

# **LABOR MEMBERS' MINORITY REPORT:**

## **Senator Stephens, Senator Lundy**

Opposition Senators, having had the opportunity to hear evidence from Treasury, the ACCC, and Justice Goldberg, make the following conclusions and recommendations

### **1: MERGER AUTHORISATION**

Labor Senators accepted the conclusion presented to the Committee by Mr Samuel and Mr Cassidy of the ACCC. The ACCC would be effectively bypassed in the new merger approval processes.

Labor Senators place great value on evidence from the ACCC that expressed frustration and dissatisfaction with the manner in which the ACT is dealing with advice presented to it by the ACCC. Moreover, Opposition Senators note Mr Samuel's comments that some Tribunal members express philosophical positions antithetical to the 'public benefit' perspective of the ACCC. Moreover, Labor Senators are concerned about comments from Mr Lyon that alludes to a perception that ACCC was not considering mergers in a purely objective fashion.

**Mr Lyon**—...The third point the Dawson review noted was that there is a perception that the Australian Competition and Consumer Commission is not as objective as it could perhaps be in considering the balance of public benefits versus anticompetitive detriment in the merger authorisation process, given that in many cases it would have previously examined the merger under its informal clearance process under section 50, which simply requires an assessment of whether it will substantially lessen competition.<sup>1</sup>

Opposition Senators believe such a perception is itself neither an objective nor reasonable position.

Labor recommends that those provisions of the Bill that seek to remove the ACCC from the authorisation process be removed specifically:

Schedule 1, item 27, page 22 (line 27) to page 23 (line 16), sections 95AT and 95 AU.

Labor Senators express grave concern about the manner in which Treasury officials conducted the proceedings. The tabling of the letter from Justice Goldberg which Mr Samuel claimed was inaccurate was not an action that accords with the best interests of public debate on this bill. The letter should not have been tabled without independent verification.

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<sup>1</sup> *Proof Committee Hansard*, 14 March 2005, p. E4.

Opposition Senators also note Justice Goldberg's response in correspondence of 16 March 2005. Firstly, the process of having the ACCC Chairman and ACT President engaged in this process of public disagreement is extraordinary and does not build confidence in the whole regulatory system. This unfortunate set of events is the direct result of Treasury's decision to table the misrepresentation of Mr Samuel's view in the Committee.

Labor Senators note that Justice Goldberg did not seek to rebut Mr Samuel's position that he had been misrepresented in the early correspondence from Justice Goldberg to Mr Lyons.

Further, Labor Senators note that the position Justice Goldberg outlines in his letter of 16 March 2005 in relation to the involvement of the ACCC in the ACT process of merger authorisation exceeds the provisions of the Bill and appears not to accord with any stated Government policy. Labor Senators would like a primary role for the ACCC in merger authorisation enshrined in legislation.

## **2: COLLECTIVE BARGAINING**

Labor Senators note the quote from Mr Lyon of Treasury:

**Mr Lyon**—As Mrs Patch said earlier, the government followed the strict requirements of the conduct code agreements in relation to the bill that was introduced to parliament on 24 June 2004. In relation to the bill that you have before you, the government considered it appropriate to notify states and territories of the reintroduction of the bill prior to its reintroduction and to alert them to the fact that there had been minor amendments. This was partially in consideration of the fact that five states had written to the Commonwealth last year endorsing the legislation and a further three were deemed to support the legislation under the terms of the conduct code agreement.<sup>2</sup>

Labor Senators also find the comments of Mr Johnson extraordinary.

**Mr Johnston**—The government took an explicit decision that it was a minor policy matter and as a matter of courtesy they advised the states of their intentions in this regard.<sup>3</sup>

Labor Senators believe that the change is clearly significant and the States and Territories should have been consulted. The Government has breached its agreement with the States and Territories by failing to consult.

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2 *Proof Committee Hansard*, 14 March 2005, p. E11.

3 *Proof Committee Hansard*, 14 March 2005, p. E11.

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Labor Senators note that when the Member for Hunter asked the Parliamentary Secretary about COAG consultation in the debate in the House of Representatives the Parliamentary Secretary declined to respond.

Labor Senators recommend that the amendment that makes a notification invalid if provided by a union acting for small business in collective bargaining should be excluded from the bill (s93AB(9)).

### **3:           THIRD—LINE FORCING**

Labor Senators note the evidence from the ACCC that the proposed changes to the bill will make it extremely difficult to restrict exclusive dealing in the form of third-line forcing. The current per se restriction under the bill is preferable.

Labor Senators recommend that proposals to remove the per se restriction of third-line forcing be scaled back.

**Senator Ursula Stephens**  
**Deputy Chair**

**Senator Kate Lundy**

