

Minority Report by Senator Xenophon

Introduction

1.1 The inquiry into aspects of bank mergers was established to investigate the economic, social and employment impacts of the recent mergers among Australian banks, what measures are in place to ensure sufficient choice for consumers, and whether section 50 of the Trade Practices Act 1974 is adequate to prevent further concentration of the Australian banking sector.

1.2 Australia's big four banks, Commonwealth Bank, Westpac, ANZ and National Australia Bank, dominate the Australian banking sector, holding 73 percent of the national banking market.¹ These major banks are a result of a series of bank mergers over the past 150 years, however there are concerns that any greater concentration of the sector, especially as a result of acquisitions of second-tier banks by any of the Big Four, will result with less consumer choice, reduced competition and job losses.

Background

1.3 There are four main views about the motivations behind bank mergers; that it improves the efficacy of banking; that it's aimed at increasing market power; that it enables banks to grow in size and share; and, also, corporate ego.

Interestingly, only one of the four intents of a merger appears to be in the interests of customers.

In fact, the Finance Sector Union stated in its submission to the Committee that "some bank mergers may be necessary to ensure that financial institutions survive, however most major mergers appear to be motivated by profit with no guarantee of any public benefits"².

1.4 Since the late 1990's, Australia's banking systems has operated according to the 'four pillars policy', which the Reserve Bank of Australia explains is:

"... an Australian Government policy that there should be no fewer than four major banks to maintain appropriate levels of competition in the banking sector."³

The reason four banking institutions is based on the notion that a merger between any two of the four would likely be followed by a merger of the other two which would result in an effective duopoly of the market.

¹ Australian Prudential Regulation Authority, *Banking Statistics*, October 2008

² Finance Sector Union, *Submission 12*, pg 13

³ Reserve Bank of Australia, Glossary,
<http://www.rba.gov.au/Glossary/detail.asp?term=Four%20Pillars%20Policy>

1.5 However, the Finance Sector Union asserted in its submission to the Committee its concerns of mergers between any of the four major banks and medium-sized banks, which it believes has flow on effects, namely increased pressure for the other big banks to also acquire ‘second tier’ banks.⁴

Indeed, the role of ‘second tier’ banks plays a crucial role in ensuring competition in the banking sector.

In a paper authored by Garry Goddard and Greg Walker, *Competition Analysis of Bank Mergers in Australia*, medium-sized banks were considered to:

“... be efficient, innovative, geographically focused, close to their customers and sufficiently differentiated from the ‘look-a-like majors’ to provide an incentive for the major banks to remain competitive.”⁵

1.6 Mergers can be considered by the Australian Competition and Consumer Commission (ACCC) under a formal or informal process, however, to date, all banking mergers considered by the ACCC have been under the informal process.⁶

“The ACCC’s approach in assessing a merger is to compare the likely state of competition in future with the merger (the factual) and the likely state of competition in the absence of the merger occurring (the counterfactual).”⁷

In its capacity to review and make an assessment on proposals of acquisition, the ACCC gives consideration to section 50 of the Trade Practices Act, which states that:

- (1) A corporation must not directly or indirectly:
 - (a) acquire shares in the capital of a body corporate; or
 - (b) acquire any assets of a person;if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

And, in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;

⁴ Finance Sector Union, *Submission 12*, pg 3

⁵ Garry Goodard and Greg Walker, *Competition Analysis of Bank Mergers in Australia*, Journal of Law and Financial Management, 2002

⁶ Australian Competition and Consumer Commission, *Submission 4*, pg 5

⁷ Australian Competition and Consumer Commission, *Submission 4*, pg 3

- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and,
- (i) the nature and extent of vertical integration in the market.

1.7 The Senate inquiry was spurred by the Westpac/St George Bank merger which was approved by the Australian Competition and Consumer Commission (ACCC) in December 2008 and also the Commonwealth Bank/BankWest merger announced earlier in 2008.

In an interview with the *Australian Financial Review*, ACCC Chairman, Mr Graeme Samuel admitted:

"... the ACCC had been "very uncomfortable" last December when troubled British lender HBOS sold BankWest to Commonwealth Bank of Australia. But the ACCC let it through after being advised by the RBA and the Australian Prudential Regulation Authority that the deal was necessary for the stability of the financial system."⁸

It was also deemed that "the proposed acquisition would not be likely to have the effect of substantially lessening competition in any relevant market"⁹.

The economic, social and employment impacts of the recent mergers

1.8 However, one of the key disadvantages to a bank merger from a consumer's perspective is that large banks have a tendency to lose touch with their communities and customers, unlike their medium-sized counterparts.

In its submission to the Committee, consumer organisation, CHOICE, stated that it has considered the impact of excessive market power held by the banking oligopoly.

"We have formed the view that such excessive market power risks the following outcomes:

- Crowding out new entrants;
- Poor customer service;
- Poor employee satisfaction;
- Excessive fees and interest rates;
- Low rates of customer switching;
- Poor product innovation;
- Reduced access to essential banking services; and,
- Reduced diversity in local areas.¹⁰

⁸ Matthew Drummond, *Australian Financial Review*, *Samuel warns on bank mergers*, 14 April 2009

⁹ Australian Competition and Consumer Commission, *Submission 4*, pg 9

¹⁰ CHOICE, *Submission 6*, pg 5

1.9 In its submission to the Committee, the Finance Sector Union called for a broader 'public interest' test to be incorporated into section 50 of the Trade Practices Act, to take into account these impacts.

"At present mergers assessed under section 50 of the Trade Practices Act 1974 do not consider job losses, for example; however the Finance Sector Union believes that they are a significant consequence of any merger and should be included when considering any merger for regulatory approval."¹¹

However, this was contrasted by the Law Council of Australia's introductory statement during the Senate Committee hearing that they:

"... can see no economic or legal justification for the introduction of an alternative regime for assessing bank mergers, or for the introduction of differ way of measuring competition in the banking sector. Rather, the Committees support the continued operation of the existing merger, prudential and public benefit regulatory frameworks for the assessment of bank mergers."¹²

1.10 Currently, there is room for the Treasurer to impose conditions on institutions seeking to merge with another bank, to minimise the impact of a merger on the community and employees, however it has been argued to the Committee that these do not go far enough and are often not enforced.

The measures available to enforce conditions on future bank mergers

1.11 In approving the merger between Westpac and St George Bank, the Treasurer imposed a number of conditions whereby, for three years, the merged entity is required to:

- Maintain (in net terms) branches and ATMs;
- Remove foreign ATM fees for Westpac customers using St George ATMs and vice-versa;
- Continue to provide a comprehensive range of affordable banking products to low-income consumers and others ... with special needs;
- Retain all Westpac and St George retail banking brands including Bank SA;
- Maintain dedicated management terms for St George and Westpac retail banking distribution; and,
- Retain a corporate presence in Kogarah.¹³

¹¹ Finance Sector Union, *Submission 12*, pg 5

¹² Law Council of Australia, *Proof Committee Hansard*, pg 43 (10 August 2009)

¹³ Treasury's Press Release 08/144 (18 December 2008), reproduced in *Submission 14 (Australian Banker's Association)*, pg 20

In addition, the bank is required during the transition period to maximise internal redeployment opportunities; assist staff made redundant during the merger process and work with consumer advocates and community stakeholders to minimise community concerns about the merger and process and work with consumer advocates and community stakeholders to minimise community concerns about the merger and its impact on customers and the community, and address any concerns as sensitively and quickly as positively.

1.12 However, the ACCC in its submission to the Committee did concede that “these conditions are not monitored or enforced by the ACCC”¹⁴, but stated that:

“If the undertaking is breached, the ACCC may seek orders from the court directing compliance with the undertaking, the giving up of any financial benefit gained from the breach, compensation for any other loss or damage as a result of the breach, or any other appropriate orders.”¹⁵

1.13 In response to the Westpac/St George merger conditions, the Brotherhood of St Laurence, which represents those in the community living in poverty, stated in its submission that it “is concerned about the lack of any appropriate monitoring and enforcement of these conditions,”¹⁶ and the impact this would have on the community.

1.14 Indeed, it seems contrary to its intent that the Treasurer will impose undertakings upon a merger but not ensure that these conditions are met. Penalties do exist for breach of these conditions, such as “the giving up of financial benefit gained from the breach, compensation for any other loss or damage as a result of the breach or any other appropriate orders”¹⁷, but it has been recommended that more effective penalties should be introduced, such as a forced de-merger of assets, to ensure the banking institutions abide by the regulations set down.

The capacity for the ACCC to enforce divestiture in the banking sector

1.15 Currently, if the ACCC considers that an acquisition contravenes section 50 of the Trade Practices Act and the parties do not agree to modify or abandon the acquisition, the ACCC can apply to the Federal Court for an injunction, divestiture or penalties to remedy any competition issues.¹⁸

1.16 Divestiture can be sought either

- By accepting binding undertakings from the notifying party to divest the relevant asset or business line within a specified period; or,

¹⁴ Australian Competition and Consumer Commission, *Submission 4*, pg 11

¹⁵ Australian Competition and Consumer Commission, *Submission 4*, pg 6

¹⁶ Brotherhood of St Laurence, *Submission 8*, pg 4

¹⁷ Australian Competition and Consumer Commission, *Submission 4*, pg 6

¹⁸ Australian Competition and Consumer Commission, *Submission 4*, pg 6

- By applying to the Federal Court pursuant to section 81 of the Trade Practices Act.¹⁹

However, according to the Law Council of Australia, “there is no general divestiture power in the Trade Practices Act which would allow the ACCC to seek divestment of assets or business lines by merging parties. Consequently, the ACCC does not have the power to seek divestiture other than in the context of a merger review.”²⁰

1.17 As the national regulator for competition, fair trading and consumer protection laws, it should be in the capacity of the ACCC to enforce divestiture in the banking sector where contraventions of section 50 of the Trade Practices Act have occurred.

1.18 While it may seem extreme, the penalties for breaches of merger conditions must be strong to ensure banks don't benefit from the merger without considering the impact the acquisition will have on the community.

1.19 Consumer organisation, CHOICE, also highlighted in its submission to the Committee that:

“... mergers are not the only way in which concentration and consequent harm to consumer welfare can occur. Creeping acquisitions, failure of competitors, organic growth and potentially other market developments can also result in excessive competition over time.”²¹

Consumer choice and competition

1.20 A national poll by McNair Ingenuity of 1000 people in response to the Westpac/St George merger found that 75 percent believed that the merger would mean less competition. It also found that 72 percent already think that there is not enough competition between banks.²²

1.21 The ACCC admitted in its submission that:

“In some cases, however, mergers have anti-competitive effects. By altering the structure of markets and the incentives for firms to behave in a competitive manner, some mergers can result in significant consumer detriment.”²³

1.22 Indeed, there are growing concerns that consumer choice as a result of bank mergers is being increasingly limited to the four major banks.

Abacus-Australian Mutuals, the industry body for credit unions, mutual building societies and friendly societies, stated in its submission:

¹⁹ Law Council of Australia, *Submission 15*, pg 7

²⁰ Law Council of Australia, *Submission 15*, pg 7

²¹ CHOICE, *Submission 6*, pg 12

²² Finance Sector Union, *Submission 12*, pg 3

²³ Australian Competition and Consumer Commission, *Submission 4*, pg 3

“Consumer choice is being squeezed in banking. Major banks have taken over the two largest regional banks and there is speculation some of the remaining regional banks are for sale.”²⁴

This concern was also detailed by Associate Professor Frank Zumbo from the University of New South Wales, who stated that:

“As markets become more concentrated, the opportunities for either collusion or parallel conduct with respect to pricing and related matters grow considerably. Within this context, banking mergers, as with other mergers across the economy, present a real and very serious risk to competition and consumers.”²⁵

1.23 During the recent considerations of the Westpac/St George and Commonwealth/BankWest mergers, CHOICE explained in its submission that it had called one the ACCC to "undertake more thorough research into consumer's experiences of and attitudes towards competition in the retail banking sector"²⁶.

"Despite such requests being made, the ACCC did not believe it was necessary or appropriate to conduct its own research into the market."²⁷

Off-shoring

1.24 Another growing community concern is the issue of off-shoring. Increasingly, banks, and other sectors, are sending jobs overseas in order to reduce costs.

In its submission to the Committee, the Finance Sector Union gave examples of the ANZ, which shifted 1,100 software development and IT positions to Bangalore in November 2005; Citigroup replacing the 150 jobs in its Brisbane call centre with positions in Manila; NAB shifting 220 IT and accounts processing positions to Bangalore in 2005 and 2006 and a further 500 jobs to India in 2008; St George shifting 100 jobs involving credit cards to India in September 2006 and a further 30 in May 2007 and Westpac moving over 500 back office processing and retail administration jobs in India in September 2006.²⁸

1.25 The Australian Bankers Association advised that it “estimates that around 3,200 full-time employment positions have been impacted by services being sourced offshore over the past few years, equivalent to about 2.4 percent of the total workforce of ABA member banks.”²⁹

1.26 But, as the Finance Sector Union of Australia argued in its submission:

“... mergers and off-shoring in the finance sector are generally not in the public interest and have often had detrimental outcomes such as:

²⁴ Abacus-Australian Mutuals, *Submission 18*, pg 2

²⁵ Associate Professor Frank Zumbo, *Submission 19*, pg 2

²⁶ CHOICE, *Submission 6*, pg 12

²⁷ CHOICE, *Submission 6*, pg 12

²⁸ Finance Sector Union, *Submission 12, Appendix 8*, pg 9

²⁹ Australian Banker's Association, *Submission 14*, pg 13

- Employment losses;
- Negative impacts on communities;
- Reduced consumer choice and service; and,
- Loss of skills and investment in Australia.³⁰

1.27 Further to this, there remains a lack of consent by customers to have confidential data held by persons other than the bank with whom the information was provided.

When applying for a loan, information about one's salary, debts, marital status, other banking arrangements, address, is provided, to name a few. Sometimes even a Passport is required for verification or a Driver's Licence.

Given the increase in off-shoring by banking institutions, it is imperative that consumers are consulted on this and provide their written consent to allow this to occur.

Conclusion

1.28 Bank mergers may come with corporate benefits, especially if it's as a result of 'rescuing' a bank that may have otherwise had to close, however with acquisitions comes a raft of other issues that must be considered to ensure that Australia's banking system remains competitive and in the community's best interests.

Recommendation 1

That the Banking Act is amended to provide for an outright prohibition against any merger between the four major banks, so as to ensure that the 'four pillar' policy is given the force of law and can only be altered by Parliament.

Recommendation 2

That all bank merger requests be subject to a formal process of approval by the ACCC.

Recommendation 3

That section 50 of the Trade Practices Act incorporates a broader 'public interest' test to include the impact of the merger on community access, costs and jobs, and that there be extensive and transparent community consultation as part of the approval process.

³⁰ Finance Sector Union, *Submission 12*, pg 2

Recommendation 4

That section 50 of the Trade Practices Act is amended to prohibit any merger or acquisition that "materially" lessens competition.

Recommendation 5

That conditions set down by the Treasurer in respect to mergers are monitored and enforced and that breaches of these undertakings are subject to effective penalties, including the acquiring company being forced to de-merge.

Further, that the Trade Practices Act is amended to provide for a general divestiture power whereby a Court can, on the application of the ACCC, order the break up of companies (i) having substantial market share; and (ii) where either the characteristics of the market prevent, restrict or distort competition; or the companies have engaged in patterns of conduct that are detrimental to competition and consumers.

Recommendation 6

That the ACCC consider applying for a divestiture order pursuant to section 81 of the Trade Practices Act in relation to both the Commonwealth Bank's acquisition of BankWest and Westpac's acquisition of St George Bank.

Recommendation 7

That all banks be required to seek written consent from customers to provide their banking data and private information to a third-party off-shore company.



**Nick Xenophon
Independent Senator for South Australia**

