

Parliament of the Commonwealth of Australia

**SENATE ECONOMICS LEGISLATION
COMMITTEE**

**CONSIDERATION OF LEGISLATION
REFERRED TO THE COMMITTEE**

Financial Sector Legislation Amendment Bill (No. 1) 2000

August 2000

Commonwealth of Australia

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REPORT

Reference of the Bill to the Committee

1.1 The Financial Sector Legislation Amendment Bill (No. 1) 2000 was introduced into the House of Representatives on 13 April 2000. Following a report by the Selection of Bills Committee, the Senate referred the Bill to this Committee on 28 June 2000 for examination and report by 16 August 2000.¹ An extension of time to report was granted until 30 August 2000.

1.2 In particular, the Committee was asked to review the Bill's amendments relating to proposed changes to the regulation of Authorised Deposit-Taking Institutions (ADIs) under the *Banking Act 1959*.

The Committee's Inquiry

1.3 The Committee invited a number of interested parties to make submissions on the Bill, in addition to advertising the inquiry on the Parliament website. The Committee received 2 submissions to the inquiry (see Appendix 1).

1.4 The Committee held a public hearing on the Bill in Melbourne on 4 August 2000. The witnesses who appeared at the hearing are shown in Appendix 2.

Measures in the Bill

1.5 The current bill would amend existing legislation so as to:

- alter the prudential regulation of ADIs under the Banking Act;
- rationalise and consolidate the Commonwealth's unclaimed moneys provisions;
- simplify and modernise service provisions in the Reserve Bank Act 1959;
- strengthen the enforcement provisions of the Superannuation Industry (Supervision) Act 1993 (SIS Act);
- facilitate the application of the Commonwealth's Criminal Code to certain offences in the SIS Act;
- clarify the extent of the Australian Prudential Regulation Authority's (APRA) powers to provide actuarial services over the period the Australian Government Actuary (AGA) was part of APRA, and
- make miscellaneous minor amendments to financial sector legislation.²

1 Selection of Bills Committee Report No. 10 of 2000, dated 27 June 2000.

2 Financial Sector Legislation Amendment Bill (No. 1) 2000, Second Reading Speech, House of Representatives Hansard, 13 April 2000, p. 15889.

Bill's provisions relating to ADIs

1.6 The Committee, in line with the Selection of Bills Committee Reference, confined its attention to the Bill's provisions that seek to alter the prudential regulation of ADIs under the Banking Act.

1.7 Section 63 of the Banking Act aims to protect depositors from being disadvantaged should a financial institution transfer its assets.³ Section 63 does this by requiring an ADI (other than a foreign ADI) to gain the Treasurer's written consent prior to:

- entering into the arrangement or agreement for the sale or disposal of its business by amalgamation or otherwise; carrying on of business in partnership with another ADI; and/or
- effecting a reconstruction.

1.8 On average there is only one section 63 application to the Treasurer each year.⁴

1.9 The Bill introduces amendments to which will allow the Treasurer (or delegate⁵) the power to impose conditions on his or her consent under section 63 of the Banking Act.

Current situation

1.10 Section 63 of the Banking Act differs from other powers in the Banking Act (and other similar legislation), in that approvals cannot be granted subject to conditions. The absence of any power to set and enforce conditions reduces the flexibility of the Treasurer (or delegate) in deciding whether to grant approval under section 63. This may hinder an applicant receiving a favourable outcome.⁶

Legislative background

1.11 This Bill forms part of the legislation designed to implement the Government's response to the recommendations of the Financial System Inquiry, chaired by Mr Stan Wallis,⁷ as announced by the Treasurer, the Hon Peter Costello, MP, in the House of Representatives on 2 September 1997. As such the Bill aims to assist in building a framework which assists the financial sector in becoming 'efficient, responsive, competitive and flexible.'⁸

3 Financial Sector Legislation Amendment Bill (No. 1) 2000, Bills Digest No. 171 1999-2000, p. 3.

4 Financial Sector Legislation Amendment Bill (No. 1) 2000, Explanatory Memorandum, p. 7.

5 Under section 63 of the Banking Act, the Treasurer has the power to delegate his or her functions to the Australian Prudential Regulation Authority (APRA), an APRA Board member or an APRA staff member; an officer of the Department and, in relation to demutualisations, to the Australian Securities and Investments Commission (ASIC).

6 Financial Sector Legislation Amendment Bill (No. 1) 2000, Explanatory Memorandum, p. 7.

7 Financial Sector Legislation Amendment Bill (No. 1) 2000, Second Reading Speech, House of Representatives Hansard, 13 April 2000, p. 15889.

8 Financial Sector Legislation Amendment Bill (No. 1) 2000, Explanatory Memorandum, p. 7.

Features of the new law in relation to Authorised Deposit-Taking Institutions under the Banking Act

1.12 Schedule 1 of the Bill proposes a number of miscellaneous amendments to the Banking Act designed to enhance the prudential regulation of ADIs. These amendments include:

- providing APRA with the power to seek injunctions where there has been a contravention (or attempted contravention) of prudential regulations;
- broadening the definition of ‘information’ to include books, accounts and documents;
- providing APRA with the power to issue directions if it considers that there is likely to be a breach of prudential regulations or standards;
- clarifying that APRA has the power to investigate, and the power to appoint another to investigate, the affairs of an ADI; and
- granting the Treasurer (or delegate) the power to attach conditions to section 63 approvals for ADIs.⁹

Injunctions

1.13 The object of amendments relating to injunctions is to grant the Treasurer, APRA, ASIC and/or members of an affected ADI, the power to seek an injunction if there has been a contravention (or attempted contravention) of a provision of sections 7, 8, 66, 66A or 67 or a condition imposed under the proposed section 64.

1.14 Under the present legislation, sections 7, 8, 66, 66A and 67 contain penalty provisions. However, these amendments are designed to allow APRA, subject to court approval, to act preemptively to stop undesirable activities rather than simply acting to impose punishment after the damage has occurred.

1.15 In the case of a contravention of sections 7, 8, 66, 66A or 67, APRA has the power to seek an injunction. If a condition under section 64 has been breached, the Treasurer and/or APRA have the power to seek an injunction. If the condition relates to a demutualisation, ASIC and/or members of the affected ADI are also able to seek an injunction, in addition to the Treasurer and/or APRA.

1.16 It should be noted that any breach of a condition, made under sections 66 or 67, is also covered by the proposed section 65A.

1.17 A range of injunctions is available including restraining injunctions, performance injunctions, consent injunctions and interim injunctions. In addition to or in substitution of granting an injunction, the court may require the person receiving (or who would have received) the injunction to pay damages to another person.

⁹ Financial Sector Legislation Amendment Bill (No. 1) 2000, Explanatory Memorandum, p. 13.

Broadening the definition of ‘information’

1.18 This proposed amendment means that the reference to information in sections 13 and 62 of the Banking Act, includes books, accounts and documents. This is a technical amendment to bring the reference to information in sections 13 and 62 into line with its meaning in section 61.

Providing APRA with the power to issue directions

1.19 APRA will be permitted to issue directions to a body corporate, (that is an ADI or a Non-Operating Holding Company) if it is likely to breach a prudential regulation or standard and the breach poses a prudential risk.

1.20 This amendment is designed to widen APRA’s directions-making power to encompass circumstances of potential prudential risk. Presently, it is limited to circumstances where prudential standards have been breached and/or a direct link to depositors’ interests has been established.

Clarifying that APRA has the power to appoint itself to investigate the affairs of an ADI

1.21 The object of this proposed amendment is twofold. Firstly it ensures that the reference to information includes books, accounts and documents. Secondly this amendment states that APRA has the power to investigate the affairs of an ADI, as well as the power to appoint a person to do so, if an ADI fails to supply information under section 13 of the Banking Act.

Attaching conditions to section 63 approvals to restructure an ADI

1.22 Amendments concerning conditions placed on consents to restructure an ADI extend the delegation provision contained in section 63 of the Banking Act to also include the functions proposed under section 64.

1.23 Section 64 gives the Treasurer (or delegate) the power to attach conditions to his or her consent granted under section 63. To be consistent with section 63, it is necessary to also delegate the conditions-making power under the proposed section 64.

1.24 The proposed section 64 is designed to give the Treasurer (or delegate) the opportunity to attach conditions to his or her consent granted under section 63 and to provide remedies in the event conditions are breached.

1.25 In line with similar conditions-making powers throughout the Banking Act, the Treasurer (or delegate) is able to impose conditions and/or revoke, further, or vary conditions already imposed. If a condition has been breached, the Treasurer has two options: revoke his or her consent under paragraph 64(2)(c) or apply for an injunction under the proposed section 65A.

1.26 Conditions that are imposed, furthered or varied, may be made by the Treasurer (or delegate) on his or her own initiative or on application to the Treasurer (or delegate) by the person who has applied for or has received consent.

1.27 Conditions cannot be attached to consents that have been granted prior to the commencement of the proposed section 64.

Issues in Evidence

1.28 The Committee was tasked with examining the Bill's amendments relating to proposed changes to the regulation of ADIs under the Banking Act. Despite this, the submissions received and the evidence given at the public hearing almost exclusively dealt with one particular amendment, specifically that which will allow conditions to be attached to section 63 approvals.

Origin of current Bill

1.29 Mr William Jones, Senior Policy Adviser, Policy Research and Consulting, Australian Prudential Regulation Authority (APRA), gave evidence that APRA had 'sought the amendments to the Banking Act' being considered by the Committee. APRA had taken this action because of its experiences in 1999.

1.30 APRA, concerned about Y2K problems, had indicated that after October 1999 any Approved Deposit-taking Institution (ADI) that took part in a merger should make no changes to its computer system in the period preceding 1 January 2000. APRA was cognisant of the fact that rationalising computer systems represented a considerable cost saving, but APRA regarded merging computer systems in the period immediately prior to Y2K to be fraught with danger. APRA, however, found that 'there was no ready way'¹⁰ for either the Treasurer or itself to impose a condition on merging entities to forestall them rationalising their computer systems. The current amendments will allow such conditions to be imposed.

Consistency with other legislation

1.31 Mr Steve French, General Manager, Financial Institutions Division, Department of the Treasury, stated that three pieces of legislation dealt with approvals for proposed mergers of Financial entities, namely the:

- *Financial Sector Shareholdings Act 1998* (FSSA),
- *Financial Sector (Transfers of Business) Act 1999* (TOB Act), and
- *Banking Act 1959*.

1.32 The provisions of the FSSA are triggered when a company proposes to acquire more than 15 per cent of a financial sector company. The TOB Act applies in cases where there is an intended change in ownership of assets, though not a change in the ownership of the financial sector entities involved. Under both the FSSA and TOB Act conditions may be imposed before any acquisition or transfer of assets may proceed.¹¹ By contrast, under section 63 of the Banking Act, while the Treasurer's prior approval must be obtained before an ADI enters into an arrangement or agreement for any disposal or amalgamation of its business, 'no conditions may attach to section 63 approvals'.¹²

10 Evidence, p. 11.

11 Evidence, pp. 9-10.

12 Evidence, p. 10.

1.33 The proposed changes to the Banking Act under consideration therefore essentially involve extending the existing situation with regard to approvals under the FSSA and TOB Act to approvals granted under the Banking Act.

Nature of amendments proposed in current Bill

1.34 Both the Treasury and APRA regarded the proposed amendments in the current Bill to be ‘purely’ technical. As a result neither the Treasury nor APRA considered adding to the current Bill, while it was being drafted, provisions to impose community service obligations (CSOs) in relation to, and/or require the preparation of public interest impact statements about, proposed mergers.¹³ It should be noted that APRA, in compliance with its statutory obligations, regarded itself as unable to consider matters that could not be categorised as being of a strictly prudential nature.¹⁴

Current review mechanisms for mergers

1.35 Mr Ross Jones, Commissioner, Australian Competition and Consumer Commission (ACCC), testified that the ACCC reviewed proposed mergers to determine if they ‘substantially’ lessened competition within the meaning of section 50 of the *Trade Practices Act 1974*. In its deliberations the ACCC consulted widely with stakeholders ‘including the customers, competitors and suppliers as well as small business, consumer and, quite often, rural groups’.¹⁵

1.36 The ACCC has the power to, and often does, place legally enforceable undertakings on entities proposing to merge. The undertakings run for six years,¹⁶ but there is a review after three years and, if the ACCC is of the view that the undertakings have been ‘substantially met’ then the entities generally are released from the undertakings.¹⁷

Concerns with the status quo

1.37 Concerns with status quo fell into three main categories namely:

- declining service provision as a result of mergers;
- lack of consultation regarding mergers; and
- need for CSOs to be applied to the financial sector.

Declining service provision

1.38 Ms Louise Petschler, Senior Policy officer, Financial Services, Australian Consumers Association, expressed concern about the increasing concentration of the retail banking market in Australia. The four major banks, according to Ms Petschler, had during the 1990s increased their share of retail transaction services from 60 to 70 per cent. Merger

13 Evidence, p. 12.

14 Evidence, p. 13.

15 Evidence, p. 17.

16 Evidence, p. 18.

17 Evidence, p. 17.

activity had thus ‘reduced competition for consumers.’¹⁸ This reduction in competition had resulted in a reduction in the level of service provided by banks.

1.39 The ACCC gave evidence that, in some instances, undertakings concerning service delivery imposed by the ACCC, as a condition of a merger proceeding, had been complied with by the entities involved for three years. However, as soon as the entities were released from the undertakings by the ACCC, those undertakings were ignored.¹⁹

1.40 Mr Tony Beck, National Secretary of the Financial Sector Union Australia (FSU), cited an example of this situation. In the Westpac-Bank of Melbourne merger, 120 branches were closed and 1,200 jobs were lost. The FSU was concerned at what it regarded as the ‘dangerous erosion of service across the country, including rural and regional Australia’, which resulted from the branch closures consequent upon mergers,²⁰ and which was occurring with little or no consultation.

1.41 The ACCC, concerned about the ramifications of the Westpac-Bank of Melbourne merger, had imposed undertakings on the merged entity, as a condition of the merger going ahead. These undertakings were honoured for the three years and then disregarded.²¹ The merger, according to Mr Beck, had produced ‘higher retained earnings, high profitability, and better shareholder returns’,²² but had not lowered the costs faced by consumers.

1.42 Mr Jones of the ACCC stated that the ACCC’s role was not to ensure that the costs faced by consumers were lowered and, to his knowledge, the ACCC had never made it ‘a requirement that firms lower their prices as a condition of approving a merger.’²³ Furthermore, Mr Jones stated that it was not viable to impose conditions for long periods because the financial sector was very dynamic and therefore any ‘open-ended requirement’ to comply with certain requirements could result in, at some time in the future, financial institutions having to comply with inappropriate requirements.²⁴

1.43 The ACA commented that the reduction in the provision of financial services in the 1990s had occurred without the ACA, Australia’s peak consumer body, being consulted, because the current framework did not allow for the ACA to put its views ‘forward at the stage where mergers were being approved’.²⁵

Lack of consultation regarding mergers

1.44 Currently a bank merger may be allowed to proceed, without any public consultation, if the merger does not infringe section 50 of the Trade Practices Act. In the event that a merger is not approved, however, the banks involved may appeal and institute a public consultation process pursuant to section 90 of the Trade Practices Act. The ACA

18 Evidence, p. 6.

19 Evidence, p. 18.

20 Submission No. 2, Financial Sector Union Australia, p. 4.

21 Evidence, p. 5.

22 Evidence, p. 5.

23 Evidence, p. 20.

24 Evidence, p. 19.

25 Evidence, p. 7.

found it anomalous that the banks could institute a public consultation process but a consumer body such as the ACA could not.²⁶

1.45 The FSU was similarly concerned about the current lack of a requirement for there to be consultation about mergers in the financial sector. Mr Beck pointed out that, even with regard to the current Bill, the FSU had not been consulted, despite the fact that the FSU ‘represents the majority of employees who will be impacted by the consequences of [this Bill]’.²⁷

1.46 Mr Beck acknowledged that some consultation did occur. Mr Beck noted, and approved of, the consultation that had taken place, regarding the current Bill, between the Treasurer and the Australian Bankers Association, the International Banks and Securities Association of Australia, the Australian Association of Permanent Building Societies and the Credit Union Services Corporation Australia Ltd. The FSU had not, however, been consulted on the Bill.²⁸

1.47 Mr Beck informed the Committee that the FSU had been consulted by the ACCC in relation to the Commonwealth Bank-Colonial Bank merger, but only out of ‘courtesy’,²⁹ not as a matter of requirement. The FSU regarded such consultation unproductive as typically the FSU’s concerns about its ‘members employment simply were not able to be taken into account by the ACCC’.³⁰

1.48 The problem essentially was that the FSU would express its concern to the ACCC about job losses resulting from mergers, but the ACCC, guided by the dictum ‘job loss presumably means lower cost’,³¹ would approve mergers for precisely the reasons the FSU was apprehensive about them. Mr Beck argued that the FSU ‘was entitled to a statutory or a mandatory opportunity’³² to express its concern for its members’ jobs, but clearly the ACCC was not the appropriate entity to express those concerns to and no other venue currently existed.

Need for CSOs

1.49 Mr Beck informed the Committee that the FSU had been ‘swamped’ by community reaction to bank branch closures, reaction that indicated that communities and individual consumers regarded banking services as akin to telecommunications services.³³ Mr Beck suggested that, just as a universal service obligation had been applied in relation to telecommunications, something similar should be applied to the provision of banking services.³⁴ The ACA also desired to see CSOs imposed on the banking industry.³⁵

26 Evidence, p. 8.

27 Evidence, p. 2.

28 Evidence, p. 2.

29 Evidence, p. 4.

30 Evidence, p. 5.

31 Evidence, p. 5.

32 Evidence, p. 4.

33 Evidence, p. 3.

34 Evidence, p. 3.

Concerns with the current Bill

1.50 Both the ACA³⁶ and FSU³⁷ considered the current Bill flawed in that no criteria were proposed against which the Treasurer would judge a proposed merger before approving it. Without such criteria, according to the ACA, it would be possible for mergers in the financial sector to be approved without reference to their ‘true impacts on consumers and communities’.³⁸ It was stated in evidence that these concerns put forward by the ACA were supported by the Financial Services Policy Centre.

1.51 Mr Beck suggested that the ‘intention of this legislation is to encourage a stronger and more effective finance sector’,³⁹ therefore the FSU did ‘not have any in principle objection’ to the Bill as it was in its members’ interests that ‘Australia [has] a competitive and effective financial services sector.’⁴⁰ Only by having a globally competitive Australian finance sector could those workers remaining in the finance sector be assured of ‘enhanced job security’.⁴¹

1.52 Mr Beck acknowledged that achieving competitiveness, and enhanced job security, was not easy. Over the past decade Australia ‘lost more than 50,000 [banking] jobs, more than 35,000 insurance jobs and more than 2,000 [bank] branches.’⁴² Mr Beck noted that the FSU’s attitude during this time of downsizing had ‘not been one of blanket opposition’, rather the FSU had ‘cooperated with a range of employers on a whole range of mergers and acquisitions’.⁴³

1.53 Mr Beck stated that, considering the FSU’s attitude to previous mergers, its representation of many workers in the finance sector, and its interest in its members’ future, the FSU was ‘entitled’⁴⁴ to be consulted about matters relating to mergers. The FSU therefore suggested that there should be an ‘obligation to consult with key stakeholders’⁴⁵ when mergers were under consideration, as well as a clear process of evaluating mergers which addressed the ‘social impact’⁴⁶ of the merger. Neither of these things is provided for in the current Bill.

35 Evidence, p. 7.

36 Submission No. 1, Australian Consumers’ Association, p. 1.

37 Submission No. 2, Financial Sector Union, p. 3.

38 Evidence, p. 6.

39 Evidence, p. 1.

40 Evidence, p. 1.

41 Evidence, p. 3.

42 Evidence, p. 3.

43 Evidence, p. 2.

44 Evidence, p. 3.

45 Evidence, p. 2.

46 Evidence, p. 2.

1.54 The ACA, in its submission, also expressed concern about the ‘limited opportunity for public debate’ on a Bill that proposed to facilitate bank mergers, especially considering the impact that bank mergers can have on communities.⁴⁷

Situation in foreign jurisdictions

1.55 The ACA noted that in some other countries, notably Canada, the financial sector had been reformed so that major banking mergers now required public consultation. Bank branches could not now be closed in less than four months (six months in rural areas where no other bank branch was within 10km), and again consultation was required on the closure.⁴⁸

1.56 Ms Jennifer Flueckiger, Industry Research Officer, FSU, also cited the situation in Canada as an example that should be studied in relation to Australian legislation.⁴⁹ Mr Jones of APRA stated that the Canadian model had not been taken into account in formulating the current Bill as the Bill predated the Canadian policy announcements.⁵⁰

1.57 Mr Beck suggested the US *Community Reinvestment Act* (CRA) as another example Australia might gainfully follow. The CRA required compliance by ADIs with ‘social and public impact statements’. Mr Beck noted that there was ‘fierce opposition’⁵¹ by the industry to the adoption of measures similar to those in the CRA.

1.58 This would seem to be correct as the Australian Bankers’ Association had issued a press release on 31 July 2000 stating that the CRA, and CSOs in general, were ‘simply not needed’. The ABA claimed that calls for CSOs which required banks to provide a minimum level of services to regional and rural Australia were frequently just calls for a minimum number of ‘bricks and mortar’ branches. Such calls, according to the ABA, were misguided as they ignored the fact that the ‘vast majority’ of customers now used various forms of electronic banking. Moreover, so the ABA argued, if ‘people can’t afford’ banking, or any other essential service, then it ‘becomes a government responsibility’, not the responsibility of the banks, to provide such services ‘on a subsidised basis’.⁵²

1.59 The report, conducted by Don Cruikshank and published in July 1999, into banking in the United Kingdom (UK), was also referred to in evidence by the FSU. The report recommended, among other things, that in the process of assessing if a merger should proceed, the Government should ‘ensure that consumers receive a fair share of the benefits’. It should be noted that the UK Government has now responded to the report and has restated its position that the ‘impact on competition’ should be central to the test for assessing mergers. There was no specific reference to the UK Government imposing conditions to

47 Submission No. 1, Australian Consumers’ Association, p. 1.

48 Submission No. 1, Australian Consumers’ Association, p. 6.

49 Evidence, p. 2.

50 Evidence, p. 14.

51 Evidence, p. 3.

52 Australian Banker’s Association, ‘Australian Banks are good corporate citizens – no need for American-style community service obligations’, Australian Bankers’ Association media release 11/00, 31 July 2000.

‘ensure’ that consumers share the benefits of mergers,⁵³ however, the UK Government supported the use of the Post Office to provide a ‘universal’ banking service.⁵⁴

Possible CSOs

1.60 Ms Petschler of the ACA was asked by the Committee to provide a supplementary submission on how a “framework” for CSOs might be introduced in the financial sector.⁵⁵

1.61 In this supplementary submission the ACA noted that the Treasurer imposed the following conditions when approving the Commonwealth-Colonial Bank merger:⁵⁶

- Colonial Bank branches to remain open for two years if no Commonwealth branch was nearby;
- country towns to keep at least one bank branch for five years;
- no reduction in employment for two years in regional NSW and Tasmania; and
- establishment of one or more call centres in Tasmania.

1.62 These conditions, the ACA commented, incorporated concepts of ‘social responsibility’.⁵⁷ The ACA suggested the Government extend its use of ‘social responsibility’ concepts and develop a ‘robust and enforceable process’ for reviewing all bank mergers. Key elements of the criteria against which bank mergers would be judged in this new approval process, would include:⁵⁸

- a mandatory review of public net benefit measures, including public hearings, which could not be side-stepped by pre-emptive undertakings;
- adequate consultation and participation with affected consumers and communities;
- consultation with stakeholders and regulators in establishing public benefit tests;
- rigorous review of competitive impacts through ACCC processes; and
- monitoring of the impact of mergers and enforcement of undertakings.

1.63 In addition to criteria for approving mergers, the ACA also suggested CSOs to be imposed on entities in the financial sector. These CSOs would have to be fully developed in consultation with industry, consumers advocates, unions and communities, but as a first draft the ACA suggested the following:⁵⁹

53 ‘Competition in UK Banking: The Cruikshank Report - Government Response’, HM Treasury, August 2000, recommendation 11 and response.

54 ‘Competition in UK Banking: The Cruikshank Report - Government Response’, HM Treasury, August 2000, recommendation 54 and response.

55 Evidence, p. 8.

56 Submission No. 1 - Supplementary, Australian Consumers’ Association, p. 3.

57 Submission No. 1 - Supplementary, Australian Consumers’ Association, p. 3.

58 Submission No. 1 - Supplementary, Australian Consumers’ Association, p. 8.

59 Submission No. 1 - Supplementary, Australian Consumers’ Association, p. 7.

- basic banking services (ie affordable and accessible ‘no frills’ accounts, to ensure all consumers are able to access retail banking services regardless of their income, geographic location and personal circumstances);
- access (maintenance of face to face bank services for consumers, ensuring a viable branch network is maintained for the majority of communities, commitments to affordable service options in areas where services are reduced or withdrawn, industry awareness of barriers to access for certain consumers, consultation on branch closures or service changes);
- community investment (using a community rating, a regulator could assess banks performance against lending, deposit and transaction services in communities and economic regions); and
- service standards (minimum requirements in fairness, fee increases, interest rate policies, consumer relations).

Conclusion

1.64 The Committee noted that both the organisations that made submissions were of the view that the Bill did not contain provisions:

- making it mandatory to consult stakeholders regarding mergers,
- providing criteria for the Treasurer, or the Treasurer’s delegate, to evaluate mergers and demutualisations against before approving them; and
- imposing CSOs on entities the finance sector.

1.65 All of the above are in the nature of proposals for additional legislative provisions. There were no suggestions that any provision in the current Bill should be struck out, indeed, the FSU stated in evidence that it had no ‘in principle objection to’⁶⁰ the Bill in its current form. The ACCC acknowledged that none of the additional legislative provisions suggested by the ACA and FSU would impact on its existing processes for approving mergers,⁶¹ a comment clearly indicating the supplementary nature of the suggestions of the ACA and FSU to the existing Bill.

1.66 The current Bill contains amendments of a technical nature that will give the Treasurer, and the Treasurer’s delegate, the power to impose conditions in relation to mergers should a situation such as Y2K again present itself. Such legislation is clearly beneficial, moreover the current Bill, if passed, will merely bring the Banking Act into line with other existing legislation. The claimed deficiencies in the current Bill are in the nature of requests for additional legislation and therefore the Committee considers that the current Bill should proceed with the proviso that the Senate’s attention is drawn to the requests for further legislation in relation to mergers and demutualisations.

60 Evidence, p. 2.

61 Evidence, p. 17.

Recommendation

1.67 The Committee recommends that the Senate pass the Bill.

Senator the Hon Brian Gibson
Chairman

LABOR SENATORS' MINORITY REPORT

Financial Sector Legislation Amendment Bill (No 1) 2000

Senate Economics Committee

Labor Report

The Financial Sector Legislation Amendment Bill (No 1) 2000 is a miscellaneous bill which amends a number of separate bills including the Banking Act 1959, the Reserve Bank Act 1959 and the Superannuation Industry (Supervision) Act 1993.

The provisions in this bill relating to the Superannuation Industry (Supervision) Act 1993 have been examined separately by the Superannuation and Financial Services Select Committee.

The focus of the Committee's inquiry into this bill was chiefly in relation to proposed powers in this bill to amend the Banking Act 1959 to add a new Section 64 which would give the Treasurer power to attach conditions when consenting to a merger of an ADI. The Treasurer would also have power to revoke or vary conditions on a consent.

Currently when two banks merge they must seek the approval of the Treasurer under Section 63(1) of the Banking Act 1959. However the Treasurer is currently unable to attach conditions to a consent under this Act, and must not unreasonably withhold consent.

The Treasurer does have power to attach conditions to a merger under the Financial Sector (Shareholdings) Act 1998. The Act provides the Treasurer with the power to attach conditions to a consent if a merger results in a financial sector organisation acquiring over 15% of the shareholding of another financial sector organisation.

Treasury and APRA officials have advised that the chief purpose of this bill is to harmonise existing powers that are contained in the Financial Sector (Shareholdings) Act 1998 into the Banking Act 1959 to facilitate APRA's ability to supervise the industry.

Labor members acknowledge that this bill does not provide the Treasurer with extensive new powers but harmonises existing powers into the Banking Act 1959.

Labor members are concerned that the Government has not recognised that there is significant community concern about the impact of bank mergers on competition and service. Labor members believe that the Government had an opportunity to address community concerns about bank social obligations through this bill. Instead the Minister for Financial Services & Regulation has explicitly said that the bill is about making mergers of ADIs easier.

The merger of the Bank of Melbourne and Westpac in 1997 in particular raised considerable community concern about the impact of bank mergers on competition and service.

Prior to the merger with Westpac, the Bank of Melbourne was regarded as an aggressive competitor in Victoria, marketing itself as ‘cutting the cost of banking.’

In 1997 the Australian Consumers Association (ACA) conducted a ‘Bank Satisfaction Survey’ in which the Bank of Melbourne topped the list for best regional bank with 48% of customers reporting that they were very satisfied with the bank. Following the merger with Westpac, the ACA’s 1999 ‘Bank Satisfaction Survey’ revealed that only 14% of customers were very satisfied with the bank. The ACA’s 1999 survey revealed that an astounding 71% of Bank of Melbourne customers believed that fees and charges were worse or a lot worse since the merger.

This significant turn around in community attitudes to the Bank of Melbourne following the merger was despite the fact that the ACCC accepted a series of undertakings from Westpac management.

The ACCC’s undertakings included that:

- 100 Bank of Melbourne Branches to be open 9am to 12noon Saturday.
- 100 Bank of Melbourne Branches to be open for a minimum of 8 hours on Monday to Friday.
- No pre-existing customer who has had a minimum of \$400 in a BML account will be charged Account Keeping Fees or Transaction Fees where the minimum balance is over \$400.
- BML will continue to offer pre-existing customers’ interest calculated on a daily basis, direct credit of salaries, automatic loan repayments and free personal cheque books.
- The CEO of BML will have authority to make decisions in respect to interest rates and fees, management of branches, marketing, credit decisions.
- During the undertaking period Westpac will provide unilateral access to its EFTPOS facilities and EFTPOS Gateway facilities to any card issuer who requests such access.
- During the undertaking period Westpac will provide unilateral access to the designated ATM network to any card issuer who requests such access on reasonable commercial terms.

The ACA stated to the inquiry that in respect to the Westpac undertakings to the ACCC that it was concerned ‘*whether those undertakings have been adequate and have protected consumers*’

The Finance Sector Union presented evidence to the inquiry that Westpac had closed 107 branches in Victoria since the merger with the Bank of Melbourne and slashed 1,200 jobs. In respect to the Westpac’s undertaking that the CEO of the Bank of Melbourne would have authority to make decisions on fees and interest rates, the FSU demonstrated that since the merger, Westpac and the Bank of Melbourne’s account structures and interest rates had become almost identical.

The ACCC have subsequently accepted a series of undertakings from the Commonwealth Bank in respect to its acquisition of Colonial. These undertakings included:

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- Provide new entrants and small players in Tasmania and regional NSW with access to CBA/ Colonial ATM and EFTPOS networks.
 - Offer CBA/ Colonial banking sites to new entrant or small player on vacation of site.
 - Provide IT systems support and processing support to financial institutions intending to provide services to customers in Tasmania or Regional NSW.
 - Provide customers in Tasmania and regional NSW with pricing and service quality that is equivalent to, or more favourable than that supplied to customers in metropolitan NSW.
 - Make available to customers in Tasmania and regional NSW the same standard products, subject to certain conditions, that are available to CBA customers in metropolitan NSW.
 - Pay the costs of and provide information to an independent monitor who will be appointed to report to the Commission on CBA's compliance with these undertakings.

The ACCC stated at the public inquiry that after a period of three years, if a bank had substantially met all of its undertakings, it would be released from them for the remaining period, effectively ending their obligations.

Of significant concern is that recent bank mergers have resulted in the merging banks acquiring significant market power. In Tasmania for instance the Commonwealth Bank will have well over 50% of customers in some markets following the merger with Colonial.

Consumer groups have expressed concern, not only that the ACCC's undertakings are ineffective at addressing the issue of market power, but that the ACCC's consultative processes are poor.

At the time of the Commonwealth Bank / Colonial merger, Chris Connolly from the Financial Services Consumer Policy Centre stated, *"The ACCC has been negotiating behind closed doors with the two banks. The banks have had top level access to ACCC staff and the Commissioner. Contrast this with the fact that the ACCC did not write to a single Tasmanian consumer or community organisation. They held no public hearings in Tasmania and the only consumer group they visited was the Australian Consumers' Association in Sydney."*

Labor members believe that there is a need for public debate about the adequacy of the undertakings that the ACCC has accepted from both Westpac and the Commonwealth Bank. The ACCC must ensure that its consultative process allow consumer and community groups to communicate their concerns about the impact of a merger before a final decision is made.

Public Interest Test

At the public inquiry into the bill, consumer and trade union organisations argued that there was a need for an improved process of consultation when the Treasurer considers consenting to the merger of an ADI.

The Australian Consumers Association were of the opinion that bank mergers should be subject to a public interest test.

There is no formal public interest test in the Banking Act 1959. Nor is a public interest test proposed in this bill.

At the inquiry into this Bill, Treasury officials stated that although there is no formal national interest test in the legislation, the Treasurer may currently consider a range of issues in consenting to a merger. These include:

- Prudential issues
- Competition policy issues
- National interest issues

Treasury officials defined the types of issues that could be included under the national interest as including employment effects, regional effects, benefits to consumers and industry, greater efficiency and productivity and benefits in creating stronger institutions or greater diversity of product lines.

The Treasurer implicitly acknowledged that public interest issues are relevant when consenting to a bank merger when he accepted undertakings from the Commonwealth Bank in respect to regional employment, and regional branches.

There was however no consensus from consumer organisations as to what should be included in a public interest test.

At the public inquiry, Senator Murray questioned both the Finance Sector Union (FSU) and ACA on the relative weightings that could apply in any public interest test.

The FSU stated that at this stage their primary concern was not about relative weightings, but about having their voice heard. The FSU cited evidence that the Treasurer had not responded to their request for meetings to discuss the impact of the then proposed merger between the Commonwealth Bank and Colonial, despite its potential impact on employment.

Ms Petcher from the Australian Consumers Association was also not concerned at what the relative weightings should be stating to the inquiry that, *“we are not at the point now where we need to worry about the fact that someone should have a bigger voice than someone else. Our concern is that we do not get the opportunity to put that voice forward at the stage where mergers are being approved.”*

The ACA stated at the inquiry that they were not in a position to be able to adequately define what should go into a public interest test nor what community obligations the Treasurer should consider when consenting to the merger of an ADI. They stated to the inquiry that, *“what we would like is an actual debate with government, with the regulators and with the banking sector around what would be viable universal service obligations and how they would look.”*

Labor members concur with the submission from the ACA that there is a need for a public debate on how the public interest should be defined.

Labor members are of the view that the Treasurer should immediately establish a forum to bring consumer groups, trade unions, pensioner groups and other stakeholders together with banking industry representatives to discuss the issues that the Treasurer could consider when consenting to a merger of an ADI.

It is also clear that in consenting to the merger of ADIs an effective consultation process would provide stakeholders with the opportunity to express their views.

Reserve Bank Act 1959

This bill also proposes amendments to the Reserve Bank Act 1959 which potentially have an impact on the terms and conditions of employment of employees of the Reserve Bank of Australia.

The Finance Sector Union of Australia, who represent approximately 500 employees at the Reserve Bank, have indicated that they are concerned that the amendments to the Reserve Bank Act contained in this Bill could be interpreted to mean that the Bank may now unilaterally determine what remuneration will apply to its employees at any particular time, without recognition of any previous workplace/industrial arrangements or agreements.

Treasury officials have confirmed that existing terms and conditions of employment for RBA staff (including access to housing loans) will not be affected by the proposed amendments.

Labor members however are concerned that the Government is actively encouraging its departments and agencies to pursue individual employment agreements to replace collective agreements. We are aware that the Australian Prudential Regulation Authority unilaterally changed long-agreed employment entitlements of Commonwealth employees transferred to it from the previous financial regulators, including the Reserve Bank.

Labor members therefore propose that the bill be amended to protect the existing collective bargaining agreements that are already in place.

Senator Shayne Murphy
Deputy Chairman

Senator Stephen Conroy

Senator George Campbell

AUSTRALIAN DEMOCRATS' MINORITY REPORT

Merger Approvals

The Australian Democrats are of the view that there are insufficient opportunities for consumer and community input and participation in bank merger approvals. At present there is no opportunity or guarantee that merger approvals will be considered in terms of a broad public interest test.

I foreshadow that the Australian Democrats will attempt to establish criteria against which merger approvals must be assessed. We envisage that a process could be created which could provide the government with the opportunity to consider the views of communities, consumers and other stakeholders .

Community Service Obligations

The Australian Democrats have long held the view that community service obligations should operate in the banking sector.

Banks have a special role in our society and fulfil an important and essential service. In past years banks have enjoyed preferential regulatory treatment.

The Democrats agree with the Australian Consumers' Association when they comment:

ACA argues that consumers (and the industry) would benefit from mechanisms which ensured minimum protections in financial services, based on the premise that access to banking services is a requirement for all consumers in our society.

The government and indeed, the Prime Minister, have recently indicated support for the proposition that banks have community or social obligations.

The Australian Bankers Associations recently indicated that they take the view that there is no social obligation on the banking sector. The opposing views of the government, the community and the ABA need to be reconciled by legislative change which ensures that banks are bound by reasonable obligations which result in all Australians having access to affordable banking services.

The Democrats reserve our position in respect of this Bill.

Senator Andrew Murray

APPENDIX 1**LIST OF SUBMISSIONS**

- No. 1 Australian Consumers' Association
- No. 2 Financial Sector Union Australia

APPENDIX 2**LIST OF WITNESSES
APPEARING BEFORE THE COMMITTEE****Friday, 4 August 2000, Melbourne****Australian Competition & Consumer Commission**

Mr Brian Cassidy, Chief Executive Officer

Mr Ross Jones, Commissioner, Mergers

Australian Consumers' Association

Ms Louise Petschler, Senior Policy Officer, Financial Services

Australian Prudential Regulation Authority

Mr William Jones, Senior Policy Advisor, Policy Research and Consulting

Financial Sector Union Australia

Mr Tony Beck, National Secretary

Ms Jennifer Flueckiger, Industry Research Officer

Department of Treasury (Commonwealth)

Mr Steve French, General Manager, Financial Institutions Division

Mr Bill Keown, Manager, Deposit Taking Institutions Policy & Prudential Unit

Ms Erin Bledsoe, Analyst, Financial Institutions Division