider participation.

In effect, it is only sophisticated market actors that have the awareness of the issues, the understanding of the complexities and the resources to participate that are being considered stakeholders. The Commission appears disinterested in wider inputs from the very consumers who are being disadvantaged by the Australian banks, because it has not designed the process to be inclusive or acted to reduce the barriers to participation.

As noted, the Commission released the Preliminary Issues Paper on 10 August 2023. While it is a useful document, it is also a technical document; it requires a solid understanding of how banking operates at a structural level, the dynamics of markets and barriers to entry, and of the regulatory frameworks. It does not contain any material that might aid this comprehension for the general public, such as FAQs aimed at non-technical readers.

Further, the intent to exclude consumers from participating in the market study is deeply embedded in the language of the Preliminary Issues Paper itself. The very consumers whose pockets are being emptied and whose wellbeing is being negatively affected by the Australian banks are referred to exclusively in the third person. For instance, the questions within the paper are framed as commentary on things that are happening to some theoretical group:

Q21 How often and why do personal banking consumers:

Q21.1 search for a new service provider?

Q21.2 switch to a new service provider?

Q22 Please describe any factors that might prompt or hinder a consumer searching and/or switching to an alternative provider of personal banking services.

The very language of the Preliminary Issues Paper views the 99% of New Zealanders with a personal bank account as a passive group on whom banking market participants act with impunity. It is disempowering and exclusionary, and underlines the degree to which the Commission is pursuing a technocratic process at the expense of the very people it should be representing.

Markets are not theoretical constructs; they are made up of people making decisions about the wellbeing of themselves and their whānau every day; sometimes well, sometimes badly, sometimes under duress, sometimes with incomplete information, sometimes because they have no other choices. All of these people are legitimate stakeholders, not merely a passive group.

And irrespective of the terms of reference of the market study, the Commission does not have license to exclude the vast majority of New Zealanders from providing valid input into considerations that will have significant and wide-ranging impacts on their lives. But exclude them it has.

Submissions and cross-submissions

The submission deadline for the Issues Paper was 7 September 2023, and the Commission published the submissions on 21 September 2023, after a two week gap required for administrative processes and any necessary redactions.

A very limited number of submissions were received by the Commission, and the bulk of these were from organisations. This underlines the fact that there has been no wider communication or engagement beyond a small group of sectoral participants, and that the barriers to participation from the wider public of Aotearoa were set far too high.

Once the submissions were received and processed, the Commission has then provided only two further weeks for cross-submissions on many hundreds of pages of technical documentation. This is remarkably short, as it does not allow a viable timeline for consumer advocates to assess and respond to the analyses presented by the Australian banks.

As a point of comparison, the Commission will normally take a full 20 working days to process an Official Information Act request – which, at its heart, is merely a matter of finding, assessing and sending documents that are already in the Commission's purview. To require advocates to assess, assimilate and then author detailed responses to highly technical information in half the time of an OIA request seems either deeply optimistic or intentionally exclusionary.

For instance, the ANZ economic analysis from Incenta runs to 40 pages; the ASB analysis from NERA and Bell Gully to 20 pages; the Deloitte study from BNZ to nearly 60 pages; and the Westpac response to 18 pages. These are all complex documents containing economic and financial analyses with international context, many of which contain references to other research papers and studies. Further documents containing detailed analysis have been submitted by Federated Farmers, Consumer NZ, Monopoly Watch and others.

As is obvious from the documents provided by the Australian banks, their submissions have been prepared by multi-person teams from some of Aotearoa's leading consultancies and law firms, working for some months. They are by nature complex documents, and it is clear they are intended to promote and support the banks position, rather than to provide neutral commentary. They are advocacy documents, not research papers, and in our view are designed to be inaccurate and misleading.

As such, responding to the substantive points raised by the Australian banks is no small task.

For instance, the ANZ submission contains the following statement:

In summary, Incenta explains that the analysis in the Preliminary Issues Paper does not appropriately compare New Zealand bank returns to those of comparable overseas banks. In particular, the analysis is:

11.1 an aggregate country versus country comparison, rather than a firm-to-firm comparison, which the Commission has undertaken in previous market studies and which is a more appropriate and robust way of comparing returns, and

11.2 an 'apples with oranges' comparison because it includes banks that are not comparable to New Zealand's banks, in (at least) two ways, namely that the analysis includes banks:

(i) from countries whose banks have experienced deep-seated banking crises (the European Union, the United Kingdom and Japan). We do not consider it appropriate to include comparators that have a materially higher probability of default when considering the performance we aspire to, or expect from, our banks. New Zealanders benefit from reliable and resilient banks.

This, in turn, is merely the summary of the detailed methodology in the additional document from Incenta Economics, which runs to several pages.

As is apparent from a first analysis of the documents, the Incenta proposition is wrong-headed on a number of levels, and relies on cherry-picking data based on arbitrary and self-serving criteria to include and exclude different countries, in order to engineer a desired outcome. Incenta's analysis is not so much a considered assessment of the facts as an attempt to construct a self-licking icecream cone.

However much the Commission may like the analogy with fully self-referential dairy products, it is unlikely to be swayed by others merely stating the Incenta analysis is wrong. Simple statements from one party provides no basis for high quality public policy development, and attempting to observe the strictures of the scientific method in public debate means participants on both sides of the debate need to provide evidence or at least an alternative hypothesis, rather than flights of fancy.

As should be obvious, rebutting Incenta's more elaborate constructions will require time, effort and expertise. And that time, effort and expertise is multiplied many times over throughout the 150-odd pages of smoke screens and water-muddying analysis from the Australian banks.

Which brings us to the question of equity.

➤ The matter of equity

As noted, refuting some of the more elaborate of the arguments put forward by the Australian banks is a non-trivial task. It requires treating some entirely specious arguments as if they are worthy of a considered assessment, conducting the analysis, and then systematically putting forward the reasons why they are not valid and why the Commission should form a different view.

Given the technocratic approach the Commission has adopted in the market study, it is highly necessary to do this work; anecdote will not suffice. And the clear purpose of the submissions by the Australian banks – which have largely thrown the kitchen sink of possible arguments at the Preliminary Issues Paper – is to make the process of refutation as arduous as possible.

The very real concern of consumer advocates is that any arguments provided by the Australian banks will be allowed to rest unless they are refuted. For instance, if we do not provide a counter-argument – supported by data and analysis – to Incenta's skewing of the pool of comparable countries, then their viewpoint will be carried forward and will form part of the agreed pool of facts in the market study, irrespective of how wrong it is.

So consumer advocates see it as essential that meritless arguments are quashed completely, as early in the process as possible.

The Commission's work plan

Part of the challenge in this process is the lack of visibility of the work plan of the Commission, and a lack of clarity about the role the Commission is playing in the market study. Our current understanding is based solely on observing the Commission's actions to date, which indicate that it is intent on playing a neutral arbiter role rather than acting as advocate for the consumers whose interests are being damaged by the actions of the Australian banks.

In other words, while it is clear that the specious arguments in the submissions from the Australian banks need to be refuted point-by-point, it is not at all clear that the Commission will be doing the work. Instead, it appears the Commission wishes to play the role of a neutral umpire, merely adjudicating the competition between the Australian banks and their detractors.

In our view, this is not the correct position for the Commission to take – but that’s the subject of a separate paper.

This leaves us taking a risk management approach; that is, in the event the Commission is not doing the refutation in the name of some theoretical neutrality, or that the quality of the refutation is poor, or that the Commission is captured by the arguments of the bank rather than refuting them, then us consumers are going to be very adversely affected indeed.

As noted, the issues of poor bank behaviour and excessive profitability have very large implications for individuals and whānau and businesses. As Monopoly Watch NZ has noted in its submission, the effect of the excess profits and unjust enrichment of the Australian banks is to increase the amount paid over the lifetime of a typical mortgage by \$450,000 to \$1 million. And these are not theoretical opportunity costs; they are actual sums of money, paid out of wages and salaries and business incomes, resulting in an impoverishment of our people and our nation.

Given the financial stakes are so high at both the individual and the national level, it is clearly in the best interests of consumers that the specious arguments put forward by the Australian banks are refuted at every turn. Yet we have no indication to date that would lead us to believe the Commission will be doing this work.

The nature of the challenge

Over the last week we have systematically worked through all the submissions made public by the Commission, assessed the work required to conduct a point-by-point refutation, and the work needed to put forward the hypotheses and evidence to support the objective view. It’s considerable, and it’s well beyond the capability of us as consumer advocates to fund.

The simple reason is that we do not have anything approximating the resources of the Australian banks to respond to the market study, particularly not in the timelines indicated by the Commission. We do not have the budget to engage the country’s leading law firms or largest consultancies or specialised economists, and our time commitments to undertaking work for study are inherently limited by the need to run our businesses and earn a living.

There is a very significant resource imbalance between the Australian banks and consumer advocates, and this translates into a very large power imbalance in the context of the market study. As Consumer NZ succinctly states:

“On a separate but aligned point, we are concerned there is not better support for independent consumer representation in the market study process. Market studies are important and significant pieces of work that take a huge amount of time and resource for all involved. As with previous market studies, non-governmental-organisations like Consumer will provide input to the best of their ability, but this input will be necessarily limited by the resources available. Given the limits on our resource, this means the independent views of consumers may be underserved through our contribution.

“The limits on our ability to contribute to the market study process in a way that would more fully represent the interests of consumers should not be interpreted as a lack of willingness on our part to participate, or to reflect a view that market study work is not a vital part of the competition and consumer protection regime in New Zealand. It is simply the reality that, as a not-for-profit, we do not have the funding support required to fully participate in the process.

"As this market study and future studies roll out, we urge the Commission to consider how the imbalance of resources between organisations representing consumer interests and the sectors that are the subjects of market studies could distort the process. While the Commission does a good job at representing consumer interests generally, in the market study process it must remain independent to produce fair outcomes to all participants. It does not represent consumers in this process."

Consumer NZ is a very small organisation compared to the Australian banks – particularly when they are viewed in aggregate – yet it's huge in comparison to our organisation. And if Consumer NZ is struggling to engage with the Commission's technocratic processes and short timelines, then the hurdle is even higher for those of us with even more limited resources.

As we've noted in previous correspondence with the Commission, the market study increasingly seems like a game played by professionals against us amateurs. The Australian banks far outweigh us in money and resources, and the Commission has tilted the playing field towards the technocrats who have the requisite domain knowledge, yet we are being expected to play as if all participants are equal.

While the Commission did not set out to be discriminatory or exclusionary, that's the place we find ourselves. We see the need to respond to the Australian banks with the same level of analysis and argument, and we see very clearly the risks of not doing so; but the barriers erected by the Commission in how it's running the market study are resulting in disenfranchisement, with a very high likelihood of adverse outcomes for Aotearoa and its people as a result.

It's easy to be concerned and negative about the trajectory of the market study, but that's not the intent of this cross-submission. Instead, we wish to identify the work that needs to be done by the Commission in order for the equity issues to be addressed.

➤ Addressing the challenge

What needs to occur

As is apparent to all participants, the issue of market efficiency and the resulting behaviour of the Australian banks cannot be decoupled from the regulatory regime. It is very much the case that the Australian banks are exploiting their market power and behaving in a way that is contrary to the idea that a social contract exists between the banks and the society they operate within; there is a strong argument to be made that the Australian banks have fully exhausted their social license to operate in Aotearoa, and are now in the business of the unjustified enrichment of their offshore shareholders.

Nevertheless, this exploitation of market power has been made possible by the regulatory settings. Through a variety of mechanisms, the Australian banks have been granted a *de facto* monopoly on certain kinds of transactions and activities, and they have been given license to act in ways that are contrary to the public interest – for which they have suffered no penalties.

To be able to develop a better approach, market participants need an objective and clear-eyed view of the current state of the personal banking market, and accurately identify the causes of the distortions and their consequences. While some of this analysis was undertaken in the Preliminary Issues Paper, there are obvious gaps and limitations.

Our position is therefore that the analysis of the submissions from the Australian banks needs to go hand-in-hand with the analysis of the regulatory frameworks that have acted as an enabler, and which have provided some of the incentives for the exploitation of their market power. In effect, our view is that the Commission must identify the true state of the current banking sector and the true state of the regulatory framework as part of the same package of work, extending the analysis conducted for the Preliminary Issues Paper.

Doing this will require the development of an economic model of the banking sector in Aotearoa, covering personal and business banking activities across all participants. The purpose of the model is to integrate the various national and international data sets, and allow both the current state of the market to be established and the veracity of the assertions from the Australian banks to be tested. Ideally, the model should also allow for the testing of what-if scenarios, to provide the mechanism for the implications of different market interventions to be tested.

As should be apparent, this is not trivial pieces of work – but is required if there is to be a factual rebuttal of the statements made by the Australian banks in their submissions.

The rationale for an economic model

As noted above, there is a very significant power imbalance between the Australian banks and their customers, and a difference in financial and human resources that spans many orders of magnitude. Expecting customers to fund the development of an economic model that allows the testing and refutation of the erroneous assertions from the Australian banks is therefore highly inequitable.

It is clearly the Commission's role to ensure the market for banking services is fair for all participants and is working well – and it is very much the Commission's responsibility to demonstrate that this is the case. This can only be done if there is a common model of how the banking sector operates using an agreed set of data, constructed and operated by the Commission as the party undertaking the market study.

We are therefore proposing that the Commission develops a suitable economic model as a matter of urgency and provides open access to all interested parties. At a minimum, the model must include:

- Documentation of the model's design, to ensure all users understand the assumptions, parameters and limitations of the model
- Documentation of the model's data sources, to ensure all users understand where the data is drawn from, and its limitations and caveats
- An interactive capability to allow hypotheses to be tested and validated
- A mechanism for generating outputs.

These are the basic building blocks of any economic model, so should not present any significant technical challenge for the Commission to implement.

The moral imperative

We have made the case that the Commission needs to provide the agreed model for how the banking sector operates in Aotearoa New Zealand, so there is a common understanding of both the problems and the levers that can be manipulated to create a functioning market in personal banking services. This will also provide a platform for the refutation of the more outlandish claims of the Australian banks, as it will allow the various hypotheses put forward by their economists and consultants to be tested.

There will undoubtedly be some cost for the Commission in developing and operating this model – and it's highly likely the Commission has not allowed sufficient budget in its funding for the market study. This is no reason to refuse to undertake the work.

This is because the Commission is not a neutral party; it is not merely an umpire, sitting on the sidelines of a market that has quite clearly failed, adjudicating the arguments of market participants. Rather, it speaks with the authority and obligations of the Crown.

As philosopher John Rawls notes, the basic principle of justice is that the interests of the weakest and poorest groups must have first call on the protective power of the state. And the Commerce Commission is the manifestation of that protective power in the context of the abject market failure in the banking sector. This, therefore, is the obligation of the Crown: to protect the weak (in this case consumers) from the depredations of the powerful (in this case the Australian banks).

The Commission's track record in playing this role is not encouraging; if it was, then the market for banking services would not have failed to the extent it has. However, the market study provides the opportunity to rectify this lamentable state of affairs – and the first step on the path is to provide the tools so the objective state of the banking sector can be established.

We therefore look forward to the Commission taking steps to establishing an equitable playing field for all market participants, and addressing the imbalances in resourcing and funding that are currently preventing consumers from properly participating in the market study.



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