

WALLIS INQUIRY — LEGAL IMPLICATIONS FOR FINANCIAL SERVICE PROVIDERS

QUESTIONS AND ANSWERS

Question – Clive Craven (Chairman):

Currently, the possibility of a series of mergers is being debated – mergers between the insurance companies and the big four banks, mergers between the big four banks, the ability of foreign banks to take over one of those banks, and then the relationship between the big banks and the regionals. I am just wondering how then you would view the possibility of the credit unions, the building societies and the other smaller players in the financial area, who are clearly in most cases regionally based (but I guess the credit unions will try and say a little more nationally based), how they fit into this merger debate?

Response – Professor Alan Fells (Speaker):

Yes, well that is fair to point out. There is that gap and everything we have said in *Wallis*. They have not really had much experience in those sectors of late. Therefore, I have not got a body of case law, so to speak, or decisions by us to draw upon, or, market inquiries to any great extent. But I think we would feel some moderate relaxation about quite a few mergers in those sectors. But the analytical questions we would ask are first, would it lessen competition – and that would turn on the extent of competitors, on whether we would regard them as separate markets in some way, and the extent of competitor pressure on the credit unions from banks and from all the other possible competitors. Then, even if we did somehow or other enter them as separate markets, and on balance I am sure that we would do so, we would then ask, really, given the number of them, would it really lessen competition to any great extent even on a narrow view. If we were still holding out against them, they could seek authorisation on the grounds that they need to rationalise and gain efficiencies and other benefits, and maybe that they have to position themselves this way in the new era. So I think we would approach this with a degree of relaxation. We have not been opposed to such rationalisation as has been occurring in those parts of the economy up till now.

Question – Ian Davidson (Barrister, Sydney):

Professor Fells, with the CFSC possible duplication with the ACCC, you mentioned that you are reasonably comfortable with the idea of an operating agreement. Given that the ACCC over some time has developed some experience in investigating and bringing matters to court, how would you see that working? Would the CFSC develop its own staff over time or would you envisage the ACCC trying to keep control of that, that is, bringing matters to court?

Response – Professor Alan Fells (Speaker):

Well, I think actually you have referred to a rather important variable in this situation – "over time". On thinking about the Wallis Report, it seems to me that it is going to take a little bit of time for the CFSC to get up to speed. I think what will probably happen is there will be some kind of transition arrangement for the first two or three years of the CFSC, where we have a highly co-operative approach to the enforcement of Part V and where, after that, hopefully the CFSC can fairly largely be the prime enforcement agency. But I think it may take a little bit of time for them to build up expertise and experience in the conduct of litigation in major cases.

In certain areas we have a degree of expertise that they may not have and it may take a bit of learning on their part. But in the longer term, I am fairly happy for them to take it over. It would also hopefully give us a chance to see how well they do it and how serious they are.

A little bit of an issue is the extent to which their role in other things like corporations and so on is going to mean that they may put some consumer protection issues lower down in the scale of priorities than they otherwise should. They will have to get that sorted out. But it is a bit of a backstop from that point of view having us there. There is a fair bit of sorting out to do. I mentioned the cases we are running – both Part IV and V, or Part IVA and V. There would have to be a few operating agreements with the State agencies, too, because as you know they all have overlapping jurisdictions and there will have to be operating agreements between them and the CFSC.

There will be some very interesting questions about whether something is a financial service or not. An insurance company decides to sell you a burglar alarm and there is something wrong with it – is that a financial services issue or not, given that it is linked, say, with an insurance policy. The legal profession will no doubt have a field day on the early cases on that point.

There is also the fact that, of course, there has been no suggestion whatsoever in Wallis that there should be any exemptions from Part IV of the Trade Practices Act – that is indeed unthinkable in the Hilmer era. So any codes of conduct that are agreed between industry still need authorisation as do other arrangements between the industry that bear on consumer protection which involve co-operation that would lessen competition. I cannot see that not being done and I cannot see any government contemplating removing that from the field of coverage of the Trade Practices Act.